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

4 BETWEEN:

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

Claimants

7 - and -  
8 GOVERNMENT OF CANADA

Respondent

9 ARBITRATION HELD BEFORE  
10 JUDGE BRUNO SIMMA (PRESIDING ARBITRATOR),  
11 PROFESSOR DONALD McRAE, and PROFESSOR BRYAN SCHWARTZ  
12 held at ASAP Reporting Services Inc.,  
13 Bay Adelaide Centre, 333 Bay St., Suite 900,  
14 Toronto, Ontario  
15 on Thursday, October 24, 2013 at 9:03 a.m.  
16 VOLUME 3

17 COUNSEL:

18 Barry Appleton For the Claimants

19 Gregory Nash

20 Frank S Borowicz, Q.C.

21 Kyle Dickson-Smith

22 Dr. Alan Alexandroff

23 Scott Little For the Respondent

24 Shane Spelliscy

25 Jean-François Hebert

26 Stephen Kurelek

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1 Toronto, Ontario

2 --- Upon resuming on Thursday, October 24, 2013

3 at 9:03 a.m.

4 PRESIDING ARBITRATOR: Good  
5 morning, everybody. This is day 3 of our hearing.  
6 Professor Rankin is back at the witness table, but  
7 I have heard that there is a procedural matter to  
8 be discussed. Should we deal with it right away?

9 MR. LITTLE: Yes, if we could.

10 PRESIDING ARBITRATOR: Mr. Little.

11 PROCEDURAL MATTERS:

12 MR. LITTLE: Okay, thanks. I want  
13 to take a moment to register a concern that we have  
14 about some apparently new exhibits that appear to  
15 have been introduced by the claimants during the  
16 opening statement without Canada's consent or the  
17 Tribunal's authorization.

18 A number of the slides,  
19 specifically of the claimants, that they referred  
20 to in their opening statement, referred to exhibit  
21 numbers that don't appear to be on the record.

22 Now, before I get into these,  
23 maybe we can just recall what Procedural No. 18  
24 provides and I will have it put up on the screen.

25 It provides that:

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1 "Documents that do not form  
2 part of the record in this  
3 arbitration may not be  
4 presented at the hearing  
5 unless agreed by the  
6 disputing parties or  
7 authorized by the Tribunal."

8 Now, our understanding of the  
9 claimants' documents that are on the record are as  
10 follows. Now, obviously all of the claimants'  
11 exhibits in their memorial and their reply  
12 memorial, which cumulatively took us from obviously  
13 Exhibit C-1 to C-931, and then on May 14th, 2013,  
14 Judge Simma, I believe the claimants provided  
15 Canada and yourself a supplementary index that  
16 addressed documents that were referenced in David  
17 Estrin's expert report that had to be given C  
18 numbers.

19 Now, C numbers were assigned to a  
20 few of those documents in Mr. Estrin's expert  
21 reports and, as you can see from the front cover of  
22 that index, which I will have put up on the screen,  
23 that took us up to cumulative Exhibit No. 931. I'm  
24 sorry, from 931 to 955, yes.

25 So the last C exhibit on the

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1 record should be Exhibit C-955, but the slides  
2 presented in the claimants' opening statement on  
3 Tuesday, some of them appear to refer to exhibit  
4 numbers exceeding 955.

5 I won't have those slides put up  
6 on the screen, but just for the record I will note  
7 slide 26 refers to an Exhibit C-963. Slide 33  
8 refers to an Exhibit C-964. Slide 96 to 99 refers  
9 to an Exhibit C-995, and slide 100 refers to an  
10 Exhibit C-996.

11 Now, we checked our records. We  
12 haven't been approached by the claimants and have  
13 no knowledge of the claimants having approached the  
14 Tribunal to seek its permission to enter these  
15 documents or present them in the hearing in  
16 accordance with Procedural Order No. 18, and given  
17 the exhibit numbers that we're seeing in the  
18 opening statement, it appears there could be up to  
19 40 documents between C-956 and C-996 that Canada is  
20 not aware of or that haven't been presented to  
21 Canada or the Tribunal.

22 So our request is three-fold.  
23 Could the claimants perhaps explain what has  
24 happened here and whether there are other documents  
25 that are new exhibits that neither we nor the

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1 Tribunal have seen in the record, because the  
2 numbering that I have just mentioned suggests that  
3 there is?

4 If indeed there are additional  
5 exhibits, then the claimants shouldn't be permitted  
6 to present them at the hearing unless they do so in  
7 accordance with the procedural order provision that  
8 I just recited.

9 And then more important, because  
10 the cat is out of the bag for the documents that  
11 the claimants did present in their opening  
12 statement without Canada's agreement or the  
13 Tribunal's consent, Canada should be permitted to  
14 discuss these documents with its witnesses in their  
15 continued preparation for the hearing; otherwise,  
16 our preparation is being prejudiced. Thanks.

17 PRESIDING ARBITRATOR: Mr. Little,  
18 when you spoke of slides, was that text or was it  
19 photographs?

20 MR. LITTLE: It was text.

21 PRESIDING ARBITRATOR: Text.

22 MR. LITTLE: I am referring to the  
23 slides and the text on the slides, which then  
24 referred to these new exhibit numbers that I have  
25 mentioned.

1                   PRESIDING ARBITRATOR: Okay, thank  
2 you. Mr. Appleton, anything to say?

3                   MR. APPLETON: Well, at the  
4 outset, it would have been very helpful if my  
5 friend had some observations to make; it would have  
6 been helpful if he would have given us some advance  
7 notice before this morning to be able to bring an  
8 answer to the Tribunal this morning.

9                   So I can just talk in some  
10 generalities, and I would like to be able to come  
11 back to the Tribunal perhaps later this afternoon  
12 when we have an appropriate time, or whenever the  
13 Tribunal would like, once I can go and look  
14 specifically at the matters which my friend says,  
15 but I think there are a few items that I think are  
16 important to that the Tribunal understand.

17                  Number one, in each and every  
18 case, the investors have been absolutely meticulous  
19 to ensure that every document reference is noted on  
20 every slide. We have gone out of our way to ensure  
21 that every item is noted so that, from our  
22 perspective, there would be nothing that would be  
23 brought to this Tribunal that is new, that is not  
24 already submitted into the record.

25                  So that when my friend says today



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1     that there are items that he says that he does not  
2     consider to be on the record (a) this is news to  
3     me, but (b) we have been quite careful to ensure  
4     that every reference is made.

5                     If you look at the demonstration  
6     aids that were presented to you, you will see that  
7     at the bottom of each and every item -- and, by the  
8     way, I note Canada did exactly the same thing.  
9     They have identified the reference to the record of  
10    each document.

11                    So this comes as a total surprise  
12    to me. What my friend might be talking about is  
13    that he may have a difference of view as to when  
14    the record ends.

15                    So I would like to look at,  
16    though. He has made reference to some issues, so I  
17    would like to have the liberty to be able to  
18    review, from looking at the transcript today of  
19    what Mr. Little has said. I would like to be able  
20    to go back and check, but I would like the Tribunal  
21    to know that we have been exceptionally careful to  
22    ensure that only matters that have been exchanged  
23    by the parties which form part of the record have  
24    been referred to.

25                    In the event that some other

1 matter or other document may have to come in, we  
2 would need to seek permission from the Tribunal to  
3 admit that. In other tribunals, that has happened  
4 in certain circumstances, but that is a Tribunal  
5 decision.

6                   So I would just like to point out  
7 that we would like to be able to come back to this.  
8 It would have been significantly easier if  
9 Mr. Little had identified these items to us in  
10 advance so we could have actually looked at them  
11 before the commencement of today's proceeding,  
12 because this is a very serious matter and we would  
13 like to be able to address the other issues if, in  
14 fact, any of those other matters exist.

15                   My own view would be unlikely,  
16 because we have been very careful to ensure we  
17 complied with the rules, that only matters  
18 exchanged between the parties form part of the  
19 record and only those matters that we have referred  
20 to have been brought to the attention of the  
21 Tribunal in advance so the other side would have  
22 notice of everything.

23                   MR. PULKOWSKI: Mr. Chairman.  
24 Apologies, Mr. Chairman. I have just reviewed the  
25 Tribunal's electronic file in preparation for this

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1 hearing, the electronic hearing bundle, as it were.

2 Actually on our electronic record,  
3 we have included in the Tribunal's hearing bundles  
4 exhibits beyond the ones indicated by Mr. Little.

5 In fact, the last exhibit number  
6 that I have here is C-998, which would suggest that  
7 these have been submitted before to the Tribunal.

8 What I can recall is of course  
9 that there is, on the one hand, the NAFTA 1128  
10 submission by the investors. I don't recall if  
11 there are any exhibits as to legal authorities  
12 attached to that document. But also, if I recall  
13 correctly, there was an exchange regarding certain  
14 supplemental exhibits in Mr. Estrin's witness  
15 statement.

16 So I suspect out of one of these  
17 two sources, there may have been additional  
18 documents that were indeed filed with the Tribunal.

19 MR. LITTLE: I referred to the  
20 additional Estrin exhibits, and that appears to be  
21 the last thing we did receive in terms of exhibits,  
22 but I am willing to hear an explanation. It is  
23 just we have checked our records and we don't have  
24 exhibits exceeding C-955.

25 PRESIDING ARBITRATOR: But would

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1 the lunch break be an adequate -- why don't you  
2 spoil each other's lunch.

3 --- Laughter.

4 PRESIDING ARBITRATOR: And try to  
5 figure that out. May I suggest that? And if in  
6 the course of this morning's visitation or  
7 examination of Mr. Estrin -- who is next, right, in  
8 line? Dirk?

9 MR. PULKOWSKI: That's correct.  
10 After Mr. Rankin.

11 PRESIDING ARBITRATOR: One of  
12 these documents happen to be called on, we will  
13 play it by ear and see what we do then.

14 MR. APPLETON: It would be  
15 helpful, Mr. President, if we could just ask for  
16 the good graces of the secretary, who is  
17 exceptionally competent and very well organized, to  
18 just see whether he could tell us, either now or  
19 later, whether these document numbers which were  
20 listed by Mr. Little fit within the 1128  
21 submissions, since Mr. Little has told us they are  
22 not within the Estrin supplemental documents.

23 If they do, that would narrow our  
24 level of enquiry and would make it much easier to  
25 get an answer because, of course, if the documents

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1     were attached to the 1128 submission, they would  
2     have been exchanged between the parties and formed  
3     part of the record, of course.

4                     MR. PULKOWSKI:  Mr. Appleton, I  
5     was just able to review the index of the 1128  
6     submission or, rather, the exhibits attached to  
7     them, and it does seem that these cover the  
8     spectrum between 956 and somewhere close to 1000 or  
9     potentially beyond that.

10                    So I see here C-987, C-988, C-989.  
11     All of these seem to be within the range that you  
12     have just identified.

13                    So perhaps we may want to  
14     double-check the content of the 1128 exhibits and  
15     see if it is actually contained.

16                    MR. LITTLE:  Okay, thank you.

17                    MR. APPLETON:  It would seem to me  
18     that might be the end of this whole matter.  If  
19     that is in fact the case and they have been  
20     exchanged by the parties, no one is taken by  
21     surprise and all of the documents are accounted  
22     for.

23                    PRESIDING ARBITRATOR:  I suggest  
24     we leave the rest of the clearing up of this matter  
25     to the lunch break so we can go ahead with the

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1 examination.

2 Thank you. And I will give the  
3 floor to Mr. Nash for the re-direct of Professor  
4 Rankin.

5 PREVIOUSLY AFFIRMED: T. MURRAY RANKIN, Q.C.

6 RE-EXAMINATION BY MR. NASH:

7 Q. Thank you very much. Good  
8 morning, Mr. Rankin.

9 A. Good morning.

10 Q. Mr. Rankin, in response to  
11 counsel's questions yesterday, you referred to a  
12 publication by Beverly Hobby?

13 A. That report or her document  
14 is footnoted in my report.

15 Q. Could you turn to that  
16 document, which is Exhibit C-851. It should be on  
17 the table in front of you, and we're going to put  
18 it up on the screen, as well. Exhibit C-851.

19 A. Yes, this is it.

20 Q. Could you turn, please, to  
21 the page at the bottom, which is noted as I-3.

22 A. I have it.

23 Q. You see that there is a  
24 reference titled, as section 120 "Constitutional  
25 Framework"?

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1 A. Yes.

2 Q. Could you read out the  
3 paragraph, please?

4 A. "To understand the  
5 legislation and its  
6 operation, the constitutional  
7 framework of Canada must  
8 constantly be borne in mind.  
9 It will likely dictate and,  
10 in some instances, restrict  
11 the scope of the  
12 environmental assessment that  
13 will be carried out. This is  
14 due to the shared nature of  
15 jurisdiction over the  
16 environment and its  
17 implications for federal  
18 action in environmental  
19 matters."

20 Q. Is this the constitutional  
21 overlay you were referring to yesterday in your  
22 oral testimony?

23 A. Yes.

24 Q. Can you just continue on down  
25 to the bottom of that page at the last sentence,

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1 starting five rows up on the right-hand side. Have  
2 I confused matters?

3 A. How does the sentence begin?

4 Q. It starts with "at what  
5 point, however". Perhaps we should just go through  
6 that paragraph. At 120, it says "shared  
7 jurisdiction over environmental assessment"?

8 A. Yes. Would you like me to  
9 begin reading there?

10 Q. Why don't you do that?

11 A. "The environment is not an  
12 enumerated head of power in  
13 the Constitution. The Act  
14 must be read and interpreted  
15 in the context of the  
16 jurisdiction over  
17 environmental assessment  
18 shared by the provinces and  
19 the federal government.  
20 "The federal Department of  
21 Fisheries and Oceans may, for  
22 example, conduct an  
23 environmental assessment of  
24 any project for purposes of  
25 determining the adverse



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1 environmental effects the  
2 project may have on fish  
3 habitat, where it considers  
4 issuing an authorization  
5 pursuant to the Fisheries  
6 Act. This could be done on  
7 the grounds that the federal  
8 government has jurisdiction  
9 over fish habitat issues. At  
10 what point, however, will the  
11 department's environmental  
12 assessment exceed federal  
13 jurisdiction and be said to  
14 be unduly intruding into an  
15 area of provincial  
16 jurisdiction? The response  
17 to this question stems to a  
18 large extent from the power,  
19 duty or function the federal  
20 authority proposes to  
21 exercise or perform with  
22 respect to a project." [As  
23 read]

24 Q. Thank you. Then just  
25 continuing on, if you go to the next page, I-4.

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1 A. Yes.

2 Q. At the middle of the page, it  
3 says, "where the federal authority proposes".  
4 Could you read that out, please, halfway down the  
5 page?

6 A. Halfway down the page?

7 Q. It says "where the federal  
8 authority" --

9 A. I'm sorry, I am looking at  
10 I-4.1. I apologize.

11 Q. No problem.

12 A. Halfway down the page?

13 Q. Where the -- I-4, 120.2 at  
14 the top, halfway down the page it says "where the  
15 federal authority proposes to exercise a power  
16 or" --

17 A. I'm sorry, the last  
18 paragraph:

19 "Where the federal authority  
20 proposes to exercise a power  
21 or perform a duty or function  
22 pursuant to a federal statute  
23 or regulation specifically  
24 provided for on the Law List  
25 Regulations, it is authorized

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1 to review all adverse  
2 environmental effects caused  
3 by the project. However,  
4 determining the level of  
5 significance of adverse  
6 environmental effects and the  
7 conditions a federal  
8 authority may attach to the  
9 issuance of a regulatory  
10 approval will be limited.  
11 The limits will include the  
12 head of federal jurisdiction,  
13 the legislation relates to  
14 (which may vary depending on  
15 the type of action or  
16 approval the legislation  
17 authorizes) as well as other  
18 areas of federal jurisdiction  
19 and including areas of  
20 provincial jurisdiction that  
21 will likely affect the area  
22 of federal jurisdiction to be  
23 protected. For example, the  
24 Department of Fisheries and  
25 Oceans could issue an

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1 authorization pursuant to the  
2 Fisheries Act if it is of the  
3 opinion that all adverse  
4 environmental effects of the  
5 project on areas of federal  
6 jurisdiction (such as  
7 wildlife in a national park)  
8 are adequately dealt with.  
9 Effects on wildlife outside  
10 the national park, however,  
11 would not normally be within  
12 its authority. The  
13 department could include  
14 conditions in the  
15 authorization to ensure that  
16 effects on wildlife were  
17 dealt with effectively and in  
18 a timely fashion - but only  
19 with respect to the national  
20 park and not adjacent  
21 territory. The department  
22 will only be able to consider  
23 those impacts in areas of  
24 provincial jurisdiction that  
25 in turn will affect an area

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1 of federal jurisdiction. It  
2 would be able to consider,  
3 for instance, the impact of  
4 the project on soil erosion  
5 in the adjacent territory (an  
6 area of provincial  
7 jurisdiction) if that erosion  
8 would have a negative impact  
9 on fish habitat. Again, the  
10 department could attach  
11 conditions in any Fisheries  
12 Act authorization to ensure  
13 that the erosion is  
14 eliminated or sufficiently  
15 reduced so as to effectively  
16 protect the fish habitat."

17 Q. Was that what you were  
18 referring to yesterday about the federal  
19 government's --

20 A. Yes.

21 Q. -- relation to the  
22 jurisdiction over provincial matters?

23 A. Yes, I was trying to make the  
24 point that the federal jurisdiction, according to  
25 this lawyer who is the leading -- as I understand

1 it, the leading lawyer in the Department of Justice  
2 in the federal system on Canadian Environmental  
3 Assessment Act, is that you must read the  
4 environmental legislation in light of the  
5 Constitution, that the federal government's  
6 authority is limited, she points out, and uses  
7 Fisheries Act examples in doing so, to areas of  
8 federal jurisdiction.

9                   And I think that is the point I  
10 was trying to make. And, therefore, I was saying  
11 that rejecting a quarry and marine proposal on  
12 matters that aren't federal -- for example, not  
13 liking a quarry because of core community core  
14 values or the like -- is not on, according to, as I  
15 read it, Ms. Hobby.

16                   Q. Could you refer, please, in  
17 your bundle volume 1 of 3 to Exhibit R-1, which is  
18 the CEAA.

19                   A. Yes.

20                   Q. And refer, in particular, to  
21 the definition of "project" on page 4 of 36. As  
22 you read that definition, does that refer to  
23 federal projects?

24                   A. It refers to projects,  
25 physical works and the like, or proposed physical

1 activity and the like.

2 That would be subject to a federal  
3 trigger under this statute and understood against  
4 the constitutional backdrop that Ms. Hobby has  
5 reminded us of.

6 Q. And in this application to  
7 this circumstance where we have a quarry and marine  
8 terminal, what do you read that definition to  
9 include?

10 A. That the project, this  
11 physical work or proposed construction and the  
12 like, would deal with those matters over which the  
13 federal government would have a jurisdiction from  
14 the Law List or federal money or land were  
15 involved, which is not the case at issue, but in  
16 this circumstance the Law List, the Law List  
17 Regulation that was affected or the statute that  
18 was affected, was, one, section 5 of the Navigable  
19 Waters Protection Act as regards the marine  
20 terminal or dock. There was a need for a federal  
21 approval for that.

22 Secondly, there was the issue of  
23 whether fish habitat or destruction of fish under  
24 sections 32 or 35 of the Fisheries Act would be  
25 triggered.

1                   Those were the three possible  
2 federal triggers as regards this project. And it  
3 was my view that since there appears to have been a  
4 conclusion that the quarry aspect did not trigger  
5 any of those, therefore, the federal government's  
6 jurisdiction as regards this "project" would be the  
7 marine terminal or dock.

8                   Q. Counsel referred you  
9 yesterday to the MiningWatch case, which is found  
10 at Exhibit R-15, if you continue on in that same  
11 bundle.

12                   Did you understand the MiningWatch  
13 case having anything to do with the division of  
14 powers?

15                   A. No, not at all. I don't  
16 believe it even arose in the case. I would have to  
17 remind myself, but it was a judicial review case.  
18 There was no constitutional concern at all.

19                   It was a case that was decided  
20 many years after the case at bar, the Whites Point  
21 quarry case.

22                   Q. Did it change the law, as you  
23 understand it, with respect to the federal  
24 government being able to exercise authority over a  
25 provincial head of power?



1                   A.    No.   No.   In my judgment, it  
2   has nothing to do with the issue that we are  
3   discussing right now; namely, the constitutional  
4   overlay that must be brought to bear on every  
5   federal CEAA application.

6                   Q.    Could you turn to the third  
7   page.  These are double-sided pages, so turn to the  
8   third physical page in the head note, and just read  
9   the part of the head note after "held the appeal  
10  should be allowed".

11                  A.    "The CEAA and regulations  
12                        require that the  
13                        environmental assessment  
14                        track be determined according  
15                        to the project as proposed;  
16                        it is generally not open to a  
17                        responsible authority to  
18                        change that level.  An  
19                        interpretation which provides  
20                        that the word 'project' in s.  
21                        21 of the CEAA means 'project  
22                        as proposed' by the  
23                        proponent, rather than  
24                        'project as scoped' by the  
25                        responsible authority..."

1                   Q.    Can I just have you pause  
2   there.  When it refers to "project as proposed",  
3   does that mean that a project as proposed, which  
4   included a federal component and a provincial  
5   component, could allow the federal government, the  
6   project as proposed, to scope in something within  
7   provincial power?

8                   A.    No, it could not because,  
9   first of all, the project as proposed by the  
10  proponent is, in the case at bar, I assume, a  
11  project where a company has asked for authority to  
12  build something.

13                   They are not considering, I  
14  shouldn't think, the constitutional division of  
15  powers.  They are proposing to build something, in  
16  this case a quarry and an accessory shipping  
17  facility.

18                   The project as proposed doesn't  
19  contemplate the division of powers, as far as I'm  
20  concerned.

21                   Q.    Does MiningWatch stand for  
22  the proposition that the federal government can  
23  scope in that portion of a project which is wholly  
24  within provincial jurisdiction?

25                   A.    It absolutely does not stand

1 for that proposition.

2 Q. Does it have anything to do  
3 with that?

4 A. It has nothing to do with  
5 that.

6 Q. Can a project description by  
7 a proponent create jurisdiction for the federal  
8 government where none would otherwise exist?

9 A. No. And I think the way you  
10 put the question is very helpful. It is not for  
11 the parties ever to determine the constitutional  
12 division of powers and jurisdiction. Just by  
13 stating something doesn't create jurisdiction.  
14 That is a matter of what the statute allows and  
15 what the Constitution of Canada allows.

16 How they say it is of little  
17 consequence on those matters. That is for the  
18 statute to determine and ultimately the  
19 Constitution to determine.

20 Q. In the course of your  
21 comments yesterday in response to questions by  
22 counsel, you referred to the Red Hill case,  
23 Hamilton-Wentworth, which is found at Exhibit  
24 C-764. It should be in the loose --

25 A. Oh, in the loose material.

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1 Yes, I refer to that in my report. I am sure it is  
2 the same. Yes, I am familiar with this.

3 Q. If you go to page 28 of 33,  
4 please, and look at paragraph 156, under section 6,  
5 the title there, "Was there a valid referral of the  
6 project to panel review".

7 A. Yes.

8 Q. Just read out paragraphs 156  
9 and 157, please.

10 A. " In Friends of the Oldman  
11 River Society v. Canada  
12 (Minister of Transport)...,  
13 the Supreme Court of Canada  
14 considered the nature and  
15 extent of federal and  
16 provincial jurisdiction over  
17 the environment, noting that  
18 the Constitution Act, 1867  
19 did not assign the matter of  
20 'environment' sui generis to  
21 either level of government.  
22 The environment was said, at  
23 page 64 of the decision, to  
24 be 'a constitutionally  
25 abstruse matter which does

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1 not comfortably fit within  
2 the existing division of  
3 powers without considerable  
4 overlap and uncertainty'. Any  
5 exercise of legislative power  
6 must be linked to an  
7 appropriate head of power.  
8 Because the nature of various  
9 heads of power differ, the  
10 extent to which environmental  
11 concerns may be taken into  
12 account in the exercise of a  
13 power may differ from one  
14 head of power to another."

15 Q. And then continuing on in  
16 paragraph 175, please?

17 A. Paragraph 175?

18 Q. Sorry, 157. I misspoke.

19 A. "In Oldman, the Supreme Court  
20 also cautioned that it is not  
21 helpful when dealing with the  
22 respective levels of  
23 constitutional authority to  
24 characterize a project as a  
25 provincial or local project.

1                   While local projects  
2                   generally fall within  
3                   provincial responsibility,  
4                   federal participation is  
5                   required if the project  
6                   impinges on an area of  
7                   federal jurisdiction. This  
8                   was the case in respect of  
9                   the Oldman River dam.  
10                  However, as stated at page 71  
11                  of the decision, the federal  
12                  government may not use 'the  
13                  pretext of some narrow ground  
14                  of federal jurisdiction, to  
15                  conduct a far ranging inquiry  
16                  into matters that are  
17                  exclusively within provincial  
18                  jurisdiction.'"

19                         Q.   Is that what you had in mind  
20                   when you were referring to the federal exercise of  
21                   authority over the quarry?

22                         A.   That's precisely what I had  
23                   in mind, and the word "pretext" is used here. I  
24                   think, the federal government cannot say, We want  
25                   to assess something which is not within our

00030

1 jurisdiction, the quarry in the circumstances,  
2 unless there was a trigger, which what I read the  
3 facts to be, there was no trigger. Therefore,  
4 there could be no pretext for the federal  
5 government to be involved in the quarry aspect of  
6 this project.

7 Q. You also referred yesterday  
8 in your comments to the importance and significance  
9 of significant adverse environmental effects, and  
10 you spoke at some length about the question of  
11 mitigation.

12 A. Yes.

13 Q. In that context, could you  
14 turn to paragraph 174, please, of the  
15 Hamilton-Wentworth decision, C-674 at page 31.

16 A. Yes.

17 Q. This is with respect to  
18 significant adverse environmental effects.

19 A. Yes.

20 " This is not to say that  
21 scientific certainty is  
22 required as to the existence  
23 of a deleterious effect on  
24 migratory bird populations in  
25 order for a referral to panel

00031

1 review to be properly  
2 grounded. However, there must  
3 be a valid basis on which to  
4 conclude that a real  
5 possibility exists that a  
6 panel would be able to  
7 conclude that, in this case,  
8 there would be a significant  
9 adverse effect on migratory  
10 bird preservation. That  
11 necessary condition to engage  
12 the process was absent. The  
13 necessary relevant  
14 information was noted to  
15 likely be unavailable for a  
16 long time and might never be  
17 available."

18 Q. Is that what you had in mind  
19 when you were speaking about the significance of  
20 significant adverse environmental effects?

21 A. Yes.

22 Q. Referring to the marine  
23 terminal, have you seen any evidence, any  
24 scientific evidence, of there being significant  
25 adverse environmental effects which could not be



1 mitigated for the marine terminal?

2 A. No.

3 Q. With respect to the quarry,  
4 have you seen any scientific evidence of there  
5 being significant adverse environmental effects  
6 which could not be mitigated for the quarry?

7 A. No.

8 Q. Referring to the quarry, you  
9 also referred to the question of the 500 metre  
10 setback being cut back to 100 metres.

11 A. Yes.

12 Q. And the 500 being based upon  
13 an erroneous calculation. Do you recall that?

14 A. I do.

15 MR. SPELLISCY: I'm sorry, I have  
16 to interject. I don't think any questions were  
17 asked of Mr. Rankin about the 500 metre setback at  
18 all yesterday.

19 MR. NASH: He did speak about the  
20 500 metre setback and the question of the erroneous  
21 calculation and going back to 100 metre. I could  
22 get the reference for you, if I wish.

23 MR. SPELLISCY: If you could  
24 provide the reference and I can see it in the  
25 transcript, that would be helpful before this line

1 of questioning continues.

2 BY MR. NASH:

3 Q. Just while we're looking up  
4 that reference, and in relation to the last answer  
5 that Mr. Rankin gave, if there was an absence of  
6 evidence that destruction of fish by activity on  
7 the land would cause destruction of fish, if  
8 blasting on land would cause destruction of fish,  
9 do you see any basis for the federal government  
10 having jurisdiction over the quarry?

11 A. Am I allowed to answer that  
12 question?

13 PRESIDING ARBITRATOR: Yes.

14 THE WITNESS: If there was an  
15 absence of evidence as to fish destruction, there  
16 would then be no reason for a trigger under section  
17 32 of the Fisheries Act. Therefore, there would be  
18 no jurisdiction for the federal government as  
19 regards the quarry.

20 BY MR. NASH:

21 Q. And if that fact was known  
22 either before or after the Minister's referral to a  
23 JRP, would that be of significance to you that  
24 there was an absence of scientific evidence?

25 A. It would be most disturbing

1 if there was a factual conclusion that the  
2 officials knew of that absence of evidence and  
3 still proceeded to scope in something in the face  
4 of warnings that they could not do so. That would  
5 be of great concern to me, because it would appear  
6 to be an abuse of discretion. And all statutory  
7 officers, be they officials or Ministers, have an  
8 obligation under the rule of law to act in good  
9 faith within the four corners of their  
10 jurisdiction.

11 If there was an absence of  
12 evidence and they proceeded nevertheless, that  
13 would be of great concern to me.

14 Q. You referred yesterday to the  
15 question of the two bases of a matter proceeding to  
16 a Joint Review Panel. Significant adverse  
17 environmental effects was one and public concern  
18 was the other. And you mentioned it was an  
19 either/or. It wasn't an "and".

20 A. Yes.

21 Q. Could you go, please, to  
22 Mr. Connelly's report.

23 A. Which is located?

24 Q. Which is before you.

25 A. Yes.

1                   Q.    I will wait for the Members  
2   of the Tribunal to get that before them.  If you  
3   would turn, please, to page 23 of Mr. Connelly's  
4   report and go to paragraph 64, and read out  
5   starting at the second sentence which is just after  
6   footnote 53 there, three lines down on the  
7   paragraph.

8                   A.    "In addition to referral to a  
9                        review panel after the  
10                      completion of a screening or  
11                      comprehensive study, as  
12                      described above, a project  
13                      may also be referred to a  
14                      review panel under various  
15                      other provisions of the Act  
16                      if either the responsible  
17                      authority or the Minister of  
18                      the Environment is of the  
19                      opinion that a project may  
20                      cause significant adverse  
21                      environmental effects or that  
22                      public concerns warrant  
23                      referral."

24                   Q.    And you will see at footnote  
25   54 at the bottom of that page, bottom of page 23,

1     there is a reference to section 21(b) of, and  
2     section 25 and section 28 of the Act, and then it  
3     goes on and says "note that".

4                     A.     "Note that while s. 21(b)  
5                             does not list these two  
6                             reasons for referral to a  
7                             review panel, in practice a  
8                             referral under s. 21(b) would  
9                             be based on likely  
10                            significant adverse  
11                            environmental effects or  
12                            public concern."

13                    Q.     So is it your understanding  
14     of the practice that there must be one of two  
15     proper bases in order to refer a matter to a Joint  
16     Review Panel or any review panel under section 21?

17                    A.     Yes. I generally thought  
18     this report was excellent.

19                    Q.     Could you please refer to  
20     Exhibit C-466, and that is the letter from the  
21     Honourable David Anderson -- I'm sorry, from  
22     Mr. Thibault to David Anderson, June 26th, 2003.

23                    A.     This is the letter... Yes, I  
24     have it.

25                    Q.     We will just wait for that to

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1    come up on the screen. Exhibit C-466; C-466. We  
2    have it on the screen. Members of the Tribunal,  
3    should I wait until you have it there in your  
4    electronic device? Okay.

5                    You mentioned the letter several  
6    times in answer to questions of counsel yesterday,  
7    and I could have sworn -- I maybe wrong -- that  
8    counsel said we're going to come back to that, but  
9    we didn't.

10                   And so I would just like you to  
11   share your observations with respect to the  
12   significance of this letter in relation to those  
13   matters of significant adverse environmental  
14   effects or public concern.

15                   A. May I just take a moment to  
16   read it?

17                   Q. Yes, please.

18                   A. Right. Well, my observation  
19   is that the letter talks of, as appropriately it  
20   should, the federal trigger in this third paragraph  
21   on the first page. It says:

22                   "On the basis of an analysis  
23                   of the information received  
24                   from the proponent, DFO has  
25                   concluded that various

00038

1 components of the proposed  
2 project will likely require  
3 authorizations under 35(2) of  
4 the Fisheries Act to  
5 harmfully alter, disrupt or  
6 destroy fish habitat, and  
7 section 32 to destroy fish by  
8 means other than fishing.  
9 Our analysis has also  
10 determined the marine portion  
11 of the project will interfere  
12 substantially with navigation  
13 thereby requiring formal  
14 approval under subsection  
15 5(1) of the Navigable Waters  
16 Protection Act."

17 If the reference is to Fisheries  
18 Act triggers with respect to the marine terminal, I  
19 think it would be uncontroversial, but it doesn't  
20 actually say that.

21 The next page, I think, is more  
22 interesting, though. Under -- I guess I have to  
23 read the whole paragraph.

24 Q. Yes, please do.

25 A. "Under subsection 5(1)(d) of

00039

1 the Canadian Environmental  
2 Assessment Act, regulatory  
3 decisions made by DFO  
4 respecting various components  
5 of the proposal are subject  
6 to the federal environmental  
7 assessment process set out in  
8 the CEAA. My department is  
9 the sole responsible  
10 authority for the  
11 environmental assessment of  
12 this project. On the basis  
13 of technical information we  
14 have received, we have  
15 determined that the marine  
16 terminal component of the  
17 proposal meets the criteria  
18 for a comprehensive study as  
19 defined in the Comprehensive  
20 Study List Regulations of the  
21 CEAA, 28(c), marine terminal  
22 designed to handle vessels  
23 larger than the 25,000 DWT.  
24 "In light of the information  
25 provided by the proponent,



00040

1 DFO believes that the Whites  
2 Point quarry and Marine  
3 Terminal, as proposed, are  
4 likely to cause environmental  
5 effects over a large area  
6 both the marine and  
7 terrestrial environments."

8 [As read]

9 It goes on to say it is subject to  
10 provincial jurisdiction and he is interested in  
11 harmonizing with Nova Scotia.

12 So my observation is I fail to see  
13 anything from the technical information that would  
14 address terrestrial environment here at all. I  
15 don't know what he is referring to and it  
16 doesn't -- although they call it the -- as does the  
17 proponent, the Whites Point Quarry and Marine  
18 Terminal, it is misleading, in that the federal  
19 triggers referred to would be those relating to the  
20 marine terminal.

21 I still understand from the  
22 evidence before this Tribunal that there was no  
23 such evidence as regards to 35 and 32 of Fisheries  
24 Act regarding the quarry, although it would appear  
25 that they are suggesting that the Minister is

00041

1 suggesting the technical review has led to that  
2 conclusion.

3 Q. The phrase used starting on  
4 the end of the second line of that last paragraph  
5 you read out, "as proposed are likely to cause  
6 environmental effect" --

7 A. Yes.

8 Q. -- the words "significant"  
9 and "adverse" are not included. Does that have any  
10 significance for you?

11 A. No, it doesn't really,  
12 because the definition of environmental effects is  
13 found in CEAA.

14 Q. Do you see any reference to  
15 public concern?

16 A. I do not.

17 Q. If the matter was being  
18 referred to a review panel based upon public  
19 concern, would you expect to see that?

20 A. Absolutely, because it is one  
21 of the two ways in which it could happen. But it  
22 rarely does, but it is usually based on that it may  
23 cause significant, unmitigatable adverse  
24 environmental effects.

25 Q. If the information upon which

1 the conclusion has been reached that there are  
2 environmental effects proves to be mistaken between  
3 the time of that letter from Thibault to Minister  
4 Anderson, but before Mr. Anderson refers the matter  
5 to a joint review panel, does that have  
6 significance to you?

7 A. Absolutely, it would. If  
8 you're suggesting that the facts were known or  
9 later became known to the effect that there was no  
10 technical basis for such a referral, because those  
11 sections of the Fisheries Act would not be  
12 triggered and there would be no terrestrial  
13 environment affected, and that was withheld from  
14 the proponent and yet was still the basis for the  
15 referral, that would be very disturbing, because it  
16 would have to constitute something akin to bad  
17 faith.

18 Q. And if you go to Exhibit C-26  
19 which is before you.

20 A. Which is that? Oh, yes  
21 the --

22 Q. The letter of Mr. Anderson to  
23 Mr. Thibault. You understand this to be the actual  
24 reference by Mr. Anderson of the project to a  
25 review panel?

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1 A. Yes.

2 Q. Which is dated August 7th,  
3 2003. If that information that you have just  
4 referred to was available to officials prior to  
5 that date, would that have significance to you?

6 A. Just let me read the letter.  
7 Sorry. I read the letter. What was your question?

8 Q. If the officials had  
9 information in their possession which was to the  
10 effect that the earlier basis upon which they had  
11 concluded that there was an environmental effect or  
12 significant environmental effect was wrong, would  
13 it be significant if that information was not  
14 brought to the attention of the Minister prior to  
15 him writing that letter?

16 A. It would be very disturbing.  
17 The letter is very short. He simply says, I am  
18 doing it. I am making the reference to a Joint  
19 Review Panel.

20 One assumes and one must infer, I  
21 think, because there is no other facts provided,  
22 that the basis of that is the information that the  
23 Minister has given to him causing him to do the  
24 Joint Review Panel referral as per the statutory  
25 jurisdiction.

1                   So it would be very disturbing, if  
2     there is no information; one probably must infer,  
3     therefore, it was predicated on the information set  
4     out in the letter from Minister Thibault.

5                   Q.   And if that information came  
6     to the Minister of Environment or his officials,  
7     even after the letter of August 7th, after the  
8     referral, would that have significance for you, as  
9     well?

10                  A.   Yes, because they can only --  
11     the federal government's involvement under CEAA  
12     must be related to a federal trigger.

13                  If what you're saying is they knew  
14     there was no such trigger and yet they still  
15     proceeded to a Joint Review Panel, that would be  
16     improper in the extreme.

17                  There would be no basis for it.

18                  Q.   Is it your opinion that an  
19     agreement between Ministers cannot confer on either  
20     the provincial or federal government a jurisdiction  
21     statutorily and constitutionally they do not have?

22                  A.   In our system of government,  
23     only superior courts of record have inherent  
24     jurisdiction. Everyone else is subject to what the  
25     statute says, and the statute has to be understood

1 as conferring jurisdiction. In this case, Minister  
2 Anderson refers to section 40 of the Act.

3 The Minister in Nova Scotia had  
4 similar authority under Part IV of the NSEA.

5 They had to do what they had to do  
6 and exercise their jurisdiction within the four  
7 corners of the Act. They had no other authority  
8 but what was conferred and what good faith and, you  
9 know, responsible behaviour requires.

10 Q. And can an agreement between  
11 Ministers create jurisdiction?

12 A. Absolutely not.

13 Q. You mentioned officials  
14 acting in good faith. In your opinion, a referral  
15 to a Joint Review Panel or a review panel under  
16 CEAA, is that required to be made on the basis of  
17 good faith by both officials and Ministers?

18 A. Absolutely, good faith. And  
19 as the Supreme Court of Canada said in its famous  
20 1998 secession reference regarding Quebec, the rule  
21 of law is one of the fundamental components, the  
22 cornerstones, of the Canadian Constitution. It is  
23 unwritten, but it is as if it were there.

24 And rule of law requires, among  
25 other things, it says, consistent behaviour and

1 people being able to plan for their lives on the  
2 basis of decisions that are made within  
3 jurisdiction and in good faith. Good faith is  
4 understood to be what rule of law connotes.  
5 Otherwise, it is an abuse of jurisdiction and the  
6 courts have been -- have been resolute ever since  
7 the case of Roncarrelli and Duplesis in Canada, and  
8 through cases that are too numerous to mention,  
9 that that is one of the cornerstones of our  
10 democracy.

11 It is absolutely central.

12 Q. Thank you, Mr. Rankin. Those  
13 are my questions.

14 PRESIDING ARBITRATOR: Thank you,  
15 Mr. Nash.

16 MR. SPELLISCY: Mr. President, I'm  
17 wondering if we could have a few minutes to see if  
18 we have any questions before the Tribunal. I know  
19 Mr. Nash asked questions after the Tribunal  
20 questions yesterday. I wonder if it would be more  
21 appropriate if we asked any follow-up questions  
22 that we might have arising from the testimony today  
23 first, and then the Tribunal can ask its questions  
24 after.

25 PRESIDING ARBITRATOR: I think

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1     that is fine with us.  Yes, go ahead.

2                     MR. SPELLISCY:  If you could give  
3     us just one minute to confer.

4                     PRESIDING ARBITRATOR:  Sure.

5                     MR. SPELLISCY:  Thank you for  
6     providing us a moment, and I apologize to  
7     Mr. Rankin.  Maybe instead of speaking to the back  
8     of his head I will come up to the podium here.

9                     PRESIDING ARBITRATOR:  Yes.

10                    MR. SPELLISCY:  I don't want to  
11     seem like a psychoanalyst sitting behind him.

12     RE-EXAMINATION BY MR. SPELLISCY:

13                    Q.  Mr. Rankin, I wanted just to  
14     ask a few follow-up questions from what arose from  
15     your testimony this morning.

16                    I wanted to go back to the  
17     MiningWatch case, because you said something that I  
18     hadn't understood to be your position yesterday.

19                    Now, you said, I think, that this  
20     case had nothing to do with the division of powers;  
21     is that correct?

22                    A.  I believe that's what I said.

23                    Q.  Can we turn to Exhibit R-15,  
24     then.  Now, I understand we're getting fairly deep  
25     into Canadian jurisprudence and Canadian



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1 constitutional law here, but if you go to -- I just  
2 want to look at the facts of this case.

3 If you look at paragraph 3, which  
4 is the first paragraph of the facts, are you there?

5 A. Yes.

6 Q. And so in the first sentence  
7 there it says:

8 "Red Chris Development  
9 Company Ltd. and BCMetals  
10 Corporation seek to develop a  
11 copper and gold open pit  
12 mining and milling operation  
13 in northwestern British  
14 Columbia."

15 Do you see that?

16 A. Yes.

17 Q. Now, a copper and a gold open  
18 pit mining operation, those would also be areas of  
19 provincial jurisdiction; correct?

20 A. Of course.

21 Q. And now there could be  
22 federal triggers on those activities; correct?

23 A. Without a doubt.

24 Q. But there might not be?

25 A. It is hard to imagine that

1     there wouldn't be.

2                     Q.     Well, let's look at what was  
3     described, and you will see in paragraph 4 --

4                     MR. APPLETON:   Mr. President, I'm  
5     sorry.   I am going to ask Mr. Spelliscy just for a  
6     moment.

7                     PRESIDING ARBITRATOR:   I beg your  
8     pardon?

9                     MR. APPLETON:   I am raising a bit  
10    of an objection, so I would like to ask  
11    Mr. Spelliscy to stop for a moment.

12                    The purpose of the questions  
13    arising from the re-direct would have to be with  
14    matters that first arise in the re-direct.  
15    Otherwise, it would be immediately going back to  
16    cross-examination.

17                    So to the extent -- it is a very  
18    narrow and extraordinary type of situation.   It is  
19    not another opportunity to re-examine the witness.

20                    Now, I am very happy, actually --  
21    if the Tribunal is prepared, I am very happy to  
22    allow Mr. Rankin to answer questions, generally,  
23    and the Tribunal, I am sure, will have questions.

24                    But the scope of this type of  
25    questioning is an extraordinary type of questioning

1     which must arise from a matter which first comes  
2     from the re-direct examination.

3                     And so we're already in a case  
4     that Mr. Spelliscy has spent a considerable amount  
5     of time examining in his cross-examination, and so  
6     I think it is important that we just take a moment  
7     to discuss this so we understand the procedures  
8     here, because both sides will have to deal with  
9     this.

10                    It seems to me that these are not  
11     issues that would be proper on that part. Now, I  
12     gave Mr. Spelliscy the benefit of the doubt to see  
13     where his question was going, to understand that,  
14     but I think we need to make sure that it can only  
15     arise from a new issue which arose from the  
16     re-direct, which of course arose from the  
17     cross-examination. So the most narrow of narrow  
18     situations.

19                    We would be happy to wait if the  
20     Tribunal wanted to talk amongst themselves for a  
21     moment.

22                    MR. NASH: If I could just say,  
23     Mr. President, my questions yesterday in response  
24     were questions arising out of the Tribunal's  
25     questions, and so it is not opening up a

1 re-cross-examination of the witness. This could go  
2 on forever, because I might have questions arising  
3 from Mr. Spelliscy's questions.

4 So that was the purpose of my  
5 questions yesterday, and that is completely normal  
6 and appropriate.

7 I consider this kind of  
8 re-cross-examination on a re-direct examination to  
9 be extraordinary. It is highly unusual. It would  
10 be -- I can't remember seeing a case like that.

11 MR. SPELLISCY: If I could respond  
12 for a second.

13 PRESIDING ARBITRATOR: Okay.

14 MR. SPELLISCY: Look, I think I  
15 actually agree with my colleague, Mr. Appleton,  
16 what he said, and that this is extraordinary, what  
17 Mr. Nash says.

18 However, I would point out that we  
19 have had re-direct examinations that lasted  
20 yesterday and today for about an hour each, and a  
21 lot of issues have come up. I am specifically  
22 asking about something that Mr. Rankin had said in  
23 his examination this morning, which is that this  
24 case that we talked about has nothing to do with  
25 the division of powers. I don't think --

1                   THE WITNESS: I don't think I used  
2 those words.

3                   PRESIDING ARBITRATOR: Sorry?

4                   THE WITNESS: I was -- I simply  
5 said this is a judicial review case. If you look  
6 at the head note, it is not a section 91, 92  
7 constitutional case at all. It might have -- it  
8 arises, of course, in a federal-provincial context.  
9 Every large project does, but I am simply saying it  
10 is a judicial review case. It is not a 91, 92  
11 constitutional case.

12                   The head note alone reveals that.  
13 That is all I was meaning to say. If I overspoke,  
14 that is all I meant.

15                   PRESIDING ARBITRATOR: Just give  
16 the Tribunal a moment to...

17                   PROFESSOR SCHWARTZ:  
18 Mr. Spelliscy, are you finished?

19                   MR. SPELLISCY: Sure. I think we  
20 have live note and we can check the transcript. I  
21 think Mr. Rankin did say it has nothing to do with  
22 the division of powers, but if the Tribunal would  
23 like to make its statements; otherwise, I do think  
24 again I am trying to focus on something that came  
25 up.

1                   When we have long re-direct  
2 examinations, which is not what we believe the  
3 intention was in this case -- in fact, we have some  
4 concerns about the time that is being used by the  
5 claimants in these long re-directs.

6                   When we have these long re-direct  
7 examinations -- and we have allowed a fairly broad  
8 scope of re-direct examinations. We have objected  
9 where issues, we think, weren't raised at all, but  
10 we have allowed a fairly broad-ranging scope of  
11 re-examination.

12                   And we think that in that case,  
13 where we're allowing that and the examination is  
14 broad-ranging, that there are going to be questions  
15 that come up and things that are said that can help  
16 the Tribunal to understand.

17                   If the re-directs were more narrow  
18 or targeted, I don't think this would come up.

19                   MR. NASH: Mr. President, the  
20 cross-examination of Mr. Rankin yesterday lasted  
21 six hours. My re-examination lasted 45 minutes  
22 today, and there was a wide, vast area of material  
23 covered in the two cross-examinations over a  
24 six-hour period.

25                   There is not anything unusual

1     about a 45-minute record.

2                     MR. SPELLISCY:   Just to correct  
3     the record, it did not last six hours.  We would  
4     have been here to about nine or ten o'clock at  
5     night if it lasted six hours.  It was a lengthy  
6     cross-examination, without doubt.

7                     PRESIDING ARBITRATOR:  Just give  
8     the Tribunal a second.  
9     --- Tribunal members confer.

10                    PROFESSOR SCHWARTZ:  We both agree  
11    with the theory that re-cross should be confined to  
12    matters in re-direct.  We are already halfway  
13    through this particular point.  Let's finish at  
14    this point, and we both agree on the theory and if  
15    another question arises, we can deal with it again.

16                    BY MR. SPELLISCY:

17                    Q.   Mr. Rankin, I want to confirm  
18    then -- and I did want to refer to the transcript  
19    and I did, and the question was asked whether this  
20    had anything to do with the division of -- this  
21    case had anything to do with the division of  
22    powers, and your answer was, No, absolutely not.

23                    A.   Yes.

24                    Q.   So, again, to come back, we  
25    have thought this was a project which did implicate

00055

1 provincial jurisdiction. If you turn to paragraph  
2 6 -- in fact sorry, turn to paragraph 5 of this  
3 decision first.

4 And you will see there what the  
5 trigger for the Department of Fisheries and Oceans  
6 was. That was the applications for dams required  
7 to create a tailings impoundment area; correct?

8 A. Yes.

9 Q. And if you turn to paragraph  
10 6, at the top it says:

11 "DFO later finalized the  
12 scope of the project as only  
13 including the tailings  
14 impoundment area, the water  
15 diversion system with  
16 ancillary facilities and the  
17 explosives storage and/or  
18 manufacturing facility."

19 Correct?

20 A. Yes. And as a result, it  
21 goes on:

22 "... DFO determined that, as  
23 the mine and mill were no  
24 longer included in the  
25 project as scoped for



00056

1 environmental assessment, a  
2 comprehensive study was not  
3 necessary and the assessment  
4 would proceed by way of  
5 screening."

6 Q. Right. So in this case, what  
7 DFO did was in fact scope to the areas of federal  
8 jurisdiction where it had a regulatory trigger;  
9 correct?

10 A. Seems to be.

11 Q. And in this case the Supreme  
12 Court, you would agree, said that that was wrong;  
13 right?

14 A. That's right. I think that  
15 is how I would characterize it.

16 Q. Right. And they said in fact  
17 you have to scope the mine and the mill into the  
18 project and include it in the assessment, even if  
19 there are no triggers for the federal government;  
20 correct

21 A. I believe that's correct.

22 Q. I just have one other  
23 question --

24 A. You said the project -- that  
25 somehow the project did implicate provincial

1 jurisdiction, and I said, yes, of course it did.

2 Is this a constitutional case?

3 No, it is not. It is a judicial review case. A  
4 review of the head note cites no 91, 92 cases  
5 whatsoever.

6 Q. But are you saying, then,  
7 Mr. Estrin, so I understand --

8 A. Mr. Rankin.

9 Q. -- the Supreme Court wasn't  
10 aware of the Constitution and what the  
11 constitutional division of powers was?

12 A. No, I am not saying that.

13 Q. So they told the RA in this  
14 case to scope the project, including areas solely  
15 within provincial jurisdiction, fully aware of the  
16 constitutional limits, of course?

17 A. I thought we were talking not  
18 about the project, but the nature of this case, and  
19 I said this is not a constitutional case. And I  
20 stand by that characterization without hesitation.

21 Q. And I agree with you that  
22 this wasn't brought up in a constitutional context.

23 A. That is all I meant to say.  
24 It is a judicial review case.

25 Q. But obviously the Supreme

00058

1 Court was aware of the constitutional issue of the  
2 limit of federal jurisdiction?

3 A. I am not sure what the  
4 Supreme Court was aware of.

5 Q. I just have one other  
6 question to clarify something that you said and I  
7 want to understand. Is it your opinion that if the  
8 federal trigger was only the marine terminal and  
9 the Nova Scotia jurisdiction was limited to the  
10 quarry, that it would have been violation of the  
11 rule of law for the federal government and the Nova  
12 Scotia government to harmonize the environmental  
13 assessment in a joint review process?

14 A. If the federal government  
15 knowingly scoped in the quarry on the basis of a  
16 Fisheries Act trigger that did not exist on the  
17 facts, that would be an abuse of process. That  
18 would, in my judgment, be a violation of everything  
19 Ms. Hobby tells us we need to do.

20 Q. But I think my question was  
21 slightly different, actually. I just want to  
22 understand when you said what you said and what you  
23 say there --

24 MR. NASH: Mr. President, I am  
25 going to object. This was covered in his

1 cross-examination. It doesn't, first, arise out of  
2 anything Mr. Rankin said here. Mr. Rankin was  
3 clarifying matters that were referred to yesterday  
4 on cross-examination, and it did not first arise in  
5 his cross-examination.

6 PRESIDING ARBITRATOR: So is that  
7 it?

8 MR. SPELLISCY: If that is the  
9 Tribunal's recollection. I hadn't thought it had  
10 been raised, and certainly I hadn't understood  
11 Mr. Rankin to take the position that he took this  
12 morning today, but if the Tribunal's recollection  
13 is that it was, I am happy to abide by that. I  
14 have no other questions.

15 PRESIDING ARBITRATOR: Thank you  
16 very much. This brings to an end the -- so, yes.  
17 So this brings to an end the examination on the  
18 witness statement of Professor Rankin. Professor  
19 Rankin, you are released -- oh, oh, sorry.

20 THE WITNESS: Oh, not so lucky.

21 --- Laughter

22 QUESTIONS BY THE TRIBUNAL:

23 THE WITNESS: I am on parole.

24 PROFESSOR MCRAE: That's right.

25 Professors don't get away that easily.

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1                   PROFESSOR SCHWARTZ: Mr. Rankin,  
2     can I bring you to paragraph 102 of your original  
3     witness statement?

4                   THE WITNESS: Yes.

5                   PROFESSOR SCHWARTZ: In a public  
6     hearing, you would expect most of the air time to  
7     be the public, not the proponent; is that right?

8                   THE WITNESS: Absolutely would.

9                   PROFESSOR SCHWARTZ: So if I am  
10    asking anything that is beyond the scope of your  
11    expertise and experience, please identify that. I  
12    don't want you to speculate on anything or anything  
13    that is beyond your expertise.

14                  So what, in your view, is the  
15    appropriate way for an assessment panel to hear the  
16    response of the proponent to the public input?

17                  THE WITNESS: Well, Professor  
18    Schwartz, I cited at paragraph 102 the fact that  
19    this was a very lengthy environmental impact  
20    statement with all of this information, and yet the  
21    affidavit of Mr. Hugh Fraser noted that over 90  
22    hours of hearings, Bilcon's expert testified for  
23    only 19 minutes or so.

24                  And in his supplemental witness  
25    statement, I recall Mr. Buxton saying that there

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1 were no less than nine of his witnesses brought  
2 there as experts to assist the panel, and they  
3 weren't asked at all.

4 I was responsible for running a  
5 very similar process in the Port Hardy  
6 ferrochromium Joint Review Panel process.  
7 Admittedly that preceded CEAA, but was a federal  
8 provincial environmental assessment, and I was  
9 shocked. That is why I cited this. I was shocked  
10 by those numbers.

11 It would suggest to me that the  
12 panel did not take into -- could not have taken  
13 into account or tested the expert evidence that was  
14 available to it. I was shocked by that. It is  
15 very different than the experience I've had at  
16 hearings.

17 PROFESSOR SCHWARTZ: Okay. Could  
18 I take you to tab R-1, which is the Canadian  
19 Environmental Assessment Act, section 34, CEAA. A  
20 question that has arisen here, you probably heard  
21 some of it, was to what extent is the onus on the  
22 proponent to ask and to what extent is the duty on  
23 the panel to invite.

24 THE WITNESS: Right.

25 PROFESSOR SCHWARTZ: This may be

1 too simple to put it in one camp or the other, but  
2 is the CEAA process supposed to be inquisitorial,  
3 in the sense it is a duty on the panel to seek out  
4 information, or is it essentially an adversarial  
5 one where, if the proponent doesn't provide the  
6 information, the panel says, You had your chance  
7 and that is the end of it. Where are we on that  
8 spectrum?

9 THE WITNESS: That is exactly the  
10 word I was going to use. It really is a spectrum  
11 as to how panels proceed in that regard.

12 Mr. Estrin spent considerable time  
13 in his report, and I can't recall whether it was  
14 his first or his response report, on this very  
15 issue and characterized it more as an inquisitorial  
16 process.

17 There is a stand-alone obligation  
18 to get the facts in order to make the  
19 recommendations to the decision-maker Ministers.

20 So it is not the full bore  
21 European inquisitorial process, but the  
22 contemplation is they are going to do that; they  
23 are going to look at the evidence before them; test  
24 it through a public review process like the JRP was  
25 in this circumstance. And if they have gaps in

1     their understanding, there are examples where they  
2     have gone and sought additional information.

3                     Here, I recall they went and  
4     sought the expertise, for reasons that I can't  
5     understand, because it would appear to be entirely  
6     beyond their jurisdiction, of an expert on NAFTA,  
7     and they actually summoned a person to assist them.

8                     I don't think there is anything  
9     improper with asking for additional help. I am not  
10    sure I understand where that fits within the terms  
11    of reference, but that is a different question.

12                    So it is on that continuum that  
13    you describe they have a stand-alone obligation,  
14    but I concede that sometimes panels do not go  
15    beyond the evidence that is before them.

16                    Here they had I don't know how  
17    many expert reports, thousands of pages of an  
18    environmental impact statement, and they had the  
19    benefit of public involvement at the hearing  
20    itself.

21                    PROFESSOR SCHWARTZ: Thank you.  
22    Now, in terms of options available to the Minister  
23    after the panel has reported, you suggested the  
24    panel provides its report, but it is ultimately up  
25    to the Minister. The Ministers, both federal and



1 provincial levels, have the discretion to proceed  
2 if they think these significant adverse effects are  
3 justified in the circumstances.

4 THE WITNESS: That's right. The  
5 statute contemplates they can make their own  
6 decision irrespective if they conclude that the  
7 public -- for example, the economic benefits are  
8 usually what the justifications are for a project,  
9 and notwithstanding what is recommended by a panel,  
10 they can go ahead and do what they wish under the  
11 statute.

12 PROFESSOR SCHWARTZ: Okay. Now,  
13 if, specifically under CEAA right now, the Minister  
14 considers that the report is inadequate --

15 THE WITNESS: Yes.

16 PROFESSOR SCHWARTZ: -- there  
17 seems to be authority to ask for clarification or  
18 recommendations.

19 THE WITNESS: That's correct.

20 PROFESSOR SCHWARTZ: I can't find  
21 what the authority is. If you think the report --  
22 the panel hasn't done an adequate job, I don't  
23 know, is there authority to refer it back for a  
24 do-over? What situation is the Minister in?

25 THE WITNESS: Could you just bear

1 with me. I recall precisely there is that section.

2 PROFESSOR SCHWARTZ: Sure.

3 Clarification, if I am reading it correctly, is  
4 37(1.1)(b), page 17 of the CEEA Act, R-1.

5 THE WITNESS: I may have to -- I  
6 know I have it scribbled down on another piece of  
7 paper, the sections. I annotated the Act myself.  
8 I am sort of without that here. Is there an  
9 opportunity to provide that information later? I  
10 know there is authority to do so. I just don't...

11 PRESIDING ARBITRATOR: Yes, you  
12 may.

13 PROFESSOR SCHWARTZ: Again, just  
14 so you understand the question, the view of the  
15 proponent seemed to be the panel has done a bad  
16 job. We don't have an adequate basis. Go ahead  
17 and proceed to industrial licensing.

18 I am not sure whether the Minister  
19 actually had the authority to do that, and I'm  
20 trying to figure out what the Minister does have  
21 authority to do in a case where the Minister  
22 regards the report as adequate.

23 Clearly, the claimant is taking  
24 the view that the Minister has had a variety of  
25 discretions. I'm trying to figure out what the

1 Minister's discretion was. It's not a question of  
2 disagreeing with the report, but just finding the  
3 report had been done properly.

4 It is not necessarily to go ahead  
5 and licence the project. There may be other  
6 options, but I am curious about that.

7 THE WITNESS: Yes.

8 PROFESSOR SCHWARTZ: In terms of  
9 duty of procedural fairness or natural justice, as  
10 it is sometimes called in Canada, you were  
11 referring to a case of the Supreme Court of Canada  
12 that said there had to be an in-person meeting in  
13 the context of a refugee determination?

14 THE WITNESS: No. That was a  
15 slightly different matter. The leading authority  
16 is Baker v. the Minister of Citizenship and  
17 Immigration, a case decided by the Supreme Court,  
18 and in that case the court made clear that in some  
19 circumstances, listing a number of factors -- one  
20 of which was the importance to the individual, like  
21 in this case, the proponent -- that some kind of  
22 hearing was required, a significant hearing.

23 What the nature of that hearing  
24 is, would it be an oral hearing or a paper hearing,  
25 a process of engagement was I think contemplated.

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1 That is what a hearing is. So why I balked at what  
2 was proposed apparently by counsel was simply  
3 getting a letter and having the Minister say, Yeah,  
4 I have read it carefully, isn't a hearing.

5 Given the fact that it is the  
6 Minister that is the statutory decision maker under  
7 the scheme, I was simply positing that it is far  
8 from lobbying to want to be heard before something  
9 is done by the decision maker. Exactly the nature  
10 of that hearing, Baker wasn't categorical on that,  
11 but there is a spectrum, once again, of  
12 opportunities to be heard.

13 PROFESSOR SCHWARTZ: Yes. You  
14 actually clarified part of what I was curious  
15 about, because I think our understanding is the  
16 same.

17 A fair hearing doesn't necessarily  
18 mean an oral hearing or an in-person meeting.

19 THE WITNESS: No, it does not.

20 PROFESSOR SCHWARTZ: It could mean  
21 the opportunity to provide written submissions in  
22 response to...

23 THE WITNESS: There is a famous  
24 article by Judge Friendly in the United States  
25 called "Some Kind of Hearing", it is titled, and

1     this is, I'm suggesting, what happened here was not  
2     some kind of hearing at all.

3                     What it was was a letter that was  
4     written and the Minister solemnly saying, I have  
5     read it. That is not a hearing.

6                     Given the circumstances, that  
7     statutory decision maker in my judgment had an  
8     obligation, when patent errors were brought to his  
9     attention, to at least hear the other side.

10                    PROFESSOR SCHWARTZ: When you're  
11    referring to engagement, is there any -- were you  
12    intending to refer to any duty on the part of  
13    government to give its reasons, or you're  
14    essentially talking about input rather  
15    than response.

16                    THE WITNESS: I can honestly say  
17    that at this point in Canada's history there is no  
18    duty, stand-alone duty, to provide reasons for  
19    statutory decision makers, so I cannot go that far.

20                    In certain circumstances, however,  
21    the courts have insisted on reasons being provided.

22                    In these circumstances, we have a  
23    report that was flawed, demonstrably so,  
24    recommendations made on the basis of that to a  
25    Minister, and the Minister providing nothing as

1 justification for his decision, except what the  
2 recommendations contained.

3 In those circumstances, it seemed  
4 to me that some sort of reasoning ought to be  
5 available. If you make a decision predicated on  
6 wrong facts or matters beyond the jurisdiction of  
7 those you mandated to provide you those  
8 recommendations, it seems to me, when that is  
9 brought to your attention, you as statutory  
10 decision maker ought to provide some, as the  
11 Supreme Court said, "justification".

12 The leading case is Dunsmuir in  
13 Canada today. It talks about three things,  
14 intelligibility, justification and transparency.  
15 Those are the hallmarks of administrative justice  
16 in Canada.

17 None of those hallmarks were  
18 available in the circumstances to Bilcon by the  
19 statutory decision maker, no transparency, no  
20 intelligibility and no justification beyond they  
21 got this report. I have told you -- and yet being  
22 told it was flawed, and yet proceeding in the face  
23 of that, to me, constituted an abuse of discretion.

24 PROFESSOR SCHWARTZ: Just one last  
25 question here for clarification.

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1                   We can't impose contemporary  
2   developments on something that happened earlier.  
3   Are you saying -- what year are we talking about  
4   when the Minister is responding?

5                   THE WITNESS: 2007, I think.

6                   PROFESSOR SCHWARTZ: Yes, vintage  
7   Canadian administrative law. At that point there  
8   was some sort of duty to respond in the  
9   circumstances?

10                  THE WITNESS: Yes. That was the  
11   law at the time. I don't think -- I can't remember  
12   when Baker was decided, but there's been a long  
13   evolution in administrative law to that effect. I  
14   think the principles of hearing the other side go  
15   back to 19th century.

16                  They have been applied now to  
17   statutory decision makers, be they Ministers, be  
18   they officials in a whole variety of ways since the  
19   case called Nicholson was decided in 1975.

20                  PROFESSOR SCHWARTZ: Input is  
21   ancient, but transparency in responding is more of  
22   a new development, as I understand it.

23                  Is that a --

24                  THE WITNESS: I take your point.

25                  PROFESSOR SCHWARTZ: Did that

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1 exist in 2007?

2 THE WITNESS: Those principles  
3 were codified in the case of Dunsmuir, but I don't  
4 think those are new concepts at all, no.

5 PROFESSOR SCHWARTZ: Thank you.

6 PRESIDING ARBITRATOR: Thank you.

7 PRESIDING ARBITRATOR: Mr. Nash?

8 MR. NASH: I was just going to say  
9 I thought the questions from the Tribunal was over.  
10 I may be able to be of assistance in identifying  
11 the section that Mr. Rankin was referring to in the  
12 CEAA. In the interests of time, if I could draw  
13 his attention to the section of that Act?

14 PRESIDING ARBITRATOR: Okay.

15 THE WITNESS: It would help me.

16 PRESIDING ARBITRATOR: Why don't  
17 you do that right away?

18 MR. NASH: All right. If you go  
19 to section 37 on page 17 of 46.

20 THE WITNESS: Yes, here it is.

21 MR. NASH: Mr. Rankin, go to  
22 subsection (1.1.) (b).

23 THE WITNESS: Thirty-seven?

24 MR. NASH: 37(1.1). It says  
25 "Approval of Governor in Council".



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1 THE WITNESS: Oh, right. Yes,  
2 there you go. Sorry, that is where I was looking.  
3 My apologies.

4 I note that 37(1.1) says:  
5 "Where a report is submitted  
6 by a review panel..."

7 In this case:  
8 "The Governor in Council may,  
9 for the purpose of giving the  
10 approval referred to in  
11 paragraph (a), require..."

12 In this case:  
13 "... the review panel to  
14 clarify any of the  
15 recommendations set out in  
16 the report."

17 Et cetera. So I think that is  
18 what I was getting -- I think that is the section.

19 PROFESSOR SCHWARTZ: Thank you.

20 PRESIDING ARBITRATOR: Thank you  
21 very much.

22 PROFESSOR SCHWARTZ: Just to  
23 follow up, in fact, I referred to that section. My  
24 puzzlement was that that says clarify  
25 recommendation. It doesn't say get more facts.

1 THE WITNESS: Well, yes. That is  
2 true that is what it says.

3 PROFESSOR SCHWARTZ: What is your  
4 view about whether that would extend to directing  
5 the Tribunal to review its fact finding or extend  
6 its fact finding?

7 PRESIDING ARBITRATOR: The panel.

8 PROFESSOR SCHWARTZ: The panel,  
9 sorry.

10 THE WITNESS: Well, either the  
11 term "clarification of any recommendations" would  
12 as a matter of statutory interpretation be  
13 included, yes or no, to do that, or it may be that  
14 as a matter of natural justice.

15 When the decision maker knows that  
16 there are deficiencies or is aware of -- brought to  
17 his attention that there are deficiencies as a  
18 matter of natural justice, one would expect they  
19 would have an opportunity to do so. So it is  
20 either connoted within that and clarification I  
21 admit may not cover what is contemplated, or it  
22 would be something that natural justice would --  
23 there is an expression "would supply the omission  
24 of the legislature", is the expression I referred  
25 to in my report.

1 I mean, if there is a deficiency,  
2 natural justice will "supply that omission".

3 PROFESSOR SCHWARTZ: Thank you  
4 very much.

5 PRESIDING ARBITRATOR: Okay. That  
6 gets us to Professor McRae's question.

7 PROFESSOR MCRAE: Thank you. I  
8 just have a couple of questions, because some of  
9 the things I was going to ask were cleared up in  
10 your response to Professor Schwartz's questions.

11 Just this morning you said that  
12 the federal government and provincial government  
13 can't agree to change jurisdiction.

14 THE WITNESS: Correct.

15 PROFESSOR MCRAE: In other words,  
16 they can't agree to confer on the federal  
17 government the jurisdiction it does not have, but  
18 you're not saying -- I didn't understand you to say  
19 that they cannot establish a Joint Review Panel.

20 THE WITNESS: No.

21 PROFESSOR MCRAE: Which has the  
22 jurisdiction of both federal and provincial?

23 THE WITNESS: That is correct.  
24 That is my view.

25 PROFESSOR MCRAE: The way I read



1 just have a comprehensive study of the marine  
2 terminal, for example, in this case, and you have a  
3 provincial analysis, be it a public hearing or not,  
4 a provincial review of the quarry.

5 In other words, there is a myriad  
6 of ways in which the fact that there is both  
7 federal and provincial involvement in this project,  
8 you can proceed.

9 It would really depend on what  
10 terms of reference the two governments decided to  
11 follow in order to assess a project.

12 PROFESSOR MCRAE: But if we're  
13 looking at just a comprehensive study, presumably  
14 the proponent would be submitting all of the same  
15 information that would they would be submitting to  
16 a Joint Review Panel, but presumably there wouldn't  
17 be a hearing and there wouldn't be the same sort of  
18 public involvement, or would there be the same sort  
19 of public opportunity in a comprehensive study?

20 THE WITNESS: There would not be  
21 the same. You can have public hearings, I believe,  
22 but they are not of the same scope. They wouldn't  
23 need to be of the same scope.

24 The point I guess I am trying to  
25 make is that if you stand back from the trees and

1 look at the forest, it is remarkable that a project  
2 of this size, a quarry and a dock with pilings,  
3 would be the subject of a Joint Review Panel in the  
4 first place.

5                   It's never been done before. It's  
6 never been done since. It's really quite  
7 remarkable when you see it, when you step back from  
8 the specifics, and look and think about it in the  
9 proper broader context, that these questions would  
10 normally arise, based on our history, about why  
11 such a thing were done.

12                   PROFESSOR MCRAE: And to relate to  
13 Professor Schwartz's question. If it had been a  
14 comprehensive study, would you still say between  
15 the final determination, the final conclusions of  
16 the comprehensive study and the Minister's  
17 decision, the Minister would still have an  
18 obligation to provide some kind of access or  
19 hearing to the proponent?

20                   THE WITNESS: Of course it would  
21 depend on the facts. If a proponent came forward,  
22 in my judgment, and said to the Minister, I have  
23 enormous problems here, the process was run in an  
24 unfair manner, the recommendations are predicated  
25 on glaring factual errors, they have done things

1     that were not within their terms of reference, if  
2     those were the facts, yes. There would be a  
3     statutory decision maker. The Minister would still  
4     have to, I think, as a matter of natural justice,  
5     hear the other side. Yes, I would say that, but it  
6     would depend on what the facts were, obviously.

7                     PROFESSOR MCRAE: And, finally,  
8     again, as I read your opinion, you seem to be  
9     saying this case would clearly be overturned if it  
10    had gone to judicial review. In other words,  
11    judicial review would have found multiple problems  
12    with the process.

13                    And my question, since I haven't  
14    studied administrative law since about 1965 and  
15    thought about it much since then, is: What would  
16    be the consequence for the proponent of successful  
17    judicial review? Would we have to start over  
18    again, or what? Is it void? I think that was  
19    mentioned in one of the opinions, that they have to  
20    start over again. What exactly would have been the  
21    consequence if they had gone to judicial review and  
22    you are correct that there are errors?

23                    THE WITNESS: If I am correct, I  
24    would have thought that a court would have quashed  
25    this decision.

1                   They would have said a decision by  
2   the statutory decision-maker Ministers predicated  
3   on such a flawed process by which there was such an  
4   excess of jurisdiction, the panel going so far  
5   beyond its terms of reference and asking itself the  
6   wrong questions and all of the things that I tried  
7   to identify in my report, they would quash that  
8   decision. They would say that decision was not --  
9   could not stand in law. It was made without  
10  jurisdiction.

11                   And at that point, it would be for  
12  a new panel to be -- presumably a whole new  
13  process, would have to be started. It is like --  
14  you know, it is like kicking somebody out of the  
15  legal profession, or a doctor, on the basis that  
16  the hearing was flawed and their livelihood was  
17  affected, and they would say -- the court would  
18  say, well, we have got to go back and do it again,  
19  with probably different decision makers, and so  
20  forth.

21                   But I must confirm that there are  
22  a variety of remedies available in administrative  
23  law. That is just the most obvious one. Go back  
24  and do it right, the court would say.

25                   PROFESSOR MCRAE: Okay, thank you



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1 very much.

2 PRESIDING ARBITRATOR: Just one  
3 question. This is really a question of fact. At  
4 the beginning of this hearing, my impression as a  
5 non-Canadian, et cetera, was that referring a  
6 project to a Joint Review Panel was a bit like a  
7 death sentence.

8 --- Laughter.

9 PRESIDING ARBITRATOR: Which are  
10 fortunately rare.

11 THE WITNESS: Very rare.

12 PRESIDING ARBITRATOR: And the  
13 only case where such a -- referred to a quarry was  
14 the one case that is before us.

15 I think I heard the number seven,  
16 seven referrals, or I might be wrong about that  
17 number.

18 So do you happen to know how many  
19 of the, let's say, referrals to a Joint Review  
20 Panel led to the death of the project?

21 THE WITNESS: Very few in Canada,  
22 but there are some. One is the Kemess North Mine.

23 PRESIDING ARBITRATOR: Would you  
24 say in most instances the Joint Review Panel came  
25 out against the project and that was the end of it,

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1 or would that be not a correct statement?

2 THE WITNESS: In the vast --  
3 repeat vast -- majority of Joint Review Panel  
4 decisions, those recommendations, I should say --  
5 not decisions, they are recommendations -- contain  
6 a number of recommendations, terms and conditions  
7 that the decision maker should apply.

8 Most of, sometimes all, of those  
9 terms and conditions are reflected in the decision  
10 to proceed.

11 In every case I believe ever,  
12 there have been mitigation recommendations made,  
13 even when, even when -- the Kemess North example is  
14 the famous one -- the panel said, You should not  
15 proceed. We recommend you don't proceed.

16 They go on to say, But if you  
17 choose to, because you are the Ministers and you  
18 decide, here are a dozen recommendations, sometimes  
19 much more, of things you should do in the event  
20 that you choose to not accept our recommendation.

21 Here they did no such thing on the  
22 main event which, of course, was community core  
23 values. But, Mr. President, the point is, very  
24 rarely are there "don't go" recommendations made by  
25 Joint Review Panels.

1                   There have been a few, but they  
2   are very rare. Even in those circumstances, they  
3   say, Should you disagree with us, here are the  
4   mitigation conditions we recommend.

5                   PRESIDING ARBITRATOR: Because  
6   yesterday there was -- sorry, there was a rather  
7   lengthy pro and con about what does it mean to  
8   consider mitigation measures, and my impression  
9   from reading what the JRP report says about  
10  mitigation measures was that of course they  
11  considered it, in a sense, but what they said was  
12  mitigation measures would not work or...

13                  THE WITNESS: That's right.

14                  PRESIDING ARBITRATOR: Is that my  
15  correct impression?

16                  THE WITNESS: Yes. Very fairly,  
17  the counsel brought to the Tribunal's attention  
18  that there were a number of mitigation measures for  
19  other issues.

20                  Let's again stand back. There  
21  were seven recommendations this panel made, I think  
22  six of which were beyond the jurisdiction. I don't  
23  think they have ever been implemented, but I may  
24  stand corrected. The main one was this should not  
25  proceed because of its impact on core community

1 values, which are beliefs that really there is no  
2 mitigation measures possible.

3 My point is simply this. The  
4 statute, the central scheme of the statute, is to  
5 recommend whether -- to examine where they are  
6 significant adverse environmental effects that  
7 cannot be mitigated, and they didn't even put their  
8 mind on their main recommendation to the issue of  
9 mitigation, and I just think that is without  
10 jurisdiction entirely.

11 PRESIDING ARBITRATOR: Thank you  
12 very much.

13 MR. NASH: Judge Simma, may I ask  
14 one question arising from Professor McRae's  
15 questions?

16 PRESIDING ARBITRATOR: Please go  
17 ahead.

18 RE-EXAMINATION BY MR. NASH:

19 Q. I understood Professor  
20 McKay's (sic) question to be in relation to whether  
21 there could be another kind of process if there  
22 wasn't a JRP.

23 A. Yes.

24 Q. Would your answer be  
25 predicated upon Nova Scotia having an environmental

1 assessment engaged under section 33, which you  
2 referred to yesterday?

3 A. Oh, absolutely. I continue  
4 to be very puzzled and concerned about just how  
5 Nova Scotia purports to have jurisdiction in the  
6 first place in these circumstances. It is  
7 confusing to me. You're supposed to have a  
8 registration, pay \$12,000, have a project  
9 description, and only then does it get triggered in  
10 the Nova Scotia context.

11 So of course I assume all of that.

12 Q. So if the federal government  
13 had no jurisdiction over the quarry and the Nova  
14 Scotia government did not have a provincial  
15 environmental assessment engaged, could they do any  
16 kind of assessment of the quarry?

17 A. I don't believe so. I mean,  
18 the Nova Scotia Environmental Assessment Act says  
19 small quarries need not be considered. Quarries  
20 used under the regulation for government road  
21 building don't need to be considered.

22 But large ones, if and only if you  
23 go through the steps in Part IV of the Act will  
24 there be an environmental assessment process. If  
25 there is no environmental assessment process

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1 triggered, there is no -- there's no jurisdiction  
2 to proceed.

3 MR. NASH: Thank you.

4 THE WITNESS: Am I free?

5 QUESTIONS BY THE TRIBUNAL:

6 PRESIDING ARBITRATOR: One little  
7 follow-up. I just reread the summary of  
8 recommendations of the panel, and in the  
9 recommendation 1, it actually comes in two parts.

10 And in the second part, the panel  
11 recommends to the Government of Canada that the  
12 project is likely to cause significant adverse  
13 environmental effects.

14 THE WITNESS: Yes.

15 PRESIDING ARBITRATOR: So it  
16 recommends that the panel is likely. Is that a  
17 formula which is in use?

18 THE WITNESS: Yes, that would be  
19 the standard way in which it would be presented.

20 PRESIDING ARBITRATOR: So somebody  
21 recommends that the project is likely to cause --  
22 to me there seems to be a logical problem in this  
23 wording, that somebody can recommend. So can I  
24 recommend to you that the pill you are taking will  
25 make you sick?

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1 --- Laughter.

2 THE WITNESS: I see what you are  
3 saying.

4 PRESIDING ARBITRATOR: It is a  
5 little strange, but if you say that is how  
6 Canadians --

7 --- Laughter.

8 THE WITNESS: Canadians are  
9 strange.

10 --- Laughter.

11 THE WITNESS: I think the  
12 formulation is an attempt to mirror the language of  
13 the statute. As I understood, they were saying  
14 that. It may be badly worded.

15 But the test is, of course, their  
16 mandate is to, Please advise us, Ministers, whether  
17 there is a "significant adverse environmental  
18 effect", and I think they were trying to put that  
19 in their formulation.

20 PRESIDING ARBITRATOR: Okay.  
21 Thank you very much.

22 MR. NASH: I will just apologize  
23 to Professor McRae. I understand I called you  
24 Professor McKay.

25 PROFESSOR MCRAE: He is also very

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1     impressive.

2     --- Laughter.

3                     PRESIDING ARBITRATOR:   So I think  
4     we have finally come to an end.

5                     PROFESSOR SCHWARTZ:   Can I just  
6     follow up on Judge Simma's question?

7                     So the mandate of a panel is to  
8     address likely significant adverse environmental  
9     effects and mitigation.

10                    THE WITNESS:   Yes.

11                    PROFESSOR SCHWARTZ:   The  
12     responsibility of the Minister is to address that  
13     and justify it in the circumstances.

14                    THE WITNESS:   The Minister has the  
15     separate step of justification.   This panel of  
16     course decided, for reasons that I think it has no  
17     jurisdiction to do so, it used its own benefits and  
18     burdens calculation, it called it, and talked about  
19     whether this was in the public interest.

20                    I see no jurisdiction to do that  
21     in the terms of reference, but it was to the  
22     government -- the fundamental scheme of course is  
23     the Ministers' political accountability for whether  
24     to allow any project to be built, and one of the  
25     things they get to decide is justification.



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1                   In other words, it might be a  
2     terrible -- this nuclear power plant might be a  
3     very bad thing, but if it is justified on economic  
4     grounds, the politicians can make that  
5     determination. That is the scheme of the Act, and  
6     they can do what they want.

7                   PROFESSOR SCHWARTZ: Thank you.

8                   PRESIDING ARBITRATOR: Thank you.  
9     I am very careful. Is there any re... this seems  
10    to be the case. Finally, thank you, Professor  
11    Rankin.

12                  THE WITNESS: Thank you very much.

13                  PRESIDING ARBITRATOR: And I think  
14    it is time -- thank you, Professor Rankin, in case  
15    you haven't heard me. And I think that gets us to  
16    the break; right? So we will have a break until  
17    10:55, and then we will hear from Mr. Estrin.

18    --- Recess at 10:39 a.m.

19    --- Upon resuming at 10:59 a.m.

20                  PRESIDING ARBITRATOR: Okay,  
21    should we wait for Mr. Appleton?

22                  MR. NASH: We can go ahead.

23                  PRESIDING ARBITRATOR: I think we  
24    are ready to start. So I welcome Mr. Estrin.  
25    Mr. Estrin, you should have a declaration in front

1 of you. Could you be so kind and read out that  
2 declaration, please.

3 MR. ESTRIN: Yes. I solemnly --  
4 is this on -- declare on my honour and conscience  
5 that I will speak the truth, the whole truth, and  
6 nothing but the truth, and that my statement will  
7 be in accordance with my sincere belief.

8 AFFIRMED: DAVID ESTRIN

9 PRESIDING ARBITRATOR: Thank you  
10 very much. Mr. Nash.

11 MR. NASH: I will introduce  
12 Mr. Estrin. Thank you, Professor Simma.

13 EXAMINATION IN-CHIEF BY MR. NASH:

14 Q. Mr. Estrin, you have been a  
15 member of the Law Society of Upper Canada since  
16 1971?

17 A. Yes.

18 Q. You're a founding editor of  
19 the Canadian Environmental Law Reports?

20 A. Yes.

21 Q. You're a founding director  
22 and member of the national executive committee of  
23 the Canadian Environmental Law Association?

24 A. I'm not a member.

25 Q. You were?

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1 A. I was, yes.

2 Q. You have taught environmental  
3 law?

4 A. Yes.

5 Q. Where have you taught?

6 A. Numerous places. The most  
7 lengthy period in the school of -- in the faculty  
8 of environmental studies at the University of  
9 Waterloo, for 13 years I was associate professor  
10 part-time, which meant I was there two days a week,  
11 teaching both an introductory course of  
12 environmental law and a more senior level course in  
13 environmental law.

14 And I keep running into those  
15 people. The people that were taking the courses  
16 were not law students. They were engineers. They  
17 were planners. They were people who became  
18 environmental managers and they went on to run  
19 regulatory agencies, et cetera.

20 I have taught at law schools. I  
21 have taught at the University of Ottawa, one year  
22 the whole course. I have given guest lectures at  
23 the University of Ottawa, faculty of law last year,  
24 and this year I taught at Osgoode, numerous ad hoc  
25 courses and in other places.

1                   Q.   And you have been practising  
2   law as a practitioner in the environmental law area  
3   for almost 40 years?

4                   A.   Over 40 years.  As I said, I  
5   was admitted in 1971 and I really dove into the  
6   area at that point.

7                   Q.   And you have published books  
8   and articles on the topic and conducted research  
9   studies?

10                  A.   Yes, and numerous books --  
11   well, not numerous, but a number of books, probably  
12   the first book in Canada about environmental law.  
13   It was called "Environment On Trial, A Citizen's  
14   Guide to Environmental Law".  That was when I was  
15   with Canadian Environmental Law Association, and we  
16   talked about what citizens could do about the  
17   environment, and also articulated the notion of an  
18   environmental bill of rights.

19                  And other books have dealt with  
20   the -- well, my largest book right now is called  
21   "Business Guide to Environmental Law", which is  
22   continuously updated twice a year.  But in terms of  
23   research studies that might be relevant, for  
24   example, one assignment that particularly might be  
25   relevant was I worked for a year for the northern

1 Quebec Inuit Association when they were negotiating  
2 with the Quebec government over the James Bay Power  
3 Project and with the Crees. One of the objectives  
4 was to write an environmental assessment regime  
5 that would apply to the whole of northern Quebec,  
6 when there was a settlement reached in that case.

7 That settlement was reached, and  
8 the environmental assessment regime that I helped  
9 to write is enshrined in the James Bay and Northern  
10 Quebec Act, federal legislation that pertains to  
11 northern Quebec. I mean, that is one example.

12 Q. And you were counsel on the  
13 Red Hill case, which has been discussed at some  
14 length in this case?

15 A. Yes. I was counsel for the  
16 City of Hamilton, then called Region of  
17 Hamilton-Wentworth, in respect of an Expressway  
18 that had been largely completed, but not completely  
19 completed. And at the time when the municipality  
20 wanted to start it up again, CEAA had come into  
21 effect and opponents had argued to the federal  
22 government successfully that CEAA ought to be used  
23 in its full panoply, and resulted in a federal  
24 panel review being appointed.

25 I acted for the city to take the

1 validity of a review panel being appointed to the  
2 federal court, and we were successful on all  
3 grounds in terms of the federal court finding with  
4 me that the federal government lacked the authority  
5 in that particular case to do what they were trying  
6 to do, and that decision was upheld by the Court of  
7 Appeal.

8 Q. I understand you have been  
9 called the grandfather of environmental law in  
10 Canada?

11 A. Yeah. I think I would rather  
12 be called the godfather.

13 ---Laughter

14 THE WITNESS: Someone actually  
15 introduced me as the godfather at the International  
16 Bar Association meeting last week in Boston. I  
17 actually should, for what it is worth, mention I  
18 guess I am the chair of the International Bar  
19 Association Environmental Committee for this year  
20 and next year. And so we -- and that is one of the  
21 things I do when I am not actually doing billable  
22 work.

23 MR. NASH: Thank you, Mr. Estrin.  
24 Those are my questions.

25 PRESIDING ARBITRATOR: Thank you,

1 Mr. Nash. The cross-examination will be done by  
2 Mr. Spelliscy. Are you going to get...

3 THE WITNESS: By the way, may I  
4 just say there were a couple of minor corrections  
5 to my reports that I thought I would bring to your  
6 attention before we begin so that --

7 PRESIDING ARBITRATOR: Maybe we  
8 could just wait. Do we have your report before  
9 us? I think we have your expert reports before us  
10 now.

11 THE WITNESS: All right. I have  
12 no idea where they are in these volumes.

13 MR. SPELLISCY: They are in volume  
14 1 of your tabs there. They will be starting at  
15 tab -- expert report of David Estrin. Following  
16 those are your appendices, and then the reply  
17 expert report of David Estrin comes after tab O,  
18 which is appendix O to your report.

19 THE WITNESS: Okay, thank you. So  
20 in the expert report, which I guess is the first  
21 tab, tab A, at page 22, paragraph 56, there was a  
22 correction in respect of what I said about the  
23 Aguathuna quarry.

24 I had said in paragraph 56 that  
25 the CEAA process did not consider the impact of the

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1 quarry, only the marine terminal, but in fact both  
2 the quarry and the marine terminal were reviewed in  
3 the Aguathuna matter.

4 So that -- and it is the same  
5 correction I am going to ask you -- well, I will  
6 bring it to your attention when we get to --

7 PRESIDING ARBITRATOR: I am not  
8 sure, Mr. Estrin, I got your correction. So it is  
9 paragraph 56.

10 THE WITNESS: (a). It should say,  
11 cases... allow the process to be satisfied, I guess  
12 we should say, take out the word "without".  
13 Considering the impact of the quarry and the marine  
14 terminal.

15 PRESIDING ARBITRATOR: So you take  
16 out the word?

17 THE WITNESS: "Without" and take  
18 out the word "only". So it should say:  
19 Considering the impact of the quarry and the marine  
20 terminal. They were both reviewed.

21 PRESIDING ARBITRATOR: Okay.

22 THE WITNESS: I meant... scoped  
23 into that particular matter.

24 And then when we come to the  
25 appendices, there is -- I think it is appendix E.



1 I am going to be possibly referring to this matter,  
2 depending on the questions. The important word  
3 here is "Belleoram". If you see on the third line  
4 of the heading appendix E, it is a long title. It  
5 says "case study", "Continental Stone Ltd. Crushed  
6 Rock Quarry and Marine Terminal Project (Belleoram,  
7 Newfoundland)".

8 This Belleoram example may come  
9 up. This is an important word. This is the  
10 Belleoram matter I will be referring to, if the  
11 questions come up, as opposed to Continental stone.

12 But, really, it is in appendix E  
13 at -- there's a chart and I compare the  
14 characteristics of Belleoram to Whites Point, and  
15 there is just a couple of...

16 PRESIDING ARBITRATOR: Oh, yes,  
17 pages 17 and 18?

18 THE WITNESS: They follow, yes.  
19 Yes, they are not numbered, but the schedule that  
20 follows.

21 And in the right-hand corner,  
22 under the line "responsible authorities", on page  
23 18 under the left-hand side. It says "responsible  
24 authorities". For Whites Point, there is a  
25 mistake. It says "Transport Canada DFO and the

1 Atlantic Canada Opportunities Agency." Cross out  
2 "Atlantic Canada Opportunities Agency." The only  
3 two RAs in Whites Point were Transport Canada and  
4 DFO.

5                   Then appendix F is the case study  
6 about Aguathuna that I mentioned right at the  
7 beginning, the detailed discussion of Aguathuna.  
8 That is the case study I did on that one. And on  
9 the first page of that, page 1. It says halfway  
10 down "The Aguathuna quarry project was important  
11 for three main reasons", and (a) needs to be  
12 corrected. In this case government officials were  
13 able to... I think take out the words in the second  
14 line, "without considering the impact of the  
15 quarry".

16                   So it should read: In this case  
17 government officials were able to allow the process  
18 to be satisfied without a review panel hearing.  
19 Just take the word out "and" as well.

20                   And then line (b), it says, "It  
21 illustrates how the CEAA process can be", and I  
22 would take out the word "eliminated and", and put  
23 in the word "just eliminated and".

24                   That all flows from the correction  
25 that I mentioned earlier, and just one more in

1 relation to that at page 10, same point. The last  
2 paragraph in this case, take out the words in the  
3 last paragraph that begins "in this case", take out  
4 the words "without considering the impact of the  
5 quarry and". So it reads: In this case government  
6 officials were able to allow the CEAA process to be  
7 satisfied without a review panel.

8 That is it. Sorry about that.

9 PRESIDING ARBITRATOR: Okay.

10 Mr. Spelliscy.

11 CROSS-EXAMINATION BY MR. SPELLISCY:

12 Q. Thank you, Mr. Estrin, and  
13 thank you for drawing our attention to those  
14 corrections. I want to just follow up and confirm  
15 a couple of things about your experience. You  
16 mentioned you are an attorney; correct?

17 A. I am a lawyer. It is sort of  
18 an American term, but, yes.

19 Q. Just to be clear, you do not  
20 have any established particular scientific  
21 expertise; correct?

22 A. Correct.

23 Q. So you have never received a  
24 degree from a faculty of science; correct?

25 A. Correct. I have a degree in

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1 political science, which I think this case has  
2 something to do with.

3 ---Laughter

4 Q. You never received an actual  
5 degree in science; correct?

6 A. Correct.

7 Q. Never worked as a scientist;  
8 correct?

9 A. Correct. In fact, I went  
10 into environmental law, Mr. President, in order to  
11 get away from mathematics, which was a very  
12 difficult subject for me. As it turns out,  
13 environmental law is full of mathematics and  
14 science.

15 Q. Mathematics wouldn't really  
16 be relevant here. In fact, in your expert report,  
17 and if you look at paragraph 44 of your reply  
18 expert report, the one you filed in December 2012,  
19 more importantly than mathematics, you say:

20 "Of course I am not a fish  
21 biologist and so I cannot  
22 purport to opine on the  
23 actual impacts that blasting  
24 at the 3.9 hectare test  
25 quarry - or the larger

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1 quarry - would have had on  
2 fish."

3 Is that true?

4 A. Correct.

5 Q. And you would also  
6 acknowledge that given your lack of scientific  
7 expertise, you don't possess the expertise to opine  
8 on the scientific merit of the conclusions reached  
9 about any effects of the marine terminal on the  
10 marine environment; correct?

11 A. Not on the scientific  
12 effects, if they are actually described. I can  
13 opine and want to opine and tell you, and can  
14 discuss, I think, whether or not there are  
15 scientific facts in the record.

16 Q. So that I understand that,  
17 and I think that is an important point, the  
18 conclusions that you are putting forth in your  
19 report, they are drawn from what you have reviewed  
20 in the record and your understanding of the  
21 documents in the record; correct?

22 A. Correct.

23 Q. So the conclusions that you  
24 draw about the Whites Point project, they are not  
25 based on any particular scientific expertise as to

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1    what happened.  They are just on your review of the  
2    documents; right?

3                   A.   And my experience, but which  
4    does not include being an expert in biology or fish  
5    matters or things like that.

6                   Q.   Now, I want to take you still  
7    to -- because I want to clarify one thing.

8                   It is in paragraph 3 of your  
9    second report.  Now, in this paragraph, you refer  
10   to what you call a spurious charge, and you  
11   complain that you have been wrongfully accused of  
12   attributing DFO's decisions to anti-Americanism or  
13   xenophobia.  You say:

14                         "Nowhere in my first report  
15                         did I assert or even imply  
16                         that DFO's decisions were  
17                         driven by anti-Americanism or  
18                         xenophobia."

19                   Correct?

20                   A.   Correct.

21                   Q.   At the end you say:

22                         "I did not say DFO officials  
23                         were anti-American or  
24                         xenophobic."

25                   Correct?

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1 A. That is what I said.

2 Q. In fact, that is because,  
3 based on your review of the documents in the  
4 record, you didn't see any evidence of  
5 anti-Americanism or xenophobia; correct?

6 A. In respect of DFO.

7 Q. In respect of DFO, thank you.  
8 So I understand, then, your report and your  
9 expertise partly here comes from comparing the EA  
10 conducted of the Whites Point project with the EAs  
11 of other projects that you believe to be similar,  
12 and I think you just took us to some of the  
13 appendices where you did so.

14 Is that a fair basis of your  
15 assessment?

16 A. Sorry, I missed the first  
17 part. I know you are asking me if the basis of my  
18 assessment is other case studies. I mean, there is  
19 a lot of other things I talk about in this report.  
20 So...

21 Q. One of the bases of your  
22 assessment would be these other case studies;  
23 correct?

24 A. Yes.

25 Q. Now, in his witness

1 statement, Mr. Neil Bellefontaine, who was the  
2 regional director general of the Department of  
3 Department of Fisheries and Oceans during the  
4 relevant period of time, he also discussed several  
5 projects that he viewed as similar to the Whites  
6 Point project. Do you recall that?

7 A. Well, you'll have to remind  
8 me of what you're talking about and give me an  
9 opportunity to review his witness statement, if you  
10 could. Is it in the material?

11 Q. You don't recall commenting  
12 on a project in your report called the Kelly's  
13 Mountain Quarry Project?

14 A. Well, I said I would like to  
15 know which one you are talking about. Is that what  
16 you're talking about? Yes, yes, I do recall he did  
17 raise that one, yes.

18 Q. It is one of the projects,  
19 okay. Now, Kelly's Mountain project, this was a  
20 quarry and marine terminal project in Nova Scotia;  
21 correct?

22 A. Yes. Well, it was a proposed  
23 project.

24 Q. It was a proposed project,  
25 proposed quarry and marine terminal in Nova Scotia;



1 correct

2 A. Yes. That is what the  
3 documents seem to indicate.

4 Q. And this project, this quarry  
5 and marine terminal, was at the time referred to a  
6 public hearing under the existing environmental  
7 assessment legislation in Canada at the time,  
8 right?

9 A. There was going to be a panel  
10 review; correct.

11 Q. And the panel review under  
12 the existing legislation at the time, that was the  
13 most intensive level of review possible under that  
14 legislation; correct?

15 A. You're talking about the  
16 predecessor to the Canadian Environmental  
17 Assessment Act?

18 Q. I am.

19 A. The EARPGO environmental  
20 review process guideline Order of the Governor in  
21 Council which was eventually held to been  
22 unconstitutional by the Supreme Court of Canada,  
23 and so that led to the replacement of it by CEAA.

24 Yes, at that time under EARPGO,  
25 the panel review was the most fulsome examination,

1 yes.

2 Q. So this was a quarry and  
3 marine terminal project in Nova Scotia that was  
4 referred to the most fulsome, is what you said,  
5 level of examination under the existing statute at  
6 the time?

7 A. It wasn't -- it was not a  
8 statute. It was an Order in Council.

9 Q. Order in Council at the time,  
10 the existing guidelines which was binding on the  
11 department at the time; correct?

12 A. Yes.

13 Q. Now, if you could turn to  
14 paragraph 147 of your reply report, your second  
15 report. If everybody is there, in 147 you talk  
16 about this proposal and you say:

17 "Because it was governed by a  
18 different EA regime than the  
19 Whites Point quarry, it is of  
20 little comparative value."

21 Do you see that?

22 A. I do.

23 Q. Now, you would agree that  
24 under EARPGO, the guidelines, Order in Council  
25 you're referring to, the standards for referring a

1 project to a panel review were also significant  
2 adverse environmental effects or public concern;  
3 correct?

4 A. I don't have it in front of  
5 me, but, in general terms, I believe that's right.

6 Q. Now, Mr. Bellefontaine also  
7 mentioned another project that you talk about, and  
8 that is at paragraph 152 of your reply report and  
9 that is the Blue Mountain project.

10 And, again, at paragraph 152, you  
11 say of the Blue Mountain project that it can be  
12 distinguished from the Whites Point quarry because  
13 it was governed by an old EA regime. Do you see  
14 that?

15 A. Yes, I see that.

16 Q. I just want to go to one  
17 more, because Mr. Daly --

18 A. I also say, I note there are  
19 differences between the Act as it read in the Nova  
20 Scotia Act at that time and the Environment Act  
21 which applies to Whites Point. For example, the  
22 definition of "environment" under the former  
23 legislation was different and apparently broader.  
24 This language is, as I point out it used the  
25 socio-economic, recreational, cultural and study

1 conditions and factors that influence the life of  
2 humans or community. The language is not used in  
3 the Environment Act, and there is no reference to  
4 aesthetic conditions.

5 Q. You're talking there about  
6 the differences between the two Nova Scotia Acts  
7 applicable there?

8 A. Well, I'm talking about what  
9 did exist in the former act when Kelly's Mountain  
10 and Blue Mountain were referred, compared to the  
11 Act that's been in force and is in force at the  
12 present time since -- when was it -- 1995, I think.

13 Q. But I think we need to be  
14 clear. You're saying the Act; you're talking about  
15 the Nova Scotia Act?

16 A. Yes.

17 Q. Thank you. Now, I do want to  
18 do one more, and I think it is the same. If you go  
19 to paragraph 156 of your report, again, you mention  
20 a project referred to by Mr. Daly, which is the  
21 Stellarton Open Pit Coal Mine project. You say  
22 again that the reason why you don't find it -- I  
23 will use your words -- or you find it of limited  
24 usefulness as a comparator was because it was  
25 governed by an old Environmental Assessment Act,

1 not the environmental act which applied to Whites  
2 Point quarry; correct?

3 A. That is certainly a point of  
4 distinction. It isn't necessarily the only point.

5 Q. No, but it is the one that  
6 you said, "as such it is of limited usefulness";  
7 correct?

8 A. Right. But there are other  
9 reasons why it doesn't, in my view, form a highly  
10 relevant precedent for this matter.

11 Q. But so that I understand your  
12 opinion, then, your opinion is that if two projects  
13 are assessed under different EA regimes, then the  
14 treatment they received is of limited usefulness as  
15 comparators; is that right?

16 A. I'm saying that provides a  
17 qualification.

18 In this case that we have in front  
19 of us and in any of the cases I looked at, I was  
20 always looking at the same regime; that is, the  
21 application of the Canadian Environmental  
22 Assessment Act and how government officials acted  
23 or did not act.

24 And although there may be cases  
25 where other provinces were involved in other

1 situations, my primary reason for looking at other  
2 cases was to see what the practice was across  
3 Canada of these same officials using the same  
4 legislation, the Canadian Environmental Assessment  
5 Act, and that I think is what is relevant here. Is  
6 there like treatment or not like treatment between  
7 how federal officials administering the Act we have  
8 in front of us acted in other cases, using CEAA?

9 Q. So your opinion, then, is  
10 based on the federal treatment that was provided,  
11 not necessarily the Nova Scotia treatment that was  
12 provided?

13 A. I think in the Whites Point  
14 case, there's ample reason to look at the Nova  
15 Scotia officials' conduct and look at their conduct  
16 in relation to other cases in Nova Scotia, and I  
17 provided some examples of that, for example,  
18 Keltic.

19 The Keltic Petrochemical Terminal  
20 I discuss in some detail in my report. And it is  
21 an amazing difference as to how that was handled.  
22 I heard yesterday Mr. Buxton being asked questions  
23 about how -- say something about how he felt that  
24 the detail he was being asked about in terms of  
25 providing engineering, in effect, details to the

00110

1 panel was really something that he found completely  
2 perplexing and surprising in a planning process.

3 Well, if the panel takes an  
4 opportunity to look, for example, at the Keltic  
5 decision, which is in the record -- I think it is  
6 Exhibit 570 -- it is a decision of the Nova Scotia  
7 Environmental Assessment Board dealing with a very  
8 major project. In fact, they said it is the most  
9 complex project they have ever had in Nova Scotia.

10 And the panel said, you know what,  
11 we don't have enough details here. We really --  
12 you know, this was only dealt with at a conceptual  
13 level. We're going to approve this or we're going  
14 to recommend it be approved, but subject to a whole  
15 raft of detailed studies to be done.

16 And the government accepted that.  
17 That was in the same year, same year as Whites  
18 Point was being processed by the panel, the Joint  
19 Review Panel. So it was a complete black and white  
20 difference in approach.

21 So I think it is relevant to look  
22 at the Nova Scotia examples, as well.

23 Q. Let me come back to -- and I  
24 want to come back to the Kelly's Mountain quarry  
25 and marine terminal, because it was in Nova Scotia,

00111

1 and you said it is important to look at those  
2 examples.

3 Again, this was a quarry marine  
4 terminal referred to the highest, most intensive  
5 level of review subject to -- under the  
6 environmental assessment at the time, and the only  
7 difference that you point out is -- or you say two  
8 things.

9 You say, one, it is under a  
10 different regime; correct?

11 A. It was under the former  
12 federal regime and under the former Nova Scotia  
13 Act.

14 Q. Right. Now, in this case  
15 also you note that the Kelly's Mountain quarry was  
16 going to be larger than the Whites Point quarry.  
17 You see that as a relevant factor, as well?

18 A. Well, let me tell you why I  
19 think that the Kelly's Mountain is not very helpful  
20 in terms of comparison. I think, first of all, it  
21 was under legislation that we're not dealing with  
22 in both cases, okay.

23 Secondly, Kelly's Mountain was --  
24 just let me... I have some statistics at hand. It  
25 was going to be the third-largest open pit mine in



00112

1 the world. It was going to be, I think, ten times  
2 the size of Whites Point quarry in terms of the  
3 area, and three times the amount of gravel taken  
4 out.

5 If I can just have a minute, I  
6 made a note about the Kelly's Mountain here  
7 somewhere. If I could just find it, I would like  
8 to do that. I may not be able to find it quickly.  
9 Just give me a sec.

10 PRESIDING ARBITRATOR: We probably  
11 won't need that.

12 MR. SPELLISCY: I don't think we  
13 will need that.

14 THE WITNESS: All right. There  
15 were other distinguishing factors which I think are  
16 important.

17 In that case, there was federal  
18 funding for both the -- for the quarry or federal  
19 financial incentives under the tax act. So that --

20 BY MR. SPELLISCY:

21 Q. Sorry, Mr. Estrin, does this  
22 have to do with the level of assessment or you're  
23 talking about -- what are you talking about with  
24 the Kelly's Mountain? I am conscious of the fact  
25 that you have opinions to offer, but I am also

1 conscious of where we are in the hearing process  
2 and the time that we have.

3 A. Mm-hm.

4 Q. So I want to make sure that  
5 we can stick to our questions. I just don't  
6 understand where this is going. If you want to --

7 A. Well, I am trying to help you  
8 answer the question as to why there are differences  
9 and why -- between Kelly's Mountain and this one.

10 Q. Right. And you think that  
11 the fact of funding is a difference in the level of  
12 assessment that was accorded in Kelly's Mountain?

13 A. No.

14 Q. That is what I would like to  
15 focus on right now, just the level of assessment  
16 that was in Kelly's Mountain; is that agreeable?

17 A. Well, you have to also  
18 consider -- one of the reasons that I understand  
19 this case is here is because the argument was that  
20 it was inappropriate that the quarry be sent to a  
21 federal review panel.

22 Q. That is not the question I am  
23 asking you right now.

24 A. In Kelly's Mountain, there  
25 were federal funding for the quarry, which meant

00114

1     there was a so-called trigger, if you want to use  
2     that concept under the old legislation.

3                     And there was also a trigger for  
4     the marine terminal, which was the same, which was  
5     the Navigable Waters Protection Act. So that is  
6     why both aspects of that project were involved,  
7     okay, which is not the case here.

8                     There is no federal funding for  
9     the quarry in Whites Point.

10                    Q.    Sir, I understand that you  
11     have points that you have made in your reports on  
12     scope of project, and I understand that and I am  
13     sure that you would like to talk about those,  
14     especially from the federal perspective, but I  
15     think it will be more efficient if we to stick to  
16     the questions that I am asking.

17                    In that way, if you need to  
18     provide context, I am willing to hear that, but if  
19     you try to stick to the points I am raising instead  
20     of trying to make points that you want to make, I  
21     think things will go a little more smoothly.

22                    A.    I am just trying to deal with  
23     the similarities or the distinctions on Kelly's  
24     Mountain.

25                    Q.    Now, I want to turn to the

00115

1 Bilcon project here and just understand briefly  
2 about what the actual project that was. Now, this  
3 was a project that was to be located on the Digby  
4 Neck in Nova Scotia; correct?

5 A. Yes. I've been there. I  
6 have seen the site.

7 Q. Right. And you would agree  
8 that, from the beginning, the project that Bilcon  
9 proposed was in fact a quarry and a marine  
10 terminal; correct?

11 A. Certainly they wanted to do  
12 both.

13 Q. Both. And, in fact, they  
14 never had an intention, as we have heard in the  
15 testimony, of just doing one, a quarry or a marine  
16 terminal; correct? They didn't --

17 A. I think that is fair, yes.  
18 To the extent they wanted to take the gravel out,  
19 they wanted to take it by boat, which is actually a  
20 very efficient way of handling it.

21 Q. Right. Now, to get some  
22 details about the quarry -- and we can do this  
23 quickly, because there's been a lot of  
24 conversation on this -- this was a 152 hectare  
25 quarry; correct?

00116

1 A. That is what I have read.

2 Q. And the idea was to produce  
3 approximately 2 million imperial tons per year of  
4 processed aggregate; correct?

5 A. That is the figure I have.

6 Q. And the life of the quarry  
7 was to be about 50 years; right?

8 A. That is what I understand.

9 Q. And the plan was to open  
10 approximately ten acres of new quarry each year;  
11 correct?

12 A. 2.5 hectares per year.

13 Q. Now, we had some discussion  
14 about --

15 A. I read that in the  
16 environmental assessment document, and if you want  
17 me to take the time to find that, I am happy to do  
18 that. I could do that for you at the break, if you  
19 like.

20 Q. I'm talking about what  
21 actually was proposed.

22 A. I am talking about what is in  
23 the environmental impact study, not what may have  
24 been proposed in some preliminary concept.

25 Q. So 2.5 hectares is what they

1 eventually ended up proposed, even though you agree  
2 that they may have proposed ten acres --

3 A. I don't know what they  
4 proposed earlier. I'm saying the information I  
5 read that was in front of the panel said they were  
6 going to open 2.5 hectares per year.

7 Q. So 2.5 hectares a year, then.  
8 We've talked about the marine  
9 terminal. The marine terminal was designed to  
10 allow for the docking of ships in excess of 25,000  
11 dead weight tons; correct?

12 A. It could be the figure. I'm  
13 not going to -- I don't have the magic number in my  
14 head. I'm not disputing it.

15 Q. But you don't recall that it  
16 was a Post-Panamax ship --

17 A. I frankly don't know what  
18 that is. I do know that it was sufficient capacity  
19 or tonnage to trigger, allegedly, the comprehensive  
20 study requirement.

21 Q. Now, I guess I just want  
22 to -- I don't want to get into this, because I  
23 think it is a question that is of Canadian law, but  
24 to be clear, Bilcon never disputed that its project  
25 was in fact a marine terminal, right, instead of a

00118

1 dock? Bilcon accepted that its project was a  
2 marine terminal; correct?

3 A. I think that is what federal  
4 officials called it. When I look at the drawing --  
5 and I am not an expert on this. If you look at the  
6 actual drawing that is in the panel review -- in  
7 the report on Whites Point quarry, there is a  
8 drawing right in the report. And it doesn't look  
9 like a dock to me. It is at page 61.

10 You see what it is. It looks like  
11 there is a conveyor from land to something that's  
12 going to be a platform up on some stilts, which  
13 will then load a ship sitting offshore.

14 That is far different than my  
15 layman's understanding of a marine terminal that is  
16 going to have a whole bunch of rock on the bottom  
17 and ships are going to come up right up against and  
18 be loaded from the land, but that is just my  
19 understanding.

20 Q. Can you just turn to Exhibit  
21 R-181.

22 A. Sorry, where is that?

23 Q. It is going to be in volume 3  
24 of the volumes in front of you there.

25 A. Sorry, 181, yes, okay.

00119

1 Q. 181.

2 A. Mm-hm. Right.

3 Q. R-181.

4 A. I have it.

5 Q. Now, this is the project  
6 description submitted by Global Quarry Products for  
7 the Whites Point quarry, and if you look at the  
8 subject line, they call it a marine terminal, do  
9 they not?

10 A. That is what it says.

11 Q. So Bilcon itself referred to  
12 the project a marine terminal, you would agree --

13 A. Yes, that is the term they  
14 use, yes.

15 Q. Now, just to be clear on  
16 something else, because you have raised this  
17 question that it was allegedly subject to the  
18 Comprehensive Study List.

19 I just want to be clear. Bilcon  
20 never objected, that you're aware, to this actually  
21 being on the Comprehensive Study List; correct?

22 A. As far as I am aware, no.

23 Q. So the --

24 A. As Professor Rankin said,  
25 though, one cannot consent to jurisdiction. If



1     there's an error of law in interpreting whether or  
2     not the Comprehensive Study List applied, then the  
3     mere acquiescence by someone subject to it is not  
4     something that goes against them.

5                     That issue arose clearly in the  
6     Red Hill case where my client, which was the City  
7     of Hamilton, had not objected originally to the  
8     application of CEAA to the completion of the  
9     expressway.

10                    They were very much aghast at how  
11     they were going to be sent to a review panel, and  
12     that is what triggered them to call me. But up to  
13     a certain point, they said, Well, if we have to get  
14     a fish permit and subject to a screening or  
15     something, you know, we accept that. That was just  
16     after is 1995, 1996.

17                    And so then the whole issue arose  
18     in that case, well, if the city didn't object to  
19     the CEAA being applied, how can you object to it  
20     now in judicial review? And the court clearly  
21     said, Justice Dawson of the Federal Court said  
22     consent to jurisdiction doesn't work. Either the  
23     Minister has the jurisdiction to apply a statute or  
24     he doesn't.

25                    And in this case, the

00121

1 circumstances didn't work. And that is a very  
2 clear finding in that case by Justice Dawson in the  
3 Federal Court, upheld by the Federal Court of  
4 Appeal.

5 Q. Now, Bilcon in this case  
6 never instituted a judicial review of the decision  
7 to call this marine terminal a marine terminal  
8 subject to the Comprehensive Study List guidelines,  
9 did they?

10 A. I am not aware of any, no.

11 Q. Thank you. Now, I just want  
12 to clarify something else. It is actually in your  
13 first report. If you could turn to paragraph 18 of  
14 your first report, in paragraph 18 you are talking  
15 about what you believe are the types of projects  
16 that are referred to Joint Review Panels, and in  
17 the last sentence you say:

18 "In contrast, quarrying is an  
19 ancient technology that has  
20 been used since at least  
21 Roman times."

22 Do you see that?

23 A. Yes.

24 Q. You would agree that of  
25 course Bilcon wasn't looking to quarry with axes

1 and shovels and wedges; right? They were going to  
2 use industrial explosives; correct?

3 A. They were certainly going to  
4 use explosives, yes.

5 Q. So in fact quarrying, there  
6 is a method of quarrying, and certainly the method  
7 of quarrying being talked about here is not an  
8 ancient technology, is it?

9 A. Quarrying itself is, and  
10 whether it may be a little bit of interpretation in  
11 the word "technology"...

12 Q. Now, in order to understand  
13 this a little bit more, you would agree that there  
14 are currently on the Digby Neck no quarries over  
15 4 hectares in size; correct?

16 A. No quarries? I am not -- I  
17 don't know.

18 Q. Just so I understand, your  
19 opinion, you said, is based on an assessment of  
20 what you believe to be similar projects, but you  
21 are sitting here unaware of whether there are  
22 quarries even over four hectares in size on the  
23 Digby Neck?

24 A. Well, there is no large  
25 quarries operating, that I am aware of, on Digby

00123

1 Neck, if that is your question.

2 Q. In fact, in terms of on the  
3 Digby Neck, there are no other marine terminals on  
4 the Digby Neck on the Bay of Fundy, either, are  
5 there?

6 A. I guess it depends on your  
7 definition of marine terminal.

8 Q. Are there any marine  
9 terminals capable of post -- handling Post-Panamax  
10 size ships or ships of 25,000 dead weight tons  
11 on --

12 A. I didn't make a search for  
13 them myself. I saw -- I was down at one end of the  
14 Digby Neck where there is a ferry going across. I  
15 think I recall that, and it had a marine terminal  
16 of sorts, but I don't think it compares to a  
17 Panamax size. I am not aware of anything like  
18 that.

19 Q. You are not aware of anything  
20 of a similar size?

21 A. That is not -- my role wasn't  
22 to make observations of whether or not there was  
23 marine terminals at Digby Neck.

24 Q. All right. But you have said  
25 that your analysis is based on a comparative

1 looking at similar projects?

2 A. Yes.

3 Q. You're looking around, but  
4 you don't know, and you say it is not your role, to  
5 look to whether there were similar marine terminals  
6 on the Digby Neck?

7 A. What I wanted to do was to  
8 provide -- examine projects that had been subject  
9 to the Canadian Environmental Assessment Act  
10 process, particularly as a result of triggers of  
11 the Fisheries Act and the Navigable Waters Act, to  
12 determine whether or not they received like  
13 treatment.

14 Q. Now, before we talk at all  
15 about the federal side, I want to look at the Nova  
16 Scotia side, because I want to see if I understand  
17 something that's been tossed about from here to  
18 there by your counsel, Mr. Estrin.

19 If we turn to Exhibit R-5.

20 A. Sorry, where is that?

21 Q. It would be, I am guessing,  
22 in volume 2 of 3.

23 A. You're referring to the Nova  
24 Scotia Environment Act?

25 Q. The Nova Scotia Environment

1 Act, yes. Everybody there?

2 If we go to Part IV, which starts  
3 at article 31 in this Act, now, it says that in  
4 article 31:

5 "...the environmental  
6 assessment process under this  
7 Part applies with respect to  
8 an undertaking as determined  
9 by the Minister or as  
10 prescribed in the  
11 regulations."

12 Correct?

13 A. Yes.

14 Q. And in article 32, which is  
15 captioned "No work without approval", it says:

16 "Until the Minister has  
17 notified the proponent in  
18 writing that an undertaking  
19 is approved, no person shall  
20 commence work on the  
21 undertaking."

22 Right?

23 A. Yes.

24 Q. Now, if we go to the next

25 tab --

1                   A.    That really begs the question  
2   of what is an undertaking and when is something an  
3   undertaking, of course.

4                   Q.    If we go to the Nova Scotia  
5   regulations, which are in tab 6, because we will  
6   note in article 31 it says "as prescribed in the  
7   regulations" --

8                   A.    Yes.

9                   Q.    -- Schedule A to this starts  
10  on page 13.

11                  A.    Mm-hm.

12                  Q.    This is a schedule called  
13  "Class I and Class II Undertakings"; correct?

14                  A.    Correct.

15                  Q.    Now, if we look at this where  
16  we go into section B, which is mining, paragraph 2,  
17  and then smaller paragraph (1), it says:

18                        "Subject to subsection 2, a  
19                        pit or quarry in excess of 4  
20                        hectares in area primarily  
21                        engaged in the extraction of  
22                        ordinary stone, building or  
23                        construction stone, sand,  
24                        gravel or ordinary soil..."

25                        It sets that up as an undertaking

1 under the Act; correct?

2 A. Yes.

3 Q. So we've seen that Bilcon's  
4 proposed quarry in Nova Scotia was, in fact, a 152  
5 hectare quarry, so in excess of four hectares;  
6 right?

7 A. Yes.

8 Q. So under these regulations,  
9 it is therefore an undertaking under the Act;  
10 correct?

11 A. Well, actually what is  
12 designated is a facility engaged in the extraction  
13 of certain things; right?

14 Q. No. That is paragraph 1.  
15 We're looking at paragraph 2.

16 A. A pit or quarry, yes, engaged  
17 in the extraction. That is my point. It is an  
18 operational term.

19 So, you know, that raises the  
20 question: At what point does a proposed quarry  
21 become an undertaking under this legislation? Just  
22 because one is talking about it, is it an  
23 undertaking? I don't know.

24 Q. You would agree under article  
25 32, which we just looked at, before you can begin



1 any work on an undertaking, you need the permission  
2 of the Minister of Environment from Nova Scotia?

3 A. And that leads to another  
4 question, because it is common in environmental  
5 legislation to have to get an approval like a -- in  
6 Ontario for 30 years, they called them certificates  
7 of approval. Before you could operate anything  
8 from which emissions might be discharged, you had  
9 to get prior approval from the Ministry of  
10 Environment.

11 And that begged the question:  
12 When did the facility actually become a facility to  
13 require the certificate? Was it when you got the  
14 building permit, when you just proposed it?

15 And so there is lots of, you know,  
16 court interpretation of what that term means. I am  
17 not aware of any specific interpretations under the  
18 Nova Scotia legislation, but to the extent that I  
19 understand this issue has come up as to whether or  
20 not a proposed quarry is actually an undertaking or  
21 not in Nova Scotia, I think that is a relevant  
22 question.

23 Q. I want to ask I think the  
24 more relevant question, which is: Bilcon couldn't  
25 actually construct a quarry for the process for the

1 extraction of stone from Nova Scotia without a  
2 permit from Nova Scotia; correct?

3 A. Without, first of all,  
4 getting an authorization under the environmental  
5 assessment regime. It would also have needed some  
6 industrial approvals under its Environment Act.

7 Q. And in order to get the  
8 authorization, it would have to go through an EA  
9 process under the Act for the quarry; correct?

10 A. In order to operate it, yes.

11 Q. Yes. And in fact not only in  
12 order to operate it, but in order to construct it;  
13 right?

14 A. Well, again, it comes back  
15 to: What does "commence work" on the undertaking  
16 mean?

17 Q. So maybe we can then agree  
18 that before a first blast for quarrying was set off  
19 on a 152 hectare quarry, they required a permit  
20 from the Nova Scotia Department of Environment --  
21 or an approval, sorry, which would then have  
22 required an environmental assessment; correct?

23 A. No. I don't agree. I may  
24 have misheard your question. If you say it one  
25 more time, I will try to listen.

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1                   Q.    I guess I am wondering.  The  
2   operation of quarrying, extracting rock, requires  
3   blasting; correct?  We've agreed --

4                   A.    In this case there was  
5   blasting.

6                   Q.    They were going to do  
7   blasting?

8                   A.    Yes.

9                   Q.    You would agree before the  
10  Bilcon undertook any blasts for the purpose of  
11  quarrying on this property for the 152 hectare  
12  quarry, they required an environmental assessment  
13  under Nova Scotia law; correct?

14                  A.    I thought you used in your  
15  prior question the word "test".

16                  Q.    No.

17                  A.    You didn't?

18                  Q.    I did not.

19                  A.    So you were past the testing  
20  stage, is that it?

21                  Q.    We're past testing.

22                  A.    We are actually wanting to  
23  operate the quarry?

24                  Q.    We are quarrying.

25                  A.    Definitely it would require

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1 an approval at the operational stage.

2 Q. In order to get an approval,  
3 you need an environmental assessment; correct?

4 A. For the operation of it, yes.

5 Q. So Bilcon could not operate  
6 this quarry in Nova Scotia without getting an  
7 authorization from the Nova Scotia Department of  
8 Environment?

9 A. Yes, baseline. I mean, at  
10 some point they would require authorizations both  
11 under the EA Act, EA provisions and the other  
12 provisions.

13 Q. Now, from the federal side,  
14 we've talked about the marine terminal that was to  
15 be constructed, and you would agree that from the  
16 federal side, before that marine terminal could be  
17 constructed, there needed to be a permit under  
18 section 5(1) of the Navigable Waters Protection  
19 Act?

20 A. Well, that is the opinion of  
21 officials in this case, which is not consistent,  
22 for example, with the opinion of officials in  
23 the -- is it -- either Belleoram or Aguathuna where  
24 there was also a marine terminal proposed and where  
25 originally it was said to be a Navigable Waters

1 permit was required, and then after further  
2 consideration -- and I use that word in quotation  
3 marks -- federal officials concluded that, well,  
4 no, a permit under the Navigable Waters Protection  
5 Act wasn't required. So there would no longer be a  
6 trigger under that Act.

7 That all had to do with a judgment  
8 as to whether or not the structure would cause  
9 significant interference with navigation.

10 So, you know, I don't know what  
11 the analysis was in this case as to why a Navigable  
12 Waters permit was actually required and why that  
13 was a valid trigger, but certainly that seemed to  
14 be the position of federal officials.

15 Q. Right. So to go back to  
16 something you said, there was a determination made  
17 that this would substantially interfere with  
18 navigation; correct?

19 A. That is a statutory criteria.

20 Q. And that statutory criteria  
21 was found to apply in this case; correct?

22 A. I don't know. I haven't seen  
23 anywhere where someone says that. It could be in  
24 the materials. I assume somebody made that  
25 determination, but I am also saying that

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1 determination was made in either Aguathuna or  
2 Belleoram, and then their officials giving it  
3 further consideration decided, well, perhaps that  
4 isn't right.

5 Q. And are you aware in  
6 Belleoram about why they made that decision?

7 A. I am not exactly aware. When  
8 we get into my case study, I would be happy to tell  
9 you.

10 Q. So you would agree that  
11 federal officials determined -- and they are the  
12 experts on navigation in this case -- that a permit  
13 was required under section 5(1) of the Navigable  
14 Waters Protection Act?

15 A. Someone did.

16 Q. Someone did. And that  
17 determination triggered the need for an EA under  
18 the CEAA; correct?

19 A. If that permit has to be  
20 issued -- it works this way.

21 If that permit has to be issued,  
22 federal officials must do an environmental  
23 assessment before they can issue the permit.

24 That doesn't mean that someone  
25 requires a permit. It means that if -- but if

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1 federal officials say to me, as a proposed  
2 proponent, You need a permit and we won't issue you  
3 one or -- and if we're going to issue you one, we  
4 have to do an environmental assessment, then you  
5 know, I would say, okay.

6                   You know, I might look at it or I  
7 might not look at it and say, Is that really  
8 required? I mean, with a legal background, I  
9 might. I don't know whether most proponents would  
10 do that.

11                   Q. Bilcon never questioned  
12 whether a Navigable Waters permit was required in  
13 this case; correct?

14                   A. I didn't see anything to that  
15 effect, but, on the other hand, in the Belleoram or  
16 Aguathuna cases, federal officials themselves took  
17 the initiative to reconsider.

18                   Q. So you would agree that,  
19 then, based on what we've just talked about, that  
20 before Bilcon could operate this quarry and before  
21 it could construct this marine terminal, both the  
22 quarry and the marine terminal would be subject to  
23 some sort of environmental assessment in Canada;  
24 correct

25                   A. I'm sorry. Would you mind

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1 just repeating that?

2 Q. Well, for Bilcon to operate  
3 the quarry in Nova Scotia and for it to construct  
4 this marine terminal, which it had determined would  
5 interfere with navigation, that an environmental  
6 assessment was required of both aspects of that  
7 project at some level of government, some level of  
8 assessment in Canada?

9 A. Yes.

10 Q. Okay. Now --

11 A. Subject to reconsideration,  
12 as I said, by Navigable Waters officials that  
13 perhaps that permit wasn't required.

14 Q. If they had a reason to do  
15 so?

16 A. Right.

17 Q. Now, I want to ask a question  
18 about solely about the joint process here and  
19 understand what had to be assessed only in the  
20 joint process.

21 A. Mm-hm.

22 Q. Once Nova Scotia and the  
23 federal government decided to hold a joint review,  
24 to send it to a Joint Review Panel, you would agree  
25 that the scope of what had to be reviewed by that



1 Joint Review Panel was going to be determined by  
2 the Minister of Environment federally and the Nova  
3 Scotia Minister of Environment and Labour? I am  
4 just asking about the joint, once they decided to  
5 go joint.

6 A. Well, they did specify in the  
7 joint panel agreement what they thought should be  
8 included. However, the real important question in  
9 this case is whether or not there was any  
10 authority, statutory authority, to even get to that  
11 point.

12 Q. I understand that you think  
13 that that is an important question, and we've got  
14 lots on it. We talked lots with Mr. Rankin about  
15 it today. I am just interested in, in fact, what  
16 had to happen once the two officials -- once the  
17 two governments decided to do a harmonized review.

18 Once they decided to do a  
19 harmonized review, you would agree that the scope  
20 of what was to be assessed as a project in that  
21 harmonized review had to include both the quarry  
22 and the marine terminal?

23 A. Well, I think you are putting  
24 the cart before the horse. You have to  
25 understand -- you have to make sure that each level

1 of government has the authority to actually  
2 environmentally assess their own component and that  
3 there is some overlapping interest before you can  
4 actually get to that point.

5 Q. But --

6 A. If you assume all of that --

7 Q. Yes. That is what I am  
8 asking.

9 A. If you assume all of that,  
10 then they can, you know, perhaps, you know, assess  
11 what they want. But, you know, you can't give --  
12 you can't gain jurisdiction by writing a joint  
13 panel agreement. You can't -- there is some notion  
14 floating around, Mr. Smith I think seems to raise  
15 it, that, you know, once there's a joint panel  
16 agreement, everything is on the table. Everything  
17 is fine, you know, and both levels of governments'  
18 complete jurisdiction is on the table.

19 That is putting the cart before  
20 the horse. The real question here is: Was there  
21 any authority to get to that point, and I don't  
22 believe there was.

23 Q. But I just want to focus on  
24 where we are. You agree that in the situation  
25 where there is a Joint Review Panel, that the scope

1 of that assessment -- I understand your point about  
2 jurisdiction, but the scope of the Joint Review  
3 Panel assessment, that Joint Review Panel would  
4 have to consider the quarry and the marine terminal  
5 in this case, because there was a requirement for  
6 an EA under Nova Scotia and federal law; correct?

7 A. If there was valid statutory  
8 authority to do what they did, then it would have  
9 been legitimate for Canada to assess the marine  
10 terminal, for Nova Scotia to assess the quarry.  
11 They didn't have to have a joint panel agreement to  
12 do that.

13 There's lots of examples in Nova  
14 Scotia where Canada and Nova Scotia have agreed,  
15 even informally, to have joint processes -- or not  
16 necessarily joint processes, but have processes  
17 that work together in a harmonized way.

18 In fact, I am counsel to Emera,  
19 which is a large power company, bringing power,  
20 electrical power, from Newfoundland to Nova Scotia  
21 through the Cabot Strait in an undersea cable.

22 That was a three-jurisdiction  
23 environmental assessment: Canada, Nova Scotia and  
24 Newfoundland. And you know what? There is no  
25 agreement, except amongst officials. They work

1 together. They agreed on what should be studied,  
2 and they did their thing.

3 And there is no need to get to a  
4 panel review or Joint Review Panel review in order  
5 for officials to harmonize.

6 Q. What you're saying here, so I  
7 understand, is there are other ways that you can  
8 harmonize, but a Joint Review Panel is one way you  
9 can harmonize an environmental assessment; correct?  
10 Just yes or no.

11 A. Well, if there are underlying  
12 jurisdictions there, yes.

13 Q. Now, let's talk, I guess, a  
14 little bit about Joint Review Panels. Now, a joint  
15 review panel -- well, I guess before we get there,  
16 let's maybe just lay a little bit of background.

17 We went over most of this  
18 yesterday, and you have heard what Mr. Rankin has  
19 said. You would agree under the CEAA there were  
20 theoretically four types of EAs possible --  
21 typically three, screenings, comprehensive studies  
22 and review panels; correct?

23 A. Yes.

24 Q. Now, you would also agree  
25 that regardless of the level of assessment, whether

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1    it was a screening, a comprehensive study or a  
2    review panel, the decision makers in government at  
3    the end of the assessment had the right under CEAA  
4    to refuse to issue the requested approvals if, in  
5    fact, there was significant adverse environmental  
6    effects that could not be mitigated and, in their  
7    view, could not be justified; correct?

8                   A.    Federal --

9                   Q.    Federal, yes.

10                  A.    -- officials?  Yes.

11                  Q.    And that is regardless of the  
12    level of assessment.  That can happen at any level  
13    of assessment?

14                  A.    Yes.

15                  Q.    Now, again, we went over this  
16    yesterday, too, so I just don't want to walk  
17    through all of the sections of CEAA.  If we have  
18    to -- but you would also agree that under the CEAA  
19    as it existed at the time, there were options to  
20    refer a project to a review panel at any time  
21    during the EA, if certain conditions were met;  
22    correct?

23                  A.    No.

24                  Q.    Okay.

25                  A.    That is wrong.  Mr. Connelly

1 in his expert report, in fact, provides information  
2 to that effect. I know the statement was floated  
3 out there yesterday that -- and if you actually  
4 look at the words of the statute, it says under  
5 some section -- it appears at -- for example I  
6 think it is section 25 of CEAA, says: An RA at any  
7 time may refer -- request the Minister of  
8 Environment to send something to a review panel.

9                   However, that was not the  
10 practice. And, in fact, the policy documents  
11 issued by the Canadian Environmental Assessment  
12 Agency make it patently clear that it was only  
13 appropriate to establish -- refer something to a  
14 review panel that started, say, as a screening or  
15 started as a comprehensive study after the  
16 screening was finished or after the comprehensive  
17 study was done, in order that there could be some  
18 reasoned determination of whether or not there  
19 would be significant adverse environmental effects  
20 based on actual facts and scientific information.

21                   And I am happy to refer the -- and  
22 I think it would be helpful for the panel to  
23 actually see those documents, which are in -- which  
24 are before them in exhibits where that is actually  
25 said. And Mr. Connelly, I think, actually talks to

1     that point, I believe -- I'll just see.

2                     Q.     Before we look at the  
3     documents, I just want to understand. You have  
4     said that the language is "at any time", but the  
5     practice was something else?

6                     A.     The policy directives of the  
7     Canadian Environmental Assessment Agency were  
8     clearly opposite.

9                     Q.     But the language of the  
10    statute is what it is; correct?

11                    A.     Well, yes, it is. But I  
12    guess, what I think is important in this case is  
13    the actual practice across Canada of how CEAA was  
14    administered in terms of whether this case received  
15    like treatment.

16                    That is why I think it is  
17    appropriate to look at the practice of DFO as to  
18    how they scoped projects in other cases and at what  
19    times something got sent to a review panel without  
20    a screening being done, without a comprehensive  
21    study being done.

22                    And I know of only one instance  
23    where that was done, and that was in the case of  
24    Red Hill, where they got shot down in court  
25    subsequently for having done that.

1                   Q.    Now, but in terms of the  
2   statute, I want to come back.  I understand you're  
3   talking about the practice, but the statute was  
4   drafted, and clearly you admitted it says "at any  
5   time"; right?

6                   A.    In one section.

7                   Q.    In section 25 and 28;  
8   correct?

9                   A.    Yes.  Section 28 has never  
10  been used.

11                  Q.    It still says it in the  
12  statute; correct?

13                  A.    It's never been used and I  
14  can tell you why it's never been used.  In order to  
15  understand --

16                  Q.    My question was actually  
17  whether it says it in the statute.

18                  A.    Yes.  But it has never been  
19  used, so it is irrelevant, isn't it?

20                  Q.    If you think it is dead  
21  letter even though it is in the statute, that's  
22  fine.

23                  A.    I can tell you federal  
24  officials don't want to use it.  Section 28 is a  
25  section that allows the federal Minister of



1 Environment, by him or herself, and regardless of  
2 any request from a responsible authority, to have  
3 an overriding discretion to send something to a  
4 review panel.

5                   The reason that it's never been  
6 used -- it was alluded to yesterday by  
7 Mr. Rankin -- is that it would open a pandora's  
8 box. In other words, if a Minister decided to do  
9 it based on public concern in that case, they would  
10 have no credible basis under rule of law for  
11 refusing to do it in any other case.

12                   That is why section 28 has never  
13 been used.

14                   Q. But now under section 21,  
15 that has been used; right?

16                   A. Section 21 is the section  
17 under which a comprehensive study -- something that  
18 began as a comprehensive study can be referred.

19                   Q. Right. It doesn't actually  
20 have to wait to the end of the comprehensive study  
21 under that section. That is governed by section 23  
22 of CEAA; correct?

23                   A. Let me just look at section  
24 23.

25                   Q. If the Tribunal wants to

1 look, it is R-1.

2 A. Yes. And, actually, let's  
3 look at section 23. You're right. It says the  
4 Minister shall take one of the following courses of  
5 action in respect of a project after taking into  
6 consideration the comprehensive study report.

7 Q. Okay?

8 A. One of those is to either  
9 refer it back to the -- refer the project back to  
10 the RA for action, or under certain conditions,  
11 refer the project to a review panel and of course  
12 section 29. The opening words of section 23 that  
13 underlie exactly what I said, the Minister has no  
14 jurisdiction to do that until he's taken into  
15 consideration the comprehensive study report, which  
16 means it has to actually have been finished.

17 Q. Right. That is under section  
18 23; correct?

19 A. Yes.

20 Q. Now under section 21, you  
21 have another mechanism to refer to a review panel,  
22 merely because something is on the Comprehensive  
23 Study List; correct?

24 A. I'm sorry, you can't ignore  
25 section 23. It is talking about comprehensive

1 studies.

2 Q. Okay. So your view is  
3 that -- just so I understand your opinion here,  
4 your view is that section 21 does not provide an  
5 independent authority for the project on its  
6 Comprehensive Study List to be referred to a review  
7 panel, that that can only happen under the language  
8 of section 23?

9 A. Section 21 does say, in  
10 section 21(b), that where a project is described in  
11 the Comprehensive Study List, the RA shall either  
12 ensure the study is conducted and a report is  
13 prepared, or refer the project to the Minister for  
14 referral.

15 But you have to take into account  
16 that the Minister gets a decision before that  
17 happens. It links back into section 23. It says  
18 the Minister in section 23 shall take one of the  
19 following courses of action in respect of a project  
20 taking into consideration the comprehensive study  
21 report.

22 Q. Section 21 doesn't mention  
23 section 23, does it?

24 A. But you can't ignore them.  
25 They are both talking about comprehensive studies,

1 and if you look at the wording of section 21, it  
2 says it requires that a comprehensive study is  
3 conducted and the report is prepared and provided  
4 to the Minister.

5 And then we come to section 23,  
6 which says the Minister is to look at that report  
7 and take one of the following courses of action  
8 after he takes into consideration that report.

9 They link together. They work  
10 together. You can't ignore them.

11 Q. So two things to clarify.  
12 One, you would disagree with what Mr. Rankin said  
13 on this, then?

14 A. What is that?

15 Q. Mr. Rankin said that it can  
16 be referred -- what Mr. Rankin said yesterday was  
17 that a project could be referred to a review panel  
18 at any time under the EA, and he agreed in this  
19 clause it allowed it to be referred to a mediator  
20 or review panel solely in accordance with section  
21 21. You would disagree with that?

22 A. I disagree with that based on  
23 the wording of the statute and the policy of the  
24 agency, which makes that also -- also corroborates  
25 that.

1                   Q.   We're getting very deep into  
2 Canadian environmental assessment law, but you  
3 talked about ensure the comprehensive study report  
4 is going to be -- in little (a); right?

5                   A.   Sorry, which one?

6                   Q.   In 21(a) you read the  
7 language that the responsible authority is to  
8 ensure the comprehensive study report is completed;  
9 correct?

10                  A.   Yes.

11                  Q.   And then we have an "or" at  
12 the end of that sentence, right?

13                  A.   Mm-hm.

14                  Q.   So the second thing he can  
15 do -- and it is on the Comprehensive Study List,  
16 not tied to (a) -- is refer the project for  
17 referral to a review panel, and if you look at the  
18 end of that, it says "in accordance with section  
19 29"; correct?

20                  A.   Yes.

21                  Q.   It does not say "in  
22 accordance with section 23," does it?

23                  A.   No, it doesn't. But I think  
24 you also can't ignore -- I think you wouldn't want  
25 to ignore your own expert's report. Mr. Connelly's

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1 report at paragraph 68, and I think it becomes  
2 relevant, Mr. President and Members of the Panel,  
3 to look at section 68.

4 Mr. Connelly says:

5 "Under the pre-October 2003  
6 Act, where issues remained at  
7 the end of the comprehensive  
8 study process regarding  
9 'significant adverse  
10 environmental effects' or  
11 'public concerns,' a project  
12 could be referred to a review  
13 panel."

14 That is the end.

15 "This gave rise to the  
16 possibility that a project  
17 could be fully reviewed as a  
18 comprehensive study, and then  
19 at the end of this process be  
20 referred to a review panel."

21 That is exactly what I am saying.

22 He says:

23 "This possibility created  
24 uncertainty about the time  
25 and cost involved in the

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1 environmental assessment  
2 process. In response to this  
3 concern, in October 2003, an  
4 amendment was made to the Act  
5 requiring the Minister of the  
6 Environment to make a "track  
7 decision" early on in the  
8 process so that a project  
9 could only be assessed as a  
10 comprehensive study or by a  
11 review panel, but not by  
12 both."

13 The important thing is that  
14 October 2003 amendment did not apply to this  
15 project, so we go back to what the requirement was  
16 before that, which was before it could be referred  
17 to a panel review, you had to finish the  
18 comprehensive study.

19 Q. Well, Mr. Connelly is talking  
20 exactly about section 23, is he not, there?

21 A. Yes.

22 Q. Okay, not section 21.

23 A. No. They work together. And  
24 as I say, you can't ignore -- you shouldn't ignore,  
25 and I am sure the panel doesn't want to ignore what

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1 the Canadian Environmental Assessment Agency says  
2 is the practice that they require. They say the  
3 screening report has to be finished or the  
4 comprehensive study report has to be finished  
5 before a decision is made and referred to a panel.

6 Q. Let's talk about review  
7 panels, Joint Review Panels.

8 A. Sure.

9 Q. These Joint Review Panels,  
10 these are independent panels appointed by the  
11 government to provide recommendations to government  
12 decision makers; correct?

13 A. The criteria is they be  
14 independent, unbiassed, and what was the rest of  
15 the question?

16 Q. And that they are appointed  
17 to provide recommendations to government decision  
18 makers; correct?

19 A. Yes.

20 Q. And one of the benefits, you  
21 agreed, and we heard it in your report and in the  
22 openings, of the Joint Review Panels and review  
23 panels, is they facilitate public participation in  
24 the process; correct?

25 A. They can, yes.



1 Q. Now, in your first report at  
2 paragraph 12, you say:

3 "A comprehensive study EA  
4 also provides mandatory  
5 opportunities for the public  
6 to participate in the  
7 process."

8 And then you continue on at the  
9 end of that paragraph to say:

10 "Participant funding is made  
11 available through the CAE  
12 agency to assist the public  
13 in reviewing technical  
14 studies and making  
15 submissions to the  
16 responsible authority and the  
17 agency during the  
18 comprehensive study process."

19 Correct?

20 A. That is what it said.  
21 Although I think the opportunity for participant  
22 funding and a comprehensive study only came into  
23 effect more recently.

24 Q. In fact, that came into  
25 effect with the October 2003 amendments; correct?

1 A. I think that is right.

2 Q. So, in fact, when you talk  
3 about participating funding in your report, that is  
4 actually a mistake. It wasn't available for  
5 comprehensive studies at the time of the Whites  
6 Point EA; correct?

7 A. I'm not sure I'm talking  
8 about it at that point in time, but to the extent I  
9 wanted to talk about it at that time, then that --  
10 what I said there is the funding wasn't available  
11 at that time.

12 Q. Okay.

13 A. That doesn't mean -- and I  
14 think since you have asked about public  
15 participation and funding, it is my experience  
16 Mr. President, Members of the Panel, that funding  
17 can be made available in other ways. First of all,  
18 if Canada really thinks there is a demand for  
19 public participation in the panel, they can make  
20 money available through the departmental budget.  
21 Nova Scotia could do the same.

22 They can even ask the proponent to  
23 volunteer to make funding available to assist  
24 intervenors in the process, and this has happened  
25 in my experience.

1                   Q.    Right.  But at the time of  
2   the Whites Point EA, the only way to ensure  
3   participant funding was to refer it to a review  
4   panel; correct?

5                   A.    That was the -- and the  
6   participant funding in this particular -- in that  
7   situation is from the proponent.

8                   Q.    Mm-hm.

9                   A.    That is the important point.  
10  Nothing is stopping the federal government from  
11  making money available.  The only benefit of a  
12  Joint Review Panel is that the participant funding  
13  would be then required to be paid by the proponent,  
14  because they enacted funding regulations under CEAA  
15  that, in the event the government's appointed a  
16  panel, they could require the proponent to pay  
17  essentially for the costs of the panel, including  
18  intervenor funding.

19                   That doesn't mean that the federal  
20  government or the Nova Scotia government couldn't  
21  volunteer to put money on the table themselves.

22                   Q.    Now, I want to come to  
23  something else that you have said, and this is  
24  actually in your reply expert report.  So if you  
25  could turn to that, it is at paragraph number 106.

00155

1 In this paragraph you say:

2 "DFO knew there were no  
3 significant adverse  
4 environmental effects to fish  
5 or navigation arising from  
6 the marine terminal, and that  
7 public concerns related to  
8 the quarry, not the marine  
9 terminal."

10 Do you see that?

11 A. Yes.

12 Q. Now, I want to take this in  
13 two separate parts here, so let's talk first about  
14 what DFO knew about significant adverse  
15 environmental effects.

16 If you could turn to Exhibit R-72,  
17 I believe it is in volume 2. You will see in this  
18 bullet point, if we turn to the page marked at the  
19 top "2", I think it will be the third page into  
20 this document. The page marked at the top "2".

21 A. Mm-hm.

22 Q. Here it says in the top of --  
23 the first bullet of the analysis part:

24 "DFO believes that the  
25 project as proposed is likely

00156

1 to cause environmental  
2 effects over a large area of  
3 both the land and marine  
4 environments and on fisheries  
5 and tourism."

6 Do you see that?

7 A. Yes.

8 Q. There is nothing in that  
9 statement there that says that that just relates to  
10 the quarry, is there?

11 A. Correct.

12 Q. I want to actually now turn  
13 to --

14 A. Hold on, though.  
15 Environmental effects is not the same as  
16 significant adverse environmental effects.

17 Q. Okay.

18 A. And that is the key criteria,  
19 the mandatory criteria that has to be found, after  
20 taking into account mitigation before a referral  
21 can be made.

22 So, you know, those words are  
23 about as mushy as one could get. The word  
24 "pretext" was used earlier. These gentlemen had  
25 studied this project for a number of years. This

1 is a memo for the Minister. Both the Deputy  
2 Minister and the Minister should have at least been  
3 aware that they needed to be able to say  
4 significant adverse environmental effects that  
5 couldn't be mitigated, or likely, after mitigation.

6 One has to wonder what they were  
7 doing in using these words, which do not form a  
8 basis for any panel referral.

9 Q. I want to talk, then, and go  
10 and talk about -- because you agreed it didn't  
11 mention anything about that it was just related to  
12 the quarry and that it does say environmental  
13 effects, and it is concerned about -- it doesn't  
14 say that it is referring to the quarry.

15 I want to turn to an exhibit that  
16 is R-301. That's going to be in volume 3.

17 A. Sorry, just to finish up on  
18 my last clarification, "environmental effects" is a  
19 term that is actually defined in the Canadian  
20 Environmental Assessment Act, Mr. President,  
21 Members of the Panel.

22 It is quite a different term than  
23 "significant adverse environmental effects."  
24 Sorry, what document?

25 Q. We are on R-301.

1 A. That is in? Sorry.

2 Q. Volume 3.

3 A. A memo of June 19th, 2002?

4 Q. That is the one, and we have  
5 talked about this yesterday.

6 A. I am not sure I have ever  
7 seen it before, so if you want to ask me questions  
8 about it, you will have to give me a chance to read  
9 it. Who is it from?

10 Q. As Mr. Buxton testified, this  
11 was a letter he received from Mr. Paul Brodie, and  
12 if you turn to the last page on page 4, Mr. Brodie  
13 was a research scientist of marine mammals.  
14 Mr. Buxton had testified that he was contacted --  
15 that Mr. Buxton contacted him, as is said in the  
16 first paragraph.

17 A. Oh, yes, I think at some  
18 point I reviewed this document, yes.

19 Q. Now, if we turn to page 2.

20 A. Mm-hm.

21 Q. On the fourth paragraph down.  
22 The fourth full paragraph, "I have little  
23 information on ship activity". Do you see that?

24 A. Okay.

25 Q. So that paragraph says:

00159

1 "I have little information on  
2 ship activity, other than a  
3 vessel length of 800 feet is  
4 being considered. This would  
5 translate into 60,000 to  
6 80,000 tonnes."

7 And it says:

8 "A steel vessel of this size,  
9 berthed parallel to the  
10 shore, loading tens of  
11 thousands of tonnes of  
12 crushed stone by conveyors  
13 for long periods, would be a  
14 major source of continuous  
15 noise. This would be further  
16 exacerbated by the steep  
17 basalt slope shoreward of the  
18 vessel deflecting noise  
19 seaward. I would expect that  
20 this could be a substantial  
21 determinant to cetaceans  
22 attempting to feed in the  
23 area."

24 Do you see that?

25 A. Yes.



00160

1                   Q.    If we turn to the fourth page  
2   of this document and look at the very last  
3   conclusion, it says:

4                        "I do not wish to mislead the  
5                        proponents of the quarry  
6                        project into assuming that  
7                        there are measures to  
8                        mitigate the environmental  
9                        consequences of blasting and  
10                      ship-loading activity  
11                      sufficient to satisfy an  
12                      informed review board.  The  
13                      example of a worst-case  
14                      scenario is not far from  
15                      reality, based on verified  
16                      movements of Right Whales  
17                      alone."

18                   Do you see that?

19                   A.   I see it.

20                   Q.    So in June of 2002, a marine  
21   mammal research scientist contacted by the  
22   claimants was, in fact, worrying himself about the  
23   potential for adverse effects from the ship loading  
24   at the marine facility on marine mammals; correct?

25                   A.   I can't agree with that.  I

00161

1 am not a scientist and I don't see the words that  
2 you're talking about in the statement, at least the  
3 ones you have directed me to. I'm not sure what he  
4 means at all by "I don't want to mislead the  
5 proponents into assuming there are measures to  
6 mitigate blasting and ship loading sufficient to  
7 satisfy an informed review board."

8 I really -- you know, he's saying,  
9 in his view, as I read that, and I think we can all  
10 read that and form our own opinions, that in his  
11 view, without actually having, I guess, much  
12 information at that point, there may or may not be  
13 mitigating measures, but that's maybe what he's  
14 saying.

15 Q. That was concluded on his  
16 view, as you say, in 2002 after just learning a  
17 little bit about the project; correct?

18 A. Yes. But --

19 Q. And federal officials had  
20 been studying the project and this ship loading and  
21 marine terminal for several years before they made  
22 their decision; correct?

23 A. I have seen no scientific  
24 analysis of what significant adverse environmental  
25 effects federal officials were worried about that

1 would justify this project going to a review panel  
2 from a marine terminal.

3 Mr. -- what is his name, one of  
4 your experts, Mr. Bellefontaine.

5 Q. The regional director general  
6 of fisheries?

7 A. Yes. He opined about disease  
8 being carried by ships, but you know what? I am  
9 surprised, very surprised, that -- unless I have  
10 missed something, and it is possible in this  
11 voluminous amount of material, that federal  
12 officials were quick to conclude there would be  
13 significant -- likely significant adverse  
14 environmental effects after mitigation measures  
15 from a marine terminal, in this case, when in the  
16 case -- when no other marine terminal in Canada has  
17 ever been referred to a review panel.

18 Where is the documentation that  
19 provides that, that enables us to come to an  
20 objective conclusion?

21 Mr. President, members of the  
22 Panel, the Canadian Environmental Assessment Agency  
23 says determination of whether or not there is  
24 significant adverse environmental effects likely to  
25 occur, after mitigation, is not a subjective

1 opinion. It has to be based on objective facts,  
2 and that's right in their own policy.

3 And, in fact, Mr. Connelly's  
4 affidavit, I think, actually, or expert report  
5 speaks to that -- to that. He refers to certain  
6 documents and, again, he doesn't necessarily give  
7 us all of the documents in his report. But the  
8 documents he does refer to, when you look at them  
9 more carefully, do say that there has to be an  
10 objective basis for reaching that conclusion.

11 I have seen nothing that would  
12 justify that.

13 Q. Right. You have seen  
14 nothing, but you admit of course you're not a  
15 scientist familiar with the Bay of Fundy; correct?

16 A. I'm sorry. I'm talking about  
17 what is objective paper conclusions put down  
18 somewhere in order to justify this extraordinary  
19 referral of a marine terminal to a review panel;  
20 never happened before in Canada, just by itself,  
21 never happened again.

22 Q. There are no other marine  
23 terminals on this location of the Digby Neck,  
24 though; correct?

25 A. It's got nothing to do with

1     where it is. The question is: Was there an  
2     objective basis to conclude that there would be  
3     significant adverse environmental effects from this  
4     marine terminal before that decision was made? And  
5     I have seen none.

6                     Q.    Okay. But to be clear, you  
7     just said it has nothing to do with where it is,  
8     but wouldn't you agree the environmental effects of  
9     the project have everything to do with where it is?

10                    A.    Yes, but I would also expect  
11     that if they were basing it on the actual impact  
12     from that environment, they would have done some  
13     analysis. What I find equally surprising that a  
14     marine terminal for the Belleoram project was  
15     exempt.

16                    Q.    The Belleoram approval, I'm  
17     not sure which, is not in the Bay of Fundy;  
18     correct?

19                    A.    Not in the Bay of Fundy.

20                    Q.    Not on the Digby Neck;  
21     correct?

22                    A.    But --

23                    Q.    Sorry, not on the Digby Neck;  
24     correct?

25                    A.    It's not on the Digby Neck,

1 but there is actually information in the file in  
2 the case study that I did, an email from federal  
3 officials, that say the environmental issues in  
4 that case are similar to the ones in Whites Point.

5 Q. Well, fortunately we will  
6 have some of those scientists, including  
7 Mr. Bellefontaine, here who can perhaps enlighten  
8 us next week.

9 Now, I want to move to the second  
10 half of your sentence in paragraph 106.

11 A. Sorry, where are we? In my  
12 first report?

13 Q. I believe it is --

14 A. My first report?

15 Q. I can't remember right now if  
16 it is your first report or your reply. I think it  
17 is your reply report. It is your reply report. In  
18 that last clause of the first sentence, you say  
19 public concerns related to the quarry, not the  
20 marine terminal. Do you see that?

21 A. 106?

22 Q. 106.

23 A. Yes, I see I said that. And  
24 I also saw that you had put to somebody yesterday  
25 that waved the letter around that said there was a

1 concern. Yes, there were public concerns about the  
2 marine terminal. I'm not denying there were not.

3 But the big issue here was the  
4 quarry, more than the marine terminal, because  
5 marine terminals are like parking lots in Toronto.  
6 They are all over the place.

7 Q. You say you're not denying.  
8 In this sentence you said public concerns related  
9 to the quarry, not the marine terminal. You now  
10 agree that is not correct?

11 A. I agree there were public  
12 concerns about both.

13 Q. So when you said the public  
14 concerns did not relate to the marine terminal,  
15 that statement was not correct?

16 A. After further reflection, I  
17 would say there is or was public concern about  
18 both, but the majority of the concern was they did  
19 not want the quarry, and that is in fact what the  
20 panel reacted to.

21 You know, having a quarry and  
22 industrial activity in this area was not consistent  
23 with community core values.

24 A marine terminal, they couldn't  
25 say that about a marine terminal, surely to

1 goodness, because marine terminals, as I say, are  
2 very common in Nova Scotia.

3 Q. Now, I want to go to some of  
4 the projects that you have referred to and some of  
5 the basis of your referrals in terms of what was  
6 referred to a Joint Review Panel or a review panel.

7 I want to go to paragraph 93 of  
8 your first report. Now, you say in this section  
9 one of the concerns that you identified -- and I  
10 should say it starts in the section --

11 A. Sorry, is this paragraph 93  
12 that begins "as mentioned"?

13 Q. Yes, it is in the section I  
14 guess where you say -- part of the section is your  
15 concern is that -- and you said it today -- the  
16 Whites Point project was the first and only quarry  
17 and marine terminal to be subjected to a panel  
18 review under CEAA; correct?

19 A. I said the -- no, I didn't  
20 say that together.

21 I said there's been no quarry ever  
22 sent to a review panel under CEAA in Canada.  
23 There's been no marine terminal by itself sent to a  
24 review panel in Canada.

25 Q. Your concern, though, was



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1     that this was the first of each to be sent. This  
2     is part of the basis for your concern, that this  
3     hasn't happened before; correct?

4                     A.    Right, mm-hm, yes.

5                     Q.    Now, if we turn to appendix D  
6     of your report, now, this is an appendix that you  
7     say provides a list of the completed review panels  
8     and JRPs up until 2010; correct?

9                     A.    Correct.

10                    Q.    Now, if we flip the page and  
11    look at line number 19, which is the Northwest  
12    Diamond project.

13                    A.    Yes.

14                    Q.    Now, again, the Northwest  
15    Diamonds project completed in 1996, on your list  
16    here, this was the first and only diamond mine in  
17    Canada to be assessed to a review panel; correct?

18                    A.    It is the only one on the  
19    list in that period.

20                    Q.    Right. And there have been  
21    other diamond mines in Canada since that period;  
22    correct?

23                    A.    Yes.

24                    Q.    And so the mere fact that  
25    this was the first and only diamond mine assessed,

1     that doesn't make it wrongful, in your opinion,  
2     doesn't it?

3                     A.    No.   But look at the -- what  
4     I was trying to compare was the scale of projects,  
5     among other things, that were sent to review  
6     panels.   Look at the scale of that project, 3,400  
7     square kilometres; square kilometres.   How many  
8     hectares is that?   I don't know, but it is several  
9     hundred thousand, I would guess.

10                    Q.    If I come down on the line  
11    to -- you will see the Voisey's Bay project, which  
12    is at line 29 --

13                    A.    Mm-hm.

14                    Q.    This is a Voisey's Bay nickel  
15    mine and marine terminal in Labrador; correct?

16                    A.    Yes.

17                    Q.    They referred it to a review  
18    panel; correct?

19                    A.    Yes.

20                    Q.    And it is the only one on the  
21    list that was a nickel mine that was referred to a  
22    review panel; correct?

23                    A.    I will take your word for  
24    that, if that is what your reading of it is, yes.

25                    Q.    You would also agree that

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1    when we talked about quarrying, that they have been  
2    quarrying, you said, since ancient Roman times?

3                   A.    Can I just say that, you  
4    know, there you have a mine and a marine terminal  
5    being referred to a review panel, but if you  
6    actually look at the triggers in that case, there  
7    were land triggers for DFO, as well as the marine  
8    terminal.

9                   So that makes that, in that sense,  
10   distinct from Whites Point.  There were clear  
11   triggers on land, as well as the marine terminal.

12                  And then look at the size of that  
13   project, 48,000 hectares.  I mean, another reason  
14   why it stands in stark comparison to Whites Point.

15                  Q.    You would agree it was the  
16   first and only nickel mines, and there have been  
17   other nickel mines in Canada; correct?

18                  A.    I don't know.

19                  Q.    Now, as I was saying before  
20   you went on your soliloquy there, that diamond  
21   mining -- you mentioned quarrying had been going on  
22   since ancient times; correct?

23                  A.    Yes.

24                  Q.    Diamond mining is also  
25   relatively old-fashioned, isn't it?

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1 A. I don't know.

2 Q. Mining diamonds for a while?

3 A. I concede if it is something  
4 like digging something out of the dirt.

5 Q. I want to focus on a couple  
6 of projects that you have identified.

7 Let's look first at Tiverton, and  
8 I want to understand, because you have just been  
9 referring to the sizes of these projects, but you  
10 have offered Tiverton as a comparator in your  
11 report.

12 But you would agree that the  
13 Tiverton projects were of a much smaller scale than  
14 the Whites Point project; correct?

15 A. Yes. But I wasn't looking at  
16 Tiverton so much as if -- why something as small as  
17 Tiverton should be sent to a review panel as to how  
18 it was scoped and why it was dealt with so quickly,  
19 given the blasting activity in the water, compared  
20 to what was happening at Whites Point.

21 So it wasn't the scale of the  
22 project that made it the basis for a comparison.

23 Q. But in fact you would agree  
24 that these are very different sizes of projects;  
25 correct?

1 A. Yes.

2 Q. In fact, what you have been  
3 saying is the size of the project does matter in  
4 whether it gets referred to a review panel; right?

5 A. I'm saying it would have been  
6 a total shock and surprise for the proponent of  
7 this quarry, Whites Point, at 152 hectares, looking  
8 at that list of projects that had been referred, to  
9 think that that project would have been referred to  
10 a review panel simply based on what had not  
11 happened before, for various reasons, size, et  
12 cetera.

13 Q. Now, I don't want to get too  
14 far into the weeds here, but we have talked about  
15 the Belleoram project, and that was in  
16 Newfoundland; correct?

17 A. Yes.

18 Q. That was not subject to an  
19 environmental assessment under Nova Scotia law;  
20 correct?

21 A. Right.

22 Q. And it was not a harmonized  
23 review, either, between the federal and provincial  
24 authorities?

25 A. You know what? I would have

1 to go back and look at my case study.

2 I do know that it was subject to  
3 the Canadian Environmental Assessment Act. That is  
4 why I looked at it.

5 Q. Right?

6 A. It was also --

7 Q. It was not a harmonized  
8 review?

9 A. It was also triggered  
10 originally by the Navigable Waters Protection Act  
11 application, similar to Whites Point, which is  
12 another reason I looked at it.

13 Q. You don't know, sitting here  
14 today, whether it was in fact a harmonized review?

15 A. I would have to have the  
16 opportunity to look back at my case study. If you  
17 want, I can do that over lunch and I can answer the  
18 question for you.

19 Q. I think we can just leave  
20 it. The Aguathuna project, if that is the way you  
21 say it, was located also in Newfoundland; right?

22 A. Yes.

23 Q. So it was also not subject to  
24 an assessment under the Nova Scotia Environment  
25 Assessment Act?

1 A. I would agree with you.

2 Q. And it was also not a  
3 harmonized review between federal and provincial  
4 authorities?

5 A. I again would have to look  
6 back at my case studies. It has been a while since  
7 I looked at that in fine detail. I will be happy  
8 to do that over lunch.

9 As I indicated before, the reason  
10 I was looking at these projects, in particular, was  
11 not so much as what happened under the provincial  
12 processes, but, rather, to determine to what extent  
13 the proponents in those two cases received similar  
14 or dissimilar treatment by federal officials  
15 compared to Whites Point.

16 Q. But you would agree that when  
17 there is a provincial process entailed, that that  
18 provincial process, in terms of actually operating  
19 the project, can be equally or even more so for the  
20 project important; correct? Getting a federal  
21 approval is not enough for a project like a quarry  
22 and a marine terminal; right?

23 A. Unfortunately, the Whites  
24 Point panel wouldn't agree with you. They assumed,  
25 from what I could see, that they were the

1 regulators, as well as the environmental assessment  
2 agency. By demanding engineering details of a  
3 standard that only you would get -- expect to have  
4 to provide at the approvals stage, they, I believe,  
5 turned themselves -- they didn't understand their  
6 function.

7 Q. I am not asking you --

8 A. I agree with you that is how  
9 it normally should work.

10 Q. I'm not asking about the  
11 review panel. I think my colleague, Mr. Kurelek,  
12 will talk about the review panel.

13 You say you looked at the federal  
14 process. But you would agree, particularly in this  
15 project, the provincial process was equally as  
16 important; correct?

17 A. Well, the environmental  
18 assessment?

19 Q. The fact that this project  
20 could not begin operation without an environmental  
21 assessment under Nova Scotia?

22 A. Yes. We went through that,  
23 yes.

24 Q. Right. And you would agree,  
25 also, that this process was harmonized through a



1 Joint Review Panel, whereas these other ones, you  
2 say you don't know whether they were harmonized.  
3 In fact, they weren't harmonized from Joint Review  
4 Panels, weren't they?

5 A. We know they weren't  
6 harmonized through Joint Review Panels, but as I  
7 said, harmonization can happen by merely having the  
8 civil servants in both jurisdictions agree to work  
9 together cooperatively. Sometimes they actually  
10 have an agreement whereby they will do certain  
11 things together.

12 Q. Now, in terms of the  
13 Belleoram and the Aguathuna cases, you would also  
14 agree -- even the Tiverton cases. You would also  
15 agree there was no public opposition to those  
16 projects; correct?

17 A. Tiverton, Aguathuna, and  
18 Belleoram?

19 Q. Belleoram, yes.

20 A. Sure. There was no evident  
21 opposition, right. And as you heard yesterday, in  
22 fact in Tiverton it was in federal Minister  
23 Thibault's riding, and I think he announced funding  
24 for the harbour. He wanted that project.

25 MR. SPELLISCY: I have no further

1 questions for you. Thank you.

2 PRESIDING ARBITRATOR: Thank you.

3 Thank you, Mr. Spelliscy.

4 Mr. Kurelek, you are going to  
5 continue? I am just wondering, because now it is  
6 12:35, would you prefer to start now, and then we  
7 break later or....

8 MR. KURELEK: I say let's break  
9 for lunch. That would be great.

10 PRESIDING ARBITRATOR: Wait a  
11 minute.

12 MR. PULKOWSKI: Just a minor  
13 point. I am just reminded that today there is  
14 actually going to be a parallel hearing taking  
15 place in the hearing room right outside or right  
16 opposite the coffee kitchen.

17 So we're just requested to be  
18 mindful of that other hearing as we break out for  
19 food in the kitchen.

20 PRESIDING ARBITRATOR: Of course,  
21 Mr. Estrin, this is particularly directed at you,  
22 because you are not supposed to converse.

23 THE WITNESS: I am happy to leave  
24 the building.

25 --- Laughter

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1                   PRESIDING ARBITRATOR: I don't  
2 blame you.

3 --- Laughter

4                   PRESIDING ARBITRATOR: Okay. So  
5 we will have our lunch break and --

6                   MR. APPLETON: Come back at 1:30.

7                   PRESIDING ARBITRATOR: Come back  
8 at 1:30, okay.

9                   MR. APPLETON: That is an hour.

10                  THE WITNESS: No, it's not. It is  
11 less than an hour.

12                  PRESIDING ARBITRATOR: It is less  
13 than an hour. 1:35. An hour is pretty short,  
14 anyway, 1:35.

15                  THE WITNESS: Yes.

16 --- Luncheon recess at 12:37 p.m.

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

18                  PRESIDING ARBITRATOR: Good  
19 afternoon, everybody. Before we continue the  
20 examination, there is news about the procedural  
21 matter of this morning.

22                  MR. APPLETON: Yes.

23                  PRESIDING ARBITRATOR: Mr. Little?

24                  MR. LITTLE: Yes. Obviously from  
25 Mr. Pulkowski's information today, the exhibits

1     that I referred to are on the record. We accept  
2     that. They are in the claimants' 1128 submission.  
3     For whatever reason, we don't have them here with  
4     us in Toronto, but Mr. Appleton offered to provide  
5     them to us. Mr. Pulkowski has provided them to us,  
6     so we have them now.

7                     We will treat them like any other  
8     document that's before the Tribunal. And it was  
9     due to an oversight on my part that we could not  
10    locate them. So I think the request that I made  
11    today no longer needs to be made. Thanks.

12                    PRESIDING ARBITRATOR: Thank you  
13    very much. Fine. Thank you. Fine. We can  
14    continue and -- okay.

15                    MR. KURELEK: Thank you, Judge  
16    Sikka.

17    CROSS-EXAMINATION BY MR. KURELEK:

18                    Q. Mr. Estrin, we met a few  
19    years ago at a procedural hearing on Bilcon. My  
20    name is Steven Kurelek. I'm one of Canada's  
21    lawyers. I am here to cross-examine you on the  
22    period that is the post-panel referral period. So  
23    I am not dealing with anything prior to the  
24    referral to the JRP in this case.

25                    And to try to keep things simple,

1 I am going to stay with just the three binders, the  
2 three -- we called them the Estrin binders that you  
3 have there.

4                   There are a couple of examples  
5 where I am going to go outside of these binders,  
6 but for everybody's ease of reference, some in  
7 Mr. Rankin binders, our tech is going to put the  
8 documents up on the screen so we don't have to keep  
9 flipping back and forth. There has been very minor  
10 use of that, but I am trying to streamline this  
11 process.

12                   So with that, I guess you are  
13 fairly familiar now with the binders, in what goes  
14 where, and your two reports are in the first  
15 binder. What I will do is, as I refer to various  
16 documents, I will try to point you to which binder  
17 we're talking about.

18                   I am starting out with the first  
19 binder and your first report, and, in particular, I  
20 would ask you to turn to paragraph 515, which is on  
21 page 133 of your first report. I think it is right  
22 at the end of part 2 of your first report.

23                   A. The one that begins "in my  
24 view"?

25                   Q. Sorry, I didn't hear that.

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1 A. Sorry, I see the one.

2 Q. It is there. So I want to  
3 talk a bit about the JRP members themselves and  
4 some of the concerns you had about the JRP. In  
5 that paragraph at the beginning, you say that when  
6 the particular background of this matter is  
7 considered, this matter being the Whites Point  
8 project:

9 "... the federal and  
10 provincial government's  
11 choice of panel members  
12 raises concerns."

13 Do you see that there, sir, at the  
14 beginning?

15 A. Yes.

16 Q. Then you go on to say that  
17 the WPQ project, in a sense, it should have been  
18 evaluated by a panel comprised of persons with  
19 regulatory experience in relation to industrial  
20 facility operations, as well as environmental  
21 expertise. Do you see that there, sir?

22 A. I do.

23 Q. So, in your view, the Whites  
24 Point JRP did not possess such expertise; is that  
25 right?

1                   A.   Well, it wasn't just my view.  
2   I actually examined, to the extent they were  
3   available, the curriculum vitae for the panel  
4   members to determine whether they taught anything  
5   about environmental assessment, lectured about it,  
6   wrote about it, and were able to -- or the  
7   regulatory process, on the other hand, had any  
8   involvement in actually industrial approvals and so  
9   as to be able to distinguish the more general level  
10  of scrutiny that goes on at the EA level, which  
11  answered questions like:  Is this project needed?  
12  What are the possible alternatives?  What are the  
13  possible effects of alternatives?

14                   That kind of approach versus the  
15  industrial licensing process where people want to  
16  be -- regulators want to be certain that there  
17  won't be a hard effect, so they will require  
18  detailed studies.

19                   When I look back at their  
20  curriculum vitae, I didn't see any of that  
21  experience.  I know that Mr. Muecke -- I'm not sure  
22  how you pronounce it -- was appointed to head a  
23  panel review for the proposed Kelly's Mountain  
24  hearing, which never went ahead.

25                   I didn't see any other regulatory

1 experience or any other EA experience. Indeed,  
2 that was before CEAA came in effect.

3 Mr. Fournier had chaired the Sable  
4 Gas panel, but it is interesting, when you look at  
5 a transcript at the end of that hearing,  
6 Mr. Fournier is the first one to say, This has been  
7 quite an experience for me as a former professor or  
8 as a professor. I had no previous contact with the  
9 regulatory hearings, quasi-judicial activities,  
10 cross-examination. It is a very interesting  
11 process, he said.

12 So obviously as of that hearing,  
13 he had no real regulatory experience in that  
14 context, and I still didn't see anything else in  
15 his CV that was available to me, at least, about EA  
16 experience other than that one.

17 So that hearing was I think in  
18 1999 or 1997, and I was looking at his CV that was  
19 published in 2003.

20 I wouldn't ordinarily get to that  
21 level of scrutiny, except that I found the approach  
22 in this case to be so different than anything else.  
23 And, as I say, the very same year the Nova Scotia  
24 Environmental Assessment Board faced a very big  
25 project, and they said, Well, we don't have all of



1 the answers, we don't have all of those details.  
2 We're going to decide at a planning level whether  
3 this is generally okay or not, and then we're going  
4 to put a whole bundle of conditions on to make sure  
5 the government regulators require these further  
6 studies.

7 That is a different approach.

8 That is why I was questioning not the credentials,  
9 per se, but the experience of the members that were  
10 appointed in that regard.

11 Q. So I will go back to my  
12 question, and I think you answered it. It is just  
13 you said a lot more than just answering my  
14 question, but I want to confirm I get the answer I  
15 thought I heard, because I asked you: Is it your  
16 view that the JRP panel members did not possess  
17 such expertise?

18 And you responded at the beginning  
19 of your answer with, It is not just my view, and  
20 then you gave another few examples of what you were  
21 talking about.

22 Let's go back to the first part of  
23 your answer. So it is your view, then, that they  
24 did not possess such expertise; is that correct?

25 A. My actual statement is, the

1 one I would answer to, is actually best put in the  
2 words I used in paragraph 514 preceding that, which  
3 you didn't refer me to. These  
4 government-appointed:

5 "... panel members who were  
6 apparently not experienced,  
7 and in any event clearly not  
8 prepared to be comfortable  
9 with standard EA evaluation  
10 methods or standard EA  
11 approaches..."

12 That was part of the lack of --  
13 the apparent difficulty they had with that and the  
14 concept of not understanding EA versus regulatory  
15 was a concern that I had.

16 Q. Let me try to make this  
17 simpler. Do you stand by everything you said in  
18 paragraph 514 and 515? Is there anything you would  
19 like to change about what you've said there?

20 A. I'm just reading it. Based  
21 on the information I had, I am very comfortable  
22 with that, yes.

23 Q. Okay, thank you. So let's  
24 turn to the JRP members themselves. You just  
25 mentioned that Dr. Fournier was on the Sable Island

1 panel review. I think the years were 1996 to '98.

2 A. Mm-hm.

3 Q. If we look at Dr. Fournier's  
4 résumé, which is in the third binder -- and it is  
5 document R-380, and, in particular, page 4 -- we  
6 will see that he has listed that role there.

7 A. Sorry, where are the page  
8 numbers?

9 Q. The page number is at the top  
10 right.

11 A. Right.

12 Q. So it is under the advisory  
13 consultative responsibilities, continued.

14 A. Yes.

15 Q. See that? It is four items  
16 down. And you would agree with me --

17 A. Sorry, I'm not sure I'm with  
18 you. I see page 4. Where on the page?

19 Q. Under the title "National",  
20 it is the fourth item down.

21 A. Okay.

22 Q. National Energy Board. You  
23 would agree with me at least according to entry,  
24 and I think what from Mr. Smith says in his expert  
25 reports, that Dr. Fournier was the chair of that

1 panel; is that correct?

2 A. Yes.

3 Q. And in fact you actually  
4 refer to the fact that Dr. Fournier was chair of  
5 that panel several times in your second report; is  
6 that correct? I could point you to the paragraphs,  
7 if you would like.

8 A. I don't dispute it.

9 Q. Would you also not dispute  
10 the Sable Gas project was a relatively large  
11 project?

12 A. Yes.

13 Q. And, in fact, if we turn  
14 to -- unless you dispute it, maybe we don't have  
15 to -- paragraph 226 of your second report. You  
16 recall the Sable Gas proposal was much larger in  
17 scale than the Whites Point quarry proposal; is  
18 that right?

19 A. So it was much larger?

20 Q. Yes. We can turn to it, if  
21 you want.

22 A. You mean it covered a lot  
23 more geographic area in terms of where it would be  
24 built and all of that; is that what you mean?

25 Q. It is more what you mean

1 here. So it is paragraph 226 of your second  
2 report. I will just read it for you, unless we can  
3 call it up on the screen:

4 "It must be recalled that the  
5 Sable Gas proposal was much  
6 larger in scale than the  
7 Whites Point quarry proposal  
8 consisting of both..."

9 And you go on to describe what was  
10 involved. So you don't dispute that, do you?

11 A. No.

12 Q. You wouldn't dispute the  
13 hearing for the Sable Gas EA necessitated a 56-day  
14 hearing, would you?

15 A. How many days?

16 Q. Fifty-six.

17 A. Whatever you say. I didn't  
18 read all of the transcripts, but it was a long  
19 hearing, yes. In fact, there were a lot of  
20 intervenors, and I don't think --

21 Q. Yes. And would you also  
22 agree that it was conducted jointly under the  
23 federal CEAA and the Nova Scotia Environment Act?

24 A. Yes. At that time, the  
25 National Energy Board I believe had an -- the

1 hearing in that case was not triggered, as I  
2 understand it without having investigated in great  
3 detail, and I could be wrong -- it was not  
4 triggered because of CEAA.

5                   Rather, the National Energy Board,  
6 under the National Energy Board Act as it existed  
7 at that time, had a statutory obligation to hold a  
8 public hearing to issue a certificate of public  
9 convenience and necessity in respect of any  
10 pipeline, interprovincial pipeline, that was over a  
11 certain distance, length.

12                   And that would have been, I  
13 believe, the essential reason why there was a  
14 public hearing in that case. If they were  
15 holding -- if they were engaged in that type of  
16 approval activity, that became a trigger for the  
17 application of CEAA.

18                   But CEAA was -- it wasn't the --  
19 the cause for the hearing in that case had nothing  
20 to do with CEAA, in my appreciation of it.

21                   Q. But you would agree it was a  
22 joint CEAA --

23                   A. They were -- it was held  
24 under the auspices of the Canadian Environmental  
25 Assessment Act and other statutes.

00190

1                   Q.    Right.  Would you agree with  
2  me it was a regulatory hearing?

3                   A.    Yes.

4                   Q.    Yes, because the NEB was  
5  involved; is that right?

6                   A.    Right.

7                   Q.    So would you agree with me,  
8  then, that by the time Dr. Fournier came to chair  
9  the Whites Point quarry panel, he had already not  
10 only had regulatory experience, but he had chaired  
11 another joint review panel of significant size?

12                  A.    He had chaired it, but as he  
13 said in the transcript:

14                        "I am a temporary regulator,  
15                        as you know.  Not long ago,  
16                        the world of energy  
17                        regulation was totally  
18                        unknown to me."

19                  That's what he said in his closing  
20 remarks.

21                  Q.    Right.  So would you agree  
22 with my question?  I can repeat it, if you like.

23                  A.    He had the experience of that  
24 hearing.  He also said, "I live in a university  
25 environment in which there is very little order and

1 very little structure." So that is how he was  
2 contrasting the hearing in front of him.

3 Q. If I could just -- what I  
4 heard you say was, yes, he did have that  
5 experience, so it sounds like a "yes" to my  
6 question?

7 A. He chaired that panel. What  
8 I was looking for was whether or not he had -- that  
9 hearing would not -- all right. You go ahead.

10 Q. Would you agree that the  
11 Whites Point project was adjacent to the Bay of  
12 Fundy?

13 A. Yes.

14 Q. Would you agree that as a  
15 result of that, it was reasonable for Canada and  
16 Nova Scotia to have appointed a member of the JRP  
17 that had expertise in oceanography?

18 A. I think that topic had  
19 certainly some relevance to the issues, yes, and  
20 that would have been Mr. -- who was that?

21 Q. Well, let's find the answer  
22 to that.

23 A. Mr. Muecke. No, it was  
24 Fournier.

25 Q. Page 1 of document 380.



1 R-380 is -- we see right at the top of the  
2 education --

3 A. Right. He's an  
4 oceanographer.

5 Q. Yes. Dr. Fournier received a  
6 Ph.D. in oceanography in 1967. Do you agree with  
7 that?

8 A. Yes.

9 Q. And would you agree that by  
10 the time he chaired the Whites Point panel in 2003,  
11 he had over 30 years -- for 30 years held various  
12 positions of assistant professor and professor of  
13 oceanography positions at Dalhousie University in  
14 Halifax?

15 A. If that is what it says. I  
16 have no reason to dispute anything he's saying. It  
17 is stated in his CV.

18 Q. Were you here yesterday to  
19 hear Mr. Buxton's testimony?

20 A. Not all of it. Most of it.

21 Q. Do you recall Mr. Buxton's  
22 testimony about what he viewed about Dr. Fournier?

23 A. No, you would have to be more  
24 specific.

25 Q. Well, I will read you -- now,

1    this is a portion of the rough draft of the  
2    transcript from yesterday.  So I don't know that  
3    it -- it certainly at this stage it wasn't the  
4    final draft, but what I have is on page 399 of the  
5    rough draft of the transcript.

6                   And when Mr. Buxton was asked  
7    about his views of Dr. Fournier, what Mr. Buxton  
8    said was:

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

1 wanted to hear."

2 Is what Mr. Buxton said. Do you  
3 recall that testimony?

4 A. Yes.

5 Q. You do, okay. Shifting gears  
6 somewhat, do you agree that there was a geological  
7 aspect to the Whites Point project, because we're  
8 talking about an aggregate quarry here?

9 A. Yes.

10 Q. Do you agree that the  
11 Claytons hired a geologist, Mr. Lizak, to help them  
12 assess the Whites Point site to determine if it was  
13 a suitable quarrying investment?

14 A. I understand they did, yes.

15 Q. Yes. In that regard, do you  
16 agree it was reasonable for Canada and Nova Scotia  
17 to appoint a person who was experienced in the area  
18 of geology as one of its Whites Point members?

19 A. Yes. I don't dispute those  
20 particular qualifications. I think what is absent  
21 is experience in the process that we're involved  
22 in, which was environmental assessment, in  
23 particular environmental assessment as a planning  
24 phase as opposed to the regulatory phase.

25 Q. We're getting there, too.

1 Because I am turning to what we call Dr. Muecke. I  
2 can't recall how you decided to --

3 PRESIDING ARBITRATOR: "Muecke".

4 MR. KURELEK: Muecke.

5 PRESIDING ARBITRATOR: The famous  
6 umlaut, you know.

7 --- Laughter

8 BY MR. KURELEK:

9 Q. Muecke. Dr. Muecke's résumé  
10 is in binder 3, just before Dr. Fournier's. It is  
11 R-379.

12 A. Mm-hm.

13 Q. And once you are there, I  
14 will ask you a few questions about that. Would you  
15 agree that, according to his résumé at least, he  
16 holds -- Dr. Muecke holds a Ph.D. in geochemistry  
17 from Oxford University?

18 A. Yes.

19 Q. Would you also agree that he  
20 worked as a field geologist early in his career  
21 from 1960 to '63?

22 A. Yes. It looks like he  
23 actually went to the University of Alberta where I  
24 went to, as well.

25 Q. Do you also agree that

1 according to his résumé he lectured in mineralogy  
2 at Oxford University from 1968 to 1970?

3 A. Yes.

4 Q. And would you agree that, at  
5 least according to his résumé, from 1970 at least  
6 until the Whites Point EA in 2003, Dr. Muecke  
7 worked as either an assistant or an associate  
8 professor of geology and sometimes earth sciences  
9 at Dalhousie University, the same university that  
10 Dr. Fournier was --

11 A. Yes.

12 Q. Now, turning away from  
13 Dr. Muecke's qualifications in geology, would you  
14 agree that -- and here I am turning now to page 4  
15 of that CV. Would you agree that Dr. Muecke also  
16 had previous panel experience in 1991 as a member  
17 of the Joint Nova Scotia-Canada Panel review of the  
18 Kelly's Mountain Coastal Quarry Project? I think  
19 it has been referred to earlier.

20 A. No. As I understand it, that  
21 panel never actually happened.

22 Q. I think the --

23 A. I could be wrong, but I  
24 understood the proposal was withdrawn.

25 Q. I'm not here to give

1 evidence, but I understand that it did commence.  
2 It just didn't complete, because the proponent  
3 withdrew, so the panel did -- but that is my  
4 understanding.

5 And, in fact, let's turn to  
6 Exhibit R-313 so we don't have to just rely on  
7 Mr. Muecke's résumé. So this is in the same  
8 binder, just a couple of documents back.

9 If you look at the Backgrounder  
10 from Canada and Nova Scotia, Mr. Muecke is on the  
11 second page, and the last paragraph there notes  
12 that he has a longstanding interest and involvement  
13 in the geological aspects of environmental issues.  
14 He has knowledge and direct experience of both the  
15 federal and provincial environmental assessment  
16 processes, having been an appointed member of the  
17 federal-provincial review panel for the Kelly's  
18 Mountain Coastal Super Quarry Project in 1991.

19 Do you see that there, sir?

20 A. I see it, but I have never  
21 seen any other details of his environmental  
22 assessment experience and having had -- you know,  
23 with that hearing not having really proceeded in a  
24 real way, it is hard to judge what his actual EA  
25 experience was.

1 Q. Let's just --

2 A. There may be some more  
3 information I haven't seen, that's all.

4 Q. So are you doubting whether  
5 Dr. Muecke actually was a panel member in the  
6 Kelly's Mountain EA?

7 A. No, no, not at all. I'm  
8 doubting whether or not it actually amounted to any  
9 environmental assessment experience in a hearing  
10 that ever finished and maybe hardly ever started.  
11 I just don't know.

12 Q. Do you agree Kelly's Mountain  
13 project was a proposed quarry with an adjacent  
14 marine terminal in Cape Breton, Nova Scotia?

15 A. That question was asked this  
16 morning. And the answer is "yes".

17 Q. I'm not sure if this question  
18 was answered, but it is a related question. Would  
19 you agree that like the Whites Point project,  
20 Kelly's Mountain was designed to ship aggregate to  
21 US markets? I can --

22 A. I think I recall something  
23 about that, yes.

24 Q. Well, let me help you out  
25 there. In the second binder, Mr. Estrin's binder,

1     this is Exhibit R-33.  It's the environmental  
2     impact assessment of the Kelly's Mountain, phase I.

3                     A.    Sorry, what tab?

4                     Q.    R-33, binder 2.

5                     A.    Okay.

6                     Q.    There's a map on -- it is an  
7     unnumbered page, a map on the one side and page 2  
8     at the top there:

9                             "Kelly's Rock Limited has  
10                            been established to develop a  
11                            rock quarry on Kelly's  
12                            Mountain."

13                    This is on page 2, the next page,

14    Chris:

15                            "The requirement for  
16                            developing such an operation  
17                            stems from identified US  
18                            markets requiring high  
19                            quality aggregate for  
20                            concrete and asphalt  
21                            production."

22                    Do you see that there, sir?

23                    A.    Yes.

24                    Q.    That is just to give you some  
25     comfort that it was designed to be shipped out to



1 the US.

2                   Would you agree that like Whites  
3 Point, Kelly's Mountain was also -- the EA was also  
4 constituted as a Joint Review Panel with Canada and  
5 Nova Scotia?

6                   A. I don't know exactly how that  
7 came about. There was -- there may be information  
8 in the materials that explains how that came about  
9 in terms of what the relationship was between Nova  
10 Scotia and Canada at that point.

11                   There was -- I would have to go  
12 back and look at EARPGO to see whether or not they  
13 actually contemplated that. I can't quite  
14 remember. That goes back to a document that was  
15 issued in 1984.

16                   Q. I could save you the trouble.  
17 Maybe we can just go back to that document I just  
18 referred to, R-313, the Backgrounder material --

19                   A. Okay.

20                   Q. -- where it talked about  
21 that.

22                   A. Sure. Where is that again,  
23 same book?

24                   Q. 313 is in binder 3, on page  
25 2, appointed as a member of the provincial-federal

1 review panel for the Kelly's Mountain Super Quarry?

2 A. It was a federal-provincial  
3 review panel. What I am not willing to agree,  
4 unless I look at the constituent documents, is  
5 whether or not it was a Joint Panel Review in the  
6 terms you are trying to refer it. It was not under  
7 CEAA, so it can't be technically compared to a  
8 Joint Review Panel as in this case.

9 It was apparently a harmonized  
10 process of some kind. I don't know. There could  
11 have been a written agreement. I don't know.

12 Q. I would like to shift gears  
13 here and turn you to a document that we've seen  
14 already many times and we'll see many times again,  
15 which is document R-27, the JRP agreement and the  
16 terms of reference.

17 Am I correct that you are familiar  
18 with that document?

19 A. The JRP agreement?

20 Q. Yes.

21 A. Well, I've certainly looked  
22 at it.

23 Q. You have talked about it in  
24 your reports. It is R-27 in binder 2.

25 A. I have my own copy. Let me

1 just...

2 Q. You brought your own copy of  
3 your own documents here today, have you?

4 A. I brought a copy of documents  
5 I thought would obviously be referenced, and I  
6 brought -- one of those is the JRP. This is the  
7 JRP agreement you're talking about?

8 Q. Yes, which has the terms of  
9 reference attached at page 7. I want to be clear  
10 you brought your own annotated and sticky  
11 documents?

12 A. I don't actually know if I  
13 have that one here, so let's use yours.

14 Q. Okay.

15 A. R-27?

16 Q. Yes. And page 9, in  
17 particular.

18 A. Sorry, which volume?

19 Q. Volume 2.

20 A. Okay.

21 Q. And at the beginning, I'm  
22 sure you're familiar with this, but we will just go  
23 through it:

24 "The Minister of Environment  
25 and Labour, Nova Scotia, and

1 the Minister of the  
2 Environment, Canada, have  
3 determined that the Panel  
4 shall include in its review  
5 of the Project, consideration  
6 of the following factors..."

7 Then I would ask you to skip down  
8 to item (i).

9 A. Sorry, you were reading from  
10 what paragraph?

11 Q. Sorry, at the top of page 9,  
12 under the title, "Scope of the Environmental  
13 Assessment and Factors to be considered in the  
14 Review." So just to remind you, two pages earlier,  
15 this is part of the terms of reference of the JRP  
16 agreement.

17 A. We have the agreement. Then  
18 the terms of reference. Okay, we're in the terms  
19 of reference, yes.

20 Q. Then the top of page 9 --

21 A. Yes.

22 Q. -- is what I just read. Do  
23 you want me to give you a second to read it again?  
24 If you go to the screen actually, it is highlighted  
25 on the screen.

1                   You would agree with me that these  
2 terms of reference mandated that the JRP consider  
3 (i), the socio-economic effects of the project,  
4 being the Whites Point project?

5                   A.    Yes.

6                   Q.    Yes, okay.

7                   A.    Sure.

8                   Q.    You would also agree with me,  
9 I'm fairly certain, that Whites Point was -- the  
10 project was quite controversial?

11                  A.    Yes.

12                  Q.    Yes. In fact, I think I  
13 heard this morning at 12:24 on the record, anyway,  
14 that you agreed not only that there was controversy  
15 or public concern about the quarry, but also about  
16 the marine terminal; is that right?

17                  A.    There was certainly  
18 objections to it.

19                  Q.    Yes. In fact, you don't have  
20 to turn to it, if you don't want to, but in your  
21 second report at paragraph 194, you wrote that  
22 there was significant opposition to the WPQ project  
23 and the project was very controversial; is that  
24 right?

25                  A.    Yes, yes.

1 Q. So we can establish that.

2 All of which brings me to our third panellist.

3 A. Sorry, was there more? If I  
4 look back at the terms of reference, is this meant  
5 to be the complete terms of reference, because it  
6 sort of ends without another page?

7 Q. That's what we have in the  
8 record here.

9 A. So it isn't necessarily the  
10 complete -- okay, fine. I just wanted to know  
11 that.

12 Q. If you could now turn to  
13 Chris Daly's witness statement, and this is in  
14 binder 1 right near the end, the second-last  
15 document in binder number 1. I would just like to  
16 have Mr. Daly introduce Dr. Grant for us here.

17 A. Sorry, which tab?

18 Q. This is the second-last -- so  
19 what is this? It is not actually numbered. It is  
20 the second last tab in binder 1, the affidavit of  
21 Chris Daly, and I am referring here to paragraph 49  
22 on page 18. When you're there, I will proceed.

23 Mr. Daly is talking on behalf of  
24 Nova Scotia and how they were suggesting various  
25 panel members. If you go three, four -- I think

00206

1 halfway down, four sentences down in paragraph 49,  
2 Mr. Daly says:

3 "We suggested Dr. Jill Grant,  
4 the director of the school of  
5 planning at Dalhousie  
6 University. We suggested  
7 Dr. Grant because her areas  
8 of expertise included the  
9 cultural context of community  
10 planning, social planning,  
11 social impact assessment,  
12 public participation in the  
13 planning process, and site  
14 planning for sustainable  
15 development. Thus, from our  
16 perspective, Nova Scotia's  
17 perspective, her expertise  
18 was very relevant to, among  
19 other things, the potential  
20 socio-economic effects which  
21 would be required to be  
22 addressed in accordance with  
23 the NSEA." [As read]

24 Do you see that there, sir?

25 A. Yes.

1 Q. So it goes on and says  
2 something similar in paragraph 51 of his affidavit,  
3 but let's turn now to Dr. Grant's résumé. Would  
4 you agree that --

5 A. Sorry, where is that?

6 Q. I should tell you where that  
7 is. It is right after Dr. Fournier's résumé, so  
8 it's R-381 in binder 3.

9 I will just ask you two  
10 questions --

11 A. Just a minute. I haven't got  
12 there yet. R, what?

13 Q. 381, did I say? Yes, the  
14 first page there.

15 A. Okay.

16 Q. Turning to page 1, would you  
17 agree that she, Dr. Grant, obtained a Ph.D. in  
18 regional planning and resource development?

19 A. If it says that, I agree.

20 Q. And also according to her  
21 résumé, would you agree, again on page 1, she was a  
22 professor at the school of planning at Dalhousie  
23 University?

24 A. Yes.

25 Q. Now, I would like to take you



1 back; with these résumés in mind, I would like to  
2 take you back to your report in binder 1 and going  
3 back to a similar area of your first report that we  
4 started with, and that is paragraphs -- I am going  
5 to focus on the last three paragraphs, I think, of  
6 your part 2 of your first report, so paragraphs  
7 515, -16 and -17.

8 And in paragraph 515, you state  
9 that:

10 "... the federal and  
11 provincial governments'  
12 choice of panel members  
13 raises concerns."

14 And then in the next paragraph,  
15 516, you set out in some detail, in a little bit  
16 more detail, what you're talking about here. You  
17 express your concern that -- this is in 516 that  
18 Bilcon's application -- your concern was Bilcon's  
19 application would be:

20 "... evaluated with a  
21 particular empathy to a  
22 position advocated by the  
23 Ecology Action Centre and/or  
24 a position advocating  
25 community control regarding

1 new development."

2 Do you see that there?

3 A. Yes.

4 Q. Now, in the case of

5 Dr. Fournier and Muecke, so we're on the next page

6 now, correct me if I'm wrong, but you base your

7 concerns, as you call them, on the fact they were

8 previously involved with an environmental advocacy

9 group called Ecology Action Centre; is that right?

10 A. Not just because of that

11 group.

12 Q. Oh?

13 A. That group, I mean, just --

14 can I finish my answer?

15 Q. Sure. No. That surprises

16 me, but go ahead.

17 A. You're misinterpreting it by

18 interrupting me. I meant to say that it wasn't

19 just because they may have been on the board of a

20 certain environmental group but, rather, an

21 environmental group who took a very clear position

22 in front of them at this hearing, and I reference

23 that, in particular, in footnote 331, which says:

24 "Jennifer Graham of the

25 Ecology Action Centre told

1                   the Panel: 'based on the many  
2                   traditional values, and the  
3                   visions for the future, which  
4                   include eco-tourism, quality  
5                   of life, ongoing traditional  
6                   fishery, we think the quarry  
7                   is an incompatible use.'"

8                   I mean, that just an excerpt from  
9                   the transcript. But the point would be that -- I'm  
10                  not saying that people who have been on the board  
11                  of an environmental organization can't be appointed  
12                  to an administrative tribunal and act in a very  
13                  fair manner. Certainly that happens, and it is --  
14                  you know, you're not disqualified because you have  
15                  been on the board of an environmental organization  
16                  of being an environmental adjudicator.

17                  But at the same time, given what  
18                  actually happened in this case, and, in particular,  
19                  Dr. Fournier's explanation of this in the CBC  
20                  interview, where he agreed that they wanted to do  
21                  something completely different than had ever been  
22                  done before in coming up with this core community  
23                  values concept, it fits right into the advocacy  
24                  position taken by the Ecology Action Centre here.

25                  And so to the extent that there

1 was something quite novel about this hearing, the  
2 approach of the panel, then -- and it was all  
3 formulated around beliefs and community visions and  
4 that type of thing, which really was a concept that  
5 they kind of put together under core community  
6 values, something that had never, ever come up  
7 before in a Canadian environmental assessment  
8 hearing, it does raise a concern from the  
9 perspective of what happened to this particular  
10 proponent, I would say.

11 Q. So just before I move on, I  
12 want to be sure that I am clear. My "oh" was not,  
13 in my view, a misinterpretation of what you said  
14 here, because I have read these paragraphs many,  
15 many times and I know exactly what you said here,  
16 so this is where I am headed.

17 A. I don't know what you're  
18 heading --

19 Q. You anticipated my next  
20 question in terms of the link between the  
21 environment action committee and these two  
22 gentlemen on the panel.

23 A. Right.

24 Q. So if you just let me --

25 A. Go ahead.

1                   Q.    -- ask the questions and we  
2 will go there.

3                   Would you agree that based on his  
4 résumé, at least, Dr. Fournier's role as a board  
5 member for the EAC took place back in 1982 and '84,  
6 some 20 years before he was appointed to the Whites  
7 Point panel?

8                   A.    Yes.  But, but, what you have  
9 to remember, and important here, is that  
10 Dr. Fournier as chair of the Sable Gas panel was  
11 criticized heavily in front of the Sable Gas panel  
12 by the Ecology Action Centre -- I am reading from  
13 the transcript that Canada provided here -- in that  
14 hearing.  Not Dr. Fournier necessarily himself, but  
15 the Ecology Action Centre brought motions in front  
16 of that panel attacking the qualifications of  
17 members of the panel in Sable Gas for potentially  
18 having a conflict of interest.

19                  Dr. Fournier had to deal with that  
20 criticism from the Ecology Action Centre very  
21 recent -- more recently than when he was on the  
22 Ecology Action Centre, and it has been suggested  
23 that he, as a result of that criticism, more recent  
24 criticism from the very organization that he sat as  
25 a board member of previously, because of the

1 criticism that was levelled at his panel in Sable,  
2 was prepared to be more environmentally sensitive,  
3 if you wish to put it that way, on the Whites Point  
4 quarry, or that's what I have heard.

5 I have tried my best to track that  
6 down, and that is the best I could come with. It  
7 is clear that there were motions in front of the  
8 National Energy Board from Ecology Action Centre  
9 represented by a lawyer, and it was an  
10 uncomfortable business for the panel at the time.

11 Q. This is news to me, and I  
12 just want to be clear what you're saying.  
13 Obviously it sounds like it is hearsay information;  
14 right?

15 A. It is not hearsay.

16 Q. Oh, you direct...

17 A. Well, I mean, I can't -- I  
18 wasn't there.

19 Q. No, indeed, even as  
20 hearsay...

21 A. So.

22 Q. I am just trying to  
23 understand what you're saying about Dr. Fournier.

24 Who was impugning his or the  
25 board's credibility or their bias, under what

1 circumstances, because I don't understand what you  
2 just said? It wasn't clear to me.

3 A. The Ecology Action Centre  
4 called on the panel to disband on the first day of  
5 that hearing.

6 Q. Yes.

7 A. And they then brought a  
8 motion alleging the two members of the panel, not  
9 Dr. Fournier, as I understand it, should be  
10 disqualified.

11 Q. Right. And as a result of  
12 that, you are extrapolating what with respect to  
13 Dr. Fournier's role with respect to his role at  
14 Whites Point?

15 A. This information is  
16 consistent with what I had gathered, from a source  
17 that I can't recall, that at Whites Point he -- it  
18 was suggested, and I wasn't there, so I don't know,  
19 was going to potentially be more empathic to the  
20 environmental critique, because he couldn't -- he  
21 wasn't able to do it as the chair of the Sable Gas.

22 Q. So just so I understand this,  
23 because this is confusing me, but let me try it.

24 It sounds like the Ecology Action  
25 Committee, who Dr. Fournier and Dr. Muecke used to

1 be board members for, they raised the challenge of  
2 some board members in the Sable Gas EA, but not  
3 Dr. Fournier, about their qualifications. Is that  
4 right?

5 A. That's my understanding. I  
6 wasn't there.

7 Q. And as a result  
8 Dr. Fournier -- I don't know, maybe the word  
9 "spooked" is appropriate here. He got spooked by  
10 that, so that when he came to the Whites Point  
11 quarry EA, he felt he had to bend over backwards a  
12 bit more to accommodate the views of EAC. Is that  
13 what we're trying to understand?

14 A. I have heard that said. I  
15 can't make that judgment myself.

16 Q. Just so I understand where  
17 you are going with that.

18 Then let's turn to -- by the way,  
19 in terms of Dr. Muecke, would you agree that  
20 according to his résumé at least on page 4, that he  
21 was a board member with EAC in 1987 to '91, so 13  
22 years before the Whites Point panel commenced; is  
23 that right?

24 A. Yes.

25 Q. Now turning to Dr. Grant.



1     Actually, before we do that, let me just confirm  
2     something you say in your second report.  You can  
3     turn to it, if you want, or I can read you the  
4     paragraph 192 in your second report where you say:

5                     "In fact, I have long been an  
6                     advocate of public  
7                     participation in  
8                     environmental assessments."

9                     Do you stand by that --

10                    A.  Yes.

11                    Q.  -- that statement?

12                    A.  Yes.  Are you off these  
13     particular panel members, because there is one more  
14     thing.

15                    Q.  No, no.

16                    A.  You're still on them.

17                    Q.  I am going right to --

18                    A.  I do want to clarify before  
19     you leave that --

20                    Q.  Sure.

21                    A.  -- issue that I have no -- I  
22     think the professional or academic qualifications  
23     of those three people were quite appropriate, in  
24     the sense of bringing particular kinds of expertise  
25     to the panel, but -- geology, yes, is relevant,

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1 oceanography is relevant, and so is planning,  
2 social impact, obviously.

3                   What I am -- so in that sense, I  
4 don't have a problem. My issue, the reason I  
5 raised it as a concern, is because of their lack  
6 of -- what I perceived to be a lack of experience  
7 in the regulatory process and not -- and asking for  
8 just too much information and putting a horrendous  
9 onus on the proponent, and then criticizing the  
10 proponent throughout their report for not providing  
11 enough information and acting as if they were  
12 stepping into the regulator's shoes.

13                   I don't think they understood  
14 that, and in that sense I criticize the appointment  
15 process for not putting someone on who had that  
16 experience and making the panel a little more  
17 neutral and consistent with the usual practice of  
18 not requiring that kind of detail as is evident the  
19 Nova Scotia Environmental Assessment Board  
20 appreciated in the Keltic matter.

21                   That is my basic criticism.

22                   Q. I don't want to put words in  
23 your mouth here, because this is your report, but  
24 the way I read those last three paragraphs in part  
25 2 of your first report is there is two prongs to

1 your criticism.

2 One is that first one you just  
3 listed that we quoted from at the very beginning,  
4 in terms of the lack of environmental expertise,  
5 and there was a lack of regulatory experience.

6 A. Mm-hm.

7 Q. Despite what we've talked  
8 about in terms of Kelly's Mountain and Sable. But  
9 also on page 134, so the end of paragraph 516, it  
10 seems to me what you're suggesting -- this is where  
11 I'm going here with the EAC and what you say about  
12 Dr. Grant -- that you are alleging it is something  
13 very close to -- you don't use the word, but it  
14 sounds to me like you're talking about bias here.

15 And, in particular, if you look at  
16 the language at the end of 516:

17 "It was reasonably  
18 foreseeable that governments  
19 were expecting the Bilcon  
20 application would be  
21 evaluated with a particular  
22 empathy to a position  
23 advocated by the EAC and/or a  
24 position advocating community  
25 control regarding new

1 development." [As read]

2 And you are talking about two  
3 different things because you're talking about, in  
4 the first instance, Dr. Muecke and Dr. Fournier,  
5 and in the second, Dr. Grant.

6 A. Yes.

7 Q. Just so we're clear, your  
8 concerns about Dr. Grant, you reference one article  
9 that she wrote in 1989. It is in footnote 330 of  
10 your first report where you say she developed  
11 arguments for greater community participation and  
12 decision making; is that correct?

13 A. Yes.

14 Q. So I am just trying to  
15 reconcile your concern that she wrote that article  
16 with what you say in paragraph 192 of your second  
17 report about -- just let me quote it here exactly:

18 "In fact, I have long been an  
19 advocate of public  
20 participation in  
21 environmental assessments."

22 I can't reconcile those two, but  
23 maybe you can?

24 A. The difference is, as  
25 Mr. Rankin said, Professor Rankin said, the whole

1 concept of beliefs, of philosophy is foreign to  
2 environmental assessment. And yet it became the  
3 dominant criteria for that panel.

4                   And I have little doubt but that  
5 Jill Grant was one of those -- had to be the key  
6 person who would have brought that particular  
7 perspective forward. Like, there is nothing wrong  
8 with having that perspective, but the way it came  
9 out in this hearing is wrong, in my view, for all  
10 of the reasons Mr. Rankin said.

11                   It is not consistent with how  
12 environmental assessment has been viewed up to this  
13 point in time, and it was used as the sole or --  
14 the sole criteria for this panel to reject the  
15 matter.

16                   So I have no -- I have to  
17 speculate, and it is only speculation, that Nova  
18 Scotia officials who nominated Dr. Grant would have  
19 understood where she was coming from in that regard  
20 and would have probably expected her to take that  
21 position forward. I mean, that is all I can say.

22                   I don't know, you know, but based  
23 on that, I have nothing -- I don't quarrel with  
24 public participation and making sure the community  
25 has an obvious active and important role, but that

1 is far different than allowing a very major project  
2 to be tossed out based on visions and beliefs, and  
3 that isn't even -- that is not -- if you're going  
4 to put that kind of philosophy, as it was called,  
5 into a legal criteria, in my view, to be fair, you  
6 have to let someone know that right at the  
7 beginning.

8                   To the extent that community  
9 planning does, in fact, incorporate some aspects of  
10 what a community wants, obviously, planners can't  
11 just go around and say, This is going to be  
12 residential and low density and this is going to be  
13 something else. They have to write reports. They  
14 have to be subject to public committee meetings.  
15 They have to go to city council.

16                   People have a full opportunity,  
17 and you can even appeal that in Ontario to an  
18 Ontario Municipal Board hearing.

19                   But in this case, it would appear  
20 that someone's -- a particular planning vision  
21 developed by people who like to talk about visions  
22 has, you know, raised this to be a regulatory  
23 criteria, and after the fact, so to speak. And I  
24 don't think that that is a process we expect in  
25 Canada, and certainly didn't experience it before.

1 Q. I would like to turn you to a  
2 different topic and probably a more innocuous  
3 topic. If you could turn to paragraph 477 of your  
4 first report and turn to the statutes now, the CEAA  
5 and the NSEA.

6 A. Sure.

7 Q. I think we have agreement on  
8 a bunch of the questions I want to ask here. In  
9 paragraph 477 -- sorry, are you ready?

10 A. Yes.

11 Q. Both the CEAA and the Nova  
12 Scotia Environment Act provide for the  
13 establishment of a joint federal-provincial panel.

14 Correct?

15 A. I do say that.

16 Q. Yes. Then on the federal  
17 side, would you agree with me that section 40 of  
18 the CEAA authorized the Minister of the Environment  
19 to establish JRPs with the province, such as what  
20 happened in the Whites Point EA?

21 A. Let me just get it out. I  
22 mean --

23 Q. It's R-1.

24 A. I know, and I know the  
25 section, but I just want to have a look at it in

1 the context of your specific question.

2 Q. Sure. It is 40(2).

3 A. Mm-hm.

4 Q. If you will go there, on page  
5 19 of 36?

6 A. Under the conditions -- if  
7 the conditions precedent are met in section  
8 40(2) --

9 Q. Sure.

10 A. -- then that is the section  
11 that does contemplate or allow for the potential of  
12 entering into an agreement with a province for a  
13 joint review.

14 Q. I am speaking generally here  
15 first, and then I will get into the specifics of  
16 Whites Point. Turning to the provincial side,  
17 would you agree with me that because it was a joint  
18 federal-provincial EA, the JRPs, the Whites Point  
19 JRPs process was also governed by the NSEA?

20 A. Well, there would have to be  
21 statutory authority in the Nova Scotia Act for  
22 that, and why don't we -- what section are you  
23 talking about that?

24 Q. Sure. Section 47, which is  
25 at R-5, and it starts at the bottom under joint



1 assessments, bottom of that page.

2 A. Mm-hm.

3 A. There is contemplation of it  
4 there, too.

5 Q. Okay, great. And now I would  
6 like to, still in the NSEA, go back to the  
7 definition section, and we dealt with this  
8 yesterday with Mr. Rankin. So this is section 3.  
9 I don't have a page number here, but, again, my  
10 understanding is this is fairly uncontroversial.

11 This is the Nova Scotia  
12 Environment Act, section 2, (r) Roman numeral v.  
13 Do you see the (r) in the middle of the page across  
14 from section 3, "Interpretation"? Do you see that?  
15 It is the definition of "environment".

16 A. That's what we're looking  
17 for?

18 Q. I wish we had page numbers,  
19 but we don't here. This is not an easy task.

20 A. There is a definition of  
21 environment, section 3. Is that what we're looking  
22 at?

23 Q. Yes, yes. It is almost smack  
24 in the middle of the page starting section (r)  
25 reads:

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1                   "'environment' means the  
2                   components of the earth and  
3                   includes..."

4                   Then if you skip down to (v):

5                   "For the purpose of Part  
6                   IV..."

7                   The Act's environmental assessment  
8    section:

9                   "... the socio-economic,  
10                  environmental health,  
11                  cultural and other items  
12                  referred to in the definition  
13                  of environmental effect."

14                  Do you see that there, sir?

15                  A.   Mm-hm, yes.

16                  Q.   If you skip down, it is  
17    actually alphabetical letter V, not Roman numeral  
18    V, for the definition of "environmental effect"?

19                  A.   Yes.

20                  Q.   Do you see there it means in  
21    respect of an undertaking:

22                  "(i) any change, whether  
23                  negative or positive, that  
24                  the undertaking may cause in  
25                  the environment, including

1                   any effect on socio-economic  
2                   conditions, on environmental  
3                   health, physical and cultural  
4                   heritage or any structure,  
5                   site or thing including those  
6                   of historical,  
7                   archaeological,  
8                   paleontological and  
9                   architectural significance."

10                  Do you see that there, sir?

11                  A.    Yes.

12                  Q.    Now, in your reply report --  
13   again, I can quote it for you or you can refer to  
14   it as well, in your reply report, paragraph 197. I  
15   will turn to it myself. In that paragraph, you  
16   say -- you go so far as to say Mr. Smith, who is  
17   one of Canada's experts in this case:

18                         "Mr. Smith is of course  
19                         correct that the panel's  
20                         process was governed not only  
21                         by CEAA, but by the Nova  
22                         Scotia Environment Act, which  
23                         provides for a consideration  
24                         of socio-economic effects."

25                  Do you see that there, sir?

1 A. Yes.

2 Q. Now, similarly, just the next  
3 paragraph down, you go on to say that the Nova  
4 Scotia Environment Act refers to effects on  
5 socio-economic conditions. Now,

6 "Mr. Smith is correct that  
7 under the Nova Scotia Act,  
8 these socio-economic effects  
9 need not be directly tied to  
10 the impacts on the natural  
11 environment."

12 Do you see that there, sir?

13 A. Yes.

14 Q. Okay. Now, in addition to  
15 the CEAA and the NSEA, the JRP's EA process was  
16 governed by what we referred to earlier in R-27,  
17 the terms of reference that are attached to the JRP  
18 agreement. Do you agree with that?

19 A. You're speaking more  
20 specifically about the socio-economic clause?

21 Q. Sure. I was speaking more  
22 generally but, sure, that is where we're going.  
23 Would you agree that the Whites Point JRP's process  
24 was governed by the JRP agreement and those terms  
25 of reference that were attached to it?

1                   A.   Well, I heard I think in the  
2 opening of Canada they called it the constitution  
3 of the panel. But the devil is in the details, and  
4 the details were those environmental impact --  
5 guidelines which is -- you know, that seemed to be  
6 a constitution, too, in some respects.

7                   Q.   Indeed. That's what I'm  
8 saying, that the Whites Point JRP process, the EA  
9 process, was governed by the terms of reference and  
10 the JRP agreement. Would you agree?

11                  A.   It provided a framework.

12                  Q.   Let me take you to your own  
13 words. Now, again, I am jumping back and forth  
14 here. Either we can get it on the screen or I can  
15 just reads it to you. I am just going to read the  
16 title. It is not even the text beyond the title.  
17 This is in binder number 1. I have to give a page  
18 number here, because it is not a paragraph.

19                       It is on page 124. And your title  
20 reads "The panel was constrained by the joint panel  
21 agreement and the terms of reference."

22                   Do you agree with that title, sir?

23                  A.   Let me take a minute, see  
24 what we're talking about -- what I'm talking about.

25                  Q.   Sure.

1 A. Yes.

2 Q. Now, going back to the terms  
3 of reference, then, and you anticipated me here  
4 with R-27, would you agree with me that the JRP,  
5 the Whites Point JRP, was required to review  
6 socio-economic effects of the Whites Point project?

7 A. It was one of the factors  
8 stipulated.

9 Q. Right. But would you agree  
10 it was required to look at those factors?

11 A. I have to look at the  
12 wording.

13 Q. Sure.

14 A. Where is it?

15 Q. We can go back to R-27 and  
16 right at the beginning --

17 A. Sorry.

18 Q. R-27 is binder 2.

19 A. Binder 2, okay.

20 Q. We have to go to page 9 at  
21 the top. I am going to point you to one --

22 A. Binder 2, tab? Sorry.

23 Q. Tab R-27.

24 A. Sorry.

25 Q. I guess I have dealt with

1     these so often I have memorized the numbers, but I  
2     realize the witnesses haven't.

3                     A.    R-27?

4                     Q.    Chris, if you could highlight  
5     that first paragraph there.

6                     A.    And page 9?

7                     Q.    Page 9.

8                     A.    Determined that the panel  
9     shall include in the review of the project  
10    consideration of the following factors.

11                    So they agreed the panel shall  
12    include.

13                    Q.    I want to focus on the word  
14    "shall"; in other words, they had to.

15                    A.    Right, right.

16                    Q.    Very good.  So now I am going  
17    to turn to the contentious topic of CCV, or  
18    community core values, because you write at some  
19    length in both of your reports about this topic,  
20    don't you, sir?

21                    A.    Yes.

22                    Q.    And in fact much of what you  
23    write about is the relationship between CCV and  
24    what the federal-provincial Environment Act define  
25    as socio-economic effects; is that correct?

00231

1                   A.   That's certainly one of the  
2 focuses, yes.

3                   Q.   Okay.  So now I am going to  
4 take you to a few sections, quotations in your  
5 first and second reports.  So we are dealing here,  
6 I think, with one exception, which is a reference  
7 to the transcript, to binder 1.  So, again, let's  
8 start with your first report.

9                   If you could turn to -- because I  
10 think we're in the second report now.  Let's go  
11 back to the first report, paragraph 230.  You are  
12 there?

13                  A.   I'm there.

14                  Q.   If you look at the beginning  
15 of 230, you see, you say:

16                         "However, inconsistency with  
17                         community core values is not  
18                         an environmental effect, as  
19                         defined by CEAA, it is a pure  
20                         socio-economic effect."

21                  Do you see that there, sir?

22                  A.   Yes.

23                  Q.   Do you stand by that  
24 statement today, sir?

25                  A.   I think that statement's been



1 taken out of context. I am saying that in the  
2 context of CEAA -- as opposed to an environmental  
3 effect as defined by CEAA, core community values is  
4 something different than those environmental  
5 effects.

6 The real question is, and I  
7 address this in my reply report, is social -- is  
8 core -- and I recognize that under the Nova Scotia  
9 statute there are -- socio-economic is a factor  
10 that is to be considered, and that was incorporated  
11 into the terms of reference.

12 The real key question is whether  
13 core community values is a socio-economic effect as  
14 opposed to how socio-economic has been interpreted  
15 in Nova Scotia before and during the time of this  
16 hearing.

17 I have looked at a number of  
18 other -- I have looked at the regulatory  
19 instruments under the Nova Scotia regulations for  
20 how to apply for environmental assessment, a  
21 proponent's guide to environmental assessment, for  
22 example, R-163.

23 It doesn't talk about beliefs. It  
24 talks about tourism under socio-economic at page  
25 12, for example. It says:

00233

1 "A discussion of the effects  
2 to the socio-economic  
3 conditions of the area should  
4 be detailed in the document.  
5 Examples of these could  
6 include employment,  
7 transportation, recreation,  
8 and tourism."

9 Then it says:

10 "Information on effects to  
11 physical and cultural  
12 heritage should be a  
13 component of the  
14 registration." [As read]

15 And it goes on. It doesn't say  
16 anything about beliefs or visions for the  
17 community.

18 Similarly, in another EA -- in  
19 another document of Nova Scotia: Guide to  
20 preparing an EA registration for pit and quarry  
21 developments in Nova Scotia, Exhibit R-81 at Page  
22 12. Again, if you look at that discussion, they  
23 have a whole section on socio-economic conditions.  
24 The first factor is economy: Describe the economic  
25 conditions for the region. Provide details of the

1 number of full- and part-time jobs during the  
2 construction operation, decommissioning, et cetera,  
3 of the project. Predict the positive and negative  
4 effects that a proposed pit and quarry will have on  
5 the economy.

6                   Next, underneath that, is land use  
7 and value: Identify past land use of the site.  
8 Describe any potential contamination that may  
9 result. Describe the predicted impacts -- this is  
10 all under land use and value -- of blasting and the  
11 noise and effects on transportation. Describe the  
12 existing conditions of the proposed modes and  
13 routes of transportation. Discuss predicted impact  
14 to traffic volumes.

15                   The next subheading under  
16 socio-economic is recreation and tourism: Discuss  
17 the existing and planned recreation on tourism  
18 activities. Describe predicted effects of pit and  
19 quarry development on recreation and tourism.

20                   The next one is human health. I  
21 am just reading it:

22                   "According to the  
23 Environmental Assessment  
24 Regulations, an environmental  
25 effect in respect of an

00235

1                   undertaking includes an  
2                   effect on environmental  
3                   health, which is defined as  
4                   those aspects of human health  
5                   that are or can be affected  
6                   by contaminants or changes in  
7                   the environment. Discuss the  
8                   predicted effects the  
9                   undertaking will have on the  
10                  health of people." [As read]

11                   And, finally, it comes to cultural  
12                  and heritage resources. It says:

13                   "Notify the heritage  
14                   stewardship section, heritage  
15                   division, and Department of  
16                   Tourism and Culture of the  
17                   proposed pit or quarry  
18                   development so that any areas  
19                   of historical, archaeological  
20                   or paleontological importance  
21                   can be identified and look at  
22                   other undertakings in the  
23                   area." [As read]

24                   Not a word about visions, beliefs,  
25                  that kind of thing.

1                   These are the documents that a  
2   proponent was to be guided by under the Nova Scotia  
3   interpretation of socio-economic criteria, and that  
4   is why I feel very clear that what had happened in  
5   this hearing has got nothing to do with  
6   socio-economic, if the criteria that the panel  
7   decided upon is beliefs and visions.

8                   Q.   So if I remember correctly  
9   from the beginning of your answer to my question,  
10   which was do you stand by the statement today, I  
11   believe you said "yes"; is that correct?

12                  A.   I explained in what context  
13   it was meant to apply. I said, yes, it is correct  
14   in terms of the social -- core community values is  
15   not an environmental effect defined by CEAA.

16                  And CEAA only discusses direct --  
17   the environmental effects and potential changes to  
18   the socio-economic environment.

19                  That is why, you know, effects  
20   could be socio-economic, but that isn't what is  
21   anticipated in Nova Scotia. And no proponent  
22   looking at their own documents would understand  
23   that that was to be a socio-economic effect.

24                  When you spell out tourism, you  
25   spell out traffic, and you spell out health, that

1 doesn't equate to visions and beliefs.

2 Q. So I will return to my  
3 question, because just to put some context here, it  
4 seems to me there is disagreement within this room  
5 on several different levels about the statements  
6 you're making here, the ones I am going to take you  
7 to.

8 So what I took from your last --  
9 the second response to my question is it sounds  
10 like a qualified "yes", so is that true, or is it  
11 just an outright, yes, you stand by your original  
12 statement in paragraph --

13 A. I provided a clarification.  
14 To the extent that you want to say -- or however  
15 you want to take it, that is what I provided.

16 Q. I am looking for, is it a  
17 yes, or is it a no, or is it a qualified yes?

18 A. Core community values is not  
19 a socio-economic effect within the context of Nova  
20 Scotia's legislation or the criteria particularly  
21 to be used for a proponent in a pit or quarry in  
22 Nova Scotia.

23 And you can also discern that,  
24 Mr. President, Members of the Panel, by looking at  
25 how socio-economic criteria have been used in other

1 panels in Nova Scotia.

2                   If you look, for example, at the  
3 Kemess report on this big, huge -- Keltic Terminal  
4 report where there was a major project, the  
5 largest, most complex one, the board said, in Nova  
6 Scotia. There is no criteria there about beliefs.

7                   If you look at the Sydney Tar  
8 Ponds, which was a joint Review Panel about the  
9 proposed hazardous waste disposal facility in  
10 Sydney, Nova Scotia, there's nothing there in those  
11 criteria about beliefs or visions.

12                   So there was -- it's not within --  
13 it's not on the table.

14                   Q. So I don't want to be accused  
15 by your counsel here of badgering the witness,  
16 so -- I will have to, because you're not answering  
17 my question.

18                   A. I'm sorry, I'm trying to.

19                   Q. What I asked you was whether  
20 you stand by this statement, and I was looking for  
21 a yes or no or a qualified yes. And it sounds like  
22 you're not willing to give me any of those.

23                   So is that the case, that you're  
24 not willing to give me one of those answers and so  
25 we will just leave it?

1                   A.   Well, let me just think about  
2 what you are asking me for a minute.

3                   Q.   It is really straightforward.  
4 It is really that portion of paragraph 230, and I  
5 will read it again:

6                                "Inconsistency with community  
7 core values is not an  
8 environmental effect as  
9 defined by CEAA."

10                   I'm pretty sure I understand where  
11 you're going there:

12                                "It is a pure socio-economic  
13 effect."

14                   All I am asking you is: Do you  
15 stand by that statement today? That is all I am  
16 asking you.

17                   A.   I don't think it is -- no, I  
18 don't stand by that statement in the sense of Nova  
19 Scotia. It doesn't apply to Nova Scotia.

20                                Nova Scotia does not interpret  
21 socio-economic effects to include core community  
22 values.

23                   Q.   Okay. So let's pursue that.  
24 So you're saying that inconsistency with community  
25 core values is not a pure socio-economic effect



00240

1 vis-à-vis the NSEA. Is that what you're saying?

2 A. Yes.

3 Q. Because you're already  
4 saying --

5 A. -- a practice in Nova Scotia  
6 when it comes to looking at environmental  
7 assessment. It has never been there, and it is  
8 still not there as far as I can tell.

9 In fact, in fact, Dr. Fournier in  
10 his CBC interview says that quite clearly. He was  
11 asked a question, Have you gone too far? And he  
12 says -- and he discusses this and he says -- he  
13 says:

14 "The second point has to do  
15 with the fact that our  
16 decision hinges on core  
17 values. Up until now, many  
18 of these decisions have been  
19 made on the basis of rocks  
20 and trees and animals, and so  
21 forth. A lot of times they  
22 have ignored the fact that  
23 people are part of that  
24 environment. The ecosystem  
25 is involved with people.

00241

1 People interact with it.  
2 They interact with the  
3 animals. They interact with  
4 nature in many ways. This is  
5 called a VEC, valued  
6 ecological component. It is  
7 well accepted in the  
8 assessment literature. It is  
9 just that the social part of  
10 it doesn't appear very often,  
11 so what we did is we  
12 emphasized the fact that this  
13 community... this community  
14 is unique in many ways. This  
15 is a community that has  
16 defined itself before the  
17 assessment began as  
18 environmentally oriented and  
19 it defined itself in such a  
20 way that there really was not  
21 very much room there for a  
22 quarry as was being  
23 proposed." [As read]

24 And he goes on to say:

25 "Now, you mentioned that

1                   there were critics, as well?"  
2                   "Yes, there were people who  
3                   said that this was  
4                   inappropriate, but I think it  
5                   was only inappropriate if you  
6                   judged it against previous  
7                   reports, because previous  
8                   reports hadn't done this."  
9                   [As read]

10                  That is, used core community  
11 values. That is why it wasn't Nova Scotia. He  
12 admits that, in my view, in this interview. It  
13 hadn't been done before.

14                  Q. So just to nail this down a  
15 little further, you don't stand by that last part  
16 of your statement in the sense that you say it  
17 doesn't apply to the NSEA; is that correct?

18                  A. It's not the practice as it's  
19 been used in Nova Scotia to date from anything that  
20 I can see. I think that is what we're interested  
21 in here, as I understand it.

22                  And I'm not a NAFTA expert, by any  
23 means. It is my first time in front of such a  
24 panel, but, as I understand it, we are trying to  
25 understand whether this proponent was treated

1 differently than other proponents using what is  
2 supposed to be similar criteria.

3 I do not understand how core  
4 community values as used here could be equated to  
5 those things I read out from Nova Scotia's guidance  
6 document.

7 Q. Okay. So two questions. I  
8 just want to make sure I understand the "it". The  
9 pronoun "it" you used in the beginning of that  
10 answer, you're talking about CCV; right?

11 A. Yes, as the panel defined it  
12 as visions and beliefs.

13 Q. I just wanted to make sure I  
14 understood it.

15 Of course in this section of your  
16 report, you're talking about the CEAA, not the  
17 NSEA; is that right?

18 A. Right.

19 Q. Right. But what you're doing  
20 now is extrapolating from that comment into the  
21 NSEA context; is that correct?

22 A. Yes. I did address that in  
23 my reply report.

24 Q. We're going there, yes. We  
25 just hit a stumbling block here.

1                   Were you here last night during  
2 Mr. Rankin's cross-examination on this particular  
3 paragraph? If you weren't, I can refresh your  
4 memory.

5                   A. I think he said, I respect  
6 Mr. Estrin, but I do disagree with him in that  
7 regard.

8                   Q. Sure. I will read it for  
9 you.

10                  A. He said something to that  
11 effect.

12                  Q. You're aware Mr. Rankin  
13 disagrees with this?

14                  A. I heard him say that --

15                  Q. I will read it.

16                  A. -- beliefs and visions are  
17 philosophy and are not a socio-economic effect.  
18 And to the extent that a socio-economic effect is  
19 supposed to be something that is measured, then I  
20 agree with him completely, and, in fact, when we  
21 look at the terms of reference, the environmental  
22 impact statement guidelines, we will see in fact --  
23 that that is how, in fact, it is supposed to be.

24                  If you're going to get into that  
25 kind of thing, you're supposed to measure it,

1 something that is measurable as observed to  
2 philosophical or discerned from -- I'm not sure  
3 what.

4 Q. Just for the record, so it is  
5 clear, I want to make sure you are not disputing  
6 what I read in the rough draft of the transcript  
7 from yesterday at page 639, where Mr. Rankin  
8 without hesitation said:

9 "I have the greatest of  
10 respect for Mr. Estrin, but I  
11 do not agree."

12 Do you recall that or do you  
13 dispute that?

14 A. I told you I recall it. I  
15 heard it. I just repeated it.

16 Q. I just wanted to give you the  
17 exact words so there was no dispute about, because  
18 it was very quick and it was a very short answer to  
19 that one.

20 A. Again, I think Mr. Rankin was  
21 not -- I think he misunderstood the context of this  
22 particular remark, because in this particular  
23 remark I was -- what I said is it is a pure  
24 socio-economic effect.

25 It was in the context of not being

1 an environmental effect, and that was the only  
2 two -- if you look at the definition of  
3 environmental effects in CEAA, it really talks  
4 about two different things. I was trying to say,  
5 well, it isn't environmental effect, so it must  
6 be -- you know, what they are talking about is  
7 something else.

8 But I agree with him on further  
9 consideration, and that is what I said. If we look  
10 at what the panel said, it is beliefs. It is  
11 visions, and it is not what Nova Scotia uses.

12 Q. So I just want to be sure I  
13 understand that, because I think what you said was  
14 Mr. Rankin in his response, which I just quoted  
15 from, last night, he misunderstood you; is that  
16 correct?

17 A. Just like -- I mean, this is  
18 a discussion of CEAA; right?

19 Q. Yes.

20 A. And Mr. Smith pointed out,  
21 well, Mr. Estrin was ignoring the whole Nova Scotia  
22 Act when he says that.

23 Q. Yes.

24 A. I think it was in that  
25 context that Mr. Rankin was --

00247

1 Q. Was misunderstood?

2 A. Yes.

3 Q. Let's move on to paragraph  
4 243, a few pages along, where you say something  
5 along the same lines. So this is in the bottom of  
6 page 63, again, the first report, where you  
7 conclude that:

8 "The Whites Point JRP  
9 identified only one potential  
10 impact of the WPQ project as  
11 both adverse and significant.  
12 This impact was  
13 socio-economic in nature, and  
14 will be described for the  
15 purposes of my report as  
16 'inconsistency with community  
17 core values'."

18 Do you stand by that statement  
19 today, sir?

20 A. It is made in the same  
21 context as the previous statement, if you look back  
22 to paragraph 239. I am really just continuing to  
23 discuss CEAA only. So it is in that same context.

24 Q. So, again, do you stand by it  
25 today, sir?



1                   A.    CCV is not a socio-economic  
2   effect as practiced or defined in Nova Scotia, in  
3   my opinion.

4                   Q.    I'm still looking for an  
5   answer to my question.

6                   A.    Sorry?

7                   Q.    Are you refusing to answer it  
8   or should I rephrase it?

9                   A.    I will try it one more  
10   time. I'm not trying to refuse to answer. I am  
11   just trying to make sure I understand the question.

12                  Q.    I am just wondering if you  
13   stand by, or it is your evidence today exactly what  
14   I just read in terms of that paragraph. I will  
15   repeat it if you want me to.

16                  A.    I'm -- core community values  
17   as a vision or beliefs is certainly not  
18   environmental in the natural environmental sense.  
19   Is it socio-economic in nature? Some people could  
20   argue that it is, and in fact I say that.

21                  But, in reality, I agree more now  
22   with the way that Mr. Rankin put it. It is really  
23   philosophy. It is beliefs. And if the statute in  
24   Nova Scotia or the guidelines said those things are  
25   clearly to be incorporated as part of

1 socio-economic, then it would be so. But that  
2 isn't so in Nova Scotia.

3 I am trying to be as helpful as I  
4 can.

5 Q. Sure. I don't even need you  
6 to be helpful so much as I just want to know  
7 whether you stand by that statement today.

8 A. I have explained it the best  
9 I can.

10 Q. So we will leave it at that.  
11 For the record, I did not get an answer to my  
12 direct question.

13 Let's turn to paragraph 262 of  
14 your report, which is page 68. And, again, we are  
15 on the same hobby horse here. You state that:

16 "The impact identified by the  
17 Panel, inconsistency with  
18 community core values, is a  
19 pure socio-economic impact,  
20 one that has no necessary  
21 connection to environmental  
22 impact."

23 Do you stand by that statement  
24 today, sir?

25 A. It is the same -- it's the

00250

1 same type of statement we just discussed, and I  
2 can't really say anything more than that I already  
3 said.

4 Q. So I will take that as,  
5 again, a non-answer to my question.

6 A. No. I...

7 Q. If you could now turn to your  
8 second report, and, again, this is what we dealt  
9 with last night. So now I am going to address  
10 number 2, paragraph 306. This is your reply  
11 report. I'm expecting this one will be a little  
12 easier. What you say here is:

13 "It is beyond debate that  
14 questions of whether or not  
15 the local community was in  
16 favour of the WPQ, or whether  
17 the WPQ would offend the  
18 community's core values, are  
19 purely local matters falling  
20 under the exclusive  
21 jurisdiction of the  
22 provincial government."

23 Do you stand by that statement  
24 today, sir?

25 A. Well, I agree with

1 Mr. Fournier in the quote that I provided. When  
2 you get to the quality of life side, what you want  
3 in your community, then that is a provincial  
4 responsibility.

5 Q. I think you said  
6 Dr. Fournier, but I presume --

7 A. Sorry, Robert Thibault,  
8 Robert Thibault, sorry, thank you.

9 Q. But that is not my question.

10 A. Okay.

11 Q. Take a few minutes if you  
12 want to examine that.

13 A. Sorry, what is the question,  
14 if I stand by that statement? Yes, I stand by that  
15 statement.

16 Q. Now, just so we're clear, do  
17 you know what statement I'm talking about? It's  
18 the first sentence of paragraph 306 in the second  
19 Mr. Estrin report.

20 A. Well, you know, as Mr. Rankin  
21 added to the discussion yesterday, I guess he was,  
22 I think, troubled by the concept: Could beliefs  
23 also come under the federal? I don't know.

24 I mean, that is a whole area of  
25 constitutional law that I haven't carefully

1 considered, but I agree, in the way that  
2 Mr. Thibault put it, when you get to what you want  
3 in your community, then that is a provincial  
4 responsibility.

5 Q. Just to give you some comfort  
6 here, when I asked Mr. Rankin this question, he  
7 agreed; he said he agreed with you here.

8 So I am going to go back to ask  
9 you now: Do you agree with yourself? Do you still  
10 stand by --

11 A. I obviously agree with  
12 myself.

13 Q. You do. So your evidence  
14 today is that you agree with what you said in  
15 paragraph 306?

16 A. Yes.

17 Q. Okay, very good. Then let's  
18 turn to our last paragraph.

19 A. If someone wants to raise the  
20 issue couldn't beliefs be a matter under the  
21 Charter of Rights, for example, possibly.

22 Q. Okay.

23 A. But...

24 Q. Turning to the next page,  
25 paragraph 311, this is the last one I am going to

1 refer to in this line of questioning. There you  
2 say, second sentence in:

3 "The only significant adverse  
4 environmental effects cited  
5 by the Panel were on  
6 community core values..."

7 You're saying much of the same  
8 thing:

9 "... matters of provincial  
10 jurisdiction."

11 A. Mm-hm.

12 Q. First of all, do you see that  
13 sentence there, sir?

14 A. Yes.

15 Q. Do you stand by that sentence  
16 there today, sir?

17 A. Yes.

18 Q. Are you aware that Mr. Rankin  
19 takes a slightly different view and does not --  
20 let's put it this way. He abstained yesterday from  
21 agreeing with the final four words of that  
22 sentence, "matters of provincial jurisdiction".

23 Are you aware of that? I am referring here to the  
24 hearing transcript page 643, 644.

25 A. I recall his hesitation in

1     that regard, and I don't know -- I'm only surmising  
2     that he might think it is either undefined as a  
3     matter of constitutional jurisdiction, or that it  
4     could be both.

5                     Q.     Just to be clear, on page 644  
6     of that transcript, Mr. Rankin said: I take no  
7     position on those last four.

8                     A.     Mm-hm.

9                     Q.     Your position today here is  
10    that you stand by that remark; is that right?

11                    A.     Yes, in the very way that  
12    Robert Thibault said it.

13                    Q.     So now my final question in  
14    this section -- and this is the last question I  
15    have for you on the JRP process. I've got  
16    something further for the government decisions, but  
17    my last question is going to ask you -- and this is  
18    where I need Chris's help, because unless we're  
19    going to pull out another binder, we're going to  
20    turn to Mr. Rankin's report here.

21                    Mr. Rankin only wrote the one  
22    report, so it is Mr. Rankin's report, paragraph  
23    129. So I will ask you to look at this on the  
24    screen, unless you would like to see it in hard  
25    copy.

1                   A.    I would like to see it in  
2   hard copy.

3                   Q.    Sorry, but we need  
4   Mr. Rankin's first binder here.  It should be the  
5   Rankin report, which I think is the first item.  
6   But Chris has it up on the screen now.

7                   A.    I had it somewhere.

8                   MR. PULKOWSKI:  That would be a  
9   clean one.

10                  THE WITNESS:  I like using clean  
11   copies.  Thank you very much.

12                  BY MR. KURELEK:

13                  Q.    Just let me know when you're  
14   ready.

15                  A.    You want to go to 129?

16                  Q.    129.  So if you are ready, I  
17   will ask the question.

18                  A.    I am ready, mm-hm.

19                  Q.    My question is:  Do you agree  
20   with what Mr. Rankin says here, which is:

21                        "Although the Panel could  
22                        indeed consider  
23                        socio-economic matters since  
24                        that was a factor listed in  
25                        the Terms of Reference,



1 consideration of  
2 socio-economic effects is a  
3 long way from the 'community  
4 core values' on which the  
5 Panel's conclusions turn."

6 A. I absolutely agree with that.  
7 And the reason is is that in the environmental  
8 assessment guidelines, in particular, and one of  
9 reasons is, is they define what had to be evaluated  
10 as effects on the human community. And I think it  
11 is in section 10.3, human environment impact  
12 analysis. And I think this becomes very important,  
13 Mr. President, Members of the Panel.

14 In section 10.3 of the final EIS  
15 guidelines they say:

16 "Describe and evaluate  
17 changes to health and to  
18 social and economic  
19 conditions that may occur as  
20 a result of project-related  
21 impacts to the biological and  
22 physical environment."

23 That is the end of the quote. So  
24 there is two things about that quote. Evaluate  
25 changes to health and social and economic

1 conditions that may occur as a result of  
2 project-related impacts to biological environment.

3 In these words, the proponent was  
4 being told to only evaluate changes to  
5 socio-economic conditions that may occur as a  
6 result of these project-related impacts to the  
7 biological and physical environments.

8 Changes to the nature of an  
9 area -- changing it from an industrial area to a  
10 rural area, or having a big box shopping centre  
11 come into a residential area -- it may infringe  
12 what could be called beliefs or even core values,  
13 but to the extent that that impact or change  
14 doesn't arise from project-related impacts to the  
15 biological or physical environment, then it is not  
16 to be evaluated, according to the panel's own  
17 guidelines, because it is not something you can  
18 evaluate, and it is not arising from impacts to the  
19 biological and physical environment.

20 It is more philosophical. You  
21 don't like it. And that is why impact on core  
22 values changing an area, say a rural area, having  
23 something imposed, as the panel said, as an  
24 industrial activity is not a socio-economic effect  
25 that requires consideration in impacts on the human

1 environment.

2                   You can't, in my view, defend core  
3 values as an element of the socio-economic factor  
4 because of the way this term has been defined in  
5 the EIS guidelines. That term "socio-economic" has  
6 been read-down, restricted or delimited by --  
7 because you have to have something that can be  
8 evaluated, and it has to be an impact arising from  
9 the biological or physical impacts of the project.

10                   And that is not how this panel  
11 defined core values. They defined core values as  
12 beliefs and visions.

13                   So I say, in my -- the way I read  
14 this, is that, well, that is another reason why  
15 core community values cannot come within even what  
16 the panel defined for what they wanted. They said:

17                   "Evaluate changes to the  
18                   social and economic  
19                   conditions that may occur as  
20                   a result of project-related  
21                   impacts to the biological..."

22                   That wasn't what they based their  
23 decision on, though.

24                   Q. So just so I am clear, my  
25 understanding is, yes, you do agree with what

1 Mr. Rankin says in that paragraph 209; is that  
2 correct?

3 A. Put it back up, because you  
4 only put up part of 129.

5 Q. I thought you had the  
6 whole -- 209.

7 A. I want to make sure I know  
8 what I'm agreeing to.

9 Q. 209?

10 A. The first sentence?

11 Q. Yes.

12 A. I agree with that.

13 Q. Okay.

14 A. For the reason -- and I gave  
15 you very specific reasons, because I believe if you  
16 have careful regard to the terms of reference --  
17 the environmental impact assessment guidelines,  
18 that isn't -- core values were certainly not  
19 socio-economic effects, unless they arose from  
20 physical or biological impacts.

21 Q. As I promised before, I went  
22 to this final paragraph, and I am moving now away  
23 from the JRP process.

24 PRESIDING ARBITRATOR:

25 Mr. Kurelek, a question. Would it be too much of a

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1 cliffhanger...

2 --- Laughter

3 PRESIDING ARBITRATOR: ... if we  
4 had a break now?

5 MR. KURELEK: In fact, it would  
6 help for the drama.

7 --- Laughter

8 MR. KURELEK: All I will say is I  
9 just have one more line of questioning, and it has  
10 to do with the government decisions. So this is a  
11 good time for the break. I am done with the JRP.  
12 It is just government decisions, and then I'm done,  
13 done.

14 MR. ESTRIN: Is there somebody  
15 else after you?

16 MR. KURELEK: We can see if we can  
17 round somebody up.

18 --- Laughter

19 PRESIDING ARBITRATOR: We will  
20 have a break until 3:15.

21 MR. APPLETON: Thank you very  
22 much.

23 --- Recess at 3:01 p.m.

24 --- Upon resuming at 3:19 p.m.

25 PRESIDING ARBITRATOR: I think we

1 can resume the examination. And let me just remind  
2 you that, of course, the idea behind starting at  
3 9:00 in the morning was that we would be able to  
4 finish at 5ish, around 5:00. So let's see how that  
5 is going to work.

6 Okay, the floor is yours.

7 BY MR. KURELEK:

8 Q. I shouldn't be long at all  
9 here. One final line, as I was saying, this is  
10 about the government decisions that followed the  
11 release of the JRP report.

12 And, Mr. Estrin, if you wouldn't  
13 mind turning to -- now, we are only going to be  
14 dealing with binder 2 and 3 for the rest of the  
15 cross. So this is binder 2, and it is the terms of  
16 reference, again, the JRP agreement. I've got a  
17 binder, a mysterious binder.

18 A. Sorry, that is the one the  
19 panel provided to me of Mr. Rankin. Sorry, what  
20 tab?

21 Q. R-27 in binder 2.

22 A. Yes, mm-hm.

23 Q. And I am going to turn you,  
24 Mr. Estrin, to a different part of this document.  
25 This is page 5. So we are still in the agreement

1 part, not the terms of reference part. When you  
2 are there, just let me know.

3 A. Yes.

4 Q. I am just going to ask you  
5 what I view as some innocuous questions. I want to  
6 make sure you agree with me that if you look at  
7 these sections here, in particular sections 6.4 and  
8 6.6 of the JRP agreement, would you agree with me  
9 that both the federal and the provincial ministers  
10 were compelled to render a decision about the  
11 project once the environmental assessment was  
12 completed?

13 A. No, I don't, and I think I  
14 say that in my report. In particular, with respect  
15 to the federal Minister, I thought that -- and it  
16 is my opinion that he had no business, but, more  
17 importantly, no authority, to accept -- to act on a  
18 report that basically concluded that the only  
19 reason it should be turned down had to do with core  
20 community values and beliefs which, as I say, is a  
21 matter of provincial jurisdiction.

22 The federal government ought to  
23 have recognized that as clearly something that they  
24 couldn't have acted on, and at the very least  
25 rejected it just on that basis alone, or told the

1 panel go back and reconsider or think about it  
2 again.

3 So I think the Minister had no  
4 authority to base a decision on that -- to accept  
5 it, rather, because it had nothing to do with  
6 federal jurisdiction.

7 Q. So you have added something  
8 to the question that I had for you. I would like  
9 to step back and just look at the JRP agreement,  
10 because I am not talking about anything about  
11 the -- I'm not going right now to the validity of  
12 the JRP report itself.

13 All I am asking you is to look at  
14 sections 6.4 and 6.6. 6.4 states:

15 "Once completed, the Panel  
16 will submit the Report, in  
17 both official languages, to  
18 the Minister of Environment  
19 and Labour, Nova Scotia, and  
20 the Minister of the  
21 Environment, Canada, and will  
22 make it public."

23 A. Mm-hm.

24 Q. Then we turn to 6.6 and 6.7.  
25 6.6 talks about:



1 "The Responsible Authority  
2 shall take into consideration  
3 the Report submitted by the  
4 Panel and, with the approval  
5 of the Governor in Council,  
6 respond to the Report."

7 A. Mm-hm.

8 Q. Do you agree that it also  
9 says:

10 "... the Responsible  
11 Authority shall take one of  
12 the courses of action  
13 provided for in subsection  
14 37(1) of the Canadian  
15 Environmental Assessment Act  
16 that is in conformity with  
17 the approval of the Governor  
18 in Council."

19 So, in other words, according to  
20 section 6.6 of the JRP agreement, the responsible  
21 authority, the federal responsible authority, had  
22 to render a decision regarding the project.

23 A. Yes. And section 37(1) also  
24 provides that whatever the RA decides is subject to  
25 the approval of the Governor in Council, as a

1 prelude, in section 1.1, and that says that,  
2 where a report is submitted by a review panel, the  
3 responsible authority has to take into  
4 consideration the report and with the approval of  
5 the Governor in Council respond to the report:

6 "The Governor in Council may,  
7 for the purpose of giving the  
8 approval referred to in  
9 paragraph (a), require the  
10 mediator or review panel to  
11 clarify any of the  
12 recommendations set out in  
13 the report."

14 And that is clearly authorization  
15 and a caveat, in my view, that if the report sends  
16 up -- is basically -- turn this down because it is  
17 a matter of it is just a provincial concern in the  
18 province, then the federal government, in my view,  
19 didn't have authority.

20 So the Minister, the RA and the  
21 Governor in Council really only had two choices.  
22 One is to turn -- to not accept the report or send  
23 it back. They couldn't act on it.

24 Q. Would you agree with me that  
25 section 6.7 is even clearer than 6.6, in the sense

1     that the Minister of the Environment and Labour for  
2     Nova Scotia, it says, "shall consider the  
3     recommendations of the panel", in this case the  
4     JRP, "and either approve with conditions or reject  
5     the project."

6                     A.    It is not mandatory, in the  
7     sense that it doesn't -- it is a contractual  
8     obligation, but if the Minister of Environment of  
9     Nova Scotia was able to conclude that the rationale  
10    for the panel's recommendation was something  
11    strange and different, that it never occurred  
12    before, and took the proponent by surprise or there  
13    was no natural justice, it was clearly open to the  
14    Minister of Environment to say, I can't accept  
15    this, because there may be a failure of natural  
16    justice here.

17                    Q.    So let's just approach this  
18    from a slightly different angle, then.

19                    I will move beyond the statutes to  
20    the actual decisions themselves, and I will ask you  
21    to turn in the same binder, so this is binder 2, to  
22    Exhibit R-161. And what this is, it is a simple  
23    news release from DFO.

24                    A.    Okay, yes.

25                    Q.    The fourth paragraph down, we

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1     see:

2                     "The Government of Canada  
3                     accepts the Joint Review  
4                     Panel's October 2007 findings  
5                     that the negative effects of  
6                     this project outweigh the  
7                     benefits and it is not in the  
8                     public interest to proceed."

9                     Do you see that there, sir?

10                    A.    I see that.

11                    Q.    And do you agree with me that  
12                    in this case the federal government did make a  
13                    decision about whether or not the project, the  
14                    Whites Point project, should proceed?

15                    A.    Well, they made a decision.

16                    Q.    Yes, that is all I am asking.

17                    I am not asking about the validity of the --

18                    A.    You didn't read out what is  
19                    also a relevant quote or supposed quote from the  
20                    Minister:

21                    "The decision to accept the  
22                    Panel's findings is  
23                    consistent with the  
24                    Government of Canada's  
25                    committee to protect the

1 environment, to ensure the  
2 quality of life for  
3 Canadians."

4 Excuse me. But where does the  
5 Government of Canada get the jurisdiction to deal  
6 with beliefs and visions in a community? It is not  
7 within the context of CEAA and it is not within  
8 federal jurisdiction.

9 Q. Yes. And I am fairly certain  
10 we're going to be dealing with that next week in an  
11 argument, but I am not going to argue with you here  
12 today.

13 All I want to make sure is that we  
14 understand that, in fact, the federal government  
15 did make a decision in this case; is that correct?

16 A. Yes, they did. And actually  
17 that brings up an interesting point. Mr. Smith has  
18 said that Canada's decision was moot because it  
19 came after Nova Scotia.

20 Well, there is a very  
21 interesting -- the letter from the Minister Parent  
22 in Nova Scotia to the proponent, or whenever he  
23 announced his decision, basically said, Well, we're  
24 making this decision, but that is without prejudice  
25 to any decision that the Government of Canada would

1 make.

2 That's an exhibit in front of this  
3 Tribunal. I may be able to tell you what exhibit  
4 number it is. So it clearly -- well, it wasn't  
5 moot for Canada to make a legally valid decision  
6 later on, contrary to what I think Mr. Smith  
7 argues.

8 Q. I think you anticipated the  
9 next document I was going to refer to. Let's see  
10 if I've got this right. Are you talking about --  
11 this is Exhibit 331 in binder 3, and this is  
12 Mr. Minister Parent's letter to Paul Buxton. It  
13 looks like it is November 20th, 2007. It is a very  
14 weak date stamp.

15 A. Yes. That is the letter.

16 Q. That is the letter?

17 A. Yes.

18 Q. So what I would ask you about  
19 this letter -- and, in particular, I am referring  
20 to the fifth paragraph down -- do you agree that  
21 Nova Scotia made a decision with respect to whether  
22 or not the Whites Point project could proceed?

23 A. They made a decision, yes.

24 Q. Okay.

25 A. The paragraph I was

1     referencing is on the back of the letter, second  
2     page:

3                     "Please note that my decision  
4                     to reject the proposal has no  
5                     bearing on the pending  
6                     decision of the federal  
7                     government made in accordance  
8                     with the Canadian  
9                     Environmental Assessment  
10                    Act." [As read]

11                   Q.   That is consistent with the  
12     constitutional division of power.  Nova Scotia  
13     can't tell Canada what to do in this respect;  
14     right?

15                   A.   I would hope so.

16                   Q.   Yes.  So let's turn back to  
17     the JRP themselves and turn back, if we could, to  
18     R-27, the JRP agreement.  Would you agree -- so if  
19     we can turn to item 6.3, we're on the home stretch  
20     here.  You're there?

21                   A.   Yes.

22                   Q.   6.3, it says:  
23                     "The Report shall include  
24                     recommendations on all  
25                     factors set out in section 16

1 of the Canadian Environmental  
2 Assessment Act and, pursuant  
3 to Part IV of the Nova Scotia  
4 Environment Act, recommend  
5 either the approval,  
6 including mitigation  
7 measures, or rejection of the  
8 Project."

9 Do you see that there, sir?

10 A. Right.

11 Q. Okay. Now, I just want to  
12 make sure we are on the same page here.

13 Do you agree with me that the JRP  
14 itself understood its mandate was not to decide  
15 whether the project could proceed, but merely make  
16 recommendations to that effect? Do you agree with  
17 that? I can take you to a document if you're  
18 doubting.

19 A. Yes, I'm sure they understood  
20 that, but they want further than that, because they  
21 also ended up saying that whatever the effects were  
22 not justifiable in the circumstance.

23 That is not their mandate. That  
24 was the mandate of the Government of Canada under  
25 CEAA, and to the extent that they went into that



1 area, I think it's not within their mandate.

2 Q. Well, let's turn to an  
3 example of what it seems the JRP understood to be  
4 their role. This is R-457 in binder 3.

5 A. Sorry, what is that?

6 Q. R-457. This is an excerpt  
7 from the transcript, volume 1 of the JRP hearings.  
8 That is just an excerpt. If you look at the last  
9 full paragraph on page 2, you will see -- and this  
10 is, I believe, Dr. Fournier. Yes, it is, at the  
11 top there, opening remarks. And he says:

12 "And the final product from  
13 this joint panel will be a  
14 report, and that report will  
15 offer advice to the two  
16 Ministers."

17 That being the federal and  
18 provincial Ministers:

19 "And I would like to stress  
20 to you that we are not a  
21 decision-making body. We are  
22 an advisory body. We provide  
23 advice to the two Ministers,  
24 and the Ministers make the  
25 decision." [As read]

1                   So, again, would you agree with me  
2   that the JRP themselves understood that they were  
3   not deciding this matter. They were merely  
4   empowered to make recommendations regarding the  
5   project?

6                   A. Well, that's what he said. I  
7   have no dispute that that is what he said in the  
8   transcript.

9                   Q. Would you agree with me that,  
10  in fact, the JRP fulfilled that mandate in the  
11  sense that their report, which is R-212 in V3, they  
12  did in fact make recommendations to the Minister?  
13  Do you agree with that? I can take you to the  
14  page.

15                  A. They certainly made  
16  recommendations.

17                  Q. Thank you, sir, for your  
18  patience. Those are my questions.

19                  PRESIDING ARBITRATOR: Thank you  
20  very much. I will give the floor to Mr. Nash. The  
21  floor is to Mr. Nash.

22  RE-EXAMINATION BY MR. NASH:

23                  Q. Mr. Estrin, in answer to one  
24  of counsel's questions this morning, you made  
25  reference to public participation in the context of

1 a review panel, and you talked about the  
2 participant funding program.

3 A. Mm-hm.

4 Q. And it was in the context of  
5 whether a comprehensive study would attract  
6 participant funding at the time.

7 Have you seen any documents to  
8 suggest that this project was referred to a JRP for  
9 the purpose of getting participant funding?

10 A. No. And I saw that first in  
11 Mr. Smith's reports, and I was taken aback. My  
12 reaction was that was ex post facto  
13 rationalization.

14 Q. You also referred to the two  
15 bases upon which a matter could be referred to a  
16 JRP, significant adverse environmental effects and  
17 public concerns.

18 Is there any case in the history  
19 of the CEAA referred to a JRP based on public  
20 concern?

21 A. No. And the reason is one I  
22 discussed briefly in answer to a question this  
23 morning, and that is the federal government is  
24 basically unprepared to do it, because it would  
25 open the floodgates. There would be no -- unless

1    they had objective criteria for determining what is  
2    public concern and how much public concern should  
3    allow them to do this, in the absence of having  
4    objective criteria, there is no way in which they  
5    could make a reasonably defensive case as to why  
6    they did it in one situation and not another.

7                    I have actually seen advice  
8    provided by the president of the Canadian  
9    Environmental Assessment Agency to the former  
10   Minister of Environment, federal Minister of  
11   Environment, Christine Stewart, that said, Don't  
12   use section 28 for that very reason.

13                   I have a copy of that document.

14                   Q.   Thank you.  Could you turn,  
15   please, to Exhibit R-301.

16                   A.   Sorry, where is that?

17                   Q.   Which is in bundle 3 of the  
18   bundle, volume 3 of 3.  You will recall that this  
19   is a letter from Dr. Brodie -- I am not sure if he  
20   is a doctor -- Paul Brodie to Mr. Buxton dated June  
21   19th, 2002.

22                   This letter was put to you in  
23   cross-examination, and it is in reference to  
24   whales.  Do you recall seeing that this morning?

25                   A.   Yes.

1                   Q.    What significance would this  
2   letter have for you if federal officials themselves  
3   had concluded that blasting on the site with a  
4   sufficient setback would have no significant  
5   adverse environmental effect on marine mammals or  
6   fish?

7                   A.    It would be irrelevant at  
8   that point, and I find that whole issue to be quite  
9   perplexing, because in the Belleoram case study, it  
10  was going to be a huge quarry.  It was -- what was  
11  it -- three times the size.  I don't know.  
12  Mr. Rankin had all of the statistics.  It was much  
13  bigger than Whites Point.

14                   And in that case, blasting was to  
15  occur 100 metres back from the sea, which had  
16  whales and all of the other kinds of -- many of the  
17  same kinds of fish and marine life.  And there was  
18  no issue.  There was no issue about setbacks.  That  
19  was fine.

20                   And that is why, you know, one of  
21  the reasons I brought out the Belleoram case study,  
22  in fact.

23                   Q.    You were referred earlier, or  
24  at least discussed in response to a question from  
25  counsel the necessity of objective and scientific

1 evidence.

2 A. Mm-hm.

3 Q. Could you turn, please, to  
4 Exhibit C-704?

5 A. Is that...

6 Q. Sorry, C-764.

7 A. Which is?

8 Q. Which is the

9 Hamilton-Wentworth case.

10 A. If you provided me with a  
11 copy, tell me where it is.

12 Q. You should have a copy in  
13 front of you.

14 A. Sorry.

15 Q. C-764. It is the Red Hill  
16 decision. We will have that put up on the screen,  
17 please. We will go to page 31 of 33.

18 MR. SPELLISCY: Can I interject  
19 here briefly? I am not sure where counsel is going  
20 with this. I didn't ask any questions about the  
21 case. We certainly never put this document to him.  
22 I understand the witness desired to talk about this  
23 case, but I certainly never asked any questions on  
24 it.

25 It seems to me that the questions

1 on objective scientific evidence weren't in  
2 relation to this. I'm not sure where counsel is  
3 going, but it seems to me we're staying outside of  
4 the grounds of cross-examination.

5 MR. NASH: The discussion, the  
6 exchange, was in respect to which criteria should  
7 be taken into account and the basis upon which a  
8 decision should be made.

9 Mr. Estrin's evidence was that it  
10 should be made on a scientific and objective basis.  
11 I am simply turning him to a paragraph of this case  
12 which deals with that.

13 BY MR. NASH:

14 Q. And that is paragraph 174, if  
15 you can, please, Mr. Estrin.

16 A. Mm-hm, yes.

17 Q. Could you read that out,  
18 please?

19 A. Yes, I can read it out, and I  
20 think it has been read out. It may be helpful to  
21 understand the context of this, but I am happy to  
22 read it out. This is not -- well, I think the  
23 context is important.

24 I was counsel on this case, so I  
25 can indeed tell you what the context was. The

1 trigger in this case was a Fisheries Act approval  
2 that needed to be obtained to complete the  
3 expressway. There was a lot of public concern  
4 about this expressway being completed, because it  
5 was in a river valley or in a valley.

6                   And CEAA was -- and at the end of  
7 the day, a federal-only panel was established to  
8 look at this issue. And how did it get to a panel  
9 review? Well, it wasn't -- I mean, yes, there was  
10 public concern, but they didn't refer it based on  
11 public concern for the very reason I articulated  
12 earlier. It was in that case where there was a  
13 memo, a briefing memo, from the president of the  
14 Canadian Environmental Assessment Agency saying:  
15 If you're going to send it to a panel, don't do it  
16 based on public concern, because that will open the  
17 floodgates and we can't handle it.

18                   So the only other basis is  
19 significant adverse environmental effects. Well,  
20 the fisheries people had said, Well, moving this  
21 creek is not going to cause any significant adverse  
22 environmental effects. In fact, it will actually  
23 improve the environment, because this creek was  
24 eroding due to urbanization. It was spilling over  
25 its banks. So they had no basis to refer it to a



1 panel on that issue.

2                   So what was happening behind the  
3 scenes, as we discovered, was that Environment  
4 Canada was looking at how taking down a whole bunch  
5 of trees to complete the expressway in the valley  
6 might impact migratory birds. Migratory birds are  
7 federal jurisdiction matter under the treaty  
8 between Canada and the United States.

9                   PRESIDING ARBITRATOR: Missouri v.  
10 Holland.

11 --- Laughter

12                   MR. APPLETON: Exactly.

13                   THE WITNESS: Yes. But the  
14 problem was that they didn't actually have  
15 jurisdiction -- they had no jurisdiction to stop  
16 the trees. They had to make the -- they had to  
17 make a link between cutting down what was allegedly  
18 40,000 trees -- that was the number that was kicked  
19 around, it was much less -- and trying to prove  
20 that that might have an impact on migratory birds.

21                   So Environment Canada behind the  
22 scenes put their minds to whether or not they could  
23 make that scientific link. And the City of  
24 Hamilton knew nothing about that, but it was that  
25 report that was supposedly going to be used as a

1 basis to conclude there was significant adverse  
2 environmental effects.

3 Well, the report from Environment  
4 Canada actually didn't reach that conclusion, but  
5 the conclusions were altered by some people at DFO  
6 before it got to the Minister to actually make it  
7 say that it would have significant adverse  
8 environmental effects. The report itself -- and  
9 this is what the Justice Dawson is referring to  
10 here in these paragraphs. She's quoting. In fact  
11 the actual analysis paper by the scientists at DFO  
12 said -- and it is all being quoted there, halfway  
13 down the page under the -- say under that heading:  
14 "Recommended ECB" -- Environmental Conservation  
15 Branch -- "Position:

16 "We have never had such a  
17 detailed data set to review  
18 in the context of an EA.  
19 Despite the existence of such  
20 an excellent baseline data  
21 set, it is not possible for  
22 DOE to accurately predict the  
23 effects of the RHC Expressway  
24 ... (VECs) such as the narrow  
25 and locally significant

00282

1                   migratory bird corridor. The  
2                   science associated with  
3                   predicting such effects is  
4                   extremely weak, and the  
5                   effects of similar local  
6                   projects, such as the ...  
7                   Parkway, in Toronto, have not  
8                   been documented. In addition,  
9                   there are no examples from  
10                  other jurisdictions in the  
11                  literature, of the effects of  
12                  such projects on migratory  
13                  birds."

14                  And then the paragraph you asked  
15    me to:

16                  "This is not to say that  
17                  scientific certainty is  
18                  required as to the existence  
19                  of a deleterious effect on  
20                  migratory bird populations in  
21                  order for a referral to panel  
22                  review to be properly  
23                  grounded. However, there must  
24                  be a valid basis on which to  
25                  conclude that a real

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1 possibility exists that a  
2 panel would be able to  
3 conclude that, in this case,  
4 there would be a significant  
5 adverse effect on migratory  
6 bird preservation. That  
7 necessary condition to engage  
8 the process was absent. The  
9 necessary relevant  
10 information was noted to  
11 likely be unavailable for a  
12 long time and might never be  
13 available."

14 And then she quotes from something  
15 that obviously the scientists didn't write in that  
16 paper and was added on by somebody else. The  
17 recommendation said:

18 "The main purpose of the  
19 panel review would be to  
20 independently explore the  
21 need for the project,  
22 'alternative means' to  
23 completing the project..."

24 I mean, that is what people behind  
25 the scenes wanted to see a process to be used for,

1 to second-guess what was a provincial project. And  
2 they were doing it in this manner behind the  
3 scenes. Sorry, I probably went beyond your  
4 question.

5 MR. SPELLISCY: I would actually  
6 like to point exactly that out. That is the  
7 problem when we start getting into essentially what  
8 is a direct examination on re-direct, is that we've  
9 now had a long dissertation on the Red Hill case,  
10 and it was exactly the basis of my objection.

11 I didn't ask any questions on it.  
12 So we have now had a bunch of evidence come in that  
13 wasn't asked on cross, and that was the exact point  
14 of my objection.

15 And I think that highlights the  
16 concern that we have, and we'll have to look at  
17 this to see if we have any questions ourselves, but  
18 I think that is the exact reason why re-direct  
19 should be limited to what is in cross and not be  
20 allowed as an opportunity for direct examination on  
21 matters that weren't raised.

22 MR. NASH: Well, I don't agree  
23 with the position of my friend, but I will go on.

24 BY MR. NASH:

25 Q. Taking paragraph 174 only

1 into account, what kind of evidence would you have  
2 expected to see of a scientific and objective  
3 nature with respect to the marine terminal and the  
4 quarry in this case?

5 A. I would have expected to  
6 see -- well, first of all, as I said earlier in my  
7 cross-examination, it is my opinion, based on the  
8 policy documents of the Canadian Environmental  
9 Assessment Agency, that they had no -- it was  
10 completely inconsistent with their policy across  
11 Canada to even try to refer this to a review panel  
12 before a screening or comprehensive study had been  
13 completed, because those are the things that they  
14 want to try and do before they refer to a review  
15 panel in order to know whether or not there is  
16 grounds for significant adverse environmental  
17 effects.

18 So if they're jumping the gun,  
19 they at least needed to definitely have that  
20 objective scientific evidence.

21 And I can do no better, in a way,  
22 to refer you to Mr. Connelly's expert report. I  
23 couldn't find it before, but in paragraph 77 of his  
24 expert report, under the heading "The significance  
25 of adverse environmental effects", it says:

1                   ""The Act does not does not  
2                   define the terms 'adverse; or  
3                   'significant'. However, the  
4                   Agency has prepared a  
5                   Reference Guide to assist in  
6                   determining if the  
7                   environmental effects are  
8                   adverse, significant, and  
9                   likely to occur. This  
10                  determination is made on the  
11                  basis of scientific analysis  
12                  and interpretation, and  
13                  public values for the  
14                  environmental components that  
15                  may be affected by a  
16                  project."

17                  And then he says:

18                  "The Reference Guide sets out  
19                  the following three step  
20                  process to determine if the  
21                  environmental effects are  
22                  adverse, significant and  
23                  likely to occur."

24                  Step one, are they adverse? Then  
25                  he describes how to deal with that. Secondly, are

1 the adverse effects significant?

2 "The Reference Guide sets out  
3 the following five criteria  
4 for determining if an adverse  
5 environmental effect is  
6 significant after the  
7 application of mitigation  
8 measures.

9 "Step 3, Are the significant  
10 adverse environmental effects  
11 likely to occur?"

12 The reference guide provides for  
13 two criteria to assist in determining that.

14 If they were going to observe  
15 their own policy, then they would have done  
16 something like that. I saw nothing of that nature.

17 Q. For either the marine  
18 terminal or the quarry?

19 A. Correct.

20 Q. You were asked a number of  
21 questions on Belleoram. And in that regard, you  
22 were asked questions, as I recall, about whether  
23 you understood the environment or, as a scientific  
24 matter, knew the environment of the Belleoram  
25 quarry.



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1                    Could you turn, please, to Exhibit  
2 C-454, which should be in front of you?

3                    A.    All right.

4                    Q.    It's an email exchange.

5                    A.    Mm-hm.

6                    Q.    And you will see at the top,  
7 the original message is from Barry Jeffrey in  
8 Dartmouth?

9                    A.    Yes.

10                   Q.    And going down, just  
11 comparing -- he's talking about panels. And he's  
12 talking about Whites Point, about halfway down, the  
13 Whites Point halfway down the page?

14                   A.    Mm-hm.

15                   Q.    Then just above Brunswick  
16 Pipeline, there is a paragraph. Could you read  
17 that out, please?

18                   A.    "It should be noted", that  
19 paragraph?

20                   Q.    Yes.

21                   A.    "That a second large quarry  
22 and marine terminal has been  
23 proposed for Belleoram on the  
24 south coast of NL..."

25                   Or Newfoundland:

1 "Many of the environmental  
2 issues will be similar. That  
3 project will be at least  
4 subject to a comprehensive  
5 study under Canadian  
6 Environmental Assessment  
7 Agency, Minister of  
8 Environment involved in  
9 decision-making." [As read]

10 Q. Is that what you had in mind  
11 when you referred to the Belleoram environment and  
12 the Whites Point environment as being similar?

13 A. Well, just in part. I mean,  
14 here we have, though, some of the same DFO people I  
15 believe that were involved in the Whites Point  
16 matter -- the names ring a bell, the people  
17 involved in these emails -- saying that they  
18 understood themselves that this issue -- that  
19 Belleoram and Whites Point would have many of the  
20 similar environmental issues.

21 But, you know, we don't have to --  
22 in order to understand that, they're absolutely  
23 right. If you look at my appendix E on Belleoram,  
24 it --

25 Q. That is in your report?

1                   A.    It is, yes.  And I think that  
2    is really a very important summary of the -- well,  
3    it is not a summary.  It actually details the....

4                   Q.    Let's see if we're all with  
5    you here.  Volume 1 of 3 is the first document, and  
6    are you going to appendix E?

7                   A.    I am going to appendix E.  
8    Mr. President and Members of the Tribunal, what I  
9    did in this case was I looked at all of the  
10   documents that were produced about Belleoram under  
11   the disclosure materials that were made available.  
12   And in appendix E, there is almost -- there's an  
13   executive summary or a summary on the first  
14   two-and-a-half pages, and then the rest of it gets  
15   into detail.

16                   But what is really remarkable  
17   about this is that -- well, first thing is to go to  
18   the chart at the end just to compare them.  If you  
19   go to the chart that is at the following page, 16,  
20   I think that provides a summary of the situation in  
21   terms of the size, and it shows how much bigger  
22   Belleoram was.

23                   But in Belleoram, they managed to  
24   scope out the quarry.  This was described by the  
25   proponent as a rock quarry and marine terminal.  So

1 one of the obvious discrepancies in treatment  
2 between Belleoram and Whites Point was federal  
3 officials found it apt to only include the marine  
4 terminal, despite the proponent itself described it  
5 as one project.

6                   And what is also interesting about  
7 how this project seemed to sail through the process  
8 compared to Whites Point is this was a project, if  
9 you look just coming back to the first page of my  
10 appendix E, financially supported by an agency of  
11 the Government of Canada, the Atlantic Canada  
12 Opportunities Agency.

13                   The ACOA was under the supervision  
14 of a federal cabinet Minister and its specific  
15 mandate was to promote opportunities for economic  
16 development in this region.

17                   So here we had a proponent, a  
18 private sector proponent, who was proposing the  
19 same type of activity, larger than the Whites  
20 Point, in a situation where the Government of  
21 Canada was providing financial assistance, and this  
22 proponent didn't get obstacles thrown in its -- at  
23 it. It got a much easier ride.

24                   And there is many -- and yet it  
25 was the same type of environment. For example,

1   aside from the fact that the quarry was excluded,  
2   they looked at the same kind of issues that were  
3   arising in Whites Point. They looked at ballast  
4   impacts on local fisheries. They looked at many  
5   things.

6                   For example, without taking a lot  
7   of time, they looked at -- well, it is hard to skip  
8   at it. But let me just -- if you turn to the third  
9   page, under the heading "Summary and extracts from  
10  federal files showing positions taken", originally  
11  it was recognized that there was going to be  
12  triggers on the land, as well as in the water.

13                   If you look, it says they were  
14  going to infill a lagoon, they were going to create  
15  stream crossing, creation of a man-made pond,  
16  dewatering ponds. And this originally would have  
17  triggered the Fisheries Act.

18                   And there is a map which shows  
19  those activities. Then we had blasting. If you  
20  come to page 4 in the middle of the paragraph:

21                   "Also the project would have  
22                   required blasting to occur  
23                   within 100 meters of the  
24                   shoreline and as close as 25  
25                   meters. In an email of June

1 the 14th, Marvin Barnes..."

2 And this will be an exhibit in

3 this proceeding:

4 "... regional manager

5 environmental assessment for

6 DFO, sent to other federal

7 officials impact of blasting

8 on adjacent finfish,

9 aquaculture sites near

10 Belleoram, Newfoundland. He

11 indicated that while they had

12 received input from our DFO

13 expert in blasting impacts,

14 that advice assumed that at

15 the onset of blasting, the

16 distance to water's edge

17 would be greater than 86

18 meters and would become

19 greater as the quarry

20 expands. Therefore, it was

21 further assumed there would

22 be no impact at all to either

23 wild or caged fish. However,

24 he then got information

25 blasting will occur about 25

1 meters from the shoreline and  
2 there would be small blasting  
3 within 10 to 15 meters of the  
4 shoreline for road  
5 construction." [As read]

6 So it is clear, as I say, pausing  
7 at that point, as of that date there were two clear  
8 triggers for DFO involvement as an RA under CEAA in  
9 this project, use of on-land water bodies and  
10 potential HADD to fish, which would were the  
11 harmful alteration and destruction of fish habitat  
12 section 35 trigger, as well as blasting activities  
13 near the shoreline that could potentially create  
14 impacts to fish.

15 So they discussed how all of this  
16 would trigger section 35(2) of the Fisheries Act.  
17 And if you skip to the middle of page 5:

18 "Therefore, as of July 1st,  
19 2006 DFO had concluded that  
20 CEAA was triggered by the  
21 activities involved with the  
22 quarry itself and not just  
23 the marine wharf." [As read]

24 But what was also happening here  
25 was that even so, DFO was trying to lessen the

1 process by which CEAA would be applied. The email  
2 proposes that the construction of the marine wharf  
3 would be subjected to a comprehensive study and  
4 other components listed above would be subjected  
5 only to a screening.

6 So that, to me, is a complete  
7 inconsistency with what they were doing at the same  
8 time at Whites Point. As I say in the next  
9 paragraph, pausing here, we can observe that DFO  
10 was acting at this point inconsistently with its  
11 approach to Whites Point.

12 In the case of Whites Point, the  
13 blasting was considered a major issue. The quarry  
14 was regarded as an element of the entire CEAA  
15 exercise. In the case of Belleoram, even though  
16 quarrying was to take place within 10 to 25 meters  
17 of the shoreline, as well as further away, DFO  
18 ignored that fact completely as a basis for  
19 applying CEAA.

20 Further, DFO was prepared to limit  
21 the way in which CEAA was applied to Belleoram so  
22 as to only do a screening, even though this was the  
23 development of a new quarry, and that in and of  
24 itself qualified for a comprehensive study.

25 So it seemed to me that even from



1    this early date, federal officials were striving to  
2    do as little as possible to apply CEAA to this  
3    federally supported project.

4                   And then DFO -- and then Transport  
5    Canada, which was the responsible authority in  
6    respect of the Navigable Waters permit, now  
7    indicated by this date they wouldn't be an RA in  
8    regard to the marine terminal.

9                   They said, well, somehow we can --  
10   we can conclude that this is not going to interfere  
11   with navigation. We won't be an RA for that.

12                  MR. SPELLISCY: I'm sorry, we have  
13   been going on for a while. We are now having  
14   Mr. Estrin read from his report into the record.  
15   We can all read his report. That serves as his  
16   direct testimony.

17                  The questions on Belleoram were  
18   fairly limited in my cross. I have let him go on  
19   for a long time, but at this point I think I have  
20   to object. This is not an opportunity for direct  
21   examination. It is not an opportunity for  
22   Mr. Estrin to simply read from the record into his  
23   report. That is not what this is for.

24                  PRESIDING ARBITRATOR: Yes.  
25   Maybe, Mr. Nash, you could keep Mr. Estrin to short

1     answers with a bit more --

2                     BY MR. NASH:

3                     Q.     Perhaps we can turn to  
4     Exhibit C-34, which is the JRP report, and if we  
5     could have that up on the screen; Exhibit C-34.

6                     And if you could go to page 61,  
7     this was the page you referred to this morning. I  
8     think you held the actual JRP report up showing the  
9     marine terminal or dock design at Whites Point. Do  
10    you recall that?

11                    A.     Yes.

12                    Q.     Specifically in relation to  
13    Belleoram, could you just comment on the extent of  
14    the expected -- what you, at least from your  
15    perspective -- I understand you're not a scientist,  
16    but from your perspective as a lawyer, an  
17    environmental lawyer specialist, can you comment on  
18    the extent of the damage to the seabed, and then I  
19    am going to take you to a diagram of the marine  
20    terminal in Belleoram, because that was the context  
21    in which you raised that this morning?

22                    MR. SPELLISCY:   Again, I don't  
23    want to be obstructionist here, but we are now  
24    asking him to comment on the question of the marine  
25    terminal at Belleoram, which is something that I

1 never asked upon, and we're now going, again,  
2 beyond what the scope of re-direct examination  
3 should be.

4 So, again, I put in my objection  
5 to that. This is not what we're supposed to be  
6 doing here.

7 MR. NASH: It was in the context  
8 of an answer given by Mr. Estrin to one of  
9 counsel's questions. He specifically referred to  
10 that document that was up on the screen.

11 PRESIDING ARBITRATOR: Yes. But  
12 I'm afraid that Mr. Estrin will go into this issue  
13 in his rather broad way.

14 MR. NASH: We will --  
15 Mr. Estrin --

16 PRESIDING ARBITRATOR: The thing  
17 was mentioned. I remember the diagram was  
18 mentioned.

19 MR. NASH: Yes, it was, and it was  
20 in the context of a comparison to Belleoram. So  
21 what I wanted simply to do was show the two  
22 diagrams and compare them, so that his answer could  
23 be put in context.

24 BY MR. NASH:

25 Q. And it is a simple question

1 for you, Mr. Estrin. You don't have to read  
2 appendix E again for us.

3 A. Yes, right.

4 Q. But, thank you.

5 A. If I may just have a moment.  
6 I just want to remind myself of the specific facts,  
7 which I know I did summarize, so I don't have to  
8 extend the discussion.

9 There is a summary of Belleoram --  
10 a summary contained in my first report beginning at  
11 paragraph 37, and my recollection, Mr. Nash, is  
12 that -- I can't seem to put my fingers on it right  
13 now. There was going to be a rock -- show me a  
14 diagram. I think I can explain it, but..

15 PRESIDING ARBITRATOR: I am afraid  
16 this is going to turn into --

17 MR. NASH: It's not going to. I  
18 will put the Exhibit C-190 in front of the -- if we  
19 can put that on the screen.

20 MR. SPELLISCY: Is this a document  
21 that I actually asked about in cross-examination?  
22 Can I get clarification?

23 MR. NASH: It refers -- it is a  
24 document or at least it is a subject matter which  
25 refers -- which was referred to in

1 cross-examination by Mr. Estrin.

2 BY MR. NASH:

3 Q. If you go, Mr. Estrin, to  
4 page 1V of that exhibit.

5 A. One, what?

6 Q. IV. It may be IV. There we  
7 go. And you go to the -- you were comparing the  
8 habitat at --

9 A. Right.

10 Q. In fact --

11 A. Oh, yes.

12 Q. Mr. Spelliscy and Mr. Estrin,  
13 you had an exchange with counsel regarding the  
14 extent of habitat affected by marine terminal at  
15 one as opposed to the marine terminal at another?

16 A. That's right. Belleoram, it  
17 says here, and that is my recollection --

18 Q. If you could, there in that  
19 first paragraph, "it was determined"?

20 A. "It was determined that 1578  
21 square meters of lobster  
22 habitat would be lost due to  
23 the marine terminal's  
24 construction. This can be  
25 mitigated by adherence to

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1 fish habitat compensation  
2 strategy." [As read]

3 Q. And can you relate how that  
4 comparison was to be made with respect to the  
5 effect on habitat at Whites Point?

6 A. Well, at Whites Point the  
7 marine terminal, as I think the panel heard  
8 yesterday, was -- the actual impacted area of  
9 habitat from the marine terminal construction  
10 itself was, I believe, somewhere in the  
11 neighbourhood of 40 square metres, or something to  
12 that effect.

13 Q. Yes.

14 A. So a great deal larger  
15 habitat was going to be actually lost at Belleoram.  
16 Lobster habitat would be lost, 40 square metres  
17 compared to 1500.

18 PRESIDING ARBITRATOR: Excuse me,  
19 if I could interrupt you, my memory is apparently  
20 not too good, but what I remember is Mr. Spelliscy  
21 made a remark he was not interested in your going  
22 into details, and we are now hearing precisely  
23 these details. I think that doesn't serve a  
24 purpose.

25 BY MR. NASH:

1                   Q.    You referred to the EIS  
2 guidelines in response to a question from counsel  
3 this afternoon.  You referred to Exhibit C-120.

4                   A.    I don't recognize them by  
5 number, but...

6                   Q.    Ms. K will assist you here.  
7 If we can put page 33 --

8                   A.    Thank you.

9                   Q.    -- up on the screen.  And I  
10 don't think we have the document up on the screen.  
11 When you were referring to it, but if you could  
12 just go back to the question that you were  
13 responding to and review 9.3, existing human  
14 environment.  I'm sorry, it is not the -- it is the  
15 incorrect page.

16                  A.    It was -- the one I was  
17 referred to was 10.3.3, I think.

18                  Q.    Yes.  And that is at page 45.

19                  A.    Forty-nine?

20                  Q.    You were looking in the  
21 general subject area of human environment impact  
22 analysis.  Do you recall that?

23                  A.    Yes, okay.  So, yes.

24                  Q.    Starting at page 45.  And you  
25 reviewed a number of areas very quickly, but what

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1 were the significance of those areas for you?

2 A. I was specifically, I think,  
3 referring to... Let me check my notes, because I  
4 want to make sure I have got the same section. It  
5 was in 10, and it was point 3. So I am wondering  
6 if I could just find my notes.

7 10.3.1 is I believe what I was  
8 referring to. That is page 45.

9 Q. Forty-five, community  
10 profile?

11 A. Yes. Right. It is under  
12 that heading. So it was the first two paragraphs  
13 under community profile: Describe and evaluate the  
14 beneficial adverse effects of the project on the  
15 VEC's select for the human environment.

16 And then it goes on to say:

17 "Describe and evaluate  
18 changes to health and to  
19 social and economic  
20 conditions that may occur as  
21 a result of project-related  
22 impacts to the biological and  
23 physical environments."

24 So the first -- those last three  
25 lines, in particular, that I was focussing on,



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1 "describe and evaluate changes to human health",  
2 but, more importantly, we were talking about  
3 socio-economic.

4 Q. Yes.

5 A. This is one of the places  
6 where they say how to evaluate and what they  
7 want -- expect to be evaluated under socio-economic  
8 conditions.

9 And here they say:

10 "Describe and evaluate  
11 changes to socio-economic  
12 conditions that may occur as  
13 a result of project-related  
14 impacts to the biological and  
15 physical environments."

16 So it doesn't say evaluate changes  
17 to socio-economic conditions that may occur as a  
18 result of the imposition of something that is  
19 foreign to the community.

20 It says evaluate those things that  
21 may occur as a result of project-related impacts to  
22 the biological and physical environment.

23 And from my reading of that, that  
24 would have connoted to any proponent, anybody  
25 working with the proponent, that it was the changes

1 arising from biological and physical environment  
2 impacts that you had to take into account.

3 Q. Okay. One last area,  
4 Mr. Estrin. Could you go to your -- well, just  
5 before we go there, you were asked a number of  
6 questions this afternoon about Dr. Fournier.

7 A. Mm-hm.

8 Q. And his involvement in the  
9 Sable Gas review panel. And if you go to your  
10 first report, paragraph 208, it was in the context  
11 as well of a discussion about the CCV, community  
12 core values. I'm sorry, I think I've got the  
13 wrong...

14 I apologize. It is your second  
15 report, paragraph 208.

16 A. Yes, right.

17 Q. Could you read that out,  
18 please?

19 A. "It is instructive to compare  
20 how the Joint Review Panel  
21 for the Sable Gas projects  
22 which involved the  
23 development of offshore gas  
24 resources in a related  
25 pipeline in Nova Scotia dealt

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1 with the community's concerns  
2 about the pipeline's  
3 interference with the 'rural  
4 quality of life'..."

5 That is what they were discussing:

6 "... and how the Whites Point  
7 quarry panel dealt with  
8 community core values. The  
9 Sable Gas panel, which was  
10 chaired by Robert Fournier,  
11 who also chaired the Whites  
12 Point quarry, JRP, it was not  
13 enough for members of the  
14 community to voice their  
15 disapproval of the project.  
16 Rather, the panel insisted on  
17 evidence of an adverse impact  
18 on the community."

19 And that is a quote from that  
20 report:

21 "The panel appreciates the  
22 high value that rural  
23 residents place on their  
24 life-style and the fear that  
25 the pipeline could undermine

1                   this life-style. However,  
2                   the panel is not convinced  
3                   that a properly designed,  
4                   constructed and maintained  
5                   pipeline would have the  
6                   significant adverse  
7                   environmental effects that  
8                   some intervenors fear."[As  
9                   read]

10                   Q.   Is that in your opinion the  
11                   appropriate way to deal with mitigation of effects  
12                   of beliefs and values?

13                   A.   Yes. The panel needed to --  
14                   if they were going to (a) base their decision  
15                   particularly on that factor, they needed, in my  
16                   opinion, to articulate that first, in advance.

17                   And, secondly, if they're going to  
18                   reach the conclusion that mitigation was simply not  
19                   possible, it was totally unfair of them, in my  
20                   opinion, from a natural justice perspective, to  
21                   refuse to give the proponent the opportunity to  
22                   know that that would be their conclusion and to  
23                   offer an opportunity to comment on how, from the  
24                   proponent's perspective, that could potentially be  
25                   mitigated.

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1 Q. And --

2 A. Obviously that opportunity  
3 appears not to have arisen here.

4 Q. And I misspoke. I actually  
5 have one more area. It will be very brief. If you  
6 could turn to Exhibit R-1.

7 A. Sorry, what is that?

8 Q. It is the CEAA.

9 A. Okay.

10 Q. It will be in volume --

11 A. I have my own copy.

12 Q. -- two.

13 A. Yes.

14 Q. If you go to section 21,  
15 there was discussion about section 21 this morning.

16 A. Mm-hm.

17 Q. It arises in the context of  
18 the linkage that you discussed between section 21  
19 and 23.

20 A. Yes.

21 Q. And if you just read -- well,  
22 I will read it out:

23 "Where a project is described  
24 in a Comprehensive Study List  
25 the responsible authority

1 shall..."

2 In this case, who is the  
3 responsible authority?

4 A. Well, that's a good question.  
5 I mean, originally it was both DFO and -- well, I  
6 think -- and they were also the RA for the  
7 navigable waters. I'm not sure whether Transport  
8 Canada was separate or not. I can't remember.

9 So it depends. If the only viable  
10 legitimate trigger for CEAA -- well, it was based  
11 on their own documents, there was only one trigger.  
12 That was a marine terminal. So whoever the RA was  
13 for that, I can't remember. If it was --

14 Q. Minister Thibault wrote the  
15 letter; right?

16 A. Right. So he was a Fisheries  
17 person.

18 Q. Right.

19 A. All right, so...

20 Q. He's in this case acting as  
21 the responsible authority?

22 A. Yes.

23 Q. So:

24 "The Responsible Authority  
25 shall: (a) ensure that a

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1 comprehensive study is  
2 conducted and a comprehensive  
3 study report is prepared and  
4 provided to the Minister and  
5 the Agency."

6 The Minister in this case is  
7 Minister Anderson?

8 A. Yes.

9 Q. And the agency is CEAA?

10 A. Yes.

11 Q. "... or (b) refer the project  
12 to the Minister..."

13 And the Minister in reference  
14 there is the Minister of Environment, who is  
15 Minister Anderson; correct?

16 A. Yes.

17 Q. "... for a referral to a  
18 mediator or review panel in  
19 accordance with section 29."

20 A. Right.

21 Q. So that section there, do you  
22 understand that section not to actually be a  
23 section which refers it to the review panel? It is  
24 a section which gets it to the Minister; is that  
25 your understanding?

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1                   A.    Right.  And that is where  
2   section 23 comes into play, because if you look at  
3   the end of section 23, it refers back to section  
4   29.

5                   Q.    It says in section 23, "The  
6   Minister", who is the Minister of Environment,  
7   "shall take one of the following courses of  
8   action", and then goes on to say...

9                   So section 21 is not actually the  
10  section which refers the matter to a review panel.  
11  It is the section which gets it to the Minister of  
12  Environment; correct.

13                  A.    Correct.

14                  Q.    Section 23 is what gets it to  
15  the review panel?

16                  A.    Yes.

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

19                  PRESIDING ARBITRATOR:  Thank you,  
20  Mr. Nash.  Do we have questions --

21                  MR. SPELLISCY:  If we could have  
22  one second to confer with my colleagues and we will  
23  advise.  Hopefully not, but let me see.

24  [Reporter's Note:  Mr. Spelliscy Mr. Little and  
25  Mr. Kurelek confer.]



1 MR. SPELLISCY: Thank you. We  
2 have no further questions for Mr. Estrin.

3 PRESIDING ARBITRATOR: All right.  
4 Thank you very much. So we have questions from the  
5 Tribunal. Who wants to start?

6 QUESTIONS BY THE TRIBUNAL:

7 PROFESSOR SCHWARTZ: Thank you.  
8 If these questions seem open-ended, they're not  
9 intended to elicit very long responses, if any.  
10 My understanding of the sequence  
11 is your original submission focussed primarily on  
12 the Federal Environmental Act. You responded to  
13 Canada's argument that any bungling under the  
14 Federal Act was moot, because the Nova Scotia  
15 process would justify the outcome.

16 Just to be clear, it remains your  
17 view -- I know this is hard for you to suspend your  
18 disbelief, but even if everything was lawful and  
19 reasonable from the Nova Scotia perspective, the  
20 panel still had a duty to go systematically through  
21 the federal list of factors in section 16 of the  
22 Canadian Environmental Assessment Act?

23 THE WITNESS: Yes.

24 PROFESSOR SCHWARTZ: It would have  
25 been rendered moot by the Nova Scotia --

1 THE WITNESS: Right.

2 PROFESSOR SCHWARTZ: Okay. Now --

3 THE WITNESS: Yes.

4 PROFESSOR SCHWARTZ: --I asked  
5 this question of Mr. Rankin this morning, and you  
6 actually touched on it briefly in  
7 cross-examination, I think, but I don't know if  
8 that was your considered position or just a casual  
9 comment.

10 Faced with a report by a Joint  
11 Review Panel, I'm the Minister and I've got a Joint  
12 Review Panel report that I think didn't do its job  
13 properly under its mandate.

14 Do I have the authority to send  
15 that back for a reconsideration and do-over by the  
16 panel?

17 THE WITNESS: Well, in specific  
18 terms, the only authority is the one that is set  
19 out in section 40, whatever it is. Sorry, 37(1.1),  
20 which -- where the Governor in Council may require  
21 the review panel to clarify any of the  
22 recommendations set out in the report.

23 And it doesn't really get much  
24 clearer than what those words say. Clearly, there  
25 is no -- but with those words it is also clear that

1 the Minister and the Governor in Council are not  
2 stuck with what the panel said. They're entitled  
3 to go back to the panel and get clarification,  
4 which could mean a further hearing, further  
5 arguments, further something.

6 And, in fact, there was a case  
7 that went to -- where the -- where a judicial  
8 review was taken of a panel report where an  
9 environmental group, I think, challenged the report  
10 about some oil development in Alberta on the basis  
11 that climate change had not been considered.

12 And the federal court ordered the  
13 panel to reopen its hearing and deal with that  
14 issue, telling the panel it was a relevant issue.

15 And I haven't read that case in a  
16 long time, but it is of the same type of -- in  
17 other words, I think the principle is the same. If  
18 the panel didn't do something that it was required  
19 to do, take into account relevant considerations or  
20 omitted to do something relevant, then either the  
21 Governor in Council or a court is entitled to tell  
22 them to go back.

23 PROFESSOR SCHWARTZ: Okay. Thank  
24 you. Now, one possible response to the contention  
25 that the federal process -- there was no findings

1 on significant adverse effects likely to occur  
2 after mitigation, that whole formula.

3 THE WITNESS: Right.

4 PROFESSOR SCHWARTZ: Is that  
5 the -- is the inadequacy analysis, seems to be one  
6 the joint review panel engaged, and they frequently  
7 say adequacy analysis.

8 And you have given your thoughts  
9 on some of that in your opinion about whether the  
10 panel was sufficiently open to expert evidence from  
11 the experts by the proponent, and so on.

12 I asked this question of  
13 Mr. Rankin, and I wanted to ask it to you, too.  
14 Where, on the spectrum of adversarial as opposed to  
15 inquisitive, do you see a Joint Review Panel? To  
16 what extent, if any, do they have a proactive duty  
17 to seek out evidence in order to fulfil its  
18 mandate?

19 THE WITNESS: If I may, I think I  
20 do address that in fairly specific terms in my  
21 report. And I am not sure exactly. If I could  
22 just have a minute, I could probably make it  
23 quicker if I could find that.

24 I think it may be in my reply  
25 report, but I'm not sure. It is probably around

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1 page 76 of my reply report. Just a second. I  
2 don't know if someone... That's not it.

3 Sorry, I am not finding it easily.  
4 Maybe there is someone here more familiar with my  
5 report than I am at this point.

6 PROFESSOR SCHWARTZ: It's been  
7 suggested to me perhaps paragraph 241 of your  
8 report is where you address that.

9 THE WITNESS: Is this the first  
10 report?

11 PROFESSOR SCHWARTZ: Sorry, the  
12 reply report.

13 THE WITNESS: Yes. I think that  
14 may be -- yes, I do address it there. But I  
15 thought that I had -- I actually had gone beyond  
16 that to articulate where its jurisdiction lay and  
17 requirements were to do that.

18 PROFESSOR SCHWARTZ: If you are  
19 confident in your report, I don't want to hold  
20 things up, so you can let us know afterwards  
21 through your counsel. That would be just fine.

22 THE WITNESS: Okay. But  
23 definitely, in my opinion...

24 MR. APPLETON: Maybe 257.

25 THE WITNESS: 257?

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1 MR. APPLETON: Yes.

2 THE WITNESS: Sorry, it is hard to  
3 find something sometimes. Yes, thank you, I think  
4 it is just a bit further. It begins at paragraph  
5 257, under the heading:

6 "The precautionary principle  
7 does not absolve the panel of  
8 its own duty to gather  
9 information, make  
10 determinations on the issues  
11 before it. The panel is not  
12 merely a passive observer."

13 I first referred to section 34 of  
14 CEAA that says:

15 "The review panel shall, in  
16 accordance with the terms of  
17 reference, ensure that  
18 information required for an  
19 assessment is obtained and  
20 made available to the  
21 public."

22 And I point out in section 35, as  
23 you are already aware:

24 "... summon any person to  
25 give evidence orally or in

1 writing regarding matters  
2 that it considers necessary  
3 to conduct an assessment of  
4 the project."

5 Then I refer to the Alberta  
6 Wilderness case, a Federal Court decision. They  
7 place a statutory obligation on panels to actively  
8 seek out the information needed to complete an  
9 assessment of the applicant supplied for a judicial  
10 review to challenge the authorization of an open  
11 pit coal mine, and granting the application and  
12 quashing the authorization, the court considered  
13 the panel's obligation to gather information.

14 The court concluded the panel's  
15 obligation, which was rooted in CEAA and its terms  
16 of reference, was entirely consistent with the --  
17 it was entirely independent of the information  
18 gathering efforts of the proponent and other  
19 interested parties.

20 So it is at paragraph 260 where  
21 the quote from that case says:

22 "I also find the  
23 information-gathering duty of  
24 the Joint Review Panel does  
25 not depend on the project

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1                   proponent CRC's information  
2                   gathering success nor does it  
3                   depend on that of any  
4                   intervenor or interested  
5                   party. The duty is the Joint  
6                   Review Panel's to meet." [As  
7                   read]

8                   There was another case, Pembina  
9   Institute, where the court found:

10                  "As an early planning tool  
11                  environmental assessment is  
12                  tasked with the management of  
13                  future risk. Thus, the  
14                  review panel has a duty to  
15                  gather the information to  
16                  fulfil this charge." [As  
17                  read]

18                  And then there is guidance in the  
19   Minister's official guideline about that, as I  
20   quote in paragraph 262, and I say, this -- if you  
21   go to paragraph 263 on the top of the next page, I  
22   quote:

23                  "It shall seek an extension  
24                  if it needs it, and shall  
25                  inform the proponent of



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1 outstanding information  
2 requests. This rule was  
3 incorporated in the terms of  
4 reference of the Dwight's  
5 Point quarry which provided  
6 the panel should schedule the  
7 hearing once the panel is  
8 satisfied that sufficient  
9 information has been  
10 provided. The panel,  
11 therefore, quite properly did  
12 not schedule the hearing  
13 until it determined it had  
14 sufficient information, but  
15 having made that  
16 determination, it seems  
17 unreasonable for the panel to  
18 then criticize Bilcon for not  
19 providing enough  
20 information." [As read]

21 So, yes.

22 PROFESSOR SCHWARTZ: Thank you  
23 very much. By the way, I have a few more  
24 questions, but if I ask anything you covered in  
25 your brief, if you could just identify the

1 paragraph number as we go.

2 THE WITNESS: I will try.

3 PROFESSOR SCHWARTZ: We will take  
4 it from there.

5 Another possible response to a  
6 question of whether there was an adequate federal  
7 environmental review done by the joint panel that  
8 might be offered is, if you read the panel's  
9 report, yes, at the end they use the formula  
10 "significant likely adverse effect after mitigation  
11 in relation to community values", but they do talk  
12 about adverse effects with respect to other aspects  
13 of the project, some of them purely maritime.

14 Now, as I understand it, section  
15 16, the federal checklist, and section 37, the  
16 duties of the Minister once it gets the federal  
17 report, has some other concepts besides adverse  
18 effects. One of them is likely, another one is  
19 after mitigation.

20 So could you tell us what --  
21 again, it is not intended to be an essay question,  
22 but what does "likely" mean? If a report explores  
23 adverse effects, but doesn't explore the "likely"  
24 concept, is that a substantial deficit? What does  
25 "likely" mean and who determines what "likely"

1 means in the circumstances?

2 THE WITNESS: Well, Mr. Connelly  
3 in his report does try and set out how to evaluate  
4 those factors. In his expert report, which I don't  
5 know the number, exhibit number, he's got a whole  
6 section on this, and it begins at paragraph 76.  
7 And he says the Act doesn't define these terms, but  
8 the agency, the Canadian Environmental Assessment  
9 Agency, has a reference guide. This determination  
10 is to be made on the basis of scientific  
11 information, and he goes on to say the reference  
12 guide has a three-step process.

13 And step one is determining are  
14 the environmental effects adverse, and he sets out  
15 a text about that, and then there is -- the next  
16 step is: Are the environmental effects -- are the  
17 adverse environmental effects significant?

18 And he says the reference guide  
19 sets out the following five criteria,  
20 which severity effect, the fact geographic extent,  
21 frequency and duration, reversibility, ecological  
22 context.

23 Then step 3, Are the significant  
24 adverse environmental effects likely to occur? The  
25 reference guide, he says, provides for two criteria

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1 to assist in determining likelihood: Probability  
2 of occurrence, if there is a high probability that  
3 the identified significant adverse effects will  
4 occur, they are likely; and scientific uncertainty:

5 "This involves determining  
6 confidence levels based on  
7 statistical methods or best  
8 professional judgment. If  
9 the confidence limit is high,  
10 then there is a high degree  
11 of confidence in the  
12 conclusion that an effect  
13 will be likely or not." [As  
14 read]

15 And then there is a whole guide  
16 from the agency on that very issue that he's in  
17 fact quoting from about how to do this, and I think  
18 it is Exhibit R-70, if I got the right number, and  
19 it goes into more detail.

20 PROFESSOR SCHWARTZ: Okay. I  
21 didn't ask about "significant", but you did address  
22 that. So there is "likely", "significant", and  
23 "after mitigation". I understand after mitigation  
24 is a defined term in CEAA.

25 THE WITNESS: Yes, yes.

1                   PROFESSOR SCHWARTZ: And doesn't  
2 only include prevention.

3                   THE WITNESS: Yes.

4                   PROFESSOR SCHWARTZ: It could  
5 include restitution?

6                   THE WITNESS: Yes.

7                   PROFESSOR SCHWARTZ: It could  
8 include compensation for people adversely affected?

9                   THE WITNESS: Yes.

10                  PROFESSOR SCHWARTZ: It could  
11 include physical replacement of habitat?

12                  THE WITNESS: Yes.

13                  PROFESSOR SCHWARTZ: I asked a  
14 question of Mr. Rankin this morning, and it turned  
15 out that you had already addressed it, I think, in  
16 your brief. I just wanted to confirm that at  
17 paragraph 550.

18                  THE WITNESS: Of which report?

19                  PROFESSOR SCHWARTZ: If I can find  
20 that, it is the first report, 550. I had asked  
21 Mr. Rankin whether, in his opinion, in this vintage  
22 2007, there was an administrative law duty to  
23 provide reasons, and I see that you have addressed  
24 that.

25                  THE WITNESS: Yes.

1                   PROFESSOR SCHWARTZ: Since I asked  
2     it of Mr. Rankin, I don't think you have to comment  
3     on it any further, unless there is anything you  
4     want to add.

5                   I do note that you do seem to  
6     provide an opinion on that question.

7                   THE WITNESS: Yes.

8                   PROFESSOR SCHWARTZ: You mentioned  
9     instructions from Minister Christine Stewart.

10                  THE WITNESS: I mentioned a memo  
11     from the president of the Canadian Environmental  
12     Assessment Agency to prepare to brief the former  
13     Minister of Environment, Christine Stewart, about  
14     the use of section 28 of CEAA.

15                  I mean, I have that memo. I don't  
16     believe it is an exhibit in this proceeding. But  
17     it came out of the Red Hill case, because that case  
18     involved the question of the validity and the bona  
19     fides of trying to send that whole thing to a panel  
20     review.

21                  And in that case, they did not  
22     send to -- although it was more controversial, by  
23     far, than Whites Point because there were -- you  
24     know, it was in an urban area and there were a lot  
25     more people that were potentially not in favour of

1 this. And it was perceived that public concern was  
2 the major issue, and it was the clearest issue.

3 They would not use that route  
4 because of the concerns that I expressed earlier,  
5 that it was --

6 PROFESSOR SCHWARTZ: Is that  
7 anything that we know federal officials would have  
8 known about at the time they made the decision in  
9 this case?

10 THE WITNESS: Yes, the very same  
11 agencies and RAs were involved, Fisheries and  
12 Oceans and the Canadian Environmental Assessment  
13 Agency, absolutely. This was in 19 -- this was in  
14 1999, and the agency -- the agency staff might have  
15 changed a bit, but, I mean, we were actually  
16 talking about -- the time they actually were trying  
17 to refer it was 2003.

18 So that is only four years, within  
19 four years. And, actually, the documents in this  
20 case quite clearly indicate -- not indicate. They  
21 actually substantiate that DFO officials were very  
22 much aware of the Red Hill case. They were looking  
23 over their shoulder and saying, How can we do this  
24 in Whites Point, given what the court decided in  
25 Red Hill?

1                   PROFESSOR SCHWARTZ: Okay, thank  
2 you. Just one last thing, just for  
3 consolidation. It is your opinion, as I understand  
4 it, that under the federal Act, a panel can  
5 consider socio-economic effects, but there has to  
6 be a biological or physical pathway.

7                   THE WITNESS: Yes.

8                   PROFESSOR SCHWARTZ: Under the  
9 Nova Scotia Act, there doesn't have to be a  
10 biological or physical pathway, but, on reflection,  
11 it is your view that socio-economic effects, for  
12 the purposes of the Nova Scotia Act as it existed  
13 at the time, does not include core community  
14 values.

15                  THE WITNESS: Yes.

16                  PROFESSOR SCHWARTZ: Thank you.

17                  PRESIDING ARBITRATOR: Professor  
18 McRae.

19                  PROFESSOR McRAE: Thank you. I  
20 just have a couple of questions, and one just  
21 followed along from the reference that Mr. Nash  
22 took you to in the environmental assessment  
23 guidelines, 10.3.1 of the community profile.

24                  And he talked about the first  
25 paragraph of the health and relating health to



1 social and economic conditions, but the next  
2 paragraphs -- and I just wondered, the wording  
3 there, I just wondered if you could comment on.

4 The next paragraph says:

5 "Identify and take into  
6 account the particular needs,  
7 interests and values of  
8 various segments of the local  
9 population, i.e., youths,  
10 seniors, fishers, and  
11 consider how the project may  
12 affect them."

13 I wondered what you understood the  
14 word "values" to mean in that context of the --

15 THE WITNESS: Yes. Could I just  
16 get out document so I have it right in front of me?

17 PROFESSOR McRAE: It is C-120.  
18 Unfortunately, I don't have the paper version in  
19 front of me.

20 THE WITNESS: I think I was handed  
21 that up, so let me just find it. Sorry. Sorry, I  
22 lost it somewhere in this paper trail. Do you  
23 have a copy? Sorry, what page?

24 PROFESSOR McRAE: 10.3, and it is  
25 on page 45, the second paragraph under "community

1 profile".

2 THE WITNESS: Right, right. It  
3 certainly uses that term "values", but what I was  
4 trying to relate to is what I understood or what I  
5 thought could be reasonably taken from how the term  
6 "social and economic conditions" were being  
7 defined, in effect, in the preceding paragraph.

8 And in that one, they had to  
9 describe and evaluate changes to social and  
10 economic conditions that may occur as a result of  
11 project-related criteria, impacts to biological and  
12 physical environments.

13 Now, the next paragraph does talk  
14 about values and says, "identify and take into  
15 account", but it doesn't connote in that context  
16 that you're to evaluate changes to socioeconomic  
17 conditions based on those values in the same way as  
18 that paragraph preceding it did. It says:  
19 Identify those and take them into account.

20 But they are not equated with, in  
21 my reading of it, socio-economic conditions. And,  
22 in any event, the values here of specific aspects  
23 of the local population may or may not be this  
24 imposition of an industrial life-style.

25 I mean, I don't know. It is hard

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1 to know what they meant by that, but it was more  
2 back -- I was focussing on what I think -- what I  
3 believed the EIS guidelines were doing is sort of  
4 restricting, in a way, social and economic to  
5 something that could be evaluated and that connotes  
6 something you can count, and that those impacts,  
7 whatever you are counting, had to arise from  
8 biological and physical environment, mental  
9 impacts.

10 PROFESSOR MCRAE: Right. I was  
11 just wondering whether that next paragraph could be  
12 interpreted as a request to the proponent to  
13 consider how the project might affect the values of  
14 various sections of the segments of the local  
15 populations.

16 THE WITNESS: And I believe that  
17 the proponent did that, you know, and in fact there  
18 is -- there is an information request from the  
19 panel that sort of elicited some evaluation by the  
20 proponent that was to the effect that many people  
21 were very concerned about -- so they surveyed, I  
22 think it was, 50 people or something as part of a  
23 sampling of the community.

24 And the upshot was that a lot of  
25 those people were very concerned about how the area

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1     was becoming depopulated, that people -- that  
2     children were leaving or young people were leaving.  
3     The schools were becoming empty, and that they  
4     would value the jobs that this thing would create.

5                     And yet you don't hardly see that  
6     point of view reflected in the panel's evaluation  
7     of values.

8                     PROFESSOR McRAE:   Thank you.

9     Another question links to something that I think I  
10    asked Mr. Rankin earlier, and that is the  
11    comprehensive study and how does public  
12    participation fit into the comprehensive study.

13                    We heard discussion earlier about  
14    whether there's financial support for them, and so  
15    on, but is it the same level of public  
16    participation if you have a comprehensive  
17    study?  Are they invited to make submissions?

18                    Not being familiar with how the  
19    process of a comprehensive study would operate, I  
20    just am a little unclear what the level of public  
21    participation might look like under a comprehensive  
22    study.

23                    THE WITNESS:  Right.  Well,  
24    obviously there won't be a panel hearing.  That is  
25    axiomatic.  But short of that, there is specific

1 opportunities for the public to, first of all --  
2 and it gets a bit confusing.

3                   You have to go back to the  
4 legislation as it read specifically at that point  
5 in time, and I don't want to be inaccurate.

6                   But my general impression, without  
7 getting back into the legislation at that time, was  
8 the public would have an opportunity to, in effect,  
9 comment on the terms of reference -- it is not  
10 terms of reference, but what the factors were that  
11 the proponent was going to assess in the  
12 comprehensive study, and then comment on the draft  
13 comprehensive study report before the Minister made  
14 any decisions.

15                   So there were, if I am right --  
16 and, you know, I have to go back and check -- two  
17 opportunities for the public to get involved in  
18 that process. But the screening whether the public  
19 had any opportunity to comment on anything was  
20 quite discretionary as opposed to a comprehensive  
21 study. It was meant to have a higher level of  
22 public participation, but not a panel review.

23                   PROFESSOR McRAE: Right. So there  
24 is a scale of little in screening, much more in  
25 comprehensive, and then the maximum in the panel.

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1 THE WITNESS: Yes.

2 PROFESSOR McRAE: Can I just ask  
3 you a question about something you were talking  
4 about this afternoon in terms of the profile of  
5 panel members of JRP?

6 You commented that you didn't  
7 think there was enough regulatory experience on the  
8 panel that was appointed for the Whites Point  
9 project. But I just wondered if you had looked at  
10 the panel members appointed in other projects, and  
11 is there a higher level of regulatory experience in  
12 other projects?

13 Is there anything you can say  
14 about the kind of people appointed? You don't talk  
15 about Professor Rankin, because I think he was one  
16 of the people -- he said he was on a Joint Review  
17 Panel, but can you say anything about that kind of  
18 experience generally?

19 THE WITNESS: I can in one sense.  
20 I mean, the National Energy Board, which has been a  
21 long-standing regulatory tribunal, tends to have a  
22 significant permanent staff, first of all, to  
23 advise it; secondly, tends to -- it uses  
24 quasi-permanent panel members, in other words,  
25 appointed for a definite term.

1                   So even if they didn't have  
2 regulatory experience at the first day, they gain  
3 it as they go through their term and sitting with  
4 more experienced panel members, and so you gain  
5 that experience.

6                   With a CEAA panel in this case, as  
7 we saw here, there is virtually no -- well, there  
8 is no requirement. It is an ad hoc appointment.

9                   So it is a luck-of-the-draw in  
10 terms of whether they choose to actually think  
11 about the need for that kind of experience or not,  
12 and it is completely discretionary within the  
13 government as to who gets appointed.

14                  Their only mandatory qualification  
15 is they must not have a bias, essentially. After  
16 that, it is open.

17                  So in Hamilton-Wentworth, there  
18 was a challenge to the appointment of one of the  
19 panel members by the Hamilton and District Chamber  
20 of Commerce, for example, on the basis that this  
21 one panel member -- a challenge that went to  
22 judicial review, but it was rendered moot by the  
23 other decision, which quashed the whole thing.

24                  But the challenge was that this  
25 particular panel member who had been appointed had

1    been a close academic associate of the leader of  
2    the opposition group to this whole proposal and had  
3    been the person's thesis advisor, or something like  
4    that, and they were still working together at the  
5    same university in the same department.

6                    So, like, there's no -- there was  
7    not a lot of concept -- I don't think there was any  
8    great depth of insight in the CEAA offices as to,  
9    you know, necessarily making sure that we had  
10   experienced -- people with regulatory experience,  
11   unfortunately, and you would get ad hoc  
12   appointments. Well, you did get ad hoc  
13   appointments.

14                   PROFESSOR MCRAE: Sorry, outside  
15   of the NEB where it is more likely you will have  
16   experienced panel members, it is simply -- there is  
17   no guarantee that you will get regulatory  
18   experience.

19                   THE WITNESS: Right.

20                   PROFESSOR MCRAE: The last  
21   question is a little bit different and sort of  
22   draws on your experience as someone who has  
23   representing proponents in these cases.

24                   THE WITNESS: Not just.

25                   PROFESSOR MCRAE: Not just, but



1 someone who has, in fact.

2                   Professor Schwartz talks every now  
3 and then about whether the relationship between an  
4 obligation on a panel to provide opportunities and  
5 the opportunity for someone to make a request to  
6 get an opportunity to speak.

7                   And in the context here, where the  
8 question has been raised as to whether or not  
9 Bilcon got legal representation for the preparation  
10 in its appearance before the panel, do you think  
11 that, in practice, proponents are better advised to  
12 have legal representation that can allow them to  
13 identify when they're perhaps not being treated  
14 fairly, and at what point they should intervene, at  
15 what point they should request judicial review, at  
16 what point they should ask for more time?

17                   I am not asking that the lawyers  
18 be able to support lawyers, but whether or not, in  
19 practice, proponents are probably better advised to  
20 treat the process as one that legal assistance will  
21 be helpful.

22                   THE WITNESS: I think when we  
23 think back where this was being held and what it  
24 arose from, I mean, certainly if it was a NEB-type  
25 hearing, you know there is going to be lawyers

1    there for everybody.  Even environmental groups,  
2    they will have lawyers, because it is a much more  
3    rigorous quasi-judicial forum, more formal rules  
4    and, you know, it just seemed to be more  
5    quasi-judicial.

6                    These panels are not -- they  
7    came -- I think it is helpful to understand.  I  
8    think the short answer is, no, it wouldn't be I  
9    think expected for Bilcon to think it needed a  
10   lawyer in this kind of proceeding.

11                   And I think it is helpful to think  
12   back to the origins of this process, this hearing  
13   process under CEAA.

14                   Originally, when they would have  
15   occasionally had these kind of hearings, in fact,  
16   the federal environmental assessment review office  
17   would not allow a member of the public to actually  
18   ask a direct question to a witness.  You would have  
19   to raise a question to the panel, and the panel  
20   would have to decide whether or not they would  
21   allow that question to be put to the witness, and  
22   even then the panel might reformulate it.

23                   So there was no real, you know,  
24   quasi-judicial kind of situation, and there was a  
25   real bias against having a lawyer there.

1                   The panels and the bureau office  
2     didn't like lawyers getting involved, because they  
3     thought it was a public hearing, in the real sense  
4     of a hearing, and lawyers just made it more  
5     difficult.

6                   And I think that is what -- I  
7     think Bilcon took the proper appreciation for that  
8     here, that that is what was going on.

9                   PROFESSOR McRAE: Thank you.

10                  PRESIDING ARBITRATOR: After this  
11     afternoon, I will never make statements like "I  
12     have been learning a lot", because considering what  
13     was said or debated about Professor Fournier, a  
14     statement like that, you know, his fake modesty was  
15     interpreted in the sense that the guy didn't have  
16     enough expertise on the matter.

17                  Okay, so none of this. I'm not  
18     learning anything.

19     --- Laughter

20                  PRESIDING ARBITRATOR: Just a few  
21     questions. Latching on to what Professor McRae  
22     just said, did the panel have any kind of legal  
23     assistance or advice which might, in your view,  
24     have contributed to keeping the panel within, on  
25     the track that it should have pursued? Were there

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1 any lawyers around or...

2 THE WITNESS: I don't know. I was  
3 not there. And the only way that could be  
4 discerned by someone who wasn't there is if they  
5 were actually named, you know, on the transcript.  
6 Someone else might be able to answer that, but I  
7 think I heard Mr. Buxton say he wasn't aware of any  
8 panel -- any lawyer being present during the panel  
9 sessions.

10 I think there was, I think,  
11 some -- in the various background documents I saw,  
12 disclosure documents, I believe I saw some  
13 reference to a legal advisor to the panel, but I  
14 don't think the legal advisor to the panel -- but  
15 there is no basis to say that legal person showed  
16 up at the hearing.

17 PRESIDING ARBITRATOR: But  
18 apparently there is no rule that a panel of that  
19 kind would have some --

20 THE WITNESS: In other situations  
21 they have had them there, I think. But...

22 PRESIDING ARBITRATOR: All right.  
23 Maybe we can ask Mr. Smith or --

24 THE WITNESS: Yes, sure.

25 PRESIDING ARBITRATOR: In your

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1 second report on page 208, the second report -- let  
2 me see. This is in....

3                   You referred to a statement by  
4 Professor Fournier. Yes, he made a statement.  
5 Professor Fournier made a statement according to  
6 which it was not enough for members of the  
7 community to voice their disapproval; rather, the  
8 panel insisted on evidence of an adverse impact on  
9 community, and then there is a statement from his  
10 thing.

11                   My question to you would be --  
12 there was, in an earlier context, mention made that  
13 Professor Fournier might have become a bit more  
14 sensitive to green concerns in our project because  
15 of an experience made in Sable Gas.

16                   THE WITNESS: Yes.

17                   PRESIDING ARBITRATOR: Could that  
18 have that been -- I mean, I could imagine if you  
19 have sort of a highly excited community listening  
20 to a statement where the chairperson of that panel  
21 makes a statement, It's not enough for you to be  
22 against. You have to really prove, present  
23 evidence, that this will have an adverse impact.

24                   It seems to me precisely the kind  
25 of statement that infuriates, let's say, the green,

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1 dark green, let's say, people. Could the  
2 experience of Mr. Fournier after that have been  
3 what made him, I think the term -- I don't know  
4 what "spooked" means. Somebody said that "spooked"  
5 him.

6 THE WITNESS: I think it is  
7 consistent with that, for sure, yes.

8 PRESIDING ARBITRATOR: Okay. Last  
9 question. A lot of not ink but sweat, or whatever,  
10 was spilled on paragraph 230 in your first  
11 report. I'm sorry to return to the community core  
12 values. I could imagine that to the members of the  
13 panel, even the abbreviation of community core  
14 values, CCV, might have -- they would have to like  
15 that, because something as solemn as "community  
16 core values" to be called CCVs in a debate is a  
17 bit... okay.

18 What you say here is really  
19 spooking me a bit in 230. You say:

20 "However, inconsistent with  
21 the community core values is  
22 not an environmental effect  
23 as defined by CCEA. It is a  
24 pure socio-economic effect."

25 [As read]

1                   And in paragraphs 243 and  
2 paragraph 262, you are more or less saying the same  
3 thing. But if I had to summarize your entire,  
4 let's say, argumentation around this matter, it  
5 would rather read as follow -- just, I'll give you  
6 my interpretation of what you wanted to say by  
7 reformulating that first sentence.

8                   It would have read: However,  
9 inconsistency with community core values is not an  
10 environmental effect, nor is it a pure socio-  
11 economic effect.

12                   So I think the sentence here, in  
13 my view, does not get your ideas right. So why did  
14 you kind of so stubbornly defend that sentence,  
15 because I do think your entire report would not  
16 suffer from this, some kind of an acknowledgement  
17 that this sentence does not really express what you  
18 wanted to say.

19                   THE WITNESS: Well, I think the  
20 way you reformulated it is more in accord, I agree,  
21 with what I am saying, sure.

22                   And the reason it was put in such,  
23 you know, pure terms, to use the word I used, is  
24 because I was thinking of it more at that point  
25 under the federal legislation where socio-economic

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1 has to only -- if something is -- it's irrelevant  
2 unless it arises from an environmental effect.

3                   So I was just basically using that  
4 context. But, in any event, however -- how you  
5 reformulated it is what I ended up agreeing with  
6 in my testimony. And as I heard from Mr. Rankin,  
7 it is -- some people could consider it to be  
8 socio-economic, but not the way -- and the  
9 important -- the importance here is from a  
10 like-treatment perspective, that Nova Scotia  
11 clearly didn't consider it as part of  
12 socio-economic in their guidance documents to  
13 proponents of environmental assessments or pit and  
14 quarry development.

15                   Nor when you look at the terms and  
16 conditions or look at what is discussed about  
17 socio-economic effects in other panel reports, you  
18 don't get into beliefs and that kind of stuff.

19                   PRESIDING ARBITRATOR: I just  
20 wanted to make sure that I understood you  
21 correctly. I think that what you said now brings  
22 you in total conformity with how Professor Rankin  
23 saw the matter probably last night; right? Okay.  
24 Thank you. Thank you very much. Yes.

25                   Is there any need for... That



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1 doesn't seem to be the case.

2                   Actually, we agreed yesterday that  
3 starting at 9:00 would have the effect of releasing  
4 us around 5:00.

5                   MR. LITTLE: If I may add, we had  
6 Mr. Petrie ready to go at 10:30, because we are now  
7 getting into the switch-over from green to yellow  
8 time.

9                   So I know we had a discussion  
10 about this at the beginning of the hearing. We're  
11 prepared to start at 9:00. That's fine, but we  
12 just want to make sure that...

13                  PRESIDING ARBITRATOR: I just want  
14 to have a look at the switch. What it says here is  
15 contingency for further cross-examination by  
16 respondent, if necessary. That would be  
17 Mr. Estrin, but there doesn't seem to be that  
18 contingency.

19                  MR. LITTLE: I think we are done.  
20 As Mr. Kurelek and I at our preliminary meeting  
21 indicated --

22                  PRESIDING ARBITRATOR: What you're  
23 saying is 9 o'clock would be too early?

24                  MR. LITTLE: We can start at 10:30  
25 when the schedule starts, or we're prepared to

1 start at 9:00, but on the condition that when we  
2 get to, I guess, October 30th, that yellow time  
3 gets pushed up and hour-and-a half.

4 In other words, we raise the point  
5 that we didn't want to be penalized for having  
6 conducted all of our cross-examinations and given  
7 the claimants ample time to do their bit, and we  
8 did that all within the time that we were supposed  
9 to under the green section, and we just want to  
10 make sure that the yellows don't benefit from our  
11 good job, I guess.

12 PRESIDING ARBITRATOR:  
13 Mr. Appleton, do you have a view on that?

14 MR. APPLETON: Mr. President,  
15 we've already had an agreement that if Canada was  
16 to finish its procedure earlier, that we would not  
17 convert any time. But we think it is important to  
18 be efficient and to be able to make sure that we  
19 can keep everything together.

20 We can always see there is always  
21 the potential for things to go a little bit longer  
22 in different ways, for more questions, a variety of  
23 different things, or even for technological  
24 problems.

25 I think that, if you like, if we

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1 gain something, I am happy to start at 9:30  
2 tomorrow morning. I think that would still keep us  
3 on schedule, but I think that we really need to  
4 make sure that we keep things rolling along and to  
5 keep this as efficient, as economical, as flexible  
6 as possible. Those are the benefits of  
7 arbitration. I think that that is an important  
8 part of what we need to do.

9 I think those viewers who are  
10 watching it on the blog need to know that, too.  
11 And so we would be very happy to start at 9:30  
12 Eastern time, if that would be acceptable, but we  
13 do think we should be starting and keeping an  
14 efficient process together here.

15 PRESIDING ARBITRATOR: Mr. Little.

16 MR. LITTLE: We are absolutely  
17 fine to do that. I think from Mr. Appleton's first  
18 sentence of his statement, I think we're in  
19 agreement --

20 PRESIDING ARBITRATOR: Yes.

21 MR. LITTLE: -- the other side is  
22 not to benefit from the fact that our side finished  
23 early. So I think I heard that. We're fine  
24 starting at 9:30 tomorrow.

25 PRESIDING ARBITRATOR: We will

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1 start at 9:30 tomorrow morning. So to the world  
2 outside -- I don't know where to look.

3 --- Laughter

4 PRESIDING ARBITRATOR: 9:30.

5 Okay, thank you very much. I think this brings us  
6 to the end of today's hearing, and we will see each  
7 other tomorrow at 9:30. Thank you.

8 --- Whereupon the hearing adjourned at 4:59 p.m.,  
9 to be resumed on Friday, October 25, 2013 at  
10 9:30 a.m.

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