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

4 BETWEEN:

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

Claimants

- and -

GOVERNMENT OF CANADA

Respondent

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

VOLUME 2

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1 Toronto, Ontario

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

3 at 9:41 a.m.

4 PRESIDING ARBITRATOR: Good

5 morning, everybody. I think we are ready. Sorry.

6 Okay, except me.

7 Good morning, everybody. It looks

8 like we are all ready. Good morning -- we will

9 continue with the examination. Good morning,

10 Mr. Buxton.

11 MR. BUXTON: Good morning.

12 PRESIDING ARBITRATOR: Mr. Buxton,

13 you should find before you a form, a declaration.

14 MR. BUXTON: Yes.

15 PRESIDING ARBITRATOR: Could you

16 please read that out.

17 THE WITNESS: I solemnly declare

18 upon my honour and conscience that I will speak the

19 truth, the whole truth and nothing but the truth.

20 AFFIRMED: PAUL BUXTON, P.ENG.

21 PRESIDING ARBITRATOR: Thank you.

22 And you have also signed an assurance that you have

23 not listened to the live stream video.

24 THE WITNESS: That is correct.

25 PRESIDING ARBITRATOR: You did not

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1 do so?

2 THE WITNESS: I did not.

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

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

7 EXAMINATION IN-CHIEF BY MR. NASH:

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

11 A. Yes, I am.

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

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

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

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

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

25 A. Yes, I do.

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1 Q. Where do you live?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

7 MR. NASH: Yes. Yes, sir.

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

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

15 PRESIDING ARBITRATOR: Mr. Nash.

16 MR. NASH: Yes, I understand.

17 BY MR. NASH:

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

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

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

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

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

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

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

13                    BY MR. NASH:

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

17                    A.    Yes, yes.

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

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

23    CROSS-EXAMINATION BY MR. LITTLE:

24                    Q.    Good morning, Mr. Buxton.

25                    A.    Good morning.

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

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

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

15                  A.   Okay.

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

19                  A.   Yes, I did.

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

25                  A.   Yes, I can confirm.

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

4 A. Yes, that is correct.

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

8 A. Yes, fine.

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

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

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

18 A. Yes, I do.

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

21 A. That is correct.

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

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1 A. That is correct.

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

6 A. That is correct.

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

11 A. Yes.

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

16 A. Yes.

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

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

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

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1 A. Later on in the process, yes.

2 Q. Okay?

3 A. Yes.

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

5 A. Yes.

6 Q. Now, you just said that as  
7 the project manager of Bilcon, you were responsible  
8 for running the EA process of the Whites Point  
9 project; correct?

10 A. That is correct.

11 Q. Of moving the regulatory  
12 process forward?

13 A. Yes.

14 Q. And gathering all of the  
15 required information for the environmental  
16 assessment; correct?

17 A. Yes.

18 Q. Also ensuring that the  
19 applicable scientific requirements of the EA  
20 process were satisfied?

21 A. Yes.

22 Q. And of ensuring the  
23 applicable legal requirements of the EA process  
24 were satisfied; correct?

25 A. Yes. That would be -- that

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

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

7 A. That is correct.

8 Q. For your principals?

9 A. That is correct.

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

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

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

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



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

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

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

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

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

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

17 A. Yes.

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

21 A. Yes.

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

25 Now, we also know that the type of

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

3 A. Yes.

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

7 A. Yes.

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

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

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

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

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

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

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

3 A. Yes.

4 Q. Okay. And that:

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

12 Right?

13 A. Yes.

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

24 A. Yes, that is correct.

25 Q. And these guidelines describe

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

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

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

10 A. That would be typical, yes.

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

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

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

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

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

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

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

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

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

16                  A.    Yes.

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

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

1 statement?

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

4 Q. Okay.

5 A. Yes.

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

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

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

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

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

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

1 A. Yes.

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

7 A. Correct.

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

17 A. Yes.

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

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1 Do you see that?

2 A. Yes, I do.

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

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

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

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

17 Q. Yes.

18 A. Yes.

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

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



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

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

10                    A.    Yes, I see that.

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

14                    A.    Yes.

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

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

21                    A.    Yes.

22                    Q.    You have reviewed this  
23     document before?

24                    A.    Yes.

25                    Q.    Can you turn to section 6 of

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

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

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

12 A. Yes.

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

18 A. Yes.

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

24 A. Yes.

25 Q. So you will agree with me

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

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

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

10                    A.    Yes, yes.

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

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

21                    A.    Yes.

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

24                    A.    Yes, it was.

25                    Q.    And then if you look at

00027

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

4 A. Yes.

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

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

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

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

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

18 A. I believe so.

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

21 A. Yes.

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

24 A. That could very well be, yes.

25 Q. And the partnership that Nova

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

3 A. That is correct.

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

8 A. Yes.

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

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

19 It is Exhibit R-113.

20 A. Yes, I have it.

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

24 A. Yes.

25 Q. That agreement was executed

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

3                     A.    Yes.

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

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

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

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

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

21                    A.    Yes.

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

25                    Here you state, Mr. Buxton, that:

00030

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

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

10 A. Yes.

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

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

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

19 A. Yes.

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

23 A. Yes.

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

00031

1     that could moor to this marine terminal; right?

2                     A.    Yes, Panamax size vessel.

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

5                     A.    Yes.

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

9                     A.    Yes, that is correct.

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

13                    A.    Yes, that is correct.

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

17                    A.    Yes.

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

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

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



1 operating at the site?

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

4 Q. Okay.

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

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

11 A. No, no, no.

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

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

19 A. That is correct.

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

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

00033

1     okay?

2                     A.    Okay.

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

7                     A.    That is correct.

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

11                    A.    That sounds correct.

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

15                    A.    Yes.

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

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

24                    Q.    Okay.

25                    A.    -- to really take us through

00034

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

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

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

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

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

25 Q. Can you turn, please, to

00035

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

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

5 A. Yes.

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

11 A. Yes.

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

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

21 Correct?

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

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

00036

1     contacted him?

2                             A.    We knew they were there.

3     They had to be dealt with as an issue.

4                             Q.    Now, looking at page 3,

5     Dr. Brodie talks about this potential interaction.

6     He states in the third paragraph:

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

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

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

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

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

00037

1 commercial shipping."

2 Correct?

3 A. Yes.

4 Q. And then finally, if you turn  
5 the page over to page 4, in the second paragraph  
6 Dr. Brodie states that the:

7 "...increasing profile of  
8 marine mammals and the North  
9 Atlantic Right Whale in  
10 particular require that a  
11 high level of caution is  
12 necessary in planning any  
13 long-term industrial venture  
14 within or proximal to their  
15 habitats."

16 Correct?

17 A. Yes.

18 Q. Now, I just have a question  
19 with respect to Dr. Brodie's note to you, and it is  
20 connected to something that you have said in  
21 supplemental witness statement in paragraph 18. So  
22 if you could turn to that, please.

23 Now, at paragraph 18, you state  
24 that:

25 "Instead of preparing a

00038

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

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

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

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

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

00039

1 we were dealing with it in June of 2002.

2 Q. Okay.

3 A. So...

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

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

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

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

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



00040

1 pick up gypsum.

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

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

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

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

00041

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

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

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

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

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

21 A. Yes.

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

00042

1 A. That is correct.

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

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

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

10 A. Yes.

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

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

16 Q. Yes.

17 A. Sorry.

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

21 A. Yes.

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

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

00043

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

4                   A.   Yes.

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

7                   A.   Yes.

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

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

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

17                  A.   Forty-nine-nine?

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

20                  A.   Yes, yes.

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

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

00044

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

7                   A.    Yes.

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

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

14                  A.    Yes.

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

20                  A.    Yes.

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

25                  That suggests there will be more

00045

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

4 A. Yes.

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

7 A. Not at that time, no.

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

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

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

16 A. Okay.

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

20 A. Yes, yes.

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

25 A. That is correct.

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

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

9 A. Yes.

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

13 A. Yes.

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

20 A. Yes.

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

24 A. Yes.

25 Q. And a comprehensive study is

00047

1 a particular type of environmental assessment;  
2 right?

3 A. Under CEAA.

4 Q. Yes, under CEAA?

5 A. Correct.

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

9 A. Yes.

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

13 A. I assume so, yes.

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

16 A. Yes.

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

21 A. Yes.

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

25 A. Yes.



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

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

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

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

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

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

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

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

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

9 A. It's possible.

10 Q. You're not disputing it?

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

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

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

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

25 A. Yes, we were aware of that.

1 We had read the Act fairly thoroughly.

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

6 A. Yes, we were aware of that.

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

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

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

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

00051

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

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

20                   I would want to know that.

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

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

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

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

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

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

25 Q. My question is more about

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

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

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

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

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

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

00054

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

3 A. That was a June letter.

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

6 A. January.

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

12 A. Yes.

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

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

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

22 A. No.

23 Q. Thank you.

24 A. No.

25 Q. All right. Mr. Buxton, I

00055

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

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

6 A. Yes.

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

9 A. Yes.

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

15 A. Yes.

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

19 A. Yes.

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

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

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



1 written in "marine terminal"; correct?

2 A. Yes.

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

7 A. Yes.

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

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

14 A. Yes.

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

19 A. Yes.

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

22 A. Yes.

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

00057

1 Stone for this 3.9 hectare quarry; right?

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

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

7 A. That is correct, yes.

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

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

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

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

23 BY MR. LITTLE:

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

00058

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

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

7                   A.    Yes.

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

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

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

18                  A.    That is correct, yes.

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

23                  A.    Yes.

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

00059

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

4 A. That is correct.

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

8 A. Yes.

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

13 A. Yes.

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

17 A. Yes.

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

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

25 In response to a question from an

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

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

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

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

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

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

24 A. No.

25 Q. Now, if you can turn to page

00061

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

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

12 A. No.

13 Q. No issue?

14 A. No.

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

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

00062

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

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

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

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

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

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

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

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

25                    A.    Yes.

00063

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

4 A. Yes.

5 Q. Okay.

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

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

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

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

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

22 Q. Okay.

23 A. Yes.

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



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

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

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

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

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

15                  A. Yes.

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

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

21                  Q. Yes.

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

1                   One of the things that I made a  
2 point of continuously is that, under the CEAA  
3 process, the proponent is a part of the -- is a  
4 part of the proceedings, is a part of the EA  
5 process and a very important part of the process.

6                   And at some point in time, and I  
7 can't pick a particular date, but I would say  
8 perhaps April 2003, we were just totally excluded  
9 from the process. We had no idea what was going  
10 on. We assumed we were in a comprehensive study,  
11 and we pick up the newspaper and find we had been  
12 referred to a review panel.

13                   Q.    Okay.

14                   A.    And so, yes, on two points,  
15 one that we had been referred and, secondly, that  
16 we had not been advised that we'd been referred, we  
17 were not pleased.

18                   Q.    So at paragraph 53 of your  
19 first witness statement, if you could turn to that.

20                   Now, at paragraph 53, you state  
21 that:

22                                "In August of 2003, I  
23                                arranged a meeting with Steve  
24                                Chapman of the Canadian  
25                                Environmental Assessment

00066

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

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

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

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

11 A. Yes.

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

15 A. That is correct.

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

20 A. Yes.

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

23 A. Yes.

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

00067

1 with Mr. Chapman that:

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

11 Do you see that?

12 A. Yes.

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

17 A. That is correct.

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

20 A. Yes.

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

00068

1 A. That is correct.

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

4 A. Certainly not under CEAA, no.

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

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

13 THE WITNESS: I understand. Thank  
14 you.

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

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

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

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

22 BY MR. LITTLE:

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

25 Now, this document is a news

00069

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

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

9 A. That is correct.

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

12 A. Yes.

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

15 A. Yes.

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

19 A. Yes.

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

22 A. Yes.

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

00070

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

3                     A.    Muecke.

4                     Q.    Pardon me?

5                     A.    Muecke.

6                     Q.    Muecke.  Thank you.

7                     PRESIDING ARBITRATOR:  Or

8     "Muecke", in German.

9     ---  Laughter.

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

12     ---  Laughter.

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

15     ---  Laughter.

16                    PRESIDING ARBITRATOR:  Whatever.

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

19                    BY MR. LITTLE:

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

24                    A.    Yes.

25                    Q.    And this agreement would set

00071

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

4 A. Yes.

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

8 A. Yes.

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

13 A. Yes, we did.

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

18 A. Yes.

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

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

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



00072

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

3 A. Correct.

4 Q. That's correct?

5 A. Yes, yes.

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

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

12 A. Yes.

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

17 A. Yes.

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

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

00073

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

5 Do you see that?

6 A. Yes.

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

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

17 Correct?

18 A. Yes.

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

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

25 Do you see that?

1 A. Yes.

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

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

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

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

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

00075

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

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

12 A. Yes.

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

18 A. Yes.

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

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

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

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

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

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

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

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

25                   Now, a draft version of the

00077

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

3 A. Yes, that is correct.

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

6 A. Yes. That sounds right.

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

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

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

16 A. Yes.

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

20 A. Yes.

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

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

00078

1 A. Yes.

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

7 A. Yes.

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

15 Correct?

16 A. Yes.

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

22 A. Yes.

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

00079

1 A. That's correct.

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

7 A. Yes.

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

11 A. It does.

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

15 A. And I did attend all  
16 meetings.

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

20 A. Yes.

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

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



00080

1 correct?

2 A. Yes.

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

5 A. Could you repeat that,  
6 please?

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

9 A. Yes, yes.

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

13 A. Yes.

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

17 A. That's correct.

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

24 A. Yes.

25 Q. So Bilcon was given as much

00081

1 time as it needed to prepare its EIS?

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

4 Q. I want to ask you just a few  
5 questions now about the preparation of the EIS.

6 Now, as the final EIS guidelines provided the  
7 instructions on Bilcon's environmental impact  
8 statement, I assume you reviewed them in detail?

9 A. Most certainly did, yes.

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

14 A. Yes.

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

20 A. Yes.

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

24 A. Yes.

25 Q. And one of those analyses was

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

6 A. Yes.

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

10 A. Yes.

11 Q. Land use and value?

12 A. Yes.

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

16 A. Yes.

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

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

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

00083

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

4                   Right?

5                   A.    Yes.

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

10                  A.    Yes.

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

16                  A.    Yes.

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

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

25                  Right?

00084

1 A. Yes.

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

4 A. Yes.

5 Q. Now --

6 A. He's an environmental  
7 planner.

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

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

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

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

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

5 A. Yes, yes.

6 Q. Is that accurate, then?

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

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

17 A. Yes.

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

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

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

00086

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

3 A. Well, yes, yes.

4 Q. And public hearings,  
5 obviously?

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

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

11 A. Oh, yes.

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

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

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

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

00087

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

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

5 A. My thing has gone off here.

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

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

10 BY MR. LITTLE:

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

13 A. Yes.

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

17 A. Yes.

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

23 At paragraph 55, you state that:

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



00088

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

4 Correct?

5 A. Yes.

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

9 A. Yes.

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

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

18 Do you see that?

19 A. Yes.

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

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

00089

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

3 Do you see that?

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

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

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

11 A. At what...

12 Q. Page 11 of that document.

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

15 A. "Detailed Project  
16 Description".

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

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

00090

1 address public concerns about  
2 the Project."

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

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

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

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

00091

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

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

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

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

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

00092

1 process.

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

6                   Q.    Okay.

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

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

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

23                   A.    Yes.

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

00093

1 submitted Bilcon's EIS; right?

2 A. Yes.

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

6 A. Yes, yes.

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

12 A. Yes.

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

17 A. Yes.

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

00094

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

4 Do you see that?

5 A. Yes.

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

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

1                               precipitation events?"

2                               Now, from this request,

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

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

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

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



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

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

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

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

00097

1 issue.

2 Q. All right.

3 A. So...

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

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

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

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

18 A. No, no.

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

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

00098

1     this process.

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

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

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

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

25                    A.    Mm-hm.

00099

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

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

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

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

23                  A.    I'm sorry?

24                  Q.    Bilcon retained AMEC,  
25  A-M-E-C?

00100

1 A. AMEC.

2 Q. AMEC?

3 A. Yes, yes.

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

6 A. Yes.

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

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

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

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

00101

1 for us, yes.

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

6 A. Yes.

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

9 A. Yes.

10 Q. And Josephine, who was she?

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

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

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

20 Correct?

21 A. Yes.

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

24 A. Yes.

25 Q. Do you take issue with what

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

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

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

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

12 Q. Okay.

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

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

20 Later on, it says:

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

25 THE WITNESS: If I could,

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

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

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

13 THE WITNESS: Yes.

14 BY MR. LITTLE:

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

19 A. Yes, yes, yes.

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

24 A. Yes.

25 Q. And if you could turn to



1 paragraph 73 of your first witness statement.

2 A. Of the first one, sorry?

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

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

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

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

21 A. No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1     ten days before the hearing --

2                     A.    Yes.

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

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

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

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

17                    Q.    Okay.

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

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

00109

1 A. Yes.

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

6 A. Yes.

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

10 A. Yes.

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

13 A. Yes.

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

18 A. Yes.

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

21 A. Yes.

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

25 A. That sounds correct.

00110

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

4                   A.   Yes.

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

7                   A.   Yes.

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

10                  A.   Yes.

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

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

19                  Correct?

20                  A.   Yes.

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

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

00111

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

5                   A.    Yes.

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

9                   A.    Yes.

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

14                  A.    Yes.

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

19                  A.    Yes.

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

22                  A.    That sounds correct.

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



00112

1 April 30th, 2002; correct?

2 A. That sounds correct, yes.

3 Q. And if you can turn to

4 Exhibit R-87, please, this is a letter from Bob

5 Petrie to yourself?

6 A. Yes.

7 Q. And it is dated April 30th,

8 2002; right?

9 A. Yes.

10 Q. And it attaches the approval

11 for the 3.9 hectare quarry?

12 A. Yes.

13 Q. And Mr. Petrie's letter in

14 the first paragraph notes that the approval was

15 issued to Nova Stone Exporters?

16 A. That's correct.

17 Q. And indeed the first page of

18 the approval provides that the approval holder is

19 Nova Stone Exporters; right?

20 A. Yes.

21 Q. So Bilcon didn't apply for

22 this industrial approval; correct?

23 A. No.

24 Q. Now, we've had a little bit

25 of discussion earlier on -- this was, I believe

00113

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

5 A. That is correct.

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

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

11 Q. Oh, of course.

12 A. Yes.

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

16 A. Yes.

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

22 A. Yes.

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

25 A. Yes.

00114

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

6 A. Yes.

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

10 A. Yes.

11 Q. All right.

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

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

19 A. Yes.

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

00115

1 A. Yes.

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

5 A. Yes.

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

14 Do you see that?

15 A. Yes.

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

19 A. Yes.

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

24 A. Yes.

25 Q. So Nova Stone's 3.9 hectare

00116

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

3 A. Yes.

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

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

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

18 Q. Fair enough. Fair enough.

19 A. Okay.

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

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

00117

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

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

7 A. Yes.

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

12 A. Yes, yes.

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

17 A. Yes.

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

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

25 Q. Well, it is certainly closer

00118

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

3 A. Yes, yes.

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

7 A. Yes.

8 PRESIDING ARBITRATOR: Excuse me.

9 Oh, it is -- we have 43 ahead of 41, so it is  
10 just...

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

14 BY MR. LITTLE:

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

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

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

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

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



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

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

11                  A.   Yes.

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

14                  A.   Yes.

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

17                  A.   Yes.

18                  Q.   At the 3.9 hectare quarry?

19                  A.   Yes.

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

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

00121

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

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

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

16                   Q. But test --

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

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

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

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

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

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

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

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

22 A. Yes.

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

00123

1 A. I was, yes.

2 Q. And this letter is dated

3 April 20th, 2003?

4 A. Yes.

5 Q. And indeed in the letter you

6 state that:

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

11 Correct?

12 A. Yes.

13 Q. And you add that:

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

22 Correct?

23 A. Yes.

24 Q. So one of the intentions,

25 then, was to blast and crush rock and start

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

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

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

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

20 Do you see my point here?

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

25 A. Well, I think you did ask the

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

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

10 A. Okay.

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

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

15 A. Sorry.

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

19 A. Okay, got it.

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

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

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

5 Do you see that?

6 A. Yes.

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

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

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

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

21 A. Yes.

22 Q. Okay.

23 A. Yes.

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

00127

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

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

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

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

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



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

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

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

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

18 A. They certainly wrote --

19 Q. Listen, please, Mr. Buxton?

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

1 question is simply not accurate.

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

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

9 PRESIDING ARBITRATOR: So that was  
10 the question.

11 MR. LITTLE: Yes.

12 PRESIDING ARBITRATOR: Okay.

13 BY MR. LITTLE:

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

18 A. Absolutely.

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

21 A. R?

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

25 A. Yes.

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

3 A. Yes.

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

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

18 Correct?

19 A. Yes.

20 Q. Then on page 2, you note:

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

25 Correct?

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1 A. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 A. It did.

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

7 A. Yes.

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

10 A. Yes.

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

13 A. That is correct.

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

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

18 A. Yes.

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

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

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

1 had been dissolved?

2 A. Yes.

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

5 A. Yes.

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

8 A. Yes.

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

14 A. Yes.

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

20 A. That is correct, yes.

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

25 A. That is correct.



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

5                   A.    Yes.

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

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

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

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

25                  The problem with not applying for

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

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

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

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

19 THE WITNESS: Thank you.

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

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

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

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

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

9                   THE WITNESS:  Thank you, sir.

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

15   --- Laughter.

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

19   --- Laughter

20                  THE WITNESS:  Thank you.

21                  PRESIDING ARBITRATOR:  Luncheon  
22   break.

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

24   --- Upon resuming at 1:36 p.m.

25                  PRESIDING ARBITRATOR:  So it looks

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

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

6     RE-EXAMINATION BY MR. NASH:

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

11                    A. Yes.

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

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

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

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

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

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

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

18 So I think those are the primary  
19 reasons.

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

23 A. Very much so. In 1990 or  
24 thereabouts -- I can't remember the exact date -- I  
25 was commissioned to draft the tourism plan for Long

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1 Island, which is the next island up from Digby  
2 Neck, so I was aware of all of the issues.

3 And also about that time, perhaps  
4 a little earlier, I was asked by a whale watch  
5 entrepreneur to help him start his business and get  
6 the necessary permits to get into the  
7 whale-watching business.

8 And as I said before, many of my  
9 jobs in that area -- and one of them was as  
10 executive director on a part-time basis of the Town  
11 of Digby and the Municipality of Digby Industrial  
12 Commission to get activity in the area, which also  
13 included tourism, the tourism industry.

14 And I may say, also, that I was  
15 very aware of the possible effects of this quarry,  
16 because I live in the area. My entire family lives  
17 in the area. My daughters live in the area. My  
18 grandchildren live in the area. All of my  
19 investments and property are in that area. And the  
20 last thing I would want to do is to destroy my  
21 investments in the area.

22 Q. In terms of the specific  
23 location of the quarry and in terms of its  
24 appropriateness for that piece of property to be  
25 operated as a quarry, did you come to any

1 conclusion as to whether or not the operation of  
2 the quarry would interfere with whale watching or  
3 ecotourism activities?

4 A. We believed not. We  
5 certainly talked to the whale-watching people.  
6 Generally speaking, the areas where whale watching  
7 is concentrated is not on the approach to the  
8 Whites Point quarry, Whites Cove.

9 And typically they go from  
10 Tiverton or from East Ferry and go out into the  
11 bay, or they go further out into the or close to  
12 the preservation area for the North Atlantic Right  
13 Whale.

14 Q. And Tiverton is about ten  
15 kilometres down the coast from Whites Point?

16 A. That is correct.

17 Q. Could you turn, please, to  
18 Exhibit R-299.

19 You were asked to comment on some  
20 matters on page 100. These are the CLC minutes.  
21 And if you go to page 100, about three-quarters of  
22 the way down, there is an entry saying that:

23 "Mr. Buxton replied there are  
24 15 sections to the  
25 environmental assessment."

1                   Geologist John Lizak,  
2   Pennsylvania; archeologist Charles Watrall;  
3   cultural Dr. Barry Moody, aboriginal, Confederacy  
4   of Mainland Mi'kmaq; and botanical Ruth Newell,  
5   George Alliston, et cetera. There are a lot of  
6   names there, including Mike Brylinski.

7                   Now, these minutes are of a  
8   meeting on January 9th, 2003. Had you retained all  
9   of those scientists by that time?

10                  A. Yes, we had. Yes, we had,  
11   although I'm not sure of what the reference to  
12   marine mammals, Dalhousie University, et cetera, is  
13   at the end, because Mike Brylinski, who was doing a  
14   lot of marine work for us, is actually from Acadia  
15   University, so...

16                  Q. Right. And what was the  
17   mandate given to you by Mr. Clayton with respect to  
18   doing scientific studies for this project?

19                  A. Mr. Clayton made it very  
20   clear to me that we were to hire the best  
21   scientists that we could find, that I was not on a  
22   restrictive budget and we were to do whatever was  
23   necessary to satisfy the regulators in this matter.

24                  Q. Was there a reason why you  
25   did not go to one of the larger engineering firms,



1    such as -- and we heard about the firm AMEC -- for  
2    the entire project, for all of the experts?

3                   A.    A number of reasons.  One is  
4    I have in the past worked for very large  
5    engineering corporations, engineering corporations  
6    with 1,500 or 2,000 engineers and technicians, and  
7    it is, generally speaking, true that they are very  
8    effective in perhaps half a dozen fields, but they  
9    are not terribly effective in all fields.  And it  
10   quite often arises that they have to go outside for  
11   specialist assistance.

12                   I saw this as very much a project  
13   management job where I managed the process, and we  
14   certainly wanted to go to the people that we knew  
15   who were highly skilled.  We wanted to go into  
16   academe and get the most qualified people that were  
17   available in academe to assist, such as Mike  
18   Brylinski.

19                   And I think that we thought that  
20   we could put actually a better team together than  
21   the two -- well, really only one large consortium  
22   in Nova Scotia at that time, which was Jacques  
23   Whitford, who have since been taken over by  
24   Stantec.  And AMEC certainly had a presence there,  
25   but not a major presence in Nova Scotia.

1 Q. And who was paying for the  
2 scientific studies and work and investigation that  
3 you were having done?

4 A. They were all paid by Bilcon,  
5 yes.

6 Q. And if you go over to your  
7 supplementary witness statement and turn, if you  
8 will, to paragraph 33, could you just read out  
9 paragraph 33, please, for the record.

10 A. "Bilcon appreciated the  
11 fishing industry, ecotourism  
12 and cultural concerns of  
13 Digby Neck residents and  
14 conducted no less than 20  
15 different studies relating to  
16 these issues to ensure that  
17 there was minimal impact on  
18 marine and terrestrial  
19 habitat and socio-economic  
20 and cultural elements in the  
21 community."

22 Q. Did you retain AMEC for the  
23 purpose of doing socio-economic studies?

24 A. Yes, I did.

25 Q. And what were the nature of

1 those studies?

2 A. These were the studies that  
3 were described in the guidelines, in the final  
4 guidelines. And of course they follow the Nova  
5 Scotia Environment Act, and they certainly  
6 concerned health. They concerned topics such as  
7 social cohesion and, in fact, everything to do with  
8 the community, the human side, if you like, of the  
9 environmental equation.

10 Q. And if you would turn to  
11 exhibit R-210, R-210, which is a letter attaching  
12 the final guidelines, and you go to page 33 of  
13 those guidelines, 33 at the bottom there, which  
14 refers under section 9.3 to the existing human  
15 environment --

16 A. Yes.

17 Q. -- did you commission studies  
18 with respect to each of the areas within that  
19 section of the EIS, section 9.3?

20 A. Yes.

21 Q. And when you reviewed the  
22 draft and final EIS guidelines, was there any  
23 reference that you recall to community beliefs?

24 A. No.

25 Q. Was there any reference, at

1 all, in the EIS guidelines to core community  
2 values?

3 A. No. I never heard the term  
4 during the entire process, including at the  
5 hearings.

6 Q. So you never received  
7 correspondence from the chair of the JRP with  
8 respect to core community values?

9 A. No. And I will say that  
10 several government departments were very helpful to  
11 us, and Health Canada was one of those departments.  
12 We had meetings with Allison Denning and reviewed  
13 precisely what they saw as health issues, for  
14 example, and what we should look at, for example,  
15 in country foods and all of that sort of thing.

16 And she put us on to the  
17 appropriate experts in Health Canada and we  
18 basically followed their guidance very closely, but  
19 we did not deal with core values, per se, because  
20 it simply was not mentioned anywhere in the  
21 document, and I even have a problem now reading the  
22 definitions in the panel report and trying to  
23 discern exactly what the panel was getting at by  
24 "core values".

25 Q. In total, how many experts

1 did you retain for the purpose of doing the  
2 environmental assessment?

3 A. I believe there were 34 or  
4 35.

5 Q. And how many reports  
6 commissioned?

7 A. Again, I think we were well  
8 into the middle 40s, perhaps 45 reports.

9 Q. And how many information  
10 requests from the panel did you respond to?

11 A. We responded to all of them.  
12 I believe there were a couple primarily concerned  
13 with detailed design that I think that the panel  
14 was unhappy with, but we responded to them all.

15 Q. And about how many were  
16 there; do you recall?

17 A. I --

18 Q. Several dozens?

19 A. Volumes, volumes of  
20 responses. I can't remember the number.

21 Q. And during the course of the  
22 hearing, you were asked to respond to undertakings?

23 A. That is correct.

24 Q. Questions that arose during  
25 the course of the hearings? The hearings were held

1 over a two-week period, approximately; is that  
2 correct?

3 A. Yes.

4 Q. And they were held from what  
5 time in the morning to what time in the evening?

6 A. I think they were held from  
7 about 9:00 to 5:00, although some evenings they ran  
8 late, if people went late with their presentations.

9 Q. Do you recall approximately  
10 how many undertakings you responded to during the  
11 course of the hearing?

12 A. I don't have that number at  
13 hand, but I think there were probably 30.

14 Q. And you were working on these  
15 overnight for the next day or for the few days  
16 later; is that how it worked?

17 A. Well, when the undertaking  
18 came in from the panel, I would assign the  
19 appropriate expert to develop an answer. And they  
20 were not required overnight, but they were required  
21 fairly shortly, perhaps in two days.

22 Q. How many experts did you have  
23 at the hearing for the purpose of responding to any  
24 questions that arose?

25 A. I believe that we had 19

1 available, and we did have discussions with the  
2 panel manager prior to the hearings and established  
3 clearly that we would have topic days.

4                   So one day would be devoted to  
5 marine issues and one would be devoted to another  
6 set of issues, and that enabled us to make sure  
7 that our experts were available on that particular  
8 day to answer questions arising, for example, from  
9 the marine topics.

10                   Q. And were the experts called  
11 upon to answer questions by the panel?

12                   A. Very, very rarely. And for  
13 issues which I think either the panel felt  
14 important or were major issues, sometimes we got no  
15 questions at all. Copper was made a significant  
16 issue. We commissioned scientific reports on  
17 copper.

18                   We brought our expert in from  
19 Pennsylvania, made the panel aware that he was  
20 there on that day, and copper was never mentioned,  
21 I don't believe, at the hearings at all.

22                   We had people with some tremendous  
23 practical experience there. John Melick, who makes  
24 his living blasting, he's a professional engineer,  
25 but all he does is blast. All day, every day, he

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1     blasts.

2     --- Laughter

3                     Q.    You engineers have a good  
4     time.

5     --- Laughter

6                     A.    He, he was almost treated  
7     with contempt, and a total non-expert who admitted  
8     that he had never set off a blast in his life nor  
9     designed one was allowed to expound to the hearing  
10    for probably 45 minutes on what he thought the  
11    blast should be or what numbers we should use. And  
12    we had great difficulty with this sort of thing.

13                    The people were there to answer  
14    any technical question, but they were just simply  
15    never -- I won't say never called upon. That's not  
16    true, but it was very rare that any of our experts  
17    were asked to contribute to the process.

18                    Q.    Did you receive notice of the  
19    presentation by the blasting person that you are  
20    referring to?

21                    A.    No, we had no idea at all  
22    that that was going to be introduced, so we didn't  
23    know what he was going to say. And we did have the  
24    opportunity to file an undertaking, and the  
25    undertaking was, in fact, consistent with all our



1 statements with respect to blasting throughout.

2 And we were very clear as to what  
3 we thought was an appropriate quantity of explosive  
4 to produce a ton of rock, and the panel chose to  
5 say in its report that, in fact, they didn't  
6 believe that figure and it said that a figure of  
7 double that quantity would be required to remove a  
8 ton of rock.

9 Well, you know, these people are  
10 in business, you know, serious business of  
11 producing rock, and you're not out by 100 percent  
12 in determining how much blasting compound it takes  
13 to produce a ton of rock. It might be 2 percent  
14 out, but they are not going to be 100 percent out.

15 So it became very confused. You  
16 know, the information that was being brought in by  
17 very experienced people in these sectors was  
18 basically ignored and random figures were being  
19 imposed into the process.

20 Q. Could you turn to Exhibit  
21 R-171, please. Mr. Little asked you some questions  
22 about the meeting on June 14th, 2002. These are  
23 handwritten notes emanating from that meeting.

24 The -- R-171. Yes. You're shown  
25 as having attended this meeting. You were there?

1 A. Yes.

2 Q. And the name Dave Kearn is  
3 there. And who was Dave Kearn and what was his  
4 involvement?

5 A. David Kearn is an  
6 environmental planner that I had worked with since  
7 1979. Again, he is an independent -- runs an  
8 independent business.

9 Q. What was his background?

10 A. His background is in  
11 environmental assessment, but on the other side of  
12 the street he worked for the US Corps of Engineers  
13 assessing environmental assessments and certainly  
14 was very highly thought of in that position and was  
15 awarded the President's medal for environmental  
16 work in the United States.

17 Q. Did he participate in the EIS  
18 process in the environmental assessment process for  
19 the Whites Point quarry throughout?

20 A. Yes. Yes, beginning to end.

21 Q. Turn also, please, to Exhibit  
22 R-178, which is two tabs over. Mr. Little also  
23 referred you to the minutes of this meeting, which  
24 is January 6th of 2003, and the attendees at the  
25 meeting, I take it, are listed down the left-hand

1 side of the first page. Do you see that?

2 A. Yes, although Bob Petrie is  
3 not mentioned. He was there, but he was late  
4 and...

5 Q. All right. And the purpose  
6 of the meetings that you had back in June of 2002  
7 and this meeting of January 2003, generally, what  
8 was the purpose?

9 A. The June 14th meeting was an  
10 advisory meeting, really. While at that time we  
11 had an approval for a 3.9 hectare quarry, the press  
12 was carrying stories that this was the precursor to  
13 a much larger quarry, and basically we thought it  
14 useful to go to the Nova Scotia Environment of  
15 Labour and bring them up to date and advise them  
16 what we were doing, why we were doing it and where  
17 we were in our thinking process.

18 The meeting of January '03 was, I  
19 think, a different category, because that was  
20 called by government departments, by CEAA and Nova  
21 Scotia Department of Environment and Labour, to  
22 have a general discussion as to what the  
23 implications were with respect to environmental  
24 assessment on this project.

25 Q. Mr. Ross, who was in

1 attendance at this meeting, was the person that you  
2 and Mr. Petrie were corresponding with with respect  
3 to getting approval under condition 10(i) for the  
4 right to blast, the approval --

5 A. That is correct, yes.

6 Q. And he was in attendance at  
7 this meeting on behalf of DFO?

8 A. Yes.

9 Q. And you mentioned that you  
10 had heard -- you now know that their marine mammal  
11 expert had said that he had no concerns about  
12 blasting with respect to marine mammals and, in  
13 particular, your blasting plan?

14 A. That is correct, in early  
15 December 2002.

16 Q. Did Mr. Ross, at this meeting  
17 a little over a month later, mention anything about  
18 the internal communications he had had with DFO  
19 scientists, both with respect to blasting and with  
20 respect to marine mammals?

21 A. No. In fact, we had no  
22 knowledge of those internal communications until I  
23 saw the documents associated with this process.

24 Q. Could you go back, please, to  
25 Exhibit R-299, the CLC meeting minutes.

1                   If you go to page 107 -- actually,  
2 just before we go there, the first page of this  
3 document is the index to the various meetings that  
4 were held with the community liaison committee;  
5 correct.

6                   A.    Yes.

7                   Q.    And so you had a meeting in  
8 July of 2002, one in August of 2002, August 8th and  
9 August 29th. So through the summer of 2002 you  
10 were holding community liaison committee meetings?

11                  A.    Yes.

12                  Q.    How was the community liaison  
13 committee formed? What was that process?

14                  A.    It is a requirement for the  
15 proponent to set up the committee liaison  
16 committee, and there are suggestions from Nova  
17 Scotia Environment and Labour as to how to set one  
18 up.

19                  I knew a fairly significant number  
20 of people on Digby Neck and the Islands. I had  
21 done work on the Islands before, and I still do  
22 work on the Islands in Digby Neck.

23                  And I tried to put together a  
24 group which represented residents living fairly  
25 close to the quarry, somebody from the whale watch

1 industry, somebody from the tourism industry, from  
2 accommodations, for example, somebody from the  
3 fishing community, from the lobster fishing  
4 community.

5 And initially I had ten people who  
6 agreed to be members of the CLC, and I reported  
7 that to Nova Scotia Department of Environment and  
8 Labour.

9 Unfortunately, within about ten  
10 days, and certainly before the first meeting, I was  
11 down to two members. The people called me and  
12 apologized profusely, but said that they were not  
13 able to serve on the community liaison committee.

14 Q. Did they give a reason?

15 A. Some were non-specific. Some  
16 were a little more specific, that they essentially  
17 had been told it was not a thing that would be  
18 appreciated in the community if they served.

19 And I had to scramble to go to  
20 other people to try to make up a number, and I  
21 think we started with perhaps only five members,  
22 but, as it was clear that we were going to go ahead  
23 with the process -- and we were required to go  
24 ahead with the process, it was a useful process --  
25 we did get other people to come and sit on the

1 committee representing other segments of the  
2 community out there.

3 Q. And who prepared these very  
4 extensive minutes of each of those meetings?

5 A. The meetings were recorded.  
6 I paid for a -- not an official court reporter, if  
7 you like, but I paid for a stenographer to come.  
8 She had a tape recorder and she basically condensed  
9 what was on the tape into these minutes.

10 So they were produced, and that  
11 person basically reported to the chair of the  
12 committee and not to us. Our job was simply to  
13 facilitate the meeting of the committee.

14 Q. And was there any reluctance  
15 that you were told about of people serving on the  
16 committee or continuing to serve after it started?

17 A. They were very -- they were  
18 difficult, difficult meetings, because the people  
19 that did come felt that they were under pressure  
20 from the community.

21 Q. What kind of pressure?

22 A. Well, perhaps the same sort  
23 of pressure that we were being put under at the  
24 time, which was vandalism of our sites, staff car  
25 tires being slashed. I took this committee, the

1 community liaison committee, for a tour of the  
2 quarry to indicate where certain features might be,  
3 et cetera, and they wanted to go, and I took them  
4 up there in a small convoy of trucks and did the  
5 tour and the explanation.

6 And by the time we came to come  
7 back down the Whites Cove Road, a very large tree  
8 had been chain-sawed down across the road blocking  
9 us into the site.

10 And some of the -- there were a  
11 couple of women on board and they were quite --  
12 they were quite distressed. They were worried  
13 about their personal safety. Fortunately, I had a  
14 truck with a winch on it and I was able to winch  
15 the tree out of the way and get people off the  
16 site.

17 And this was pretty much  
18 continuous. Our signs were chainsawed down. We  
19 had to put up security cameras, and we have film on  
20 our security cameras of our site being vandalized,  
21 signs chainsawed down or spray painted.

22 Q. This is at your local office?

23 A. This was in our office at  
24 Little River. We opened an office in Little River,  
25 but the same sort of thing happened in our office



1 in Digby.

2 Q. Can you turn, please, to page  
3 107 of Exhibit R-299.

4 You indicated to Mr. Little in  
5 response to one of his questions that you  
6 understood there was an EA process going on, and I  
7 understood your answer to be in the context of the  
8 spring 2003. Do you recall that?

9 A. I don't recall the specific  
10 question, I'm sorry.

11 Q. All right. Let me ask you  
12 this. You had made a Navigable Waters Protection  
13 application --

14 A. Yes.

15 Q. -- Act application for a  
16 marine terminal?

17 A. Yes.

18 Q. Back in February of 2003?

19 A. Yes.

20 Q. And subsequent to that, you  
21 understood there was an EA ongoing. Was the EA  
22 going on in relation to the marine terminal?

23 A. Yes. There was an EA going  
24 on. It was perhaps -- and we understood it to be a  
25 comprehensive study, and we have letters on file to

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1 indicate it was a comprehensive study, but it  
2 was -- there seemed to be some uncertainty about  
3 it.

4 Q. Did you understand that there  
5 was any other EA going on, other than with respect  
6 to the marine terminal?

7 A. No.

8 Q. And were you told during the  
9 spring of 2003 that the level of environmental  
10 assessment would be a comprehensive study?

11 A. We were. We were told by  
12 DFO, Department of Fisheries and Oceans, in  
13 writing, yes.

14 Q. Were you also told that it  
15 might be a possibility that you would go up to a  
16 Joint Review Panel?

17 A. I believe that is indicated  
18 in one of the letters, yes.

19 Q. And did you know at that time  
20 how many environmental assessments in Canada had  
21 been conducted since the inauguration of CEAA in  
22 1995 at the JRP level?

23 A. I didn't know when I -- when  
24 I read that letter. I mean, we thought the  
25 comprehensive study was the appropriate level, and

1 certainly CEAA thought it was the appropriate  
2 level.

3 Panel reviews were a little --  
4 although we knew they were possible, we had read  
5 the Act, that seemed a remote possibility to us at  
6 the time, and I certainly didn't do any research or  
7 investigations.

8 Q. Can you go, please, to  
9 Exhibit C-304.

10 And Mr. Little also referred you  
11 to this document, which is a memo to Bill Clayton  
12 Jr., Mark Lowe and John Wall. And it's a memo  
13 specifically about the meeting that you had with  
14 Mr. Chapman on August 29th of 2003.

15 A. Yes.

16 Q. And you remember that Mark  
17 McLean was at that meeting, as well?

18 A. Yes.

19 Q. And Mr. McLean was from which  
20 department at that time?

21 A. I assume he was still with  
22 Environment at that time, although I think he was  
23 on a -- perhaps on a secondment to DFO at that  
24 time, but I think his statutory employer at that  
25 time was Environment and Labour. I understood it

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1 to be, in any event.

2 Q. And you mentioned in response  
3 to one of Mr. Little's questions that you learned  
4 about the launching of the JRP through the press.

5 A. That is correct.

6 Q. If you could go over to page  
7 001125.

8 A. Yes.

9 Q. And read number 2 at the top  
10 of that page.

11 A. "We asked why the press had a  
12 copy of the letter requesting  
13 or recommending..."

14 Of course I hadn't seen the  
15 letter, so I didn't know whether it was a request  
16 or a recommend:

17 "... the panel review from  
18 Mr. Thibault, Minister of  
19 Fisheries and Oceans, to  
20 Mr. Anderson, Minister of the  
21 Environment, and why a copy  
22 of this letter was available  
23 at a debate on Digby Neck  
24 during the recent election  
25 campaign. We asked for a

1 copy of that letter. Steve  
2 Chapman advised that Minister  
3 to Minister correspondence  
4 was classified as a cabinet  
5 document and could not and  
6 would not be released."

7 Q. How did you find out that the  
8 letter was available at a debate on Digby Neck?

9 A. By somebody who was at the  
10 meeting, who was involved in the election process.

11 Q. And by this time of your  
12 meeting with Mr. Chapman, the election had come and  
13 gone. The election was called on July 5th?

14 A. It had come and gone, yes,  
15 yes.

16 Q. Could you read number 3,  
17 please.

18 A. "We further asked how the  
19 press and others had a copy,  
20 and Chapman advised that he  
21 could not explain how they  
22 obtained a copy."

23 Q. And number 4?

24 A. "We asked why, i.e., on what  
25 grounds, Mr. Thibault had

1                   asked for a panel review and  
2                   under which section of the  
3                   Canadian Environmental  
4                   Assessment Act. Chapman  
5                   advised that Mr. Thibault had  
6                   requested a panel review on  
7                   the grounds that the project  
8                   had raised environmental  
9                   concerns and specifically the  
10                  effect on fish habitat."

11                  Q. Did Mr. Chapman advise you of  
12                  what scientific evidence the government had based  
13                  on this conclusion -- to base this conclusion on?

14                  A. No.

15                  Q. And did you understand the  
16                  answer to be in relation to the effect on fish  
17                  habitat of the marine terminal?

18                  A. Oh, clearly. We knew that we  
19                  were going to damage or destroy, albeit a very  
20                  small segment of the floor of the Bay of Fundy, but  
21                  that I suppose technically under that -- under  
22                  section 35, if you destroy two square feet,  
23                  technically you are destroying fish habitat.

24                  We knew that we were going to  
25                  destroy some fish habitat, because we were putting

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1 piles into the rock at the bottom of the ocean  
2 floor.

3 So we were -- we were fairly sure  
4 that we would go into a HADD, yes.

5 Q. Mr. Little mentioned to you  
6 that DFO had concluded and had advised you that  
7 they had concluded that the activity on land could  
8 kill fish. Do you recall that --

9 A. Yes.

10 Q. -- this morning? At this  
11 meeting with Mr. Chapman, was there any mention of  
12 the 500 metre setback?

13 A. I don't think that that was  
14 discussed as a significant issue at that meeting,  
15 no.

16 Q. Was the I-Blast model or any  
17 reference as to how the 500 metre setback had been  
18 arrived at, was that raised?

19 A. No. I don't believe - I  
20 don't believe it was. It could have been, but I  
21 don't think it was a major part or reason why we  
22 had gone to the meeting.

23 Q. Were you ever advised of or  
24 given the calculation upon which the 500 metre  
25 setback had been established?

1                   MR. LITTLE: Excuse me. I need to  
2 interject here, but I asked no questions about  
3 calculations that were used to derive a setback.

4                   MR. NASH: With respect,  
5 Mr. Little asked questions about DFO's conclusion  
6 as to what the activity on land might do to kill  
7 fish, and of course that is based on a setback  
8 calculation.

9                   MR. LITTLE: I believe I merely  
10 asked for confirmation that DFO had concluded that  
11 a section 32 authorization was needed and nothing  
12 more than that.

13                  MR. NASH: And of course that was  
14 based upon a conclusion that the 500 metre setback  
15 would be required. So my question simply  
16 follows --

17                  PRESIDING ARBITRATOR: Right. I  
18 remember section 32 was mentioned, but Mr. Little  
19 didn't go behind that. So if you could just keep  
20 yourself...

21                  MR. NASH: Yes.

22                  BY MR. NASH:

23                  Q. Could you go over, please, to  
24 page 001127.

25                  A. Yes.



1 Q. About halfway down the page,  
2 you state, "We noted Thibault's statement".

3 A. Yes.

4 Q. And could you read that out  
5 and explain what that is, please.

6 A. "We noted Thibault's  
7 statement to the press that  
8 the project would create  
9 serious navigational problems  
10 when neither the Federal  
11 Department of Transport nor  
12 Navigable Waters Coast Guard  
13 had raised this issue with  
14 us. Chapman had no  
15 explanation for this."

16 Q. You were referred by  
17 Mr. Little to issues of public concern. You recall  
18 that in relation to the provisions of CEAA, that  
19 there were two categories, two bases, upon which --

20 A. Yes.

21 Q. -- an assessment could be  
22 referred to a JRP?

23 A. Yes.

24 Q. Significant adverse  
25 environmental effects was one, and public concern

1 was another. Did you ultimately obtain a copy of  
2 the June 26th letter from Mr. Thibault?

3 A. As a part of the panel  
4 process, yes.

5 Q. And do you recall whether  
6 there was reference to public concern in that  
7 letter?

8 A. No, I don't -- I'm sure that  
9 there was not. I believe the statement was that  
10 there would be widespread environmental effects,  
11 and possibly authorizations required under section  
12 35 and section 32 of the Fisheries Act, if my  
13 memory serves me correctly.

14 MR. LITTLE: Again, Judge Simma, I  
15 think I asked for confirmation that the project had  
16 been referred to a review panel on June 26th, 2003.  
17 And Mr. Buxton and I had some exchanges about the  
18 CEAA Act and referral to a review panel, but we  
19 didn't get into any details about this June 26th  
20 letter.

21 MR. NASH: But of course the  
22 question arises out of the question of the June  
23 26th letter, that there was reference to a June  
24 26th letter and there was reference to statutory  
25 provisions, and the question is simply about what

1 statutory provision was being relied upon. I've  
2 got no further questions on that, in any event.

3 BY MR. NASH:

4 Q. Could you go to Exhibit R-87,  
5 please, Mr. Buxton. You will see this is the  
6 letter from M. Petrie attaching the approval of the  
7 3.9, and you may recall that Mr. Little referred to  
8 it from time to time as the conditional approval.

9 I would just like to take you, if  
10 I can, to page 3 of the actual approval, which is  
11 page 013391 at the bottom. You will see there that  
12 there is a title "General Terms and Conditions".

13 A. Yes.

14 Q. And there are a number of  
15 conditions going over page 3, page 4, and then on  
16 to page 5 all the way down to condition (p). Would  
17 you have had any difficulty complying with those  
18 conditions?

19 A. No.

20 Q. If you go to page 8, you will  
21 see the title "Separation Distances", page 013396  
22 at the bottom. You will see that there are  
23 separation distances A and B, and there is:

24 "The approval holder shall  
25 not locate the active area of

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1                   the quarry within 30 metres  
2                   of the boundary of public or  
3                   common highway, 30 metres of  
4                   the bank of any water course,  
5                   30 metres of the boundary of  
6                   the quarry property, and will  
7                   not blast within two of  
8                   those..."

9                   And then (iii) is, "within 800  
10                  metres of the foundation or base of the structure  
11                  located on the site." Do you see that?

12                  A.    Yes.

13                  Q.    Would you have had any  
14                  problem complying with those conditions, those  
15                  separation distances?

16                  A.    No. We were well clear of  
17                  all of those separation requirements.

18                  Q.    If you go to page 9 under  
19                  number 10?

20                  MR. LITTLE: I hate to interject  
21                  again, but I asked no questions about any of these  
22                  provisions, Mr. Nash.

23                  MR. NASH: Well, on this point,  
24                  with respect, Mr. Chairman, Mr. President, my  
25                  friend referred to this document as a conditional

1 approval, and Mr. Buxton referred to it as an  
2 approval subject to conditions.

3 And so I am simply taking him  
4 through the conditions.

5 PRESIDING ARBITRATOR: We are  
6 facing the same problem that you latch on to a  
7 term, and then you really kind of fill it with  
8 substance and that creates Mr. Little's --

9 MR. NASH: His concern.

10 PRESIDING ARBITRATOR: His  
11 displeasure. So are you going to go deep into  
12 that?

13 MR. NASH: No, I'm going to have  
14 one more question on that.

15 PRESIDING ARBITRATOR: Okay.

16 MR. NASH: That is at page 9 under  
17 blasting.

18 BY MR. NASH:

19 Q. Those are the blasting  
20 conditions under number 10 there, Mr. Buxton?

21 A. Yes.

22 Q. And aside from -- going from  
23 blasting condition 10(a) to (h), would you have had  
24 any difficulty complying with those conditions?

25 A. No, we would not.

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1 Q. So aside from condition  
2 10(i), you could have complied with all of the  
3 conditions and proceeded with the blasting?

4 A. Yes.

5 Q. And you wanted to do a test  
6 blast, you said, in the fall of 2002?

7 A. Yes.

8 Q. Had you known in early  
9 December of 2002 when you -- had you known the  
10 information you now know, that Mr. Conway the  
11 marine mammal expert at the DFO had no concerns  
12 about blasting, what would you have done with  
13 respect to blasting on the Whites Cove site?

14 A. We would have arranged a test  
15 blast or blasts very quickly.

16 Q. And would those blasts have  
17 been monitored?

18 A. That would have been the  
19 entire purpose of the test blast is to monitor them  
20 and find out just precisely what the peak  
21 velocities were and what the noise factors were, et  
22 cetera, so that we could extrapolate from that and  
23 provide empirical data.

24 Q. And you would have been  
25 monitoring for vibration in the seabed?

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1 A. Yes.

2 Q. And on land?

3 A. Yes.

4 Q. And through the water?

5 A. Yes.

6 Q. Thank you. Those are my  
7 questions.

8 PRESIDING ARBITRATOR: Thank you,  
9 Mr. Nash. I have the impression that colleagues  
10 might have questions.

11 QUESTIONS BY THE TRIBUNAL:

12 PROFESSOR SCHWARTZ: I have a few.  
13 I have a few, thank you.

14 I am looking at your original  
15 witness statement, and at paragraph 65, you say,  
16 you were repeatedly encouraged not to use legal  
17 counsel, paragraph 65, page 10 of the original  
18 witness statement:

19 "I was encouraged repeatedly  
20 not to have legal advice and  
21 assistance."

22 THE WITNESS: Yes.

23 PROFESSOR SCHWARTZ: Then you  
24 refer to an item from Mr. Fournier to yourself with  
25 documents attached. Is there anything else you

1 recall about that encouragement or discouragement  
2 to use legal counsel, because you say repeatedly  
3 there is a reference to it in the documents.

4 THE WITNESS: Are you on 55? I'm  
5 sorry, Professor.

6 PROFESSOR SCHWARTZ: Paragraph 65.

7 THE WITNESS: I don't think there  
8 was anything more specific that I recall than those  
9 sort of written notes with respect to legal  
10 counsel.

11 PROFESSOR SCHWARTZ: To your  
12 recollection, did the panel itself have legal  
13 counsel?

14 THE WITNESS: I don't believe so.  
15 And I think -- I think there is a reference in  
16 Mr. Fournier's opening remarks that legal counsel  
17 is not -- is not encouraged and that people are  
18 encouraged to make their own presentations to the  
19 panel.

20 PROFESSOR SCHWARTZ: Did any of  
21 the other individuals or groups have legal counsel  
22 at the hearing?

23 THE WITNESS: Not that I recall.

24 PROFESSOR SCHWARTZ: Okay. The  
25 second thing I was a bit curious about was your



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1 interactions with Nova Scotia after the joint panel  
2 report, and you tried to have a meeting with the  
3 Minister.

4 THE WITNESS: Yes.

5 PROFESSOR SCHWARTZ: Then  
6 eventually the meeting was set up with the Deputy  
7 Minister, which never went ahead. Do you recall  
8 that?

9 THE WITNESS: Correct.

10 PROFESSOR SCHWARTZ: So you say in  
11 paragraph 83 of your original witness statement,  
12 Mr. Minister Parent, to your dismay, refused to  
13 discuss the report:

14 "Mr. Parent simply stated  
15 that he would be accepting it  
16 without any review or  
17 consideration."

18 THE WITNESS: Yes.

19 PROFESSOR SCHWARTZ: Is that close  
20 to a quote? Is that a paraphrase? It's a fairly  
21 strong statement. Is there anything else you can  
22 help us with in terms of what you recall about that  
23 conversation? I know it was a long time ago, a  
24 very long time ago.

25 THE WITNESS: I don't think I can

1 add to that, I'm sorry.

2 PROFESSOR SCHWARTZ: There was a  
3 call from the Minister, apparently, to you  
4 directing that there be a meeting with the deputy.  
5 Do you remember anything about what was said when  
6 that was set up or when it was cancelled? Do you  
7 have any recollection of that?

8 THE WITNESS: The Minister did us  
9 the courtesy of calling me and on the morning of  
10 the day that he released his decision.

11 And he gave us the news that he  
12 had accepted the panel's recommendation, and I said  
13 that I think, you know, we still wanted to meet  
14 with him notwithstanding the fact that he had made  
15 the decision.

16 And he thought that there was, you  
17 know, nothing further he had to say. He had made  
18 his decision. And I said, Well, you know, we  
19 really need to know what was behind this decision  
20 and what the issues were, and he indicated that he  
21 would be very pleased to set up a meeting with the  
22 acting Deputy Minister, I believe Nancy Vanstone at  
23 the time.

24 And I said that would be -- that  
25 would be very useful to us. We really wanted to

1 understand what the problem was with the project.

2 And I did contact the Deputy  
3 Minister and we set up a time. That was cancelled.  
4 I believe we set up a second time. That was  
5 cancelled. And I think the third time I was  
6 basically told there was no purpose or point in  
7 having any further discussions on it.

8 PROFESSOR SCHWARTZ: And you  
9 didn't make any written representations to Nova  
10 Scotia after the panel report and before the  
11 Minister made his decision? You tried to go set up  
12 a meeting, according to your testimony. I was just  
13 wondering whether there was -- said, okay, we can't  
14 get a meeting, so here is our written submission.  
15 Is there....

16 THE WITNESS: No. We didn't -- we  
17 did not -- well, I think that we wrote and  
18 basically said that the panel process was flawed  
19 and we needed to discuss it. I can't give you the  
20 date of that letter right now. I'm sure --

21 PROFESSOR SCHWARTZ: I think it is  
22 on the record, that one.

23 THE WITNESS: I'm sure it is on  
24 the record.

25 PROFESSOR SCHWARTZ: Is that C-25?

1                   MR. PULKOWSKI: Can we put it on  
2 the screen, perhaps? That is Exhibit 25 of the  
3 first witness statement. Exhibit 25 to the first  
4 Buxton witness statement.

5                   PROFESSOR SCHWARTZ: That has to  
6 do with a meeting that was apparently promised with  
7 the Deputy Minister, and then cancelled. And I  
8 have already asked the witness about that.

9                   THE WITNESS: Yes.

10                  PROFESSOR SCHWARTZ: I believe  
11 prior to that you had written initially asking for  
12 the meeting with the Minister and you indicated  
13 some of your concerns. But after that, there was  
14 no, Okay, you won't meet me in person so --

15                  THE WITNESS: We did not make a  
16 formal presentation of, Here are our issues. The  
17 decision had been made. And by this time, the  
18 federal Minister had also made his decision and it  
19 seemed that we had nowhere to go.

20                  PROFESSOR SCHWARTZ: Okay. And  
21 you mention in your witness statement you couldn't  
22 get a meeting with the federal Minister. There is  
23 no written submission after you couldn't get a  
24 meeting, similarly; right?

25                  THE WITNESS: No.

1                   PROFESSOR SCHWARTZ:   Okay, thank  
2   you.

3                   Now, Mr. Little asked you about --  
4   I believe asked you about submissions after the  
5   Joint Review Panel report.  You asked to make some  
6   undertakings.  Was the time frame for any of those  
7   undertakings when you had to respond, was any of  
8   that after the public hearings were finished?  Were  
9   there any cases in which you said, Here is my  
10  undertaking, and I will give it to you after the  
11  hearings are over?  Was it all you had to give it  
12  before?

13                  THE WITNESS:  I believe that all  
14  of the undertakings that were assigned to Bilcon  
15  were in by the end of the hearings.  That is my  
16  recollection.

17                  There were some undertakings which  
18  were perhaps a little more onerous and required  
19  more research by some government departments, which  
20  came in I think a little bit after the end of the  
21  hearings.

22                  PROFESSOR SCHWARTZ:  But you  
23  weren't invited to make any submissions after the  
24  hearings, and you didn't ask to make any  
25  submissions to the panel after the hearings were

1 over; is that correct?

2 THE WITNESS: No. I think -- I  
3 think in the wrap-up, I think when the -- when the  
4 last undertaking was received, and I can't remember  
5 the date of that, but there was a fixed date at  
6 which basically the panel said, you know, that's  
7 the information that we're going to work with. I  
8 think it was the date of the last undertaking that  
9 was to come in.

10 PROFESSOR SCHWARTZ: Okay, thank  
11 you for that. You mentioned, I think it is in your  
12 supplementary affidavit, you had the impression  
13 from the body language of the panel that you were  
14 not being well received.

15 There is a point -- which volume  
16 is that?

17 MR. PULKOWSKI: Excuse me. That  
18 would be the transcript of the hearing, volume 12,  
19 Exhibit No. C-164.

20 PROFESSOR SCHWARTZ: Yes. If you  
21 don't recall, it is perfectly understandable. When  
22 I was reading over the transcript of the Joint  
23 Review Panel hearing, there was one point in volume  
24 12 at which there is some crowd cheering in  
25 opposition to Bilcon, and the Chair of the panel

1       says that's not respectful. Do you recall that?

2                       THE WITNESS: I do.

3                       PROFESSOR SCHWARTZ: Did that give  
4       you any reassurance about the panel's bona fides?

5                       THE WITNESS: It would have done  
6       if that had stopped the process, but it didn't.  
7       And we did have a communications advisor on our  
8       team and he wasn't there every day, but he was  
9       there on many of the days.

10                      And when this particular thing  
11       took place, I was questioning one of the opponents  
12       to the quarry, and the fellow simply ignored my  
13       question and made, you know, pronouncements about  
14       destroying this and destroying that, and American  
15       companies coming in and raping Nova Scotia, and so  
16       on, to the loud cheers of the crowd.

17                      But I was trying to get to ask  
18       some serious questions, and I had a computer in  
19       front of me and my document director pointed to my  
20       screen where the communications person was  
21       basically saying, you know, don't follow up on  
22       this, and so I didn't. I stopped the questioning.

23                      And it certainly -- it certainly  
24       put a real dent in our ability to question some of  
25       the intervenors. There seemed sort no point. It

1 was just going to be a cheering exercise.

2 And the chair of the panel did the  
3 following morning talk to the people and basically  
4 say, you know, Yesterday there were incidents of  
5 cheering. This is inappropriate. Would you please  
6 desist?

7 And it did tone down significantly  
8 from there, but on that particular day it just  
9 simply continued.

10 PROFESSOR SCHWARTZ: I understand.  
11 Another question about something I noticed on the  
12 transcripts, and if you don't recall, again, that  
13 is perfectly understandable.

14 But there is one point at which  
15 the chair of the panel says something like, Well,  
16 this is a little bit like a referendum.

17 THE WITNESS: I remember it well.

18 PROFESSOR SCHWARTZ: Oh, okay.  
19 Did that give you a heads-up that the community  
20 values approach was going to be adopted?

21 THE WITNESS: I wouldn't have  
22 attached community values or core values, or  
23 whatever they were, to that statement, but it  
24 certainly shocked me that, in any way, shape or  
25 form, the panel should think that it was there to



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1 do a head count of who was for and who was against  
2 the quarry.

3 That really, really shook me.

4 PROFESSOR SCHWARTZ: Thank you  
5 very much.

6 THE WITNESS: Thank you.

7 PRESIDING ARBITRATOR: Just a  
8 couple of questions on my part.

9 THE WITNESS: Yes, sir.

10 PRESIDING ARBITRATOR: You said  
11 that people were discouraged or felt discouraged  
12 from participating in the community liaison  
13 committee because of --

14 THE WITNESS: Yes.

15 PRESIDING ARBITRATOR: And  
16 therefore you had -- if you look at the later  
17 meetings, there is a list of 30 people. So what  
18 led to this, let's say, larger participation?

19 THE WITNESS: Yes. They, they  
20 would not have been community liaison committee  
21 members, though.

22 If you would just take a look at  
23 the minutes, even though there is quite a long list  
24 of people, the ones at the top are noted as being  
25 CLC members, and then the rest are attendees --

1                   PRESIDING ARBITRATOR: All right.

2                   THE WITNESS: -- at the meetings.

3   And if we had a consultant there that we were asked  
4   to produce, that tended to increase the number of  
5   people that came to the meetings. So we did have  
6   some fairly significant turnouts, but the number of  
7   actual members of the committee I don't think  
8   really ever got above seven, and we were lucky to  
9   get five or six at a meeting.

10                  PRESIDING ARBITRATOR: Okay, thank  
11   you. Another question. In your first report in  
12   paragraph 42, you say that the opinions of your  
13   experts were virtually ignored. But you made that  
14   more precise, so a couple of your experts were  
15   heard?

16                  THE WITNESS: Yes, there was some  
17   questions. There were some questions of our  
18   experts, but I think -- I think we actually did a  
19   little bit of analysis afterwards.

20                  There were probably ten or 11 of  
21   our experts that were never questioned at all.  
22   They just sat there like lumps all day.

23                  PRESIDING ARBITRATOR: All right.  
24   But if you had 19 experts attending, and you say  
25   ten or 11 or 12 of them were not heard, that's

1     probably -- I wouldn't describe that as your  
2     experts virtually being ignored if, let's say, a  
3     little less than half of them were apparently  
4     heard.

5                     THE WITNESS:  Yes.  Remember, all  
6     of the experts weren't there every day, because we  
7     tried to schedule them into the theme days.

8                     So the people who were experts on  
9     marine activities, they would all be there on this  
10    particular day.

11                    Even those that were questioned  
12    were really -- it seemed like they were not being  
13    questioned to the extent that the panel was  
14    interested in their views or their opinions, or to  
15    justify the studies that they put in.  There might  
16    have been two or three fairly trivial questions,  
17    and then they moved on.

18                    Whereas some of the intervenors --  
19    and, again, we had no idea of their  
20    qualifications -- were allowed to present a 20-odd  
21    or 25-minute submission, and then line up -- the  
22    other intervenors could line up for questions and  
23    it seemed like they had the floor for  
24    three-quarters of an hour.

25                    We didn't know who they were, you

1 know.

2 PRESIDING ARBITRATOR: Thank you.  
3 You said that the terms or the words "core values"  
4 or "community core values" were not mentioned at  
5 the hearings.

6 THE WITNESS: They were not  
7 mentioned in the guidelines. They were not  
8 mentioned in the hearings. They were never  
9 mentioned at all until the final report of the JRP.  
10 That's the first time the words "core values"  
11 entered this process.

12 PRESIDING ARBITRATOR: Okay. And  
13 my last question. I simply cannot really  
14 understand why it was impossible for you to  
15 indicate to the panel this view, strong view of  
16 yours in the morning, that the requests that you  
17 were faced with were for detailed design issues and  
18 not -- that they were not appropriate at this  
19 stage.

20 So you said there was simply no  
21 opportunity to just --

22 THE WITNESS: No. We made that  
23 point, because they were asking for this kind of  
24 detail in the IRs, in the information requests.  
25 And I think we quite specifically sort of said in

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1   some of our responses that this level of detailed  
2   design is not appropriate at this stage of the  
3   process.

4                   However, you know, we went part of  
5   the way with them. But I think we made it quite  
6   clear that we were -- we were not comfortable with  
7   attempting to provide detailed design at that stage  
8   of the process.

9                   PRESIDING ARBITRATOR: Okay. So I  
10  might have misunderstood you, because from the  
11  morning my memory is that you said there was simply  
12  no opportunity for you to get that message to the  
13  panel, that their questions were relating to design  
14  and that was going too far at that stage of the  
15  procedure.

16                  THE WITNESS: No. I think --

17                  PRESIDING ARBITRATOR: Well, okay.

18                  THE WITNESS: -- in several of the  
19  responses to the IRs, we make that point quite  
20  strongly.

21                  PRESIDING ARBITRATOR: Okay.

22                  THE WITNESS: Yes.

23                  PRESIDING ARBITRATOR: Thank you,  
24  Mr. Buxton. Yes, one question from Professor  
25  McRae, or questions.

1                   PROFESSOR MCRAE: I have a  
2 follow-up to Judge Simma's question, and that  
3 relates to the community liaison committee.

4                   THE WITNESS: Yes.

5                   PROFESSOR MCRAE: Did it matter  
6 whether people who attended were members or not in  
7 terms of community consultation,  
8 participation? You said that only a few members  
9 were there, but quite a lot of other people were  
10 there.

11                  THE WITNESS: Yes. Anybody could  
12 attend the meetings. We advertised them as being  
13 open to the public.

14                  But it is the responsibility of a  
15 community liaison committee member to take the  
16 information that they pick up at the meeting and  
17 basically transmit it, if you like, to their  
18 friends and neighbours and the group that they  
19 represent.

20                  So anybody could go to the meeting  
21 and participate. We made no -- well, it was not my  
22 business, in any event. The chair -- I was simply  
23 there to answer questions. The chair of the CLC  
24 ran the meeting, and she made it clear that anybody  
25 that wanted to speak could speak at these meetings.

1 So it wasn't rather -- it wasn't like a council  
2 meeting where only the councillors can speak and  
3 the public is sitting.

4 They were all arranged as a round  
5 table and anybody could speak at any time and ask a  
6 question, or express an opinion.

7 But the duty of a community  
8 liaison committee member was to take that  
9 information away with them and, if they were a  
10 fisherman, to get it to the fishermen's groups or  
11 whoever they were representing there.

12 PROFESSOR MCRAE: And who were the  
13 people who were coming from the public? Was this a  
14 cross-section of those who supported and those who  
15 opposed the project, or were they the 400 who were  
16 applying for jobs, or do you have any sense of what  
17 the cross-section was?

18 THE WITNESS: I think a fair  
19 majority were opponents.

20 PRESIDING ARBITRATOR: What was  
21 that?

22 THE WITNESS: Opponents to the  
23 quarry. I can think of a specific meeting where we  
24 were asked to produce our archeologist and  
25 Dr. Watrall came along and gave a precis of his

1 study of the site.

2                   And there were a fairly  
3 significant number of people there who wanted to  
4 get it on record that they thought he was full of  
5 absolute nonsense, that there was actually a  
6 fishing village in Whites Cove and they had  
7 evidence of that, and that they were most certainly  
8 artefacts, foundations, possibly graves, all over  
9 Whites Cove, because it was a community.

10                   And that seemed to come from a  
11 children's book by the name of "Fog Magic", which  
12 describes a fishing village, and I don't know who  
13 sort of started the story that Fog Magic was  
14 actually somebody who had lived at one time in  
15 Whites Cove.

16                   Whereas our archeologist and our  
17 historian, Dr. Moody, the chairman of the history  
18 department at Acadia University, were absolutely  
19 clear from studies of deeds and maps, et cetera,  
20 that there were probably only ever two houses on  
21 the 350 acres and only one basement is remaining, a  
22 very small basement.

23                   So they came -- I think certainly  
24 that meeting was, I think, swamped with opponents  
25 to the quarry. But I think it varied as to



1 subject.

2 PROFESSOR McRAE: And an unrelated  
3 matter. After Dr. Brodie did not produce the  
4 proposal you expected from him, did you then go and  
5 search for an alternative marine mammal specialist?

6 THE WITNESS: We did. We got in  
7 touch with the New England aquarium, which is  
8 actually sort of the centre for studies and data on  
9 the North Atlantic Right Whale, and I forget the  
10 lady's name now -- I think it was Brown -- who is  
11 the chief curator, supplied us with an enormous  
12 amounts of data on occurrences of the species, the  
13 various species of whale, over a multi-year period.

14 So at least we were able to gather  
15 sort of the baseline data that we needed to try to  
16 assess the risk, you know, how many of these whales  
17 came close, were observed close to the quarry in  
18 this number of years.

19 And basically we found that we had  
20 to do a lot of that work ourselves, and that became  
21 an important part of the EIS. But probably the  
22 most important thing that we did, as far as marine  
23 mammals is concerned, was we engaged the firm, the  
24 consortium, of JASCO and LGL, who are probably the  
25 companies that, for example, DFO would hire if they

1     were looking for a study. They are the experts in  
2     this sort of work.

3                     We commissioned them to do both a  
4     literature search on marine mammals and fish and  
5     the effects of particle loads, et cetera, and they  
6     produced a report for us, which was ultimately  
7     accepted by DFO, although reluctantly. And it  
8     superseded the incorrect work that was done by DFO,  
9     because the wrong model was used to set this --  
10    sorry, 500 metre setback distance. They used the  
11    I-Blast model, which is only to determine the  
12    strength of blasts in water. It has nothing to do  
13    with blasting on land.

14                    So we did an extensive study by  
15    JASCO and LGL to provide this baseline data as to  
16    what, in fact, the noise decibel levels would be  
17    with respect to marine mammals.

18                    And I think that is probably -- I  
19    think it is probably the work that DFO is now using  
20    with respect to marine mammals.

21                    PROFESSOR McRAE: Thank you.

22                    PRESIDING ARBITRATOR: Yes.

23    Professor Schwartz.

24                    PROFESSOR SCHWARTZ: Yes, thank  
25    you. I guess an issue I am trying to figure out in

1 my own mind is this tension between panel didn't  
2 invite me, and, on the other hand, you didn't ask.

3 And that relates to a whole lot of  
4 issues. Judge Simma asked about one of them. It  
5 is Bilcon's position there were experts there who  
6 weren't invited to share their expertise, that you  
7 didn't get a chance to respond to adverse  
8 testimony, some of which you think was  
9 scientifically unfounded, and so on.

10 In terms of they didn't invite --  
11 no post hearing brief. In terms of that basic  
12 question that they didn't invite you, but, on the  
13 other hand, you didn't ask, do you have any  
14 concluding thoughts you can share with us?

15 THE WITNESS: Well, I think we did  
16 make representations, particularly with respect of  
17 our copper expert. He came in with great  
18 difficulty to make the hearing. He had had a  
19 family tragedy, I think, and made time to come in  
20 to the hearing.

21 I advised the panel manager that  
22 he was going to be there. I reminded her, again,  
23 in the morning that he was going to be there.  
24 Copper was obviously on the panel's mind. It was  
25 an issue, an important issue.

1                   By 4 o'clock in the afternoon,  
2 mid-afternoon break, the subject of copper was not  
3 raised. The panel didn't seem interested that  
4 Mr. Schoepner was there. I again went to the panel  
5 manager and said, Would you remind, please, the  
6 chairman that Mr. Schoepner is here to answer your  
7 questions on copper? And he's here specifically  
8 because the panel made this an important topic in  
9 its information requests.

10                   And the day finished late, I  
11 think, but no questions, not even acknowledgement  
12 that he was there. And, you know, one got to the  
13 stage later on in the hearings that one found it  
14 very difficult, in fact, to work and operate in  
15 that -- it was a very hostile environment, and I am  
16 not easily intimidated, but it was a very hostile  
17 environment.

18                   PROFESSOR SCHWARTZ: Thank you  
19 very much.

20                   PRESIDING ARBITRATOR: I see  
21 Mr. Nash moving. What is that going to be?

22                   MR. NASH: I have one question,  
23 one-and-a-half questions, arising from Professor  
24 Schwartz's question.

25                   PRESIDING ARBITRATOR: Let me just

1 tell you that I was educated in a civil law  
2 environment, particularly Austria, where education  
3 in civil law was particularly civil in nature.

4 MR. NASH: Yes.

5 PRESIDING ARBITRATOR: So I am a  
6 little curious. Is that an admissible stage? I  
7 will ask my colleagues, the common lawyers. Yes,  
8 okay, all right. Go ahead, please.

9 MR. NASH: Thank you,  
10 Mr. President.

11 FURTHER RE-EXAMINATION BY MR. NASH:

12 Q. Mr. Buxton, Professor  
13 Schwartz asked you about submissions to the  
14 Minister after the JRP recommendations had been  
15 issued, the report, but before the Ministers made  
16 the decision.

17 And I am not sure that I followed  
18 the response. So could I ask that document C-195  
19 be put on the screen? It is a letter from  
20 Mr. Buxton to Honourable Mark Parent October 29th,  
21 2007. I am not sure you can see that, Mr. Buxton,  
22 but is that a submission you made to Minister  
23 Parent?

24 A. Yes.

25 Q. And that was before he made

1 his decision; correct?

2 A. Yes, it was. I rather  
3 understood the question to be: Did we make a  
4 submission sort of based on an entire presentation  
5 of what we found wrong?

6 I do remember clearly us basically  
7 saying, in a general sense, you know, we had real  
8 issues and we wanted to bring these issues to his  
9 attention before he made the decision.

10 But we didn't lay them all out in  
11 a report, as I think you asked, Professor.

12 Q. And with respect to  
13 submissions to Minister Baird, could we have  
14 Exhibit C-544 put on the screen, which is a letter  
15 from Bilcon of Nova Scotia to Minister Baird  
16 November 21st, 2007.

17 And that letter was sent,  
18 Mr. Buxton, to Minister Baird prior to Minister  
19 Baird making his decision; is that correct?

20 A. Yes, yes.

21 Q. Thank you. Those are my  
22 questions. I think it was only one and a half.

23 PRESIDING ARBITRATOR: Thank you  
24 very much, Mr. Nash. My colleagues don't have any  
25 questions either.

1 MR. LITTLE: Excuse me, I have one  
2 more question.

3 PRESIDING ARBITRATOR: Oh, yes,  
4 Mr. Little.

5 FURTHER CROSS-EXAMINATION BY MR. LITTLE:

6 Q. I am just going to stay here  
7 in my seat. I think the response from Mr. Buxton  
8 was that they didn't lay -- it is not spelled all  
9 that correctly, but they didn't lay all their  
10 concerns out in a report that they provided to the  
11 Minister of Environment and Labour after the  
12 issuance of the JRP recommendation, but before the  
13 Minister's decision.

14 Now, I believe the exhibit that  
15 we're seeing now, which is Exhibit No. C-002,  
16 provides exactly the opposite, that -- and this is  
17 a four-page document that sets out the detailed  
18 concerns that Mr. Buxton had with the report.

19 That was provided to Minister  
20 Parent, and it was reviewed by Minister Parent.  
21 Maybe we could go to the signature page. So  
22 perhaps Mr. Buxton could tell us if he recalls this  
23 letter.

24 A. Yes. Sorry.

25 PRESIDING ARBITRATOR: Go ahead.

1                   THE WITNESS: It is difficult for  
2 me to speak. Yes, I recall that letter. Yes.

3                   PRESIDING ARBITRATOR: So I think  
4 the issue is whether, in your letters, in the  
5 letters, you set out the concerns. And I don't  
6 have the lines here. I cannot read it or run that  
7 machine. So I see precisely the words you used to  
8 say that they did not -- apparently you said, We  
9 did not set out concerns, that it was a more  
10 general letter.

11                  THE WITNESS: Yes. And I think  
12 those were general concerns. I mean, actually, a  
13 lot of the material we were not aware of until this  
14 process started.

15                  PRESIDING ARBITRATOR: So would  
16 you consider that letter still a letter which has  
17 not really set out the concerns in the kind of  
18 detail that you seem to have had in mind? It was  
19 more of a general nature.

20                  THE WITNESS: I was really sort of  
21 thinking that Professor Schwartz was thinking that  
22 we would have put together, you know, a  
23 comprehensive 50- or 60-page study of why we  
24 thought that the panel was wrong. These are  
25 general, general comments, essentially, first



1 blush. And much of the material we simply didn't  
2 have. We were not aware of a lot of the material  
3 that was withheld from us, which, you know, did  
4 tremendous damage to our EIS, the material that was  
5 withheld by DFO. We didn't have it. I was not  
6 aware of it until this process started.

7 PRESIDING ARBITRATOR: Mr. Little,  
8 do you want to continue on that? Sorry.  
9 Mr. Little, do you want to continue on that point?

10 MR. LITTLE: No. It's okay.  
11 Thanks.

12 PRESIDING ARBITRATOR: Thank  
13 you. I think brings to an end this long exercise.  
14 Mr. Buxton you are a free man again.  
15 --- Laughter

16 PRESIDING ARBITRATOR: Thank you  
17 very much.

18 THE WITNESS: Thank you very much,  
19 Mr. President. Thank you.

20 PRESIDING ARBITRATOR: Yes,  
21 actually I think that is probably the time for a  
22 break. Let's have a ten-minute break and meet  
23 again at 3:15 sharp, and in the meantime set up  
24 Mr. Rankin. Okay. So at 3:15 sharp we will  
25 continue.

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1 --- Recess at 3:03 p.m.

2 --- Upon resuming at 3:16 p.m.

3 PRESIDING ARBITRATOR: Looks like  
4 we're all being back. Before we the examination of  
5 Professor Rankin starts, let me just announce that  
6 from tomorrow onwards we're going to start the  
7 hearing at 9:00 instead of 9:30, which will  
8 facilitate the work of our court reporter, and  
9 everybody seems to be happy.

10 So tomorrow we will see each other  
11 at 9:00 instead of 9:30. With this, I give the  
12 floor to Mr. Nash to introduce Mr. Rankin.

13 EXAMINATION IN-CHIEF BY MR. NASH:

14 Q. Thank you, Judge Simma.  
15 Professor Rankin, could you relate to the Tribunal,  
16 in a summary form, your experience in an  
17 administrative, constitutional and environmental  
18 law?

19 A. Thank you. I have had a  
20 really blessed career. I studied at Harvard in  
21 administrative law and environmental law, and then  
22 taught it for 13 years at the University of  
23 Victoria faculty of law, practising during that  
24 period, as well.

25 I left the university to join --

1 to actually establish a boutique litigation firm  
2 with Joe Arvay and my late partner John Finlay,  
3 which did exclusively public law litigation,  
4 constitutional, administrative law and, in my case  
5 a lot of environmental litigation.

6 I did work for the Government of  
7 British Columbia both as a lawyer in court. I  
8 defended the government in the first Environmental  
9 Assessment Act litigation under the then new  
10 British Columbia Environmental Assessment Act.

11 I served as commission counsel  
12 during that period to an inquiry, a Joint Review  
13 Panel preceding the CEAA, but a Joint Review Panel  
14 between British Columbia and Government of Canada  
15 in relation to a proposed ferro chromium project on  
16 northern Vancouver Island.

17 I have done a lot of work with  
18 aboriginal people in my career, most recently  
19 acting for the Tsawwassen First Nation in  
20 Vancouver, which has a modern treaty.

21 On the administrative law side,  
22 that has been my -- a lot my academic writing has  
23 been in that field. I was asked to translate the  
24 entire three-volume work of Rene Dussault and Louis  
25 Borgeat, the leading text on administrative law,

1 from French to English, which I am proud to have  
2 done.

3 And I am currently the regional  
4 editor for the Canadian Journal of Administrative  
5 Law and Practice.

6 PRESIDING ARBITRATOR: Oh, I am  
7 very sorry. I forgot to, first of all, ask you to  
8 read out the statement in front of you.

9 DR. RANKIN: Certainly. I  
10 solemnly declare upon my honour and conscience that  
11 I will speak the truth, the whole truth and nothing  
12 but the truth and that my statement will be in  
13 accordance with my sincere belief.

14 AFFIRMED: T. MURRAY RANKIN, Q.C.

15 PRESIDING ARBITRATOR: Yes. And  
16 you have also signed an undertaking and assurance  
17 that you were not listening --

18 MR. NASH: No, no. Professor  
19 Rankin is an expert.

20 PRESIDING ARBITRATOR: Okay. I am  
21 learning.

22 --- Laughter

23 MR. NASH: It's okay.

24 THE WITNESS: I will sign whatever  
25 you ask me to, but I haven't signed anything yet.

1 --- Laughter

2 BY MR. NASH:

3 Q. Have you acted as an advisor  
4 to the Government of Canada?

5 A. Yes. I have advised the  
6 chief review officer, a statutory office created  
7 under the Canadian Environmental Protection Act,  
8 and appeared as her counsel on a number of matters.

9 I have been a joint expert in the  
10 Nestucca oil spill for the Government of Canada and  
11 British Columbia in the context of an oil spill  
12 occurring off the coast of Oregon in the United  
13 States that occurred back in, I think, the late  
14 1980s.

15 I have done an enormous amount of  
16 work for the Province of British Columbia. I was a  
17 treaty negotiator on their behalf and negotiated  
18 three treaties with First Nations.

19 And I have been also very active  
20 on environmental policy reform for the Province of  
21 British Columbia. I have acted for government --  
22 governments, First Nations and for industry in my  
23 career.

24 Q. And are you involved in any  
25 environmental law organizations?

1                   A.    Until my recent detour in my  
2    career, the last year I put my name in -- my hat in  
3    the ring to run for federal office. I am now a  
4    member of parliament. Until that time, I was chair  
5    of the Environmental Law Centre at the University  
6    of Victoria, co-chair.

7                   I have been the past president of  
8    the West Coast Environmental Law Association, the  
9    Land Conservancy of British Columbia, and the  
10   Public Interest Advocacy Centre during my career.

11                  I was also -- a number of private  
12   sector environmental lawyers get together every  
13   year in what's called the Environmental Law Forum.  
14   I was co-chair of that a year ago. I of course  
15   resigned from that, as I am no longer in the active  
16   practice of law, although I do remain a member of  
17   the bar.

18                  Q.    Thank you, Professor Rankin.  
19   Those are my questions.

20                  PRESIDING ARBITRATOR: Who is  
21   going to -- yes, Mr. Spelliscy.

22   CROSS-EXAMINATION BY MR. SPELLISCY:

23                  Q.    Good afternoon, Mr. Rankin.

24                  A.    Good afternoon.

25                  Q.    My name is Shane Spelliscy.

1 I am counsel for Canada here. I am going to be  
2 asking you a few questions about the expert report  
3 that you submitted in this arbitration.

4 Just to lay out some ground rules  
5 to make sure we understand each other, if you don't  
6 understand a question, you let me know. I will try  
7 and re-ask it. If you think I have misunderstood  
8 something you say, you let me know and we will try  
9 to get on the same page.

10 Now, I know you are here to  
11 provide your opinion, but in order to help this go  
12 a little more smoothly, let me ask you to do the  
13 following.

14 If I ask you a question and you  
15 can give me a yes or no answer, I would appreciate  
16 it if you do. If you need to then offer an  
17 explanation of that answer, please go ahead after,  
18 but, for the record, I would ask that you say yes  
19 or no, if you can.

20 If you can't, let me know, That's  
21 not a yes or no question. I can't say yes or no,  
22 and then you can feel free to explain why. Does  
23 that sound acceptable?

24 A. Yes.

25 Q. Great. Now, I would like to

1 just start with something that you just said, which  
2 was -- and I think that most of us know you are an  
3 elected member of parliament right now; correct?

4 A. I was sworn in as a member of  
5 parliament on December 8th, 2012. I have been a  
6 member of parliament for less than a year.

7 Q. Now, you submitted this  
8 expert report on December 21st of 2012; correct?

9 A. That's right.

10 Q. Now, in your expert report,  
11 you don't disclose that you are currently sitting  
12 as a member of parliament; correct?

13 A. The report was in fact  
14 written, and the signature was added I think in  
15 December of 2012, but a great deal of the work that  
16 led to it was done much before that.

17 Q. And so you didn't update it  
18 when you signed it on December 21st?

19 A. No.

20 Q. You are currently a member of  
21 the opposition to the Government of Canada,  
22 correct, the official opposition?

23 A. That is correct, yes.

24 Q. Now, you went through -- your  
25 training is as a lawyer, you said; correct?



1 A. That's correct.

2 Q. You have never received a law  
3 degree from any faculty of science?

4 A. No.

5 Q. Sorry, a degree from any  
6 faculty of science?

7 A. No. I have a degree in arts  
8 and science.

9 Q. And is that in --

10 A. No.

11 Q. In a science science?

12 A. No, no.

13 Q. You never worked as a  
14 scientist; correct?

15 A. Correct.

16 Q. So the opinions that you are  
17 advocating in this case in your report, they are  
18 based on your review of the documents in this case?

19 A. Yes. I state in my opinion  
20 it is based on my review of witness statements that  
21 I had received. I have since had occasion to read  
22 the supplemental witness statement by Mr. Buxton,  
23 which hadn't been available when I did it.

24 I have also reviewed the witness  
25 statements by Mr. Smith, and then his rejoinder,

1 Mr. Estrin, and then his reply and the evidence  
2 that was brought to my attention by counsel for the  
3 investors, Bilcon of Canada.

4 Q. And did you also read the  
5 pleadings in the case, the memorial and counter  
6 memorial?

7 A. Yes. Sorry, yes. Thank you,  
8 I did.

9 Q. I would like to discuss what  
10 your opinions were of the conduct of the Department  
11 of Fisheries and Oceans prior to the referral to  
12 the JRP panel. Those are outlined at pages 33 to  
13 42 of your report.

14 Just to let you know, I will be  
15 discussing those and my colleague, Mr. Kurelek,  
16 will come and ask you some questions about your  
17 opinion on the actual process of the Joint Review  
18 Panel.

19 A. It's been a while since I had  
20 the report in front of me. Perhaps you could take  
21 me to it in this pile of material.

22 Q. I apologize for the pile of  
23 material but, like any lawyer, I am sure you have  
24 an affinity for paper, so it is all there. It is  
25 in volume 1 of your first volume.

1 A. There it is.

2 Q. Now, to understand what's in  
3 your report, I would just like to get a basic  
4 understanding of what your experience is, with  
5 respect, and your understanding of the general  
6 scheme of environmental assessment in Canada.

7 So if you would turn to paragraph  
8 62 of your report -- I'm sorry, I think it is --  
9 well, before I actually go into this, let me ask  
10 you and see what we can do without going to the  
11 documents and maybe we will save time.

12 The Canadian Environmental  
13 Assessment Act, that's the federal statute  
14 applicable to environmental assessment; correct?

15 A. At the time, the statute that  
16 applied was the Canadian Environmental Assessment  
17 Act. If you mean at the present time, there is a  
18 new statute called the Canadian Environmental  
19 Assessment Act, 2012, which supplanted the statute.

20 At the relevant time, it was the  
21 earlier version -- it's been amended a couple of  
22 times -- of the Canadian Environmental Assessment  
23 Act. I make that point in my report.

24 Q. Sure. Let's agree to live in  
25 the past here, and when we talk about the Canadian

00211

1 Environmental Assessment Act, we'll talk about the  
2 one that was in effect in 2003.

3 A. Yes.

4 Q. Now, the scheme of that Act  
5 is set up to determine when a project requires an  
6 authorization of a federal authority requires a  
7 federal authority to make a decision, an EA is  
8 required prior to that; correct?

9 A. Perhaps you could repeat the  
10 question.

11 Q. In terms of -- I guess I'm  
12 looking for your understanding of what triggers the  
13 CEAA, and my understanding, from your report, was  
14 that in terms of a triggering the CEAA -- maybe it  
15 would be useful to go to an actual paragraph in  
16 your report. If we go to paragraph 62.

17 A. Yes. Yes, there is three  
18 ways in which it is triggered, the expenditure of  
19 federal money, the involvement of federal land, and  
20 most typically when one of the listed regulations  
21 or statutes that are in the Law List Regulations  
22 are triggered -- that is a "trigger" a federal  
23 trigger -- that's the most typical way in which the  
24 CEAA kicks in.

25 Q. Okay. So if we look at the

1 first sentence of paragraph 62 of your report, what  
2 it says is that:

3 "The general scheme of the  
4 Act is that if a 'project',  
5 as defined in the statute and  
6 which is not on an 'exclusion  
7 list' is proposed, an EA is  
8 required before a federal  
9 authority can make a decision  
10 under Section 5 of the Act."

11 Do you see that?

12 A. Yes.

13 Q. So you would agree, then, the  
14 first question to be answered, if a project is  
15 proposed, is: What is the project that is being  
16 proposed by the proponent; correct?

17 A. Yes.

18 Q. And if that project that is  
19 proposed -- and you mentioned other things, but if  
20 it requires a decision under section 5 of the CEAA,  
21 then an EA is going to be required; correct?

22 A. Yes. But I wish you to  
23 understand the -- what the academics and the courts  
24 have made abundantly clear, and that is that that  
25 federal trigger has to be within an area of federal

1 responsibility.

2 Q. We'll get to that.

3 A. I just didn't want to  
4 overstate the point there.

5 Q. But if there is a federal  
6 trigger, you agree the CEAA is triggered and an  
7 environmental assessment has to happen?

8 A. Yes.

9 Q. And that environmental  
10 assessment actually has to happen prior to any  
11 authorizations or decisions being made by the  
12 federal government; right?

13 A. Yes.

14 Q. Now, in this case, you're  
15 aware that Bilcon's proposed project was a quarry  
16 and marine terminal at Whites Point in Nova Scotia;  
17 correct?

18 A. Yes. There were two  
19 components to the project. The federal component  
20 would have been the marine terminal, in my  
21 judgment, and the provincial component would have  
22 been the quarry, unless there was a trigger for the  
23 quarry which, for reasons I would be happy to  
24 elaborate on, I don't think there ever was.

25 Q. But I guess I want to come

1 back to what the question was, what Bilcon proposed  
2 as its project. Now, you would agree in its  
3 proposal submissions made to the government, it  
4 described its project always as a quarry and a  
5 marine terminal; correct?

6 A. The proponent described its  
7 project as both a quarry and a marine terminal.

8 Q. Now, the construction of a  
9 marine terminal at Whites Point of the one that was  
10 envisaged here, that required a federal approval  
11 under section 5(1) of the Navigable Waters  
12 Protection Act; correct?

13 A. Yes, that's correct.

14 Q. And section 5(1) of the  
15 Navigable Waters Protection Act, that is listed in  
16 section 5 of the Canadian Environmental Assessment  
17 Act. So that project, that component of the  
18 project required a federal EA; correct?

19 A. More precisely, it is not  
20 listed in section 5 of the Canadian Environmental  
21 Assessment Act. Rather, it is listed in the Law  
22 List Regulations as one of the sections that would  
23 be triggered by section 5 or which section 5 would  
24 trigger, depending how you see it.

25 Q. It is incorporated therefore

1 and required a federal EA of the project?

2 A. Yes, yes.

3 Q. Now, that is with respect to  
4 the marine terminal. With respect also to the  
5 quarry, now you would agree that the quarry  
6 triggered an environmental assessment under Nova  
7 Scotia law; correct? And I'm talking about the  
8 large quarry.

9 A. I believe that if there was  
10 an application, that is to say if there was under  
11 section 33 of the Nova Scotia Act a registration by  
12 the proponent, the payment of what I understand to  
13 amount to \$1,200 or so and a project description,  
14 at that point the Nova Scotia Act would be  
15 triggered.

16 But for smaller quarries such as  
17 those under ten acres, four hectares, there was in  
18 fact a regulation under that NSEA that said you did  
19 not need to get an environmental assessment. So --  
20 I'm insisting on the specificity of the requirement  
21 under the law. The law says if you have a  
22 registration of a project -- of an undertaking, I  
23 should say, provide a project description, pay a  
24 lot of money, engage the public servants in Nova  
25 Scotia, at that point and only at that point is a



1 Nova Scotia statute triggered.

2 Q. Now, you've talked about the  
3 registration document, but just let me understand.

4 You would agree that under Nova  
5 Scotia law, a quarry in excess of four hectares is  
6 an undertaking under the Nova Scotia  
7 environmental -- the NSEA. It is an undertaking;  
8 correct?

9 A. Yes.

10 Q. And you would agree that  
11 under the Nova Scotia legislation, that before such  
12 an undertaking -- before work could proceed on that  
13 undertaking, an environmental assessment was  
14 required; correct?

15 A. No. I would not agree with  
16 that, for reasons I have said. There is a very  
17 specific statutory requirement that was, in my  
18 understanding, not followed in the circumstances.  
19 That is, that undertaking is the subject of the  
20 Nova Scotia Act if there's, one, a project  
21 description; two, registration; and, three, under  
22 the regulations, the payment of quite a  
23 considerable sum of money which, at that point and  
24 only at that point, triggers the requirement of an  
25 environmental assessment for that undertaking, in

1 other words, to engage the public servants and Nova  
2 Scotia to do their work, et cetera.

3 But, no, only with that formality  
4 would I agree with your statement.

5 Q. So let me understand, then.  
6 Is your position that Bilcon could have begun  
7 construction of this quarry without obtaining a  
8 permit from Nova Scotia to do so?

9 A. No. That is not my position.  
10 For purposes of a test quarry, as you know, under  
11 the four hectare limit, there was no need for an  
12 environmental assessment.

13 For applying for -- I don't think  
14 they ever did apply for the environmental  
15 assessment for the larger quarry, which, as I say,  
16 I don't recall having been achieved. The  
17 registration process under section 33 is a  
18 statutory requirement.

19 Q. But I just am not sure I  
20 understand your answer, then, Mr. Rankin.

21 Did Bilcon not require -- did  
22 Bilcon require a permit to construct a 152 hectare  
23 quarry in Nova Scotia from Nova Scotia?

24 A. Bilcon should have applied  
25 and sought registration, and at that point an

1 environmental assessment would be required under  
2 the Nova Scotia legislation.

3 Q. I understand that timing --

4 A. Yes.

5 Q. I guess what I want to  
6 understand is they could not begin construction of  
7 that quarry in Nova Scotia until they had done so?

8 A. A larger quarry?

9 Q. The larger quarry, yes.

10 A. Until it applied, had  
11 registration, paid their money, yes.

12 Q. So in fact leaving aside how  
13 formally that got triggered, you would agree that  
14 under Nova Scotia law, Bilcon needed to obtain a  
15 permit from Nova Scotia in order to begin  
16 construction of the quarry?

17 A. Yes.

18 Q. You would agree that before  
19 they got that permit, there would have to be an  
20 environmental assessment?

21 A. Of some kind.

22 Q. Of some kind, yes, but under  
23 Nova Scotia law there would have to be an  
24 environmental assessment?

25 A. Right.

1                   Q.    So then you agree that before  
2   this project, the quarry marine and terminal  
3   project, could be constructed, there had to be at  
4   least a federal environmental assessment of the  
5   marine terminal, and there would have to have been  
6   at some point a provincial environmental assessment  
7   of the quarry.  An EA on both aspects was needed by  
8   some jurisdiction in Canada; correct?

9                   A.    Yes.

10                  Q.    Now, I want to come back to  
11   something and try and understand something you just  
12   mentioned, and that was when you were talking about  
13   the scope of federal jurisdiction under CEAA.

14                  A.    Yes.

15                  Q.    You are familiar with the  
16   MiningWatch case, Mr. Rankin?

17                  A.    Of course.  But that case  
18   of -- that took place many years after the story  
19   that is before this arbitration Tribunal.

20                  Q.    Right.  Now, that took place  
21   actually in 2010 the decision was issued; correct?

22                  A.    Yes.  I would assert as a  
23   lawyer that it has no relevance to the case at bar.

24                  Q.    I just want to understand  
25   that opinion a little bit, because you would agree

1 the MiningWatch case actually did interpret  
2 language in the CEAA that had not changed between  
3 the 2003 Act applicable to the Whites Point project  
4 and the -- actually, what was applicable in the  
5 MiningWatch case, was in fact the 2004 CEAA. You  
6 would agree the relevant language had not changed;  
7 correct?

8 A. Until the Supreme Court of  
9 Canada told us their opinion or their judgment in  
10 the MiningWatch case, which occurred in 2010, the  
11 Government of Canada's practice had been uniformly  
12 to "scope to trigger", and I will explain that if  
13 the panel wishes.

14 And in a number of cases that are  
15 referred to in either my materials or those of  
16 Mr. Estrin, namely, the Tolco case, the Sunpine  
17 case, the Prairie Acid Rain case, in each of those  
18 cases the government was told that it had to scope  
19 to trigger; that is, that they could only do an  
20 environmental assessment within federal  
21 jurisdiction. They could not go beyond the federal  
22 jurisdiction.

23 So you have to have the  
24 Constitution overlaid on CEAA. It is not  
25 transparent on the face of the statute.

1                   So if you have a trigger under  
2   section 5 of the Navigable Waters Act, and you can  
3   scope and you have to do a study, because that's  
4   one of the statutes that is listed for that federal  
5   purpose.

6                   My point is the -- later on it  
7   was -- the case that counsel is referring to called  
8   MiningWatch said it was really up to the proponent  
9   how they stated their case and they would scope to  
10   what the proponent said. The practice at the  
11   relevant time of this investigation was to scope to  
12   only the limited federal trigger.

13                  And to be very clear, I don't  
14   understand how they could have included the quarry  
15   in that regard. They could have dealt with the  
16   marine terminal, the dock, but for reasons I could  
17   talk to and a number of cases I could refer you to,  
18   I do not believe they had the jurisdiction to scope  
19   in the quarry.

20                  Q.   Okay, Mr. Rankin, I would  
21   like to sort of take some of -- take some time to  
22   understand your opinion here.

23                  So I understand you're talking  
24   about the uniform practice at the time, but you  
25   would agree the Supreme Court in MiningWatch was

00222

1 interpreting the same language that existed in the  
2 CEAA that was applicable to the Whites Point  
3 project, the same language?

4 A. I confess I haven't looked,  
5 because there were amendments to the Canadian  
6 Environmental Assessment Act that took place after  
7 this statute that we're involved with that took  
8 place. And I confess I haven't compared this  
9 precise language.

10 I would not be surprised if you  
11 told me that the language was the same, but to be  
12 totally truthful, I haven't compared the two myself  
13 because, as I said, there were a series of  
14 amendments that took place in that statute up to  
15 and including of course the most recent change.

16 So I would not be surprised if the  
17 language was similar, but I can't confirm that.

18 Q. Okay. Well, let's maybe help  
19 us confirm that. If you go to tab R-15, I am  
20 probably going to need you to have two tabs open,  
21 R-1 -- R-15 is the MiningWatch decision, and R-1 is  
22 the Canadian Environmental Assessment Act as it  
23 existed at the time of the Whites Point quarry.

24 Now, if we go to paragraph 20 in  
25 the Supreme Court's decision, at the very beginning

00223

1 it says, at the very first sentence, paragraph 20,  
2 it says:

3 "The decision of the Federal  
4 Court of Appeal and the  
5 positions of the government  
6 and Red Chris on the proper  
7 interpretation of s. 21 are  
8 largely based on their  
9 interpretation of the  
10 application of s. 15(1) of  
11 the CEAA."

12 Do you see that?

13 A. Yes.

14 Q. And just to be clear, what  
15 you're saying here is the position being advanced  
16 by the government here that is referred to is that  
17 it should scope to its triggers; correct?

18 A. Just to be clear, I'm saying  
19 the practice of the government and understanding of  
20 the -- and the case law confirming that was that  
21 the federal government must scope to their trigger  
22 at the relevant time of the Whites Point quarry  
23 matter.

24 Q. Mm-hm.

25 A. Yes, that's what I'm saying.



1                   Q.   Now, so this refers to  
2   section 15(1).  And if you take a look in that  
3   paragraph, they quote what section 15(1) is.  Do  
4   you see that in paragraph 20 of the Supreme Court's  
5   decision?  They actually quote what section 15(1)  
6   of the relevant act of CEAA is?

7                   A.   That's right, yes.

8                   Q.   If you go down -- if you go  
9   back to C-1 -- and I apologize for the flipping  
10  here, but if you go back and you look at C-1, and  
11  it is on page 9 of 36, you will see section 15.1  
12  of -- 16(1) of CEAA and you can confirm that in  
13  fact that is the same language; correct?

14                  A.   Yes, it is.  Yes, it looks to  
15  be the same language.

16                  Q.   Right.  I will slow down as  
17  we all try to manage these three-inch binders and  
18  the paper stuck to them.

19                  Now, if we go down to -- back to  
20  Exhibit R-15 and we turn to paragraph 28 in the  
21  Supreme Court's decision, it says:

22                         "The starting point in the  
23                         statutory interpretation  
24                         exercise is the definition of  
25                         section 2 of the CEAA."

1 Do you see that?

2 A. Yes. Mm-hm, yes.

3 Q. And then in the next  
4 sentence, the next sentence, it provides the  
5 definition of CEAA at the time. That is in  
6 MiningWatch, correct, any proposed construction,  
7 operation, modification, decommissioning,  
8 abandonment or other undertaking in relation to  
9 that physical work; correct?

10 A. Yes.

11 Q. The Supreme Court in fact in  
12 that paragraph underlined the word "proposed";  
13 right?

14 A. Yes.

15 Q. If we flip all the way back  
16 to R-1, and we go to what is at page 4 of 36, there  
17 is a definition of "project".

18 You will see, and you can confirm,  
19 that the definition of project that is being  
20 interpreted by the Supreme Court is the same as the  
21 definition of project in the CEAA that applied in  
22 the Whites Point case; correct:

23 A. Yes.

24 Q. Now, if we go to paragraph 34  
25 of the Supreme Court's decision, R-15, you will see

1    what their interpretation of this language, the  
2    same language that is in the CEAA, that is being  
3    interpreted. You will see what it is. It says  
4    when the term "project" in sections 18 and 21 is  
5    considered in context, the correct interpretation  
6    is "project as proposed" and not "project as  
7    scoped". Do you see that?

8                   A.    I do.

9                   Q.    And if you continue on to  
10   paragraph 39, you will see in this paragraph in the  
11   second sentence of R-15 it describes the discretion  
12   of the Minister to scope a project or to scope an  
13   environmental assessment. It provides that section  
14   15(1) grants the discretion to scope to either the  
15   Minister, in the case of mediation or a review  
16   panel, or the RA. It says:

17                               "However, this exercise of  
18                               this discretion is limited by  
19                               section 15(3)."

20                   Do you see that?

21                   A.    I do.

22                   Q.    And then if you flip the page  
23   over, still in paragraph 39, you will see how they  
24   decide to describe the definition or the discretion  
25   is actually limited. That says:

00227

1 "Consistent with the view  
2 that the 'project as proposed  
3 by the proponent' is to apply  
4 in the absence of text or  
5 context to the contrary, the  
6 scoping of the project  
7 performed by the RA or  
8 Minister under s. 15(1) is  
9 subject to s. 15(3). In  
10 other words, the minimum  
11 scope is the project as  
12 proposed by the proponent,  
13 and the RA or Minister has  
14 the discretion to enlarge the  
15 scope when required by the  
16 facts and circumstances of  
17 the project."

18 Do you see that?

19 A. I see it. I'm still having  
20 trouble with its relevance, if I am allowed to  
21 respond.

22 Q. Let me ask you a question  
23 first, and then I can get your response.

24 A. Yes.

25 Q. What I want to confirm is

1     that the Supreme Court here is interpreting the  
2     exact same language that is in the CEAA that was  
3     actually applicable to the Whites Point project;  
4     correct?

5                     A.     The text is the same.

6                     Q.     The text is the same. And in  
7     interpreting that language, it says that in fact  
8     the project has to be -- that the project under  
9     consideration is as proposed by the proponent;  
10    correct?

11                    A.     Yes.

12                    Q.     And the project that was  
13    proposed by the proponent was, in this case, at all  
14    times a quarry and a marine terminal; correct?

15                    A.     Yes. So may I at least  
16    explain why I think this is of little relevance or  
17    not?

18                    Q.     Well, I understand, and maybe  
19    we can get there through some questions, that you  
20    have said that this is of little relevance because  
21    of what the practice was at the time?

22                    A.     I'm saying, if I may, two  
23    distinct things. First of all, I commend to the  
24    Tribunal the work of another Department of Justice  
25    lawyer named Beverley Hobby, who I referred to in

1 my materials, who is their leading expert on the  
2 Canadian Environmental Assessment Act; indeed,  
3 wrote a book on the subject.

4 And she makes abundantly clear,  
5 and I have cited the material in my report, that  
6 you must read the scoping decision in light of the  
7 Constitution, that the federal government has no  
8 jurisdiction to go and scope in matters beyond what  
9 is a fisheries matter in this case.

10 It cannot deal with matters such  
11 as a quarry, unless there is a trigger that the  
12 federal government has. That's the first point.

13 The second point is that referring  
14 us to how the Supreme Court of Canada has  
15 determined the law to be in 2010, with the greatest  
16 respect, is not relevant to how the world worked at  
17 this relevant time when the Department of Fisheries  
18 and Oceans consistently triggered, scope to  
19 trigger.

20 I have read emails from officials,  
21 Mr. Hood comes to mind, who confirmed that they  
22 must scope to trigger. There is reference to the  
23 famous Redhills or Hamilton -- a case involving a  
24 Hamilton Expressway, where the court makes  
25 abundantly clear and the Department of Fisheries

1 recognizes it's got to be that you can only scope  
2 to trigger.

3 So, yes, the Supreme Court of  
4 Canada clarified the law looking at the very same  
5 terms in 2010, but I thought we agreed we would  
6 talk about the past?

7 Q. We are trying to talk about  
8 the past, and that is why I brought up the  
9 language, Mr. Rankin, because it is the same as it  
10 is in the past.

11 A. The language is the same.  
12 The practice is very, very different.

13 Q. You say that, Mr. Rankin.  
14 Let me understand this.

15 You're aware that on the same day  
16 that the Whites Point project was referred to a  
17 Joint Review Panel, two other projects were  
18 referred to a Joint Review Panel; correct? Were  
19 you aware of that?

20 A. I don't know which ones  
21 you're referring to.

22 Q. You're not aware of the  
23 Jackpine and Verizon oil sands projects also being  
24 referred to a Joint Review Panel on the same day?

25 A. No, I didn't know they were

1 referred to a Joint Review Panel on the same day.

2 Q. Were you aware that they were  
3 referred to the Joint Review Panel on the same day  
4 by Minister Thibault of the Department of Fisheries  
5 and Oceans?

6 A. No.

7 Q. And now in the referral of  
8 those cases, are you aware that the DFO Minister  
9 actually requested the entire oil sands project be  
10 referred to a review panel?

11 A. No, I was not aware.

12 Q. Let's talk also about the  
13 consistent practice that you mentioned.

14 You are aware -- because you said  
15 you read some of the determinations, you are aware  
16 of the position taken by the Canadian Environmental  
17 Assessment Agency as to scope of the project at the  
18 relevant time?

19 A. Perhaps you could enlighten  
20 me.

21 Q. Well, let's turn to Exhibit  
22 R-14 in your materials. It is an operational  
23 policy statement from 1988 which talks about the  
24 scoping of the environmental assessment.

25 It talks about the scoping of the



1 project. On the third page, it says "scope of the  
2 project", and it talks about in determining -- the  
3 very bottom, "In determining the scope of the  
4 project", and it lists what the RA must consider.

5 It talks about, in fact, the  
6 undertakings which physical works fall within the  
7 scope of the project and which undertakings in  
8 relation to those physical works fall within the  
9 scope of the project. Do you see that?

10 A. Which physical activities not  
11 in relation to physical work identified in the  
12 inclusion list fall within the scope, yes, I see  
13 that. Then I see reference to the principal  
14 project accessory test, yes.

15 Q. You see reference, then, to  
16 interdependence and linkage at the bottom there, as  
17 well?

18 A. Yes, yes.

19 Q. Before you asked me to  
20 refresh your recollection, so you have not seen in  
21 your review in this case of the documents in this  
22 case or what you based your opinion on any of  
23 the -- even in the notes of Mr. Hood any of the  
24 materials that was relaying the opinion of the  
25 Canadian Environmental Assessment Agency on how

1     this particular project should be scoped?

2                     A.    I don't recall any -- I have  
3     seen emails from some of the officials that worked  
4     for CEAA.

5                     Q.    Mm-hm.

6                     A.    But I am not entirely sure  
7     what you are referring to.

8                     Q.    Okay.  But you --

9                     A.    I just point out that this  
10    document, again, that you referred me to, which  
11    talks about determining the scope of what the  
12    responsible authority must consider, must be  
13    understood in light of the Constitution, as Ms.  
14    Hobby has stressed and as the courts have made  
15    clear.

16                    Q.    I'm sorry, when was Ms.  
17    Hobby's --

18                    A.    It is referred to in my  
19    material.

20                    Q.    Do you know when it was  
21    published?

22                    A.    It is one of those updating  
23    under those loose leaf books that keeps getting  
24    updated.  I don't remember its initial publication  
25    date, although it is in my materials.

1                   Q.    Do you know if it was the one  
2    you are referring to was written before the Supreme  
3    Court's decision in MiningWatch?

4                   A.    Whether it has been updated  
5    since, I don't know, but definitely it would have  
6    been first published before the MiningWatch  
7    decision, which of course is silent on the  
8    constitutional points I have made.

9                   Q.    I am struggling with that  
10   last point you just made. In terms of the scope of  
11   the project determination where the Supreme Court  
12   read it as at least the project as proposed, do you  
13   believe the Supreme Court decision to have been in  
14   error?

15                  A.    No, of course not. The  
16   Supreme Court of Canada is the supreme law-making  
17   body. It is not in error. It makes -- it has  
18   interpreted the law definitively in 2010. I am not  
19   suggesting that for a moment at all.

20                  I am simply pointing out that the  
21   case did not deal with the fundamental point that I  
22   am trying to stress, which is that the practice was  
23   to scope to trigger at the relevant time and that  
24   the Constitution, and according to the Department  
25   of Justice's leading expert, Ms. Hobby, is that you

1 must understand the federal government's  
2 constitutional authority as an overlay to  
3 interpreting CEAA.

4 That's a fundamental point that  
5 came out of the government's attempt, in the case  
6 of Redhills, and the pretext -- and that is the  
7 word the judge used -- the pretext of dealing with  
8 migratory birds to address a controversial highway  
9 project in Ontario.

10 And the Supreme -- the court --  
11 and the Federal Court at that time said extremely  
12 clearly to the Department of Fisheries and Oceans,  
13 Department of Environment: Government of Canada,  
14 you must only deal with material as you scope  
15 projects within federal jurisdiction.

16 And the court said you can't as a  
17 pretext, because of your migratory birds  
18 jurisdiction or in this case section 32 or 35 of  
19 the Fisheries Act, purport to deal with matters in  
20 the province's jurisdiction; namely, the quarry.

21 And of course the case that  
22 counsel is referring me to now, the 2010 Supreme  
23 Court of Canada decision, is silent on that point.  
24 It didn't arise.

25 Q. But you mentioned the Redhill

1 case and I don't want to spend much time talking  
2 about it, but you would agree on the Redhill case  
3 that in fact the provincial environmental  
4 assessment of the project had already been  
5 completed; correct?

6 A. The case was about the  
7 federal government's use of CEAA to attempt to  
8 scope in matters beyond its constitutional  
9 jurisdiction.

10 Q. Well, in terms of the Redhill  
11 case, the question was as much about whether there  
12 was in fact a project that was -- triggered the  
13 CEAA, was it not?

14 A. Yes.

15 Q. And so in this case, we've  
16 agreed that there was a project that triggered the  
17 CEAA, because there was a marine terminal. The  
18 question then is the scope of the project, is it  
19 not?

20 A. In my judgment, this should  
21 have been limited to the assessment by the federal  
22 government of the marine terminal.

23 Q. Now, I would like to  
24 understand a little bit about that judgment. You  
25 said it's based on your review of the documents in

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1 the case, but just to confirm a couple of things,  
2 you are aware that eventually DFO scientists  
3 determined that they believed that the operations  
4 in the quarry would result in the death of fish or  
5 by means other than fishing; correct?

6 A. I have read, and I am  
7 thinking now of the supplemental witness statement  
8 by Paul Buxton, a series of emails to which he  
9 refers from federal officials, and I believe the  
10 conclusion was that as of 2002, there was no  
11 fish-bearing stream on the quarry land and that  
12 they had walked away, I believe, from a conclusion  
13 that there was a section 32 trigger, as well,  
14 vis-à-vis the quarry.

15 Q. Okay.

16 A. I believe that is what I read  
17 from his supplemental witness statement. In  
18 referring to a number of emails, of course, that he  
19 would not and the proponent would not have been  
20 aware of at the relevant time.

21 Q. Now, you said that as of  
22 2002. Are you aware of whether DFO scientists had  
23 actually gone out to visit the site by that time  
24 and done their final assessment of the project?

25 A. I think there was an email to

1 the effect that there had been a conclusion as of  
2 December 2002 to that effect that there was no  
3 section -- no Fisheries Act trigger vis-à-vis the  
4 quarry.

5 Q. Okay. That is what your  
6 opinion is based on, the fact that by December of  
7 2002 they didn't believe there was a Fisheries Act  
8 trigger for the quarry?

9 A. It is a bit more complicated  
10 than that. There is two sections of the Fisheries  
11 Act that are in the Law List Regulation that could  
12 trigger a federal involvement in the quarry. The  
13 first is section 32. The second is section 35.

14 The first involves destruction of  
15 fish. The second involves habitat alteration, et  
16 cetera.

17 And the section 35 -- there was no  
18 fish-bearing streams, and I believe it was common  
19 ground that there was no section 35 trigger for  
20 habitat alteration or destruction, et cetera.

21 But the fish -- the section 32  
22 one, would this proposal of this quarry harm --  
23 destroy fish, I believe that by that -- by that  
24 time, and I may have my dates right -- I would have  
25 to go back and look at Mr. Buxton's material to

1 confirm it. I believe there had been inside the  
2 Department of Fisheries a conclusion by  
3 Mr. Conroy -- Conway that there was no marine  
4 mammal issue and that in an email from Mr. Zamora  
5 to someone else -- I'm sorry, I don't have all of  
6 this in front of me -- that there had been a  
7 conclusion, as well, that there were no section 32  
8 triggers for the quarry.

9                   So, yes, I believe that was the  
10 case.

11                   Q. And that is by the end of  
12 December or the end of 2002, is your recollection?

13                   A. Well, I can remember the  
14 officials advising the Minister of fisheries,  
15 Mr. Thibault, right up until the decision in June  
16 of 2003, to ask the Minister of Environment,  
17 Mr. Anderson, to create a joint -- to this to a  
18 Joint Review Panel, that they were still -- and  
19 their emails confirmed this very vividly -- looking  
20 for a federal trigger for the quarry  
21 unsuccessfully. I think that is pretty important.

22                   That was very much in my mind when  
23 I wrote my material here. I just think that it was  
24 really disturbing, frankly, if that was the case,  
25 that the officials did not believe they had a



1 trigger, but the Minister was asked to scope in the  
2 quarry, no common ground that the marine terminal  
3 is very much within federal domain, but to ask that  
4 a Joint Review Panel be established vis-à-vis the  
5 quarry when it was -- they were looking for a  
6 trigger at that time. I'm thinking of Mr. Hood's  
7 emails and the like. That caused me a great  
8 concern.

9 Q. Okay. So just so that I have  
10 it, your opinion, then, in your report is based on  
11 your belief that, in fact, DFO officials did not  
12 believe they had a trigger on the quarry?

13 A. Yes.

14 Q. Now, in your report and just  
15 here -- so you're not contesting, as you said, that  
16 a federal EA of at least the marine terminal was  
17 required; correct?

18 A. Of course not.

19 Q. You're not contesting, and I  
20 think we established earlier, that at least from  
21 your point of view, once a registration document  
22 then filed, there would have had to have been a  
23 Nova Scotia EA of the quarry part of the project;  
24 correct?

25 A. Again, these are statutory

1 processes, counsel. These are -- there is no  
2 inherent jurisdiction. This is simply a statutory  
3 process that you get -- you go through the door  
4 with the Nova Scotia sign on it if and only if you  
5 do a project description of your undertaking. You  
6 pay, I believe, \$12,000 at the time. You get the  
7 public officials engaged doing their job.

8 Yes, at that point the  
9 undertaking -- you have asked for it to be subject  
10 to an environmental assessment, and of course it  
11 can't be built to your quarry unless and until you  
12 get that assessment.

13 I can tell you, standing back from  
14 the trees and looking at the forest, it is  
15 exceedingly rare for quarries to be subject to the  
16 kind of review panel and public process that took  
17 place here.

18 It has never happened. It hasn't  
19 happened since, and it hasn't happened before. So  
20 I find that extraordinary.

21 But if you're asking me how the  
22 Nova Scotia door gets opened, it gets opened on the  
23 payment of the 12,000, on the registration of the  
24 undertaking, and then under section 47 it is the  
25 Nova Scotia Minister who says there is also another

1 government that has an EA process; we can go  
2 together and do a Joint Review Panel.

3 Q. Okay. I think what I really  
4 want to understand is just confirm again that that  
5 all had there had to be a Nova Scotia EA process,  
6 though, before they could operate the quarry,  
7 before they could construct it?

8 A. Yes. If the proponent had  
9 asked for one. It never did.

10 Q. Okay?

11 A. It never did.

12 Q. But there has been testimony  
13 in this case that they did come to operate a quarry  
14 in Nova Scotia. Are you aware of that?

15 A. Yes.

16 Q. So if they came to operate a  
17 quarry in Nova Scotia, you would agree that  
18 eventually at some point they would have to ask for  
19 permission from Nova Scotia to develop a quarry;  
20 correct?

21 A. Had they applied for a 155  
22 hectare quarry and filled out the right forms and  
23 paid their money, yes.

24 Q. Now, just so I understand  
25 your opinion, your opinion is that in fact the Nova

1 Scotia Minister of the Environment was unable to  
2 remove that requirement and send this project to a  
3 Joint Review Panel unless they filed a registration  
4 document?

5 A. I'm confused about this, to  
6 be totally candid. You cannot consent to  
7 jurisdiction, fundamental administrative law  
8 principle. You only have what the statute allows.  
9 The statute required there to be this section 33  
10 point I have made under the Nova Scotia Act,  
11 registration, payment of money, project description  
12 of the undertaking, and then you are in the door.

13 That never happened. So I look  
14 back at this in puzzlement as to how the process  
15 was triggered. Obviously Bilcon wanted to get the  
16 environmental assessment to build the quarry and  
17 they needed a dock, so of course they did.

18 But if you're asking me at a  
19 technical administrative law point of view, has --  
20 was jurisdiction properly conferred? I am  
21 troubled, because I never saw any evidence of  
22 registration or payment or the like. The Minister  
23 simply invited them to the party, and I'm not sure  
24 they had statutory authority to do so.

25 Q. Okay.

1                   A.    But everybody assumed it was  
2   the case and off we went.

3                   Q.    Right.  And to your  
4   knowledge, Bilcon never objected to that; correct?

5                   A.    I can't say.

6                   Q.    To your knowledge?

7                   A.    To my knowledge, no.

8                   Q.    No.  Now, you mentioned the  
9   type of EA and you were talking about quarries.  
10  Let me just go through some of this with you.

11                   You would agree that under the  
12  CEAA as it applied at the time there were four  
13  types of quarries, correct, screenings,  
14  comprehensive studies, panel reviews and  
15  mediations; correct?

16                   A.    Under the federal CEAA, there  
17  were those four possibilities.

18                   I don't believe mediation has ever  
19  taken place.

20                   Q.    We can talk about three  
21  possibilities?

22                   A.    Yes.  In practical terms,  
23  yes.

24                   Q.    So now but just so I  
25  understand, under the CEAA, under the federal

1 assessment legislation, no project is by default of  
2 the act a review panel. It has to be referred for  
3 a review panel; correct?

4 A. Indeed, it must be the  
5 Minister of Environment who refers it to a review  
6 panel.

7 Q. Now, if you will bear with  
8 me, I would like to look at some of the provisions  
9 in the CEAA that actually allow for that referral.  
10 So if you can go to Exhibit R-1. Let's turn to  
11 section 20.

12 This section occurs in a section  
13 of the CEAA dealing with screening assessments;  
14 correct?

15 A. Yes.

16 Q. And this section talks about  
17 allowing or gives the Minister discretion to refer  
18 a project to a review panel after the completion of  
19 the screening report; correct?

20 A. It is a different Minister, I  
21 believe, isn't it, the responsible authority here?

22 Q. Well, I think if you look at  
23 section C, if you look -- if we pull up section C,  
24 look at the bottom. It says:

25 "The Responsible Authority

1                   shall refer the project to  
2                   the Minister for a referral  
3                   to a review panel in  
4                   accordance with..."

5                   A.    Yes.

6                   Q.    This is the mechanism that  
7                   occurs, but, you're right, the responsible  
8                   authority has to make the first referral, and then  
9                   there is a second?

10                  A.    That is right.

11                  Q.    Now, if you look up just  
12                  above where we were just looking there, you see  
13                  that there are three little Roman numerals, and  
14                  these are the instances where, after a completion  
15                  of the screening, the project can be referred to a  
16                  review panel and an assessment can be referred to a  
17                  review panel. Under little 1, you see it says,  
18                  essentially, where the screening assessment --  
19                  after the screening assessment, it is uncertain as  
20                  to whether the project is likely to cause  
21                  significant adverse environmental effects; correct?

22                  A.    No, not correct. Something  
23                  you have left out that is absolutely critical to  
24                  this entire proceeding, in my judgment. It says,  
25                  "It is uncertain" -- where, one:

1 "It is uncertain whether the  
2 project, taking into account  
3 the implementation of any  
4 mitigation measures that the  
5 Responsible Authority  
6 considers appropriate, is  
7 likely to cause significant  
8 adverse environmental  
9 effects."

10 And it is my opinion that the  
11 failure of this review panel to address its mind to  
12 the statutory requirement of mitigation measures is  
13 a fatal flaw in the exercise of that panel's  
14 jurisdiction. And you've glossed over something  
15 which is fundamental to the whole Canadian  
16 Environmental Assessment Act and process, in my  
17 judgment.

18 Q. Sure. Fair enough. I had no  
19 intent of sort of downplaying the requirements  
20 there. So if you would like, we can read out the  
21 entire clause here. It will take a little bit  
22 longer, but you would agree, then, under (ii) --  
23 and just to be clear with respect to your comments  
24 on mitigation, my colleague, Mr. Kurelek, will ask  
25 you some questions on that later, so you will get a



1 chance to explain your opinions there.

2 But let's focus on what the Act  
3 says now. Under (ii), it says it can be referred  
4 to a review panel after completion of the screening  
5 where the project, taking into account the  
6 implementation of any mitigation measures that the  
7 responsible authority considers appropriate, is  
8 likely to cause significant adverse environmental  
9 effects, and paragraph (b), which is the one above,  
10 does not apply. Do you see that?

11 A. Yes.

12 Q. Now, paragraph (b) above that  
13 is being referred to there is a paragraph that  
14 says:

15 "Where taking into account  
16 the implementation of any  
17 mitigation measures that the  
18 Responsible Authority  
19 considers appropriate, the  
20 project is likely to cause  
21 significant adverse  
22 environemntal effects that  
23 cannot be justified in the  
24 circumstances."

25 And then it says:

1                   "The Responsible Authority  
2                   shall not exercise any power,  
3                   or perform any duty..."

4                   Et cetera, et cetera; right?

5                   A.    That is what it says.

6                   Q.    So under paragraph 20(b),  
7   once the screening report is complete, then a  
8   responsible authority in looking at that report can  
9   say -- can determine for itself it is likely to  
10  cause any adverse environmental effects.  They  
11  can't be justified in the circumstances and can  
12  refuse to allow the -- basically refuse to issue  
13  the authorization; correct?

14                  A.    Mm-hm.

15                  Q.    What we have under C2, and  
16  the way that is working is, in essence, if D  
17  doesn't apply, so if there is not a determination  
18  that the adverse effects cannot be justified, then  
19  that question can be referred up to a review panel;  
20  correct?

21                  A.    Yes.

22                  Q.    Now, if we go to 3, it says  
23  the project can be referred where public concerns  
24  warrant a reference to a mediator or a review  
25  panel; correct?

1                   A.    That is the alternative that  
2    is available under the statute.  It was not the  
3    alternative that appears to have been used in this  
4    case.

5                   Q.    We will get to that.

6                   A.    It is disjunctive.  In other  
7    words, it is "or" and not "and".

8                   Q.    These are all disjunctive;  
9    correct?

10                  A.    Yes.

11                  Q.    Now, we will try to walk  
12    through some the other provisions in here more  
13    quickly.  I know there is reference in 21, but I  
14    want to skip over that for now and refer to some  
15    similar provisions.  If you look at section 23 of  
16    the Canadian Environmental Assessment Act on the  
17    next page, this essentially provides a mirror  
18    provision, except that it happens after the end of  
19    a comprehensive study; correct?

20                  A.    Yes.

21                  Q.    Again, so all three options  
22    are here in terms of when it can be referred to a  
23    review panel and they are all disjunctive; correct?

24                  A.    I believe so.

25                  Q.    So only one of those would

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1 have to be satisfied under the statute for it to be  
2 referred to a review panel; right?

3 A. Yes.

4 Q. Now, if we turn to section 25  
5 of the Canadian Environmental Assessment Act now,  
6 section 25 it is under a section called  
7 "discretionary powers"; correct?

8 A. Yes.

9 Q. Under this section, a  
10 responsible authority can request that a project be  
11 referred to a panel review, and this time we have  
12 two circumstances, not three; correct

13 A. Yes.

14 Q. And that is under (a), and it  
15 is again a project taking into account mitigation  
16 measures, may cause significant adverse  
17 environmental effects; correct?

18 A. Yes, that is what it says.

19 Q. (b) again says public  
20 concerns warrant a referral; correct?

21 A. That is the alternative that  
22 is available.

23 Q. Right. There is again a  
24 disjunctive; right?

25 A. Yes.

1                   Q.   Then in section 20 -- now I  
2   should say this is referral to the Minister for  
3   referral, so this is where the responsible  
4   authority is of the opinion at the time.

5                   Now, at the lead-in to that  
6   section, it says subject to 21(b) and (c), which is  
7   the provisions on screening we looked at, where at  
8   any time the responsible authority is of the  
9   opinion that -- do you see that?

10                  A.   You have to slow down a bit  
11   when you use quotations.

12                  Q.   Right. Do you see that?

13                  A.   Perhaps you could refer me to  
14   the section.

15                  Q.   Section 25.

16                  A.   Oh, there it is.

17                  Q.   Right at the top where it  
18   says "where at any time". Do you see that? So  
19   this applies not after the completion of a report,  
20   but at any time in the process; correct?

21                  A.   Yes.

22                  Q.   If we go down to section 28,  
23   you will see this is a similar provision as we just  
24   saw for 25, but this actually allows at any time  
25   the Minister of the Environment to refer the

1 project to a review panel; correct?

2 A. That's right.

3 Q. Again, there is no time  
4 limitation on when they might do that; right?

5 A. No.

6 Q. Again, this is a disjunctive  
7 test, so only one of these conditions would have to  
8 apply to justify a referral under the statute;  
9 correct?

10 A. I believe that's correct.

11 Q. Now, I would like to come  
12 back to section 21 of the CEAA.

13 Now, this section starts off and  
14 it says:

15 "Where a project is described  
16 in the comprehensive study  
17 list, the Responsible  
18 Authority shall..."

19 And it gives two options; correct?

20 It says ensure that a comprehensive study is  
21 conducted and a comprehensive study report is  
22 prepared, or refer the project to the Minister, and  
23 that is the Minister of the Environment, for a  
24 referral to a mediator or review panel; is that  
25 correct?

1 A. That is what it says.

2 Q. So in this provision here --  
3 now this -- you're aware this is a provision that  
4 was relied upon by the Minister of Fisheries and  
5 Oceans to request the Minister of the Environment  
6 to refer this panel -- project to a review panel?

7 A. Yes. And I am not entirely  
8 sure I agree but, for sake of argument, I will  
9 assume that he had jurisdiction.

10 I understand from the material I  
11 read there is an argument that Mr. Estrin will  
12 bring forward or has brought forward that the kind  
13 of dock is not the kind of marine terminal, in  
14 quotes, contemplated in the comprehensive study  
15 list regulation.

16 And I am in agreement with  
17 Mr. Estrin on that particular point of statutory  
18 interpretation. So I don't believe, therefore,  
19 that it would have been the kind of project  
20 requiring a comprehensive study.

21 But I acknowledge the section is  
22 ambiguous, and I know that is how the government  
23 proceeded in this circumstance.

24 Q. Right. And you also  
25 acknowledge even if section 21 didn't apply, then

1 under section 25 that we have just seen, it could  
2 have been referred to a review panel?

3 A. Yes. Absolutely, yes. But  
4 this is what happened here, you have told me, and I  
5 agree that is what happened here.

6 Q. Now, if we look at the  
7 referral to a review panel here under little B, in  
8 fact as opposed to the other sections, there are no  
9 instructions or conditions that have to be met  
10 before a referral other than being on the  
11 comprehensive study list; correct?

12 A. Yes, yes.

13 Q. Now, I want to go to that  
14 list, and I don't want to focus too much on some of  
15 the projects, because we can get into a very  
16 academic debate on marine terminals, but I want to  
17 talk about -- go to R-10 and I just want to look at  
18 the beginning.

19 So if you flip to R-10 in your  
20 book, I am somewhat hopeful there is an actual tab  
21 in there in R-10, a flag somewhere that will direct  
22 you to the Comprehensive Study List Regulations.  
23 If not, it is about 30 pages in, three-quarters of  
24 the way through.

25 A. It is a pretty big...



1 Q. Unfortunately, they are not  
2 consecutively paginated here.

3 A. Yes, I have it.

4 Q. Now, if we just go to -- I  
5 will wait for a second. Does everybody have where  
6 we are in the Comprehensive Study List Regulations?

7 A. It seems to be about halfway  
8 through.

9 Q. I want to focus on the first  
10 page right now, actually, the very first page to  
11 it. For those of you having trouble, I think he  
12 has it up on the screen right now. There you go.  
13 Great.

14 The very first sentence there  
15 says, "Whereas the Governor in Council", that is  
16 the Cabinet in Canada:

17 "... is satisfied that  
18 certain projects and classes  
19 of projects are likely to  
20 have significant adverse  
21 environmental effects."

22 Do you see that? Do you see where  
23 I am pointing to, Mr. Rankin?

24 A. Of course, yes.

25 Q. At the very beginning there?

1 A. Yes.

2 Q. So then the types of projects  
3 in this list have then been deemed by the Governor  
4 in Council, by the Cabinet in Canada, as likely to  
5 have significant environmental effects; correct?

6 A. It is a preamble.

7 Q. Right. But it says the  
8 Governor in Council is satisfied that these  
9 projects are likely to have significant adverse  
10 environmental effects?

11 A. That is what it says, yes.

12 Q. That significant adverse --  
13 likely to have significant adverse environmental  
14 effects, that is what the language was in the CEAA;  
15 correct?

16 A. Yes.

17 Q. Now, of course just to  
18 clarify, that doesn't of course mean these projects  
19 will have significant adverse environmental  
20 effects; right? Just the fact they are on this  
21 list is not a determination they will. That is the  
22 sort of thing that is determined through an  
23 environmental assessment; correct?

24 A. It just says that the track  
25 will be -- if I can put it, they are likely more

1 rigorous than merely a screening by putting it on a  
2 comprehensive list, if I may, is that -- that is  
3 how I would have thought they meant that, in the  
4 context of the statute, is the three categories we  
5 talked about.

6 Q. But they specifically use the  
7 language "likely to have significant adverse  
8 environmental effects"; correct?

9 A. Yes.

10 Q. Which is the language for  
11 essentially referral to review panels; correct?

12 A. For certain categories, or  
13 they call it classes of projects, yes.

14 Q. Correct. Okay. I just want  
15 to confirm that in fact now the determination --  
16 because we have heard a lot about the science that  
17 was and wasn't done. The determination as to  
18 whether projects will actually have the significant  
19 adverse environmental effects that may be deemed  
20 likely to occur, that happens in the environmental  
21 assessment?

22 A. That is correct, yes.

23 Q. Now so that we're on the same  
24 page here, then, you agree, then, that under the  
25 CEAA, a project can be referred to a review panel

1 at any time during the EA if it's on this  
2 comprehensive study list, or if a responsible  
3 authority or Minister determined that, taking into  
4 account mitigation measures, there could be  
5 significant adverse environmental effects, or  
6 public concern warrants it?

7 A. Yes.

8 Q. And so there is nothing in  
9 the CEAA that actually prevents a project from  
10 beginning as one level of assessment, and then  
11 getting referred to a review panel?

12 A. No. Indeed, the section you  
13 referred to specifically contemplates that.

14 Q. Now, I want to come back to  
15 something you have written in your report to see if  
16 I can understand, and it is at paragraph 78 of your  
17 report. I think this was referring to the comment  
18 that you made earlier?

19 A. Yes.

20 Q. Which is that in your view,  
21 it says -- you say it would be unusual for a  
22 project of this scope and kind to be subject to a  
23 full -- you say joint review process, and you  
24 repeat the observations of two Canadian professors,  
25 Professors Doelle and Tollefson, who comment, and

1 then you provides a comment. It says -- they  
2 comment that panel reviews -- they assume that  
3 panel reviews are for large and controversial  
4 projects. Do you see that?

5 A. Yes, that's right. They go  
6 on to point out there is only one -- at the time,  
7 only between one and five panel reviews per year in  
8 Canada that are -- that were -- that were  
9 triggered, and they say that panel reviews are for  
10 large and controversial projects.

11 A quarry of this size, it was  
12 shocking to me that this kind of project would be  
13 the subject of a Joint Review Panel, let alone a  
14 review panel. It is unprecedented.

15 Q. Okay.

16 A. It has been -- I think it is  
17 unprecedented before then and unprecedented since  
18 then, and that is what the professors are saying,  
19 panel reviews for large and controversial projects.  
20 Note the conjunctive.

21 Q. Right. That was what these  
22 two professors note, but as we looked through the  
23 CEAA, and you expressly confirmed, the language in  
24 the CEAA is expressly disjunctive, isn't it? It is  
25 for controversial and --

1                   A.    Yes, yes, but they are saying  
2   that the way -- the context in which actually in  
3   practice one has these very rare things called  
4   review panels tend to be, in their judgment -- and  
5   they have studied in their book all of these --  
6   they have concluded that is when they were actually  
7   used.

8                   Q.    Right.  But --

9                   A.    The Minister has the  
10  opportunity to cause a review panel when one of two  
11  circumstances, likely significant adverse  
12  environmental effects that, after mitigation, still  
13  exist, or public concern.

14                   This quote is interesting, and why  
15  I included it is because their assessment of the  
16  real world, the lay of the land, was that both  
17  factors have to be present.

18                   And I would have confirmed that  
19  there was controversy in this case, in Whites  
20  Point, to call it a large project of the kind that  
21  normally review panels in Canada have been subject  
22  to as very, very unusual.

23                   Q.    Okay.  But you would confirm  
24  that under the statute, even if it is a small  
25  project, if it's controversial, if there is enough

1 public concern, it can be referred to a review  
2 panel?

3 A. If the Minister chooses to  
4 use that as the alternative route that was  
5 available to him. That of course was not what was  
6 done here.

7 Q. We can get to that. Now, I  
8 just want to understand how this statutory scheme  
9 fits, then, with the claimants' project and  
10 understand a little bit about the claimants'  
11 project, because you just mentioned that you didn't  
12 believe that it was large.

13 I guess in thinking about that, I  
14 want to understand something about that. So you  
15 are aware that in this case, as we discussed in the  
16 quarry marine terminal proposal, the quarry was to  
17 be 152 hectares; correct?

18 A. I think we were proposing to  
19 take the rock out of 2-1/2 hectares a year or  
20 something like that.

21 Q. Two-and-a-half hectares a  
22 year, but for 50 years?

23 A. Yes.

24 Q. In fact, the description they  
25 submitted was for a 152-hectare quarry operation,

1 would you agree?

2 A. Yes, that's right.

3 Q. And the production would be  
4 approximately, and it is in imperial tons, but 2  
5 million imperial tons of aggregate a year?

6 A. I believe that's right.

7 Q. And they said the life of the  
8 quarry was to be 50 years. And you did say -- now,  
9 in the project description, you said you believed  
10 that was about 2-1/2 hectares of quarry a year?

11 A. If memory serves. In other  
12 words, it would be misleading to suggest that all  
13 of a sudden those 152 hectares would be mined in a  
14 given -- in a period of time.

15 When you ask about the size of the  
16 quarry, I point out immediately, after paragraph 80  
17 and following, other projects in Atlantic Canada,  
18 such as Belleoram, six times as large that never  
19 were subject to a review panel.

20 In fact, to my knowledge, there's  
21 never been a quarry subjected, of any size, to a  
22 review panel.

23 Q. Now, we'll come to that, but  
24 just to clarify now, you are also aware there's  
25 never been another quarry of this size proposed on



1 the Digby Neck, right?

2 A. Yes, I think that is right.

3 Q. Now, just to clarify this,  
4 you said 2-1/2 hectares. If you turn to Exhibit  
5 R-181. I'm sorry, it is going to be in volume 2 of  
6 your materials.

7 A. Yes, I have it.

8 Q. 181, final project  
9 description submitted. Have you seen this  
10 document?

11 A. I don't believe I have.

12 Q. If you could turn to page 5.

13 A. Yes.

14 Q. On what would be the second  
15 paragraph down in the last sentence, it says  
16 approximately ten acres of new quarry would be  
17 opened each year. Do you see that?

18 A. Yes. About 2-1/2 hectares.

19 Q. About --

20 A. It is almost exactly 2-1/2  
21 hectares.

22 Q. We have heard four from other  
23 people.

24 A. Wait a second. I can't  
25 remember.

1 Q. I think it is close to four.

2 A. I think it is close to four.

3 I think you are right.

4 Q. We will agree it is under  
5 four hectares, then?

6 A. Yes, that's right. Yes.

7 Q. And then, again, in order to  
8 transport the rock that Bilcon produced, it was  
9 going to design a marine terminal, and if you will  
10 see there on page 4, it talked about a marine  
11 terminal. You're aware it was for Post-Panamax  
12 class ships; correct?

13 A. Yes.

14 Q. And, in fact, you are aware  
15 that they were talking about a ship that was  
16 approximately 225 metres in length?

17 A. Yes. I think that -- I  
18 wasn't aware of the length, but I knew that that  
19 was the class of vessels contemplated.

20 Q. Post-Panamax class?

21 A. Yes.

22 Q. Right. Now, if we come  
23 back -- and I apologize to everybody for doing  
24 this -- to R-10, if you have taken that out and  
25 lost your Comprehensive Study List Regulations.

00266

1 Are you there?

2 A. I am.

3 Q. In R-10 on the Comprehensive  
4 Study List Regulations, I would like to turn, if we  
5 can, to item 18(i). Now, I understand your  
6 position that, in fact, this of course will only  
7 apply where there is a federal trigger. But what I  
8 would just like to talk about is the size of the  
9 projects here.

10 This is on the Comprehensive Study  
11 List Regulations, and in (i) it says a proposed  
12 construction, decommissioning, abandonment, and  
13 then it says of:

14 "(i) a stone quarry or gravel  
15 or sand pit with a production  
16 capacity of 1 000 000 t/a or  
17 more."

18 Do you see that?

19 A. I do.

20 Q. So you would agree, then,  
21 that if there was a federal trigger on the quarry  
22 for Bilcon, if there was, then it would have been  
23 in excess of this and would have triggered a  
24 comprehensive study; correct?

25 A. Yes. I think that is what it

1 means.

2 Q. Now, and just to come down,  
3 if we go to 28(c), we see on 28(c) that it says:  
4 "A marine terminal designed  
5 to handle vessels larger than  
6 25 000 DWT."

7 Dead weight tons. I understand  
8 the point you made earlier about there is some  
9 confusion as to whether this applied, even though  
10 the government applied it in this case, but you  
11 would agree the marine terminal done by Bilcon was  
12 designed to handle ships greater than 25,000 dead  
13 weight tons?

14 A. I would repeat the definition  
15 of marine terminal on page 2 of the comprehensive  
16 study regulations, in my judgment, this would not  
17 be the kind of marine terminal contemplated by the  
18 regulation at all, size notwithstanding, because of  
19 the fact it does not include (c), production  
20 processing or manufacturing areas that include  
21 docking facilities used exclusively in respect of  
22 those areas.

23 This was a purpose-built dock,  
24 and, therefore it did not, in my judgment,  
25 constitute a marine terminal of the kind

1 contemplated in this regulation.

2 That is just my interpretation,  
3 and I believe another witness, Mr. Estrin, has the  
4 same view, from reading his material.

5 Q. You're aware from reading the  
6 materials that Mr. Smith has a different view?

7 A. I am indeed.

8 Q. You're aware that --

9 A. And the practice, as I said,  
10 was that there was -- (a) it is ambiguous, I would  
11 be the first to acknowledge; and (b) the practice,  
12 I think, was to include these kind of things under  
13 the comprehensive study list. I don't believe,  
14 though, that there has ever been a stand-alone  
15 marine terminal that has been subject to a review  
16 terminal -- a review panel.

17 Q. Right. But you agree that  
18 under -- you agree that Bilcon, as far as you are  
19 aware, certainly never objected to the marine  
20 terminal being assessed under this process?

21 A. In my experience, proponents  
22 don't object when they are asked to -- when they  
23 are seeking an authorization from the government.

24 Q. You say in your experience  
25 proponents don't object. I'm not sure I understand

1     that.

2                     A.    My apologies.  I simply say  
3     that the reality of seeking an authorization or an  
4     environmental assessment requirement is that  
5     proponents are often not thinking from a legalistic  
6     point of view in challenging the wording of  
7     sections of regulations.

8                     They just want to acquire the  
9     relevant authorization and move on.

10                    Q.    But you do agree that, in  
11     fact, at the Canadian bar there is a very active  
12     process on environmental assessment in terms of  
13     judicial review of government decisions?

14                    A.    Oh, yes, of course.

15                    Q.    So in fact you agree people  
16     do object to decisions made in the context;  
17     correct?

18                    A.    Yes, yes.  But I also would  
19     say that sometimes one does that at one's peril.  
20     There is a legal possibility, no doubt, to seek  
21     judicial review at any time in the process, but  
22     there is a practical reality of just getting on  
23     with the job.  That is frequently at the forefront  
24     of these kinds of matters.

25                    Q.    I don't want to pursue this

1 issue of Canadian law too far, because it is  
2 probably of limited relevance here. But in terms  
3 of that, you say judicial review has -- there's a  
4 time limit as to when you can seek judicial review,  
5 correct, of a governmental decision? There is a  
6 time limb limit to when you seek judicial review;  
7 correct? There is essentially -- you have to  
8 object in a relevant period of time or else you  
9 lose your rights to a judicial review of that  
10 decision?

11 A. Usually. Not always.

12 Q. So you said that, in fact,  
13 that you object at your peril, but in a sense if  
14 you don't object, you also don't object at your  
15 peril; correct? You fail to raise a complaint, the  
16 time may pass and you may no longer be able to  
17 object; right?

18 A. Yes, that's right.

19 Q. Now, I want to talk about  
20 now -- and we have agreed that this was referred  
21 under section 21. That actually didn't have any  
22 grounds for referral, but I do want to talk a  
23 little bit about what grounds there might have been  
24 under other sections of the CEAA and about the  
25 significant adverse environmental effects, public

1 concern.

2                               So you would agree -- and you  
3 might disagree with the conclusion, but you would  
4 agree at least there is evidence that government  
5 officials were concerned about the environmental  
6 effects of this project; correct?

7                               A. Just to be clear, do you mean  
8 the marine terminal that you have been speaking of,  
9 or are you taking us back to the quarry?

10                              Q. I would say that -- I would  
11 say that the government officials were concerned  
12 about the environmental effects of both the quarry  
13 and marine terminal; correct?

14                              A. Yes. The government  
15 officials, both Nova Scotia and Canada, had  
16 concerns about the environmental effects of the two  
17 aspects of the project.

18                              Q. And they were concerned that  
19 there would likely be significant adverse  
20 environmental effects; correct?

21                              A. Yes.

22                              Q. And you would also agree, and  
23 you mentioned it before, that, in fact, they agreed  
24 or there was evidence of public concern on the  
25 record; correct?



1 A. Yes.

2 Q. And government officials were  
3 aware of that public concern; right?

4 A. Yes.

5 Q. And, in fact, you would agree  
6 that the Minister of Fisheries and Oceans,  
7 Mr. Thibault, in referring this to a panel, he was  
8 also aware of the public concern about the project;  
9 right?

10 A. I don't recall him speaking  
11 to that in any documents I read, but I know that he  
12 was actively involved in this process, and I have  
13 read a number of emails from his office expressing  
14 his concern. So I assume so, yes.

15 I am not hedging. He used the  
16 "significant adverse environmental effect"  
17 language, as I recall, in moving this up. So that  
18 is why I hesitate. I don't have in my mind  
19 statements he has made about that. But in the  
20 grand scheme of things, yes, this was people in  
21 favour and opposed to this project.

22 Q. Right. And the Minister was  
23 aware of that --

24 A. I am certain that he was. I  
25 just don't know that he expressed it in any

1 document I've got in my mind at the moment.

2 Q. Okay. To be clear, if he  
3 didn't express it in any document, you do agree he  
4 was aware of it?

5 A. Oh, yes.

6 Q. And you would agree the  
7 public concern here was not just about the quarry,  
8 but also about the marine terminal; correct?

9 A. If there was public concern  
10 about the marine terminal, it certainly paled in  
11 comparison to the concern about the quarry itself.

12 I don't recall much about the  
13 actual marine terminal. We were having two or  
14 three pilings, a few square metres that were  
15 affected on the floor of the Bay of Fundy, but I  
16 don't -- I don't recall.

17 I should say I think there was  
18 both, yes. But I think the primary concern appears  
19 to have been with respect to the quarry itself.

20 Q. But you would agree there was  
21 public concern, then, with respect to the marine  
22 terminal?

23 A. I think so, yes.

24 Q. Well, let's just for --  
25 relatively quickly, if you could turn to Exhibit

1 R-170. It is in -- thank you, Dirk -- volume 2.  
2 If you turn in to page 8, I should say these are a  
3 collection of letters of concern that were received  
4 by the Canadian Environmental Assessment Agency, by  
5 Department of Fisheries and Oceans and government  
6 officials?

7 A. Yes, I have seen this before.

8 Q. Great. If you turn to page  
9 8.

10 A. Page 8?

11 Q. You would see on page --  
12 sorry, it is the numbered page 8 in the upper  
13 right-hand corner.

14 A. Oh, yes.

15 Q. And to be clear, it is  
16 numbered 009660.

17 A. I see that.

18 Q. In the bottom. I am just  
19 reading --

20 A. I see there is reference to  
21 the terminal, yes, indeed.

22 Q. It says "I would like" --  
23 maybe we will wait for it to come up on the screen  
24 here, Exhibit R-170, 2003. Thank you. You see  
25 here it says:

00275

1 "I would like to object in  
2 the strongest possible manner  
3 to the proposed shipping  
4 terminal at Whites Point."

5 Do you see that?

6 A. Yes.

7 Q. Okay. Now, we will flip  
8 further. If you go to page, in the bottom right,  
9 Bates number 9621.

10 A. Sorry, is that further along?

11 Q. It is further along, 009621,  
12 if you're looking at the bottom right hand. It is  
13 probably easiest with Bates numbered pages there.

14 A. Could you repeat the page  
15 number?

16 Q. 009621.

17 A. The numbers get bigger. I'm  
18 sorry, I don't see it.

19 Q. They do, indeed. If you can  
20 flip -- well, we can see it up on the screen here.  
21 Maybe it is the easiest. Can you blow that up,  
22 Chris?

23 Okay. Again, this says:

24 "As a fourth-generation  
25 fisherman with 30 years of

1                   experience, I wish to state  
2                   my opposition to the  
3                   construction of the Whites  
4                   Point quarry marine  
5                   terminal."

6                   And then it talks about movement  
7   of ships to and from this terminal represents a  
8   threat to vessels and gear.

9                   A.   Yes, I see that.

10                  Q.   We could continue, but would  
11   you agree, just even after seeing this small  
12   sample, there was public concern about the marine  
13   terminal?

14                  A.   Apparently, yes. And most of  
15   the concern was about the quarry, but, yes, indeed  
16   I see from your material there was concern, as  
17   well, about the marine terminal or the dock.

18                  Q.   So that I understand, then,  
19   your analysis, you acknowledged there was concerns  
20   about significant adverse environmental effects.  
21   There were public concerns. We've seen these as  
22   the keys for referral to a review panel under CEAA,  
23   but your analysis is based on what you say is a  
24   comparative analysis of other projects, correct, an  
25   analysis of when other projects were referred to

1 review panels which you say differs from the  
2 practice here?

3 A. Absolutely.

4 Q. So to be clear, you're not  
5 disputing that under the CEAA there is statutory  
6 authority which this could have gone to a review  
7 panel?

8 A. Yes. If the Minister had  
9 used public concern as the basis for the referral,  
10 yes, and I don't know of many examples where that  
11 has been the test. It is almost invariably, from  
12 my experience at least, the significant -- the fear  
13 that unmitigated significant adverse environmental  
14 effects that can't be justified is what people --  
15 what is usually the reason for sending any project  
16 to an environmental assessment under CEAA.

17 Q. Mm-hm. But you did confirm  
18 earlier that you were aware that officials, at  
19 least government officials, were concerned about  
20 the likelihood of significant adverse environmental  
21 effects of the project.

22 A. Of the terminal.

23 Q. Of the terminal?

24 A. Yes.

25 Q. And so you would agree that

1 for that, when we're talking about those tests  
2 under CEAA, those tests were in the letter of the  
3 law?

4 A. Yes. If you're asking me to  
5 agree, did the federal government have ample  
6 authority to send the marine terminal to a review,  
7 the answer is absolutely, yes.

8 Q. Okay. So let's look then at  
9 some the projects that you would like to compare.  
10 I would like to look at paragraph 33.

11 A. Of?

12 Q. Of your report. I'm sorry.  
13 It is page 33 of your report.

14 A. Is the heading "Apparent  
15 Breaches of Administrative Law".

16 Q. That's the one, and it says  
17 "i. WPQ", which is this project compared with other  
18 projects not subject to JRP; correct?

19 A. Yes.

20 Q. Now, if you would turn two  
21 pages into the section into paragraph 74?

22 A. Yes.

23 Q. You say -- you admitted in  
24 this first sentence, "Although no two projects are  
25 ever identical". Do you see that the first clause?

1 A. Of course.

2 Q. You have agreed that of  
3 course you're not a scientist; right?

4 A. That's correct.

5 Q. So you're not qualified to  
6 comment on, from a scientific perspective, the  
7 difference in environmental effects between  
8 different projects; right?

9 A. I absolutely agree.

10 Q. Now, in the next clause  
11 there, you say:

12 "... where projects were as  
13 obviously similar in scope  
14 and location as the Tiverton  
15 and Whites Point projects  
16 were, and were acknowledged  
17 as such by key officials, the  
18 law requires provable and  
19 demonstrably appropriate  
20 justification for treating  
21 them differently."

22 Correct?

23 A. What I mean is that rule of  
24 law, which sort of is our key concept of our  
25 Constitution, requires like cases to be treated



1     alike.

2                     If you need to -- if you're going  
3     to divert dramatically from treating one case  
4     differently from another, you need to have good and  
5     valid reasons for doing so. That is basic  
6     political morality and legal requirement under our  
7     Constitution. I'm thinking of the Quebec secession  
8     case as the classic example of that statement.

9                     Here we have a situation where, in  
10    my judgment, the Tiverton quarry and the Tiverton  
11    Harbour projects ten miles away were so similar --  
12    not identical, and there is many things to  
13    distinguish them -- that it was remarkable,  
14    unusual, that there would be such a difference in  
15    treatment for these two projects.

16                    Tiverton involved blasting on the  
17    ocean floor. It involved putting in a breakwater.  
18    It involved a quarry, separate owners, but nearby,  
19    for that purpose. Here we had a quarry and a  
20    marine terminal which didn't have nearly that kind  
21    of impact on the ocean floor.

22                    And yet Tiverton was the subject  
23    of merely a screening, like 99 percent of other  
24    federal assessments.

25                    This project, ten kilometres away,

1 was subject to the full Joint Review Panel, for  
2 which there is one or two, up to five maybe a year  
3 in the entire country.

4 I found that the disparity,  
5 frankly, utterly staggering.

6 Q. Let's look at the disparity,  
7 then, and I want to come back to a couple of things  
8 you just said. You said the Whites Point project  
9 didn't have nearly the impact on the ocean floor.  
10 Now, again, that is your assessment from review of  
11 the documents, but you're not a scientist in terms  
12 of evaluating those effects; correct?

13 A. Well, I don't know that one  
14 needs to be a scientist to conclude that doing what  
15 was done, blasting the floor of the ocean and  
16 putting down a rock pile breakwater, as compared to  
17 putting in piles for a dock or a marine terminal at  
18 Tiverton, I really don't think one needs to be a  
19 scientist to note the dramatic difference in that.

20 We can talk about the quarry and  
21 the size differential and the fact that Tiverton  
22 would go on for -- would not go on for 50 years the  
23 way that the project at Whites Point quarry would  
24 do. I accept all of that.

25 But if you're talking about the

1 marine environment, no, I don't think you need to  
2 be a scientist to note what seems to be pretty  
3 obvious.

4 Q. But you just mentioned a  
5 couple of things there that I do want to pause  
6 upon, because you said the projects were so  
7 similar.

8 But you're aware, of course, and  
9 you mentioned you were aware, there were actually  
10 three separate projects at Tiverton?

11 A. Yes. I know there was a  
12 difference of that kind, yes.

13 Q. In fact, what was proposed at  
14 Tiverton wasn't a quarry and marine terminal.  
15 There was a harbour proposed by DFO and separate  
16 quarry proposed by somebody else; right?

17 A. Yes.

18 Q. And now let's look at the  
19 quarry. You've said and you've admitted it was  
20 much smaller, but yet you have said it is so  
21 similar.

22 So the quarry you would agree at  
23 Tiverton was 1.8 hectares in size; right?

24 A. Yes.

25 Q. You're aware that the quarry

1 was permitted to operate for two years at most;  
2 correct?

3 A. Yes. I thought we were -- I  
4 was focussing on -- your questions were about the  
5 marine terminal, the water, the issue of the marine  
6 environment, I thought.

7 I concede immediately there was a  
8 great difference in the size of the quarries,  
9 duration of the quarries, et cetera. Ten  
10 kilometres away, the same officials at the same  
11 time were dealing with a project that had dramatic  
12 impact on the ocean floor requiring a habitat  
13 authorization, section 35 permit, at Tiverton.

14 And the same officials treated  
15 that with merely a screening, and they managed to  
16 get that assessment done in a matter of months.

17 Up the road, a marine terminal  
18 that was just pilings, as I understand it,  
19 impacting a few square metres, was subject to a  
20 process that the federal government -- that took  
21 many, many years to complete.

22 I just find the difference quite  
23 dramatic.

24 Q. Right. But I want to -- if  
25 you're willing to admit the Tiverton quarry was

1 nothing like the Whites Point quarry, then let's  
2 talk about the harbour, because the harbour of the  
3 sort being built at Tiverton, now that was is  
4 actually a repair and an upgrade of an existing  
5 harbour; correct?

6 A. Yes.

7 Q. So, in fact, it was intended  
8 to provide improved access for the fishing fleet  
9 that operated out of Tiverton; right?

10 A. I'm not sure if that is  
11 relevant vis-à-vis the significant adverse  
12 environemntal effects. The purpose of one is not  
13 relevant under CEAA.

14 Q. Well, let's look, then, at  
15 the size, so the fishing vessels that it was  
16 designed to support.

17 A. Yes.

18 Q. Much smaller than the Panamax  
19 ships that would come in?

20 A. Much smaller.

21 Q. And, in fact, a fraction of  
22 the size of the ships that would be at Whites  
23 Point; correct?

24 A. Yes.

25 Q. And you're looking at, you

1 say, the blasting activities to create, and you're  
2 looking at what is done at the marine terminal.

3 But we have looked at the  
4 provision in the comprehensive study. You would  
5 agree the harbour, the harbour -- construction of a  
6 harbour of this sort, a breakwater, it's not on the  
7 comprehensive study list; correct?

8 A. I don't know. I haven't  
9 taken -- put my mind to it. I will take your word  
10 for it.

11 Q. But, in fact, when you're  
12 looking at what the Governor in Council has  
13 decided, it is likely to cause significant adverse  
14 environmental effects. We can talk about whether  
15 or not this project was in, but clearly a marine  
16 terminal of 25,000 dead weight tons is deemed  
17 likely to cause significant adverse environmental  
18 effects, whereas a harbour is not; correct?

19 A. It was open to the  
20 authorities to trigger a full review panel for the  
21 harbour, if they wished to do so, if there had been  
22 a reasonable determination that after mitigation  
23 measures were taken into account, there was or  
24 might be, may be, significant adverse environmental  
25 effects. It was open to the government to do a

1 full environmental review panel on Tiverton should  
2 they wish. They did a mere screening.

3 Q. And they did that screening,  
4 and now so that I understand, you would not -- you  
5 wouldn't say that regardless of the science,  
6 regardless of what came out, the two projects had  
7 to be treated the same, would you?

8 A. Of course. I would say that  
9 there is no two projects that are identical.

10 I would say that within ten  
11 kilometres for a quarry and a marine terminal  
12 project in one case, and a harbour and a quarry in  
13 another, to be treated so differently by the same  
14 people at the same time was very surprising.

15 Q. But you would agree that what  
16 you're advocating is that in fact the government  
17 officials would have to turn their minds to the two  
18 projects to consider their effects similarly and  
19 make a decision based on science as to whether or  
20 not they should be treated the same or differently;  
21 correct?

22 A. I'm not really advocating  
23 anything. I am just simply asked to assist the  
24 panel with providing my opinion, and that is what I  
25 am doing. I'm not advocating anything here.

1                   Q.    Your opinion, though, is that  
2    what is required by Canadian law?

3                   A.    Yes.

4                   Q.    And to be clear, you're not  
5    commenting on international law?

6                   A.    No, I'm not.

7                   Q.    You're commenting on Canadian  
8    law.  What is required by Canadian law is for  
9    officials to turn their minds to these proposed  
10   similarities?

11                  A.    Yes.

12                  Q.    And make a scientific  
13   evaluation as to whether they should be treated the  
14   same or different?

15                  A.    That is correct.  I believe  
16   the rule of law requires like cases as much as  
17   possible to be treated alike, and that there is an  
18   abuse of discretion if, for no apparent reason that  
19   on the face of it exists at least, one project gets  
20   treated very, very quickly and the Minister is on  
21   record according to the emails as saying, Let's  
22   hurry up, can we make this project go faster in  
23   Tiverton, yet in the case of the Whites Point  
24   quarry emails saying, We want to slow it down,  
25   according to Nadine Beliveau, his assistant, on



1     some emails that were made available.

2                     So I think the disparity in  
3     treatment, in the face of that documentary evidence  
4     suggesting that the politician wanted a different  
5     treatment, calls for an explanation under the rule  
6     of law principles in our Constitution. I think it  
7     does.

8                     Are they identical? I was very  
9     clear to acknowledge that of course they are not,  
10    but the same officials dealing with the same  
11    environment ten kilometres away at the same time  
12    reaching such dramatically different determinations  
13    struck me as calling for an explanation.

14                    Q.    Right. And on your  
15    understanding, then, is it that officials did not  
16    turn their minds to the similarities and the  
17    differences between the two projects?

18                    A.    I believe that on the fact --  
19    on the evidence that was brought to the Tiverton  
20    officials' knowledge that the determinations were  
21    radically different, and then there was a change  
22    made in the Tiverton as a result. They were called  
23    on it and they did some change which is, frankly,  
24    not in my mind right now.

25                    Q.    Okay?

1                   A.    But after they -- after I  
2    think Bilcon complained that there was a disparity  
3    in treatment, they did something different.  I  
4    can't remember.

5                   Q.    So Bilcon raised the issue  
6    and officials acted, is your recollection?

7                   A.    They did something different  
8    to Tiverton as a result.

9                   Q.    Now, at Tiverton you're aware  
10   there was no public opposition to the project;  
11   correct?

12                  A.    No.  I understand that the  
13   Minister was -- wanted the project to go ahead  
14   because the fishing community was anxious for it to  
15   proceed.  I believe that there was -- I don't know  
16   if there was any concerned citizens.  I don't know.  
17   But I believe that if there was, the level of  
18   controversy was dramatically different if there  
19   were any at all.

20                  Q.    And the level of controversy,  
21   you would agree that is a ground under the CEAA,  
22   anyways, for two projects to be treated  
23   differently; correct?

24                  A.    If that were the reason given  
25   by the Minister, if it was the case that that is

1     why they decided to trigger an environmental  
2     assessment, of course.

3                     Q.    Okay.  And you keep coming  
4     back to if that was the reason given.  Is your  
5     opinion, then -- because you admitted that you  
6     believe the Minister was aware of the public  
7     concern.

8                     Is your opinion based on the fact  
9     he didn't mention that public concern in the  
10    letter, the referral letter?

11                    A.    Yes.

12                    Q.    That is the only basis?

13                    A.    As the statute contemplates  
14    this bifurcation, this one or the other for  
15    triggering an environmental assessment, either  
16    public concern -- which is very rarely the source  
17    in practical terms of calling for a federal review,  
18    otherwise it would just be a matter of how many  
19    people are opposed, and the like.

20                    It is normally, and in the case  
21    here, the rationale given by the Minister was the  
22    fear of significant adverse environmental effects,  
23    that they used that track to get there.

24                    Q.    You would agree under section  
25    21 they didn't have to use any track.  He could

1 have just written and said, Please refer; correct?

2 A. With respect to the marine  
3 terminal, if this were a marine terminal  
4 comprehensive study, it could have been the case,  
5 yes.

6 Q. Yes. I understand your  
7 opinion on scope of project.

8 A. Not with respect to the  
9 quarry, no, I do not accept that.

10 Q. In your materials,  
11 Mr. Rankin, in your report, you also discuss two  
12 other projects. One of those is the Belleoram  
13 project, and that is at paragraphs 80 to 82 of your  
14 report?

15 A. Yes.

16 Q. Now, I want to clarify  
17 something. You don't actually refer to the  
18 comprehensive study report that was prepared in  
19 this section. Did you review that environmental  
20 assessment?

21 A. I didn't look at it  
22 carefully. I think it was in the materials, but I  
23 never really looked at it. I noticed it was six  
24 times as large as the Whites Point quarry proposal,  
25 with three times as much annual production.

1                   And there was no -- there was a  
2 comprehensive study, but there was no review panel,  
3 and it was -- I think the decision to give them an  
4 EA was -- environment assessment was done  
5 relatively quickly, but...

6                   Q.    You're aware --

7                   A.    Yes.    Sorry.

8                   Q.    You're aware it was in  
9 Newfoundland and Labrador?

10                  A.    Yes, it was.    It was in the  
11 same region as DFO's, as the Department of  
12 Fisheries and Oceans' region as in the case of  
13 Whites Point quarry.

14                  Q.    Well, the same Fisheries and  
15 Oceans region.    You are aware, though, the  
16 environment ranges considerably different  
17 Newfoundland and Labrador and southern Nova Scotia;  
18 correct?    There is an environmental difference  
19 between --

20                  A.    Of course, of course I am  
21 aware.    But it was located in a commercial -- the  
22 Belleoram project was located in a commercial  
23 fishing area, lobster -- as I recall, American  
24 lobster was the species -- with developing  
25 aquaculture operations and so forth.

1                   Q.    Okay.  Now, you're aware that  
2   it is far away, and you have said, again, you're  
3   aware of these facts from the documents.  But in  
4   terms of how the projects were treated or what the  
5   concerns were, again, you're not qualified as a  
6   scientist to comment on the environmental  
7   differences between the sites; correct?

8                   A.    Of course, no, I'm not.  I'm  
9   merely pointing out under the rule of law the great  
10  disparity in treatment between the two marine  
11  terminal and quarry projects.

12                  Q.    Right.  But you would agree a  
13  disparity in treatment that could be justified  
14  based on the science done as to what the effects  
15  are, correct, or what the likely effects are?

16                  A.    Yes.

17                  Q.    And you would agree, also, in  
18  the Belleoram case, that in fact there was no  
19  public opposition to this project or no significant  
20  public opposition; correct?

21                  A.    Yes.

22                  Q.    You mention also in your  
23  materials the Aguathuna project at paragraphs 89 to  
24  91.  This was also a project in Newfoundland and  
25  Labrador; correct?

1 A. That's right.

2 Q. Now, this was a project, you  
3 are aware, that was a redevelopment of a quarry and  
4 shipping facility that had been operating for over  
5 50 years; correct?

6 A. Yes.

7 Q. Now, you're also aware that  
8 with this project there was no public concern with  
9 this project?

10 A. I believe that is right.

11 Q. Finally on the last part of  
12 this, in paragraphs 92 and 93, you reference  
13 certain other charts prepared by Mr. Estrin. In  
14 terms of commenting very briefly on some of those  
15 other projects, you didn't actually review any of  
16 the other documents associated with those, the  
17 primary documents associated with those projects;  
18 correct?

19 A. Counsel, to be totally frank,  
20 I can't remember at this stage. I might have  
21 looked at a couple of them just in scanning them,  
22 but I frankly don't recall.

23 But I do know that he looked at 28  
24 environmental assessments for quarries between 2000  
25 and 2011, and only one was subject to a public

1 review hearing and that was Whites Point quarry.

2 And, you know, I think that  
3 standing back from the trees and looking at the  
4 forest it is pretty, pretty staggering, because  
5 some of them were bigger than this one.

6 And he talks about that in his  
7 report, as I recall, as well, but I don't have that  
8 right in front of me.

9 Q. But you are unaware, then,  
10 and you don't recall today or have any knowledge of  
11 the reasons why officials treated those projects  
12 differently than they had treated the Whites Point  
13 project, do you?

14 A. No. I'm simply making the  
15 point there were 28 quarry proposals in Nova Scotia  
16 between 2000 and 2011. Twenty-eight environmental  
17 assessments were done. One was the subject of a  
18 public review hearing. One was rejected,  
19 recommended for rejection, and then ultimately the  
20 Ministers chose to reject it.

21 I am just pointing out that fact,  
22 which I think is salient.

23 Q. You would agree there is  
24 nothing in either -- well, there is nothing in CEAA  
25 or the Nova Scotia Act that would prevent a quarry



1 from being referred to a review panel?

2 A. None. Not at all.

3 Q. So you say there was only  
4 one, but you would agree that the mere fact there  
5 is only one doesn't mean it is abuse of discretion;  
6 correct?

7 A. I think it is telling that in  
8 the circumstances of all of those quarries, that  
9 only one was the subject of a referral to a review  
10 panel.

11 Q. But you understand also that  
12 not one of those other...

13 PRESIDING ARBITRATOR: Excuse me.  
14 I think we are getting into a time problem again.

15 MR. SPELLISCY: I have one  
16 question.

17 PRESIDING ARBITRATOR: I think it  
18 is so fascinating that time flies for me, but it  
19 has come to my attention we have been going on for  
20 three-and-a-half hours, and so the question for you  
21 is --

22 MR. SPELLISCY: I have one  
23 question.

24 PRESIDING ARBITRATOR: One  
25 question left?

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1 MR. SPELLISCY: One question.

2 PRESIDING ARBITRATOR: That sounds  
3 good.

4 --- Laughter

5 MR. SPELLISCY: It could be a long  
6 question.

7 PRESIDING ARBITRATOR: I mean just  
8 time wise.

9 MR. SPELLISCY: It is a multi-part  
10 question. It has lots of A, Bs and Cs.

11 MR. KURELEK: And then it is my  
12 turn.

13 PRESIDING ARBITRATOR: Please ask  
14 the question, and once you are finished with that,  
15 we can get back to the time issue.

16 BY MR. SPELLISCY:

17 Q. I just wanted to confirm,  
18 Mr. Rankin, that in fact on the 28 applications you  
19 saw, not one of those other quarry projects was  
20 located on the Digby Neck?

21 A. That's correct.

22 Q. Thank you. It seems  
23 anticlimactic now.

24 --- Laughter

25 Q. Those are my questions.

1 Thank you.

2 A. Thank you very much.

3 PRESIDING ARBITRATOR: So may I  
4 ask...

5 Mr. Kurelek, may I ask you how  
6 much time you envisage -- may I ask you how much  
7 time you envisage the continuation of the  
8 examination to take?

9 MR. KURELEK: It is difficult to  
10 say, but based on what I have seen so far in the  
11 examination, I would be at least an hour and a  
12 half, possibly two hours, and I am quite happy to  
13 sit here until it is done tonight, if that is all  
14 right, or we can start tomorrow.

15 My preference would be to do it  
16 tonight, but I am in others' hands.

17 PRESIDING ARBITRATOR: Let me just  
18 allow us to stick our heads together.

19 --- Tribunal members confer

20 PRESIDING ARBITRATOR: The  
21 Tribunal is willing to continue the examination  
22 beyond five o'clock. In that case, we will need a  
23 break for the court reporter. How long a break  
24 would you need? Twenty minutes. So the court  
25 reporter needs a break of 20 minutes. After the 20

1 minutes, we will try to complete Mr. Kurelek's part  
2 of the exercise, but the re-direct probably any  
3 realistic -- will have to be tomorrow.

4                   What this change in our program  
5 will also mean is that there will be no  
6 late-evening or evening transcript, but you would  
7 get the transcript, the more or less finished  
8 transcript, tomorrow morning still, depending on  
9 how long. This is a bit of an exceptional  
10 situation, so if the transcript turns out to be  
11 later tomorrow, you will have to live with that.

12                   Okay, I think if that is the case,  
13 it is 5:00, so we continue at 5:25 in order to give  
14 the court reporter her 20 minutes, and then  
15 continue with Mr. Kurelek's part of the  
16 examination.

17 --- Recess at 5:05 p.m.

18 --- Upon resuming at 5:25 p.m.

19                   PRESIDING ARBITRATOR: Ladies and  
20 gentlemen, can you take your seats?

21                   MR. NASH: You have to turn your  
22 mics on.

23                   PRESIDING ARBITRATOR: Is that  
24 more effective? Take your seats. A continuation  
25 of the show like in the old movies where you saw

1 the one, two, three between the...

2 We are told there is a need for an  
3 Internet connection to be fixed, so we have another  
4 moment. Just one second.

5 All right, we are all set. So the  
6 examination continues, Mr. Kurelek. The witness is  
7 all yours.

8 CROSS-EXAMINATION BY MR. KURELEK:

9 Q. Thank you. Mr. Rankin, my  
10 name is Stephen Kurelek and I'm counsel for Canada.  
11 I am going to ask you some questions just like  
12 Mr. Spelliscy did. My topic is a little bit  
13 different. I've got a couple of topics, but they  
14 are all post referral to the JRP.

15 I know this is a bit like the last  
16 speaker in the day on a long CLE day, but the good  
17 news for you is I am going to keep you physically.  
18 I've got not just the three, but I have four  
19 binders.

20 A. Okay.

21 Q. And the reason I prefer to  
22 have the table here is, just like with you, I am  
23 going to need you to look at two binders at once  
24 several times.

25 A. Okay, sure.

1                   Q.    So it will be a bit awkward  
2   for those with computers at the desk, but that is  
3   where we're headed.

4                   So as I suggested, we are dealing  
5   with the post panel referral era, and I just want  
6   to confirm something I think I heard at the  
7   beginning of your testimony with Mr. Spelliscy.

8                   Footnote 3 on page 3 of your  
9   report.  By the way, I will do my best to point you  
10  to which binder I'm talking about.  I have a little  
11  list here of which exhibits go in which exhibit.

12                  Your report, of course, is the  
13  first item in binder 1.  Just to confirm, at the  
14  time you wrote your report, you hadn't read the  
15  supplemental reports of Mr. Estrin or Mr. Smith,  
16  but you have since done so; is that correct?

17                  A.   That is correct, yes.

18                  Q.   I will be referring to those  
19  or at least one of them.  And I don't think I heard  
20  this question so far.  Did you write your own  
21  report, sir?

22                  A.   Yes.

23                  Q.   So turning to the substance  
24  itself, would you agree with me that the JRP in one  
25  point was constituted, in part, under the CEAA, the

1 federal Canadian Environmental Assessment Act? It  
2 was part CEAA, it was partly constituted under  
3 NSEA; is that correct?

4 A. Subject only to the point I  
5 tried to make earlier today about the way in which  
6 the Nova Scotia component of that occurred, i.e.,  
7 the failure to register, et cetera.

8 I would agree that this was --  
9 this purported to be a joint review process. A  
10 Minister from the Nova Scotia government, the  
11 Minister of Environment, federal, jointly referred  
12 this matter to the Joint Review Panel.

13 Q. And in particular, just so we  
14 put a finer point on it, CEAA of course is R-1 in  
15 the first binder and NSEA is R-5 in the first  
16 binder, as well.

17 A. Yes.

18 Q. Would you agree that under  
19 section 40(2)(a) of CEAA, so that is page 19 of 36  
20 in the binder there, that that allowed for the  
21 Constitution -- allowed the federal government to  
22 engage in a Joint Review Panel with another  
23 province?

24 A. Oh, yes.

25 Q. And, similarly, turning to

1 the provincial side, would you agree that the same  
2 power existed for Nova Scotia in this case under  
3 section 47 of the NSEA? That is at tab 5 -- sorry,  
4 R-5.

5 A. At the risk of belabouring  
6 the point I was trying to make earlier, 47, section  
7 47, has to be read, I think, along with section 33  
8 of the Nova Scotia statute.

9 Section 47 that you referred to  
10 says where an undertaking is also subject to the  
11 environmental assessment or other review  
12 requirements of Canada, et cetera, the Minister may  
13 do so and so. I am just pointing out that section  
14 33 is to me a live issue, as well, and I won't  
15 repeat what I said earlier on that score.

16 Q. Okay. Turning to the -- I  
17 guess we don't have a page number here, but I'm  
18 staying with section 47 of the NSEA, which is  
19 entitled "Joint Assessments". Turning to the page  
20 right after the beginning of that section, you see  
21 47(1) -- yes, 47(1)(d), this is that the statute  
22 allows the Minister to determine what issues shall  
23 be addressed in the assessment or review.

24 Do you see that there, sir?

25 A. Yes.



1                   Q.    What I would like to do is,  
2    the same exhibit, but just to turn back to section  
3    3 of the NSEA.

4                   Unfortunately, our copy is a  
5    little bit difficult to read in terms of how these  
6    letters are set up, but if you look at -- section 3  
7    is the interpretation section. Do you see that on  
8    the left?

9                   A.    Yes.

10                  Q.    Then on the right, you've got  
11    a bunch of items defined. I would like to take you  
12    first to item (r), which is right in the middle of  
13    the page, and the definition of "environment" means  
14    the components of the earth, and includes...

15                  Now, this one is -- it is Roman  
16    numeral (v), so under (r) there is (i), (ii),  
17    (iii), (iv), and then (v). So "environment" means  
18    "for the purposes of part IV", which is the EA  
19    section of the NSEA, "the socioeconomic,  
20    environmental health, cultural and other items  
21    referred to in the definition of environmental  
22    effect". Do you see that there, sir?

23                  A.    Yes.

24                  Q.    Then skipping down a bit  
25    further, there is another V on that page, and this

1 one is not Roman numeral V, but V on its own, the  
2 letter, and that is the definition of  
3 "environmental effect", which means under this Act,  
4 "in respect of an undertaking: Any change, whether  
5 negative or positive, that the undertaking may  
6 cause in the environment, including any effect on  
7 socioeconomic conditions, on environmental health,  
8 and physical and cultural heritage or any  
9 structure, site or thing including those of  
10 historical, archaeological, paleontological or  
11 architectural significance."

12 Do you see that there, sir?

13 A. Yes.

14 Q. Now, turning to another  
15 significant document in this whole process, in the  
16 same binder 1, R-27, you have been there already.  
17 I believe this is the JRP agreement. You are  
18 familiar with that document?

19 A. Yes. I am, yes.

20 Q. You know that at page 7 we  
21 have the terms of reference for the JRP attached  
22 there starting at page 7.

23 A. Yes, I am familiar with  
24 these.

25 Q. Now I would like to -- at



1 permit 'standalone'  
2 consideration of the socio-  
3 economic effects, those were  
4 not the Terms of Reference  
5 that were imposed on the  
6 JRP."

7 Do you see that there, sir?

8 A. I do.

9 Q. Now, turning to your next  
10 paragraph, you quote extensively from Part 3 of the  
11 terms of reference we just referred to in R-27. So  
12 that starts on page 55 and continues on to page 56.

13 A. I may be able to help you,  
14 counsel. I accept that I made a typo in that list.  
15 I should have included socio-economic effects.  
16 Mr. Smith brought that up in his rejoinder, and I  
17 concede that there is -- socio-economic should be  
18 in that list. Indeed, I do make that point on  
19 paragraph 129, where I say, "Although the panel  
20 could indeed consider socio-economic matters".

21 And that was just a typo that he  
22 pointed out.

23 Q. Well, let's talk about that  
24 typo, because it seems to me there are two. One  
25 is, just to be clear, between items (c) and (h) at

1 the top of page 56 --

2 A. Yes.

3 Q. I see three periods, three  
4 dots. And I presume that those represent an  
5 ellipsis between (c) and (h) because of the items  
6 that you didn't include, which would be (d), (e)  
7 and (f) from the terms of reference; is that  
8 correct?

9 A. That's right, that's right.

10 Q. Then between (h) and (l),  
11 there are no dots representing an ellipsis. So is  
12 that the typo you're talking about, or are you  
13 talking about the complete absence of (i) from  
14 that?

15 A. I wish to say that the terms  
16 of reference do, indeed, list the socio-economic  
17 effects of the project, and I stand corrected on  
18 that point.

19 Q. And so --

20 A. I said that in 129, but I  
21 didn't list it there.

22 Q. Right. So it is your  
23 evidence here today that that was merely a typo on  
24 your part that you didn't include (i) in that list  
25 on page 56 of paragraph 126?

1                   A.    I concede that this isn't  
2    terribly elegantly written and I am the first to  
3    acknowledge that.

4                    I would accept that the panel has  
5    the ability to deal with socio-economic effects.  
6    The Federal Act is not to the same effect, but the  
7    terms of reference are the Bible for the joint  
8    review panel and it does indeed say that they can  
9    consider socio-economic effects.

10                  It would be my opinion, however,  
11    that the use of the term "community core values: is  
12    not a socio-economic effect. It is a value. It is  
13    not measurable. It is not mitigatable.

14                  It is not of the kind that the  
15    panel was entitled to take into account, but I  
16    concede that this is very badly stated on this  
17    part, and I wish to correct that.

18                  Q.    And just so I am clear, which  
19    part are you saying is badly stated? Is it  
20    paragraph 125 or 126?

21                  A.    It is probably all badly  
22    stated. I meant to say socio-economic is a  
23    legitimate listed consideration. The Federal Act  
24    is not to the same effect. The Federal Act talks  
25    about environmental effects resulting from

1 biophysical impact.

2                   The Nova Scotia Act, at least as  
3 regards environmental assessment, has stand-alone  
4 ability to deal with socio-economic effects.

5                   I don't believe that term is  
6 defined. My position is that it does not include  
7 what the panel concluded; namely, community core  
8 values, but presumably we can talk about that.

9                   Q. Sure. We will get there,  
10 actually, but I just want to make sure I completely  
11 understand your final sentence in paragraph 125.

12                   So would you agree that the last  
13 part of the sentence, that those were not the terms  
14 of reference, that that is actually incorrect; is  
15 that right?

16                   A. That is not correct.

17                   Q. Would you also agree that the  
18 first part of the sentence is actually not accurate  
19 either, because, in fact, the Nova Scotia -- under  
20 the Nova Scotia Act in this case the socio-economic  
21 effects must have been considered by the JRP; is  
22 that correct?

23                   A. The Nova Scotia Act, it is  
24 always difficult to, in a Joint Review Panel -- I  
25 had to do this when I was doing a joint review for

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1 the federal and provincial governments as  
2 commission counsel. To mush together the  
3 provincial and federal statutes is difficult,  
4 particularly difficult in some of the provinces.

5 But, anyway, this terms of  
6 reference very clearly gave the panel the ability  
7 to address and consider "socio-economic" effects.

8 And so where I said that is not  
9 the case, I was in error.

10 Q. Okay, thank you. I will give  
11 you your wish here. We're turning to core  
12 community values.

13 Next topic, then. As you say in  
14 paragraph 129, the panel could consider  
15 socio-economic effects, but consider -- your point  
16 here is consideration of socio-economic effects is  
17 a long way from the community core values, or what  
18 we call CCV, on which the panel's conclusions turn.

19 Is that still your position today,  
20 sir?

21 A. I wish to try to be as clear  
22 as I can about this fundamental point.

23 The chair of the Joint Review  
24 Panel said that the key reason for the decision or  
25 the recommendation was "community core values" and



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1 the impact of this project on community core  
2 values.

3 What is critically important to me  
4 are two factors. One, it is my position is that  
5 the federal government had no basis on which to  
6 make a determination based on that, but neither did  
7 the general -- neither was this one of the  
8 socio-economic effects.

9 Core community values, as defined  
10 by the panel, is about values. It is about  
11 beliefs. It is about philosophy.

12 Socio-economic effects are matters  
13 that could be the subject of expert evidence and,  
14 indeed, I understand AMEC was called upon to  
15 provide evidence of socio-economic effects. What  
16 is the difference?

17 Socio-economic effects are the  
18 subject of scientific, social scientific analysis.  
19 They are measurable. They are mitigatable, if that  
20 is a word.

21 Core community values, by the  
22 panel's own admission, were never looked at with  
23 respect to mitigation. There was no mitigation, at  
24 all. The panel chair acknowledged that on the CBC  
25 interview referred to in my report.

1                   To me, those are entirely  
2 different categories. To make a decision that it  
3 turns on community core values, which is nowhere to  
4 be found in the statute, nowhere to be found in the  
5 terms of reference, is unknown to any other  
6 environmental assessment process. The phrase has  
7 not occurred in any others that I have seen.

8                   And while values are very much  
9 involved, and we can talk about one panel report  
10 called Kemess North, where aboriginal values are  
11 considered, even there there were serious  
12 environmental harms.

13                  There was the use of a lake as a  
14 tailings pond. It wasn't uniquely decided on the  
15 basis of values. And those of course were with  
16 respect to constitutionally-protected aboriginal  
17 rights.

18                  So my point is simply that no  
19 properly-constituted panel had the jurisdiction to  
20 make a determination on the basis of a standard  
21 called "core community values". It does not get --  
22 it is not a function of socio-economic effects  
23 which, as I say, social scientists can measure  
24 that. They can provide for mitigation measures  
25 along the lines that you would expect in a

1 scientifically-oriented process such as  
2 environmental assessment.

3 To determine and to make a  
4 recommendation turning on core community values was  
5 without jurisdiction, in my opinion.

6 Q. So I will return to my  
7 question, because you didn't answer it.

8 I will quote you here, 129:

9 "Although the Panel could  
10 indeed consider socio-  
11 economic matters since that  
12 was a factor listed in the  
13 Terms of Reference,  
14 consideration of socio-  
15 economic effects is a long  
16 way from the 'community core  
17 values' on which the Panel's  
18 conclusions turn."

19 So my question is: Is that still  
20 your --

21 A. Yes.

22 Q. -- position today?

23 A. That is what I was trying to  
24 elaborate on just now.

25 Q. Yes, okay. May I ask you now

1 to turn to what I would call the fourth binder, but  
2 really it is Mr. Estrin's bundle number 1. We're  
3 turning to Mr. Estrin's first report, in  
4 particular, paragraph 230 of Mr. Estrin's report,  
5 which is page 60.

6 A. Page?

7 Q. Page 60, paragraph 230. This  
8 is where Mr. Estrin is talking about core community  
9 values, as well. This is obviously a very hot  
10 issue in this case and there is lots of ink spilled  
11 over it. And, in particular, I would like you to  
12 look at the beginning of paragraph 230 of  
13 Mr. Estrin's first report when he says:

14 "However, inconsistency with  
15 community core values is not  
16 an environmental effect, as  
17 defined by CEAA, it is a pure  
18 socio-economic effect."

19 A. Yes.

20 Q. So what I would like to know,  
21 and my question to you is, considering what you say  
22 in paragraph 129 of your report, which again is  
23 consideration of socio-economic effects is a long  
24 way from the community core values on which the  
25 panel's conclusions turn, do you agree with what

1 Mr. Estrin says at the beginning of paragraph 230  
2 of his first report?

3 A. I have the greatest respect  
4 for Mr. Estrin, but I do not agree.

5 Q. Thank you. I would like you  
6 to turn now in that same binder, the fourth binder  
7 or the first Mr. Estrin binder, we're going to  
8 Mr. Estrin's second report, and this is paragraph  
9 306, which is on page 94 of Mr. Estrin's second  
10 report. I am going to ask you a similar question.

11 Maybe I should wait. So this is  
12 page 94, paragraph 306. It is the Mr. Estrin  
13 number 1 binder. I think we only handed up one  
14 Mr. Estrin binder today. We will hand up the other  
15 two tomorrow, like the gift that keeps giving.  
16 --- Laughter

17 PRESIDING ARBITRATOR: Are you  
18 talking about the reply expert?

19 MR. KURELEK: Yes, yes. The  
20 second expert of Mr. Estrin dated December 2012,  
21 page 94.

22 May I proceed or? We're not there  
23 yet?

24 PRESIDING ARBITRATOR: Yes.

25 BY MR. KURELEK:

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1                   Q.    Yes, okay.  The paragraph  
2   306, Mr. Estrin says:

3                    "It is beyond debate that  
4                    questions of whether or not  
5                    the local community was in  
6                    favour of the WPQ, or whether  
7                    the WPQ would offend the  
8                    community's core values, are  
9                    purely local matters falling  
10                   under the exclusive  
11                   jurisdiction of the  
12                   provincial government."

13                   Do you agree with that statement,  
14   sir?

15                   A.   Well, I note that he  
16   references section 92 of the Constitution Act, and  
17   92.16, as I recall -- maybe I am wrong.  One of the  
18   latter sections is matters merely local and  
19   private, which are the exclusive jurisdiction of  
20   the provincial governments under the Constitution  
21   Act, 1867.

22                   So to that extent, I think he is  
23   making a pretty uncontroversial constitutional  
24   statement.

25                   Q.    So in your view, you agree

1 with that one?

2 A. Yes. I agree, yes.

3 Q. You agree with that one.

4 Turning to the next page, paragraph 311 of that  
5 same binder, Mr. Estrin's second report, and there  
6 he says "the only significant" -- sorry, this is  
7 the second sentence in the paragraph 311:

8 "The only significant adverse  
9 environmental effects cited  
10 by the Panel..."

11 That is the JRP:

12 "... were on community core  
13 values, matters of provincial  
14 jurisdiction."

15 Do you agree with that statement,  
16 too, sir?

17 A. I just want to say again that  
18 community core values are subjective beliefs and  
19 they are not, in my judgment, subject to rigorous  
20 scientific analysis. They can't be mitigated,  
21 according to the Panel at least, and they can't be  
22 measured. They are simply philosophical beliefs.

23 I still don't understand how, in  
24 any environmental assessment, federal, provincial,  
25 municipal, there could be something that turned on

1     such a subjective standard.

2                     So do I agree with the statement?

3     I didn't write this report, obviously. So the only  
4     significant adverse effects were on community core  
5     values. That is what the chair said that was the  
6     basis, the key basis, for their determination.

7                     Matters of provincial  
8     jurisdiction? I... To the extent they are a legal  
9     standard, they are local. I suppose that means  
10    they are more likely provincial. But I didn't  
11    write this, so I am not really in a position to  
12    evaluate its meaning.

13                    Q.   No, I wasn't asking that. I  
14    was just asking whether you agreed with it.

15                    A.   Do I agree with it?

16                    Q.   I ask you that in the context  
17    of what you said at the beginning of paragraph 129  
18    of your report, just to give you some context.

19                    A.   I say in paragraph 129 that:

20                         "Although the Panel could  
21                         indeed consider socio-  
22                         economic matters since that  
23                         was a factor listed in the  
24                         Terms of Reference,  
25                         consideration of socio-



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1                   economic effects is a long  
2                   way from the 'community core  
3                   values' on which the Panel's  
4                   conclusions turn."

5                   Clearly I agree with that, because  
6    I wrote it.

7                   When you are asking me if I agreed  
8    the only significant adverse environmental effects  
9    cited by the panel were on community core values,  
10   that I agree with, as well, because the chair said  
11   that to the CBC.

12                  Matters of provincial  
13   jurisdiction? I have no position on the  
14   constitutionality of that phrase. It is more local  
15   than it is national. I see no federal head of  
16   power which would capture community core values, if  
17   that is the question.

18                  Q. No, it wasn't the question.  
19   That is a much deeper question. That could  
20   probably be a master's thesis in terms of whether  
21   it is constitutional or not.

22                  All I am looking for -- it looks  
23   like we have narrowed it down to four words. Do  
24   you agree with those last four words of what  
25   Mr. Estrin says in that second sentence in

1 paragraph 311, "matters of provincial  
2 jurisdiction"?

3 A. Well, they are certainly not  
4 matters of federal jurisdiction. Does that help?

5 Q. We're getting closer.

6 --- Laughter

7 Q. I wouldn't mind a yes or no,  
8 or you can even abstain and say you take no  
9 position.

10 A. I will take no position.

11 Q. Okay. Very good. I would  
12 like to turn now to paragraph 99 of your report,  
13 which is on page 45, so that is back in binder 1.

14 A. Got it.

15 Q. In that paragraph, you say --  
16 one of the things you say -- you say a number of  
17 things, but one of the things you say at the  
18 beginning is the JRP imposed several new criteria  
19 in the final EIS guidelines, and you list a few of  
20 those:

21 "Thus the Panel did not  
22 provide adequate notice of  
23 these concerns so that the  
24 Proponent knew the case it  
25 had to meet."

1 I will return to that paragraph in  
2 a moment, but I would like you now to turn to item  
3 or -- sorry, Exhibit 209, which according to my  
4 records is binder 2.

5 So you can leave your binder 1  
6 open. I think you can dispense with Mr. Estrin for  
7 the moment. 209 is near the back.

8 A. Draft guidelines?

9 Q. That's right.

10 A. Right.

11 Q. These are the draft EIS  
12 guidelines. Do you have that there? Can you  
13 confirm that they were issued or at least they are  
14 dated on the front page November 2004?

15 A. Yes.

16 Q. Should I slow down here for  
17 the Tribunal?

18 MR. PULKOWSKI: Just a second,  
19 please, yes.

20 MR. KURELEK: I am going to go to  
21 the final guidelines next after this.

22 THE WITNESS: My memory was that  
23 these terms came into the final, but not the draft.  
24 Am I not right on that?

25 BY MR. KURELEK:

1                   Q.   Well, yes.  As you say, there  
2   were some differences between the two.  So would  
3   you agree -- a fairly innocuous question here.  
4   Would you agree the draft guidelines contains  
5   instructions to Bilcon on both the content and the  
6   structure of what it had to put in its EIS?

7                   A.   Yes.

8                   Q.   And if we're looking for  
9   confirmation of that, it is on page 2 of that draft  
10  guidelines.

11                   Now, would you also agree -- I can  
12  point you to pages here if we need to go to them --  
13  that the draft guidelines contain instructions to  
14  Bilcon to include in its EIS an assessment of the  
15  effects of the Whites Point project on the  
16  biophysical environment?

17                   A.   Yes.

18                   Q.   Do you agree with that?

19                   A.   Yes.

20                   Q.   And would you also agree that  
21  those same draft guidelines contained instructions  
22  to Bilcon on what it needed to include in its EIS  
23  in terms of the socio-economic conditions of the  
24  region?

25                   A.   Yes, yes.

1 Q. Just for the record,  
2 biophysical, pages 15 and 22; for socio-economic  
3 pages 18 and 26.

4 Now, I would like you to turn to,  
5 before we get to the final EIS guidelines, Exhibit  
6 242, which is a letter from the JRP to Mr. Buxton.  
7 And 242 is in binder 3.

8 Here you might want to keep binder  
9 2 available, because we will be going back to that.

10 This is a short exhibit. It is  
11 just one page, 242. It is the JRP letter dated  
12 December 15th, 2004. It is a letter requesting  
13 Mr. -- asking Mr. Buxton for Bilcon's comments on  
14 the draft EIS guidelines, the Exhibit 209. In  
15 particular, the letter states that:

16 "The Joint Review Panel  
17 believes it is important for  
18 Bilcon of Nova Scotia's views  
19 regarding the draft  
20 guidelines to become part of  
21 the public record."

22 The letter goes on to say that:

23 "Therefore, the Joint Review  
24 Panel requests that Bilcon of  
25 Nova Scotia review the draft

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1 guidelines and return  
2 comments to the Panel."

3 Is that correct, sir?

4 A. Yes.

5 Q. In fact, isn't it true that  
6 in the same letter, the JRP even invited Bilcon to  
7 make a formal presentation on the same topic in the  
8 upcoming scoping meetings, and that is in the last  
9 paragraph there?

10 A. Yes.

11 Q. Now, I think we heard some  
12 evidence today earlier on the scoping meetings.  
13 They were held between January 6th and 9th, 2005.  
14 Isn't it true that despite having received this  
15 letter, Bilcon did not provide any comments on the  
16 draft EIS guidelines prior to those scoping  
17 meetings? Is that true?

18 A. I am not sure, to be honest.  
19 I'm not sure.

20 Q. I can tell you that on the  
21 record there is nothing indicating that.

22 Earlier today -- well, I will ask  
23 you this. Were you aware of whether Mr. Buxton  
24 attended those scoping hearings?

25 A. I heard him say that he did.

1                   Q.   Earlier today, I think 11:24  
2   this morning, Mr. Buxton admitted that he did  
3   attend those meetings.

4                   Would you agree that despite the  
5   invitation in the JRP's letter, Bilcon did not make  
6   any presentation at those scoping meetings?

7                   A.   That appears to be the case.

8                   Q.   Now, beyond making a  
9   presentation at the scoping meetings, are you aware  
10  of Bilcon offering any comments at all on these  
11  draft EIS guidelines?

12                  A.   I am not personally aware. I  
13  don't recall reference -- since the report was  
14  written, I had access to the supplemental witness  
15  statement of Mr. Buxton. It hadn't been available  
16  to me. So that is another thing I have looked at,  
17  and I don't recall any reference to it in there.

18                  Q.   Well, let me help you out  
19  here. The very next exhibit, 243, in binder 3 --

20                  A.   Yes, I have it.

21                  Q.   -- this is a letter dated,  
22  from Bilcon, January 16th, 2005. These are  
23  Mr. Buxton's or Bilcon's comments on the draft  
24  guidelines. I will give you a second to review --  
25  have you seen that letter before, by the way?

1 A. I can't remember.

2 Q. I will just give you a second  
3 to give it a scan.

4 A. Yes.

5 Q. Would you agree that in that  
6 letter Mr. Buxton does not complain or say anything  
7 about how the draft EIS guidelines exceeded the  
8 scope of the JRP's terms of reference, and here I  
9 am talking about Exhibit R-27?

10 A. I think that is correct, yes.

11 Q. Now, returning to binder 2,  
12 this is the last exhibit in binder 2, and it is  
13 210. These are the final EIS guidelines. They  
14 come right after the draft ones in our binder  
15 there.

16 And do you agree that they are  
17 dated March 31st, 2005 at the top of the first  
18 page?

19 A. Yes.

20 Q. Is the Tribunal with me  
21 here? So this is the last exhibit in binder 2. It  
22 is Exhibit 210.

23 I am happy to slow down, if you  
24 wish. I will ask you to turn, Mr. Rankin, to pages  
25 3 and 4. So this is the table of contents. We can



1 go to the individual sections within the final  
2 guidelines, if necessary, but we can expedite  
3 matters just by referring to a few items there.

4 In particular, I am thinking about  
5 sections 9.3 and 10.3. Would you agree that the  
6 final guidelines make it clear that EIS -- sorry,  
7 Bilcon's EIS had to address the impacts of the  
8 Whites Point project on the existing human  
9 environment and on human environmental impact  
10 analysis?

11 A. Yes. I thought that was  
12 consistent with the mandate to look at  
13 socio-economic factors.

14 Q. And you see on page 3, under  
15 9.3, there is the topic 9.3.8, socio-cultural  
16 patterns, which you also see on the next page under  
17 10.3.8. Do you see those?

18 A. Yes, I do.

19 Q. Now, we talked earlier about  
20 whether Bilcon objected to the scope of the draft  
21 EIS guidelines. Are you aware of Bilcon ever  
22 objecting to the scope or the content of the final  
23 EIS guidelines?

24 A. I am not, but I am not  
25 surprised either. In these circumstances often

1   proponents will simply get along, you know, get on  
2   with it. Got to write our report. Have to get our  
3   experts lined up in order to address the various  
4   components. But I know of -- I don't recall any  
5   objection to it. But as I say, that is not  
6   terribly extraordinary.

7                   Q.   I'm going to turn briefly to  
8   paragraph 98 of your report on page 44, so I  
9   apologize, going back to the very first binder in  
10  binder number 1.

11                  A.   This is Mr. Buxton's  
12  testimony, is that --

13                  Q.   No. This is you, sorry. I  
14  am going to paragraph 98 of your report. It is the  
15  very first item in the binder.

16                  A.   In which I cite the excerpts  
17  from Mr.... Mr. Buxton, is it?

18                  Q.   We're talking about basic  
19  procedural fairness here?

20                  A.   Right.

21                  Q.   Oh, I see, where you are  
22  quoting from?

23                  A.   I quoted large chunks of his  
24  testimony --

25                  Q.   Yes, right.

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1 A. -- his witness statement.

2 Q. But your complaint here is:  
3 Basic procedural fairness  
4 required that Bilcon receive  
5 adequate notice in order to  
6 prepare the case to meet."

7 We heard talk of this earlier  
8 today. This is what you say:

9 "It is my view that this did  
10 not happen. For example, the  
11 terms of the draft EIS  
12 Guidelines were very  
13 different from the Final  
14 Guidelines that the JRP  
15 approved."

16 Do you see that there, sir?

17 A. Very much so. And he  
18 provides examples of where how absolutely -- you  
19 know, how very, very different the final guidelines  
20 were from the draft ones.

21 Q. Right. Now, my question to  
22 you is: Do you agree that both the draft EIS  
23 guidelines that we just looked at and the final EIS  
24 guidelines included provisions on the inclusion of  
25 the likely socio-economic effects of the Whites

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1 Point project? I can take you to the sections, if  
2 you wish.

3 A. The 9.3 and 10.3 of which you  
4 just took me to, you mean?

5 Q. In the final, and in the  
6 draft 8.2 and 9.2.

7 A. Right. My point, of course,  
8 is that the new ones were much more discursive,  
9 including things like traditional knowledge, et  
10 cetera. I don't think that was in the first one,  
11 but I don't recall.

12 Q. Yes. They were different,  
13 but do you agree --

14 A. Yes.

15 Q. Do you agree both of them  
16 included -- asked for the inclusion in the EIS of  
17 the likely socio-economic effects of the project?

18 A. I do. Yes.

19 Q. Now, we're going back to  
20 binder 3 to keep everybody alert. Is it true that  
21 Bilcon requested several extensions to the deadline  
22 of the filing of its EIS?

23 A. I believe that's true.

24 Q. So let's look at those  
25 requests for extension. In fact, it is not

1     essential that everybody looks at these.  They are  
2     fairly straightforward.

3                     Exhibit R-245 is a letter from  
4     Bilcon to the JRP.  It is, in particular, on August  
5     30th.  Bilcon advised that it could not meet the  
6     August submission deadline -- this is August 30th,  
7     2005 -- couldn't meet the August deadline and  
8     likely would not be able to file its EIS until  
9     December 2005; is that correct?

10                    A.  Apparently.

11                    Q.  And, again, similar thing on  
12     December 8th, 2005.  So this is the expected  
13     delivery date.  Bilcon wrote another letter to the  
14     JRP advising that it would not be able to submit  
15     its EIS until March of 2006; is that correct?

16                    A.  Yes.

17                    Q.  Now, turning to -- this is  
18     same binder, C-137, which is near the back of  
19     binder 3.  This is a letter from Paul Buxton dated  
20     April 25th, 2006, if you could look at that?

21                    Do you agree that this is the  
22     letter that indicates that Bilcon didn't file its  
23     EIS until that time, April 25th, 2006?

24                    A.  Do I agree?

25                    Q.  That this letter confirms

00333

1     that Bilcon didn't file its EIS until April 25th,  
2     2006?

3                     A.    Yes.

4                     Q.    And earlier we looked at the  
5     final EIS guidelines, and the date, I think it was  
6     stamped at the top March 31st, 2005.  So would you  
7     agree that the EIS was not delivered until more  
8     than a year after the final EIS guidelines were  
9     issued?

10                    A.    Yes.

11                    Q.    Very good.

12                    Now, I would like to turn to a  
13     different topic that came up with Mr. Spelliscy,  
14     and this is -- if you could turn to page -- sorry,  
15     paragraph 136 of your expert report.

16                    A.    Yes.

17                    Q.    This is binder 1.  Once  
18     everybody is ready, I would ask you if you could  
19     for us read the first three sentences of your  
20     paragraph 136.

21                    A.    "Section 37 of the CEAA  
22                            requires mitigation measures  
23                            to be taken into account by  
24                            the responsible authority.  
25                            However, the JRP in regard to

1 the WPQ did not consider  
2 mitigation measures at all.  
3 This omission violates the  
4 letter as well as the spirit  
5 of this statutory  
6 requirement."

7 Q. Is that your position today?

8 A. My position is the following.  
9 The chair of the tribunal indicated publicly on CBC  
10 that they did not think they needed to include  
11 mitigation measures in the report. He said that  
12 acknowledging it was an unusual thing to do, an  
13 omission.

14 In my mind, one of the core  
15 components of any environmental assessment repeated  
16 over and over again, both in the terms of reference  
17 and in the Federal Act, is the need to provide  
18 mitigation measures, compensation, restoration.  
19 The term is defined to include a number of things.

20 To me, to provide a report to the  
21 Ministers that did not include mitigation measures  
22 for the central finding that this was "contrary to  
23 core community values" would in Canadian law be  
24 deficient as a matter of jurisdiction.

25 They had a statutory obligation to

00335

1 provide mitigation measures, and even in a number  
2 of panel reports I could take you to where the  
3 government -- where the panel recommended to  
4 government that it not proceed, the panel  
5 nevertheless went through a number of -- sometimes  
6 dozens of mitigation measures in the event that the  
7 Ministers chose not to accept the recommendations.

8                   So this is a glaring deficiency  
9 acknowledged by the Chair and contrary to the terms  
10 of reference and the statute.

11                   So I do stand behind that as  
12 regards the core finding of core community values.

13                   Q. So I will take that as a,  
14 yes, you do stand by that.

15                   Moving on to two pages along, page  
16 61, paragraph 144, you quote Mr. Connelly, who is  
17 one of Canada's experts in this case.

18                   A. Yes, very much so.

19                   Q. It says here. And you quote  
20 him, and you took issue with Mr. Spelliscy earlier  
21 because he didn't refer to the mitigation measures,  
22 parenthetical statement here. So let me read it  
23 all:

24                   "If on the other hand the  
25 appropriate government



00336

1 decision-maker determines  
2 that the project is likely to  
3 cause significant adverse  
4 environmental effects (again,  
5 taking into account any  
6 appropriate mitigation  
7 measures) that cannot be  
8 justified in the  
9 circumstances, the  
10 responsible authority shall  
11 not take an action that would  
12 permit the project to be  
13 carried out in whole or in  
14 part."

15 A. Yes.

16 Q. And from that, you say:  
17 "In other words, Mr. Connelly  
18 appears to confirm that  
19 mitigation measures must be  
20 considered in the calculus.  
21 However, mitigation measures  
22 were not considered by the  
23 JRP."

24 Do you still agree with that  
25 statement?

00337

1                   A.    I think Mr. Connelly puts it  
2   very well just above at paragraph 138, where he  
3   says that there are certain factors that must be  
4   considered in every type of environmental  
5   assessment. One of these mandatory factors is the  
6   mitigation measures.

7                   And he goes on and provides, I  
8   thought, a very effective reason for that  
9   requirement. So the panel -- Bilcon has the  
10  opportunity to, as he says, citing Professor Hanna:

11                   "...make the project better,  
12                   to respond to the concerns of  
13                   those affected, and to  
14                   improve the likelihood that  
15                   the proposal will be  
16                   favorably received by the EIA  
17                   and other approval agencies."

18                   There is a reason for this  
19  statutory requirement. It is, I think, pretty  
20  central, and the chair stated categorically that he  
21  didn't see the need to provide mitigation measures  
22  on the issue of community core values, because  
23  apparently these subjective values could not be  
24  mitigated, as I understand it.

25                   Q.    Just to repeat my question, I

00338

1 will make it even narrower. Do you agree and still  
2 stand by the final sentence on that page 61?

3 A. Yeah, I am speaking  
4 particularly of community core values. The panel  
5 might have said that it had, I think, some  
6 self-serving language about how it did it, but it  
7 did not, in fact, provide mitigation measures for  
8 the key reason. Their first -- there were several  
9 recommendations made. The first one was to reject  
10 it on the basis of community core values and not to  
11 provide mitigation, so that is what I was referring  
12 to.

13 Q. Now, I will ask you now to  
14 turn to the JRP report itself, which is the first  
15 item in binder 3. It is R-212.

16 I will start by asking you: Have  
17 you read this report in its entirety?

18 A. Yes. Not for a long time,  
19 though.

20 Q. Secondly, do you recall if  
21 the word "mitigation" appeared at all in the  
22 report?

23 A. I believe that it does.

24 Q. Would you be surprised if I  
25 told you that it appeared more than 70 times?

00339

1 A. No, I wouldn't be.

2 Q. I would like to take you to a  
3 few of those examples, starting with page 20 of  
4 that report. This is under the title "Adequacy  
5 Assessment Framework". This is just setting things  
6 up, but at the bottom of the first column, you will  
7 see the panel say that:

8 "To be able to conclude that  
9 a project's potential adverse  
10 effects are well understood,  
11 capable of being mitigated  
12 and not significant, the  
13 Panel would require  
14 confidence in the  
15 following..."

16 And it lists a bunch items there,  
17 including the sixth item down, "Appropriateness,  
18 technical and economic feasibility of proposed  
19 mitigation measures".

20 Do you see that there, sir?

21 A. I do.

22 Q. Let's get more into the  
23 substance of it. I would like you to turn to pages  
24 35 and 36, so we are not dealing with paragraphs  
25 now. We are dealing with pages, 35 and 36.

00340

1                   This is under the title of  
2   "Wetlands". And at the very bottom of page 35 and  
3   moving on to the top of page 36, we have the panel  
4   saying:

5                   "The Panel concludes that the  
6                   Proponent has not  
7                   demonstrated that its  
8                   mitigation measures can  
9                   protect the ecological  
10                  integrity and continuing  
11                  viability of the wetland. The  
12                  Panel believes that the  
13                  wetland would experience  
14                  adverse environmental effects  
15                  from the disruption of its  
16                  watershed."

17                  Next paragraph:

18                  "Alternative mitigation  
19                  measures (such as different  
20                  strategies for developing the  
21                  site) that might protect the  
22                  wetland would reduce the  
23                  amount of the resource that  
24                  could be extracted and  
25                  increase project costs, which

00341

1                               may not be economically  
2                               feasible."

3                               Do you see that there, sir?

4                               A.    I do.

5                               Q.    Next, I would like to move to  
6 page 96 of that report, R-212. This is rather a  
7 long one, but I think it is a useful passage for  
8 understanding how the panel considered mitigation  
9 measures.

10                              There is a reference in the first  
11 sentence. I will just read the first sentence, and  
12 then I will pause. This is at the bottom of 96,  
13 bottom of --

14                              A.    Under "core values"?

15                              Q.    No, we are not there yet.

16 The first column, bottom of the first column:

17                              "For the most part, the items  
18 presented in Table 3.2 have  
19 the potential for some form  
20 of future mitigation."

21                              Now, table 3.2 is on page 98. It  
22 is two pages further. It is an itemization of what  
23 they call "Burdens Identified With the Proposed  
24 Quarry". The previous table is the benefits  
25 identified with the proposed quarry.

00342

1                   So that is what is being referred  
2 to here in terms of what they are saying about  
3 table 2.

4                   So, again:

5                   "For the most part the items  
6 presented in Table 3.2 have  
7 the potential for some form  
8 of future mitigation."

9                   Then they go on to say:

10                  "With proper planning,  
11 creation of adequate  
12 baselines, regular monitoring  
13 and appropriate management  
14 practices, the burden  
15 represented by individual  
16 elements could be reduced.  
17 The Panel believes, however,  
18 that in some cases the costs  
19 associated with mitigation  
20 could become prohibitively  
21 expensive (thereby  
22 undermining the viability of  
23 the Project) or engender  
24 other environmental effects  
25 (requiring additional

00343

1                   assessment that may lead to  
2                   conclusions that the Project  
3                   would have adverse effects).  
4                   For example, the Panel notes  
5                   that construction of an  
6                   artificial breakwater to  
7                   ensure ship safety on a risky  
8                   coastline could reduce the  
9                   risk of docking accidents but  
10                  would involve significant  
11                  costs; the presence of such a  
12                  structure could seriously  
13                  alter the local marine  
14                  ecosystem, creating the  
15                  potential for significant  
16                  adverse environmental  
17                  effects. The Panel believes  
18                  that the sum of these burdens  
19                  represents a substantial cost  
20                  for those unlikely to benefit  
21                  from the Project."

22                  Do you see that there, sir?

23                  A. I do.

24                  Q. So now we're moving to the  
25                  final example which, as you anticipated, is in core



00344

1 values. This is on page 100, and it is a critical  
2 paragraph, the last paragraph on that page. And  
3 there the panel says:

4 "The Panel considers the  
5 community's core values to be  
6 a Valued Environmental  
7 Component, as important to  
8 the broader ecosystem as any  
9 other part of the  
10 environment. From the body of  
11 accumulated evidence, the  
12 Panel concludes that the  
13 implementation of the  
14 proposed Whites Point Quarry  
15 and Marine Terminal complex  
16 would introduce a significant  
17 and dramatic change to Digby  
18 Neck and Islands, resulting  
19 in sufficiently important  
20 changes to that community's  
21 core values that warrant the  
22 Panel describing them  
23 collectively as a Significant  
24 Adverse Environmental Effect  
25 that cannot be mitigated."

00345

1 Do you see that there, sir?

2 A. I do.

3 Q. So then let me return to what  
4 you say in your report, which is on paragraph 136,  
5 second sentence:

6 "However, the JRP in regard  
7 to the WPQ did not consider  
8 mitigation measures at all."

9 A. Right.

10 Q. Do you still stand by that  
11 statement that it did not consider mitigation  
12 measures at all?

13 A. Yes, because at paragraph  
14 148, the chair says -- in paragraph 148 of my  
15 report, I cite the chair, who says, "We were so  
16 certain that this was a bad thing" -- I will just  
17 wait. Paragraph 148:

18 "We were so certain that this  
19 was a bad thing that it was  
20 inappropriate for that  
21 particular environment that  
22 we did not provide any of  
23 those mitigating  
24 recommendations at all. I  
25 think many people pointed to

00346

1                   that and that was a very  
2                   conscious effort on our part.  
3                   "The one [thing] that  
4                   absolutely couldn't be  
5                   adjusted was this business of  
6                   core values and the social  
7                   component. It would have had  
8                   such an effect on the  
9                   environment that would have  
10                  changed it forever and for us  
11                  that was the determining  
12                  factor."

13                  Similarly, where the Panel number  
14       1 recommendation appears at page 103, there is no  
15       reference to mitigation at all.

16                  So, again, I say that "community  
17       core values" is such an amorphous standard. They  
18       also refer to "sacred landscape" just in the same  
19       page that -- I think 99 that was referred to. I  
20       just don't understand how a proponent would be able  
21       to meet such an amorphous standard as that, and  
22       then to go on and say, And we're not even going to  
23       comment on mitigation.

24                  Of course there is reference to  
25       mitigation involving wetlands and other things, but

1 the panel chair indicates the reason for turning  
2 this down, recommending it not proceed, was  
3 community core values, and then to say, Well, you  
4 can't mitigate them, I say that is a statutory --  
5 that is a deficiency in the jurisdiction.

6 The recommendations should have  
7 included mitigation measures for the reasons that  
8 Mr. Connelly, citing Professor Hanna, indicated  
9 earlier.

10 Q. What I would like to do is to  
11 contrast what you say with what Mr. Fournier says  
12 in that CBC interview in the second line that you  
13 quoted in paragraph 148.

14 A. Yes.

15 Q. You quote Mr. Fournier --  
16 Dr. Fournier as saying:

17 "We were so certain that this  
18 was a bad thing that it was  
19 inappropriate for that  
20 particular environment that  
21 we did not provide any of  
22 those mitigating  
23 recommendations at all."

24 A. Yes.

25 Q. Now, what you say back in

00348

1 your second sentence of paragraph 136 of your  
2 report is:

3 "However, the JRP in regard  
4 to the WPQ did not consider  
5 mitigation measures at all."

6 Those are two very different  
7 things, sir, so I am going to ask you again: Do  
8 you stand by your second sentence in paragraph 136  
9 that, in spite of the four examples that I brought  
10 you to in the JRP report, that the JRP did not  
11 consider mitigation measures at all when it was  
12 conducting the EA?

13 A. The central conclusion of the  
14 panel, the first recommendation, was that this  
15 project ought not to be accepted by the Ministers  
16 because it was inconsistent with community core  
17 values. They did not address mitigation quite  
18 deliberately on that.

19 There were other minor things  
20 where mitigation comes up, by the main event here,  
21 the main event according to the chair, was it was  
22 inconsistent with core values, which is a standard  
23 nowhere else found in Canadian environmental law.

24 So do I agree? Yes, because the  
25 key event was its core community values, and

1    whether they had considered them is really not  
2    pertinent to the recommendation that goes forward  
3    to the Ministers.

4                   The Ministers make the decision  
5    under this legislation. All they get is a  
6    recommendation. The recommendation had to include  
7    mitigating measures. That is the basis of Canadian  
8    environmental law. Can this -- are there  
9    significant adverse environmental effects that  
10   cannot be mitigated, but maybe can be justified for  
11   other reasons?

12                   Those are the standards that the  
13   legislation very clearly required this panel to  
14   meet and they did not meet it.

15                   Whether they thought about it, I  
16   don't know. Did they recommend it? Did they  
17   provide those measures as required by the terms of  
18   reference to the real decision makers? The answer  
19   is "no".

20                   Q. In terms of my question, I  
21   heard a number of different somewhat contradictory  
22   responses.

23                   I heard at times that you stand by  
24   your second sentence at paragraph 136. Other times  
25   I heard it is irrelevant, is what you said.

00350

1 A. Yes, to the main --

2 Q. Then there was another  
3 response that I can't quite recall. All I am  
4 looking for is: Do you stand by your position here  
5 that the panel did not consider mitigation measures  
6 in its JRP report, regardless of its relevance?

7 I am trying to determine the  
8 veracity of --

9 A. As regards --

10 Q. -- of what you said in your  
11 report.

12 A. Right. I do not stand by the  
13 fact, if you mean that sentence in out-of-context  
14 way I think you're suggesting I should say it.

15 Q. No, no, no, in the context.

16 A. In the contention of core  
17 community values?

18 Q. Regardless of how you say it,  
19 they did not consider mitigation measures at all?

20 A. Yes, that is the case  
21 vis-à-vis community core values, as I read it, as  
22 the chair indicates here.

23 Q. Okay.

24 A. And no recommendations.

25 Whether they thought about it, the key is did the

00351

1 Ministers get the benefit of their recommendations?  
2 And the answer appears to be, at the chair's  
3 admission, "no".

4 Q. So your position, then, is  
5 with respect to that sentence, that applies to core  
6 community values?

7 A. Yes.

8 Q. But that is not -- correct me  
9 if I'm wrong, but it doesn't look to me like you  
10 are focussing in merely with that sentence on core  
11 community values; is that correct? You were  
12 speaking globally here.

13 A. Yes. I was going -- the  
14 panel -- yes, you are right. I accept what you're  
15 saying. I think you're saying there are references  
16 to mitigation in the report. Yes, there are.

17 The panel tells us there  
18 is several recommendations, the core one being,  
19 number one, the core one being about core community  
20 values, the core one saying community core values,  
21 we cannot mitigate them.

22 That is, I guess, what I am trying  
23 to say. If I overstated it, I stand corrected,  
24 but, frankly, the fundamental point of this is the  
25 chair acknowledged they are not going to put any



1 mitigation information forward for the  
2 consideration of the decision makers.

3                   These are not the decision makers.  
4 These are people who are recommending to the  
5 Ministerial decision makers.

6                   Q. That is a good segue to my  
7 next section. I am now moving away from the JRP  
8 itself to the government decisions that followed.  
9 So this will be the last section of my  
10 cross-examination so we might get to bed before  
11 10:00 tonight.

12 --- Laughter

13                   Q. Okay. So a fairly  
14 straightforward question. Would you agree that the  
15 JRP, once it issued its final report, that the  
16 federal responsible authority must render a  
17 decision as to whether or not and under what  
18 conditions a project may proceed? I am just  
19 speaking in general here.

20                   A. Yes.

21                   Q. And I could point you to  
22 section 37 of CEAA and section 6(6) of the terms of  
23 reference, but generally it doesn't seem like there  
24 is an argument there.

25                   A. I accept that.

1                   Q.    Do you agree on the  
2   provincial side that Nova Scotia also had to render  
3   a decision about the project once the JRP issued  
4   its final report?

5                   A.    You make an important  
6   distinction, actually.  The recommendation is the  
7   case federally.  It is different at the federal --  
8   at the Nova Scotia legislation.

9                   Q.    Right, yes.

10                  A.    Yes.

11                  Q.    And, again, I would refer to  
12   section 40(1) of the NSEA and section 6.7 of the  
13   terms of reference.  So that is R-5 and R-27 of the  
14   record.

15                  A.    Yes.  I agree with all of  
16   that.

17                  Q.    Now, let's turn to paragraphs  
18   157 to 163 of your report, and I will narrow it  
19   down a bit.

20                        In paragraph 161 -- sorry, this is  
21   binder 1 of Mr. Rankin's report.

22                  A.    Correct.

23                  Q.    Actually, let's start with --  
24   I will just say globally your claim is in these  
25   paragraphs 157 to 163 that the federal and

1 provincial Ministers breached rules of natural  
2 justice and procedural fairness by failing to meet  
3 with Bilcon -- now this timing is important here --  
4 after the release of the JRP report, but prior to  
5 the government decisions; is that correct?

6 A. Yes. That's correct.

7 Q. Okay.

8 A. And I --

9 Q. I can narrow it down.

10 A. Would you like me to explain  
11 that point?

12 Q. Let's just go to paragraph  
13 157 and 161, and then we will see if that is -- if  
14 I haven't -- we haven't answered your question --  
15 if you haven't had a chance to offer what you want  
16 to offer here.

17 In particular, paragraph 157, you  
18 state that:

19 "Their refusal to hear from  
20 Bilcon..."

21 "Their" being the governments:

22 "Their refusal to hear from  
23 Bilcon and to rely on the  
24 Report and recommendation of  
25 the JRP is itself a denial of

00355

1                   ... justice and therefore a  
2                   fundamental jurisdictional  
3                   error."

4                   A.   Denial of natural justice.

5                   Q.   What did I say?

6                   A.   Justice.

7                   Q.   Natural justice, yes, natural  
8   justice, "and therefore a fundamental  
9   jurisdictional error"; is that correct?

10                  A.   That's what I wrote.

11                  Q.   That's what you say.  Then  
12   skipping over to paragraph 161 of your report, you  
13   opine that:

14                         "Since the Ministers were the  
15                         final decision-makers, it is  
16                         a patent denial of  
17                         justice..."

18                  A.   Natural justice, I think.

19                  Q.   Oh...

20                  A.   Natural justice.

21                  Q.   Oh, you're right.  I left  
22   that out.  Okay, again:

23                         "... of natural justice to  
24                         not provide Bilcon with an  
25                         opportunity to be heard."

00356

1 Is that correct?

2 A. That's what I wrote.

3 Q. Now, this refers to something  
4 that we talked about with the previous witness, so  
5 I just want to make sure the record is straight  
6 here.

7 While Bilcon was not granted an  
8 in-person audience with either the federal or  
9 provincial governments after the JRP report was  
10 released, but before the decisions were issued,  
11 would you agree that Bilcon did, in fact, deliver  
12 several written submissions to the governments  
13 about the report, about their views about the  
14 report?

15 A. Yes.

16 Q. So then let's turn to those,  
17 because we alluded very briefly to them with  
18 Mr. Buxton, but I would like to get into them with  
19 more detail.

20 We are turning here to binder 2,  
21 in particular -- sorry, no, we are starting with  
22 binder 3. The first one is binder 3.

23 A. Okay.

24 Q. In fact, yes, virtually all  
25 of them are binder 3. I have to jump around a bit.

1 In particular, I am looking at C-195. Now, the C  
2 exhibits are at the end. They follow the highest  
3 numbers of the Rs. So what did I say, C-195?

4 A. Volume 3, isn't it?

5 Q. Yes, binder 3. So I think  
6 we're going to stay with binder 3 for a bit here,  
7 other than jump back to binder 1 for your report.

8 So would you agree that this is a  
9 letter dated October 29th, 2007 from Paul Buxton  
10 for Bilcon to Minister Parent, who is the Nova  
11 Scotia Minister of the Environment and Labour. Do  
12 you agree with that?

13 A. Yes.

14 Q. Do you see at the bottom --  
15 it is a short letter. It is only a one-pager, and  
16 at the bottom of the first paragraph, Mr. Buxton  
17 says:

18 "We are having a difficult  
19 time understanding all of  
20 these recommendations..."

21 This is from the JRP report:

22 "... as they are not in  
23 accordance with the  
24 information filed with the  
25 review panel and in the

1 public records."

2 Do you see that?

3 A. Yes. I interpreted that  
4 simply to mean that there were so many factual  
5 errors and other inconsistencies that he wanted the  
6 opportunity to speak to the Minister or have the  
7 opportunity for the Deputy Minister to provide a  
8 hearing for him to bring those concerns to his  
9 attention.

10 Q. Okay?

11 A. That is how I read that.

12 Q. That is the first letter that  
13 we see that Bilcon has written to Minister Parent.

14 There are two more. So I would  
15 ask you to turn now to C-196. This is shortly  
16 after November 8th, 2007. I said C-196.

17 A. Yes, I think I have seen this  
18 before.

19 Q. You have seen this letter  
20 before?

21 A. Yes.

22 Q. And four paragraphs down, you  
23 see Mr. Buxton, again writing to Minister Parent  
24 November 8th, 2007:

25 "The Joint Review Panel

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1 report is fundamentally  
2 flawed and is not based on  
3 sound science and facts. The  
4 report does not apply the  
5 analytical framework  
6 established by the applicable  
7 legislation and guidelines  
8 and makes far-reaching  
9 recommendations that are well  
10 beyond the panel's mandate.  
11 The report ignores important  
12 information provided by  
13 Bilcon and adopts new rules  
14 and standards without  
15 providing any opportunity for  
16 Bilcon to respond."

17 Do you see that?

18 MR. PULKOWSKI: For the court  
19 reporter...

20 MR. KURELEK: Sorry. Actually, it  
21 is in that -- as long as I have referred you, it is  
22 the fourth paragraph down in the November 8th, 2007  
23 letter. Sorry about that. And we are at C-196.

24 BY MR. KURELEK:

25 Q. Do you see that there, sir?



1                   A.    Yes.  I'm surprised you're  
2   not reading some of the other paragraphs, but, yes,  
3   I certainly see that.

4                   Q.    Well, we can go there, but --  
5   because, you know, look at the top of page 2.  They  
6   talk about the rubber stamp of this report on a  
7   rush basis.  But I would like to take us to an even  
8   longer letter that follows this one, and that is  
9   dated November 16th.  This is the one that I think  
10  was referred to in Mr. Buxton's re-re-direct.

11                  A.    Yes.

12                  Q.    So this is C-2.

13                  A.    C?

14                  Q.    C-002.

15                  A.    Oh, yes, yes.

16                  Q.    So it should be just C-2 in  
17  your tab there.

18                  A.    Yes.  It is, yes.

19                  Q.    This is the much longer and  
20  more involved letter.  This is November 16th, 2007.  
21  Again, it is Mr. Buxton writing on behalf of Bilcon  
22  to Minister Parent, and here he goes into a  
23  seven-item list of what he titles generally as the  
24  problem, the panel misunderstood its task, and it  
25  itemizes in a fair bit of detail what Mr. Buxton's

1 problems were with the JRP report.

2 Do you agree -- do you see that  
3 there, sir, and do you agree this letter was sent  
4 to Minister Parent by Buxton?

5 A. Yes.

6 Q. And do you agree also that on  
7 November 20th -- so now I am turning to just a  
8 little bit back, R-560, so it is the very last R  
9 exhibit in the same binder.

10 This is a transcript that we  
11 received from Mr. Appleton of a conversation that I  
12 think was again referred to earlier in  
13 Mr. Buxton's -- I think it was in the  
14 cross-examination section, where I think he called  
15 it a courtesy call from Minister Parent to  
16 Mr. Buxton on the day that Minister Parent was to  
17 announce that the Government of Nova Scotia was  
18 going to accept the JRP's recommendation.

19 Do you see that transcript there,  
20 sir?

21 A. I do.

22 Q. And, in particular, on page 2  
23 at the top, about halfway down that first  
24 paragraph, do you see where Mr. Buxton says:

25 "We felt, Mr. Minister, you

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1 know, I have to say that we  
2 felt that the panel was not  
3 fair. We think that the  
4 report contains many errors  
5 and we brought some of those  
6 errors to your attention, but  
7 there are a significant  
8 number of errors in that  
9 report and that  
10 recommendations right from  
11 procedures through to really,  
12 I think, ignoring the  
13 regulators including your own  
14 department and our own  
15 experts." [As read]

16 Do you see that there, sir?

17 A. I also see that the Minister  
18 follows up and says that, "best to get Nancy", who  
19 I gather is the Deputy Minister, to give you a call  
20 and have a fuller face-to-face.

21 Q. Yes.

22 A. I heard Mr. Buxton testify  
23 that two or three occasions those opportunities  
24 were proffered but never realized.

25 Q. Yes. That was the evidence

1 today.

2                   If you look back at page 1, just  
3 in case there is any concern that Mr. Parent did  
4 not receive those three letters from Mr. Buxton,  
5 you will see the second-last paragraph on that  
6 page, Minister Parent says:

7                   "I got your letter. I got it  
8 at three different locations  
9 and read it through very,  
10 very carefully and have made  
11 notes on it, and thank you  
12 for sending that to me."

13                  Do you see that there, sir?

14                  A. I do.

15                  Q. Do you refer in your report  
16 to any of those three letters or to that telephone  
17 conversation?

18                  A. No, I do not.

19                  Q. Then turning next, there is a  
20 federal side to this story, as well.

21                  C-204 is a letter from Mr. Buxton,  
22 again, sending a note to Minister Baird, and it is  
23 very similar language. In fact, the fourth  
24 paragraph down, which I read from a previous  
25 paragraph, is virtually identical to one that

1 appears in the November 8th letter to Minister  
2 Parent, but attaching -- attached to Mr. Buxton's  
3 November 21st, 2007 letter to Minister Baird, do  
4 you see at the back of it -- it is not a  
5 misfiling -- he attached the previous letters to --

6 A. I do.

7 Q. You see that there?

8 A. I know. I recognized that.

9 Q. Again, is it true that you  
10 did not refer to this letter to Minister Baird in  
11 your report?

12 A. No. The reason I didn't is  
13 because this is not the kind of "hearing" that I  
14 believe natural justice required in these  
15 circumstances.

16 Mr. Smith in his rejoinder  
17 suggests that -- he uses the word "lobbying" as if  
18 this was somehow just opportunity for Bilcon to  
19 lobby. The farthest thing from the truth. The  
20 statutory decision maker under the scheme is the  
21 Minister -- is the cabinet federally, actually, and  
22 the Minister of Environment in Nova Scotia.

23 In Canadian administrative law,  
24 there has been an increasing requirement that the  
25 opportunity to be heard be given when you are

1 especially affected.

2 Now, here's a situation, if you  
3 stand back from it, where we've had this very long  
4 process, a number of factual errors, a number of  
5 glaring omissions, a number of jurisdictional  
6 errors of the kind I hope I have demonstrated  
7 today, failure to provide mitigation, using a  
8 standard in core community values unknown to law.

9 Before this multi-million-dollar  
10 decision is taken by the relevant Ministers, it was  
11 my opinion, and remains my opinion, that there  
12 needs to be a right to be heard by the decision  
13 makers.

14 Simply writing a couple of letters  
15 to Ministers, I see no response, for example, from  
16 the federal Minister at all -- and I believe there  
17 was none -- doesn't strike me as in accordance with  
18 core fundamental principles of natural justice.

19 To me, this is contrary to the  
20 rules of procedural fairness and Canadian law. I  
21 realize it is unusual for me to be advocating that  
22 position as an administrative lawyer where  
23 political decision makers are involved, but I don't  
24 draw back from it, because the statutory scheme is  
25 that these people make decisions even though they

1 are Ministers, framed by a statutory process, with  
2 recommendations on their desk. And to proceed in  
3 the face of errors and not have the opportunity to  
4 be heard in these circumstances -- not everywhere,  
5 I appreciate, would Ministers have such an  
6 obligation, but in these circumstances, I would  
7 take you to the Baker case, the famous case in the  
8 Supreme Court of Canada, where a woman, a Canadian  
9 woman, was to be -- a woman from Jamaica with  
10 children in Canada was to be deported.

11 Humanitarian considerations  
12 required some kind of hearing to be provided for  
13 her in those circumstances. Not everywhere.

14 Here, where the entire process is  
15 going to be decided by Ministers and not to give  
16 the opportunity to be heard, in these  
17 circumstances, strikes me as contrary to natural  
18 justice. Simply writing a couple of letters and  
19 having the Minister, provincial, say that, I've  
20 read them carefully, isn't what I consider to be  
21 what natural justice, in these circumstances,  
22 should have contemplated.

23 Q. I'm going to follow this  
24 line, but take you in a slightly different  
25 direction, starting, if you could, at paragraph 49

1 of your report.

2 A. Forty-nine?

3 Q. Forty-nine, yes. You might  
4 keep a placeholder on paragraphs 163, because I am  
5 coming right back to that. But in paragraph 49 of  
6 your report, which is on page 24.

7 A. Yes.

8 Q. You conclude there that:  
9 "So as a matter of law, even  
10 in the context of a joint  
11 federal-provincial review,  
12 the federal government can  
13 only address matters over  
14 which it has constitutional  
15 jurisdiction, and only in  
16 accordance with its statutory  
17 mandate, as set out in the  
18 CEAA."

19 Do you see that there, sir?

20 A. Yes.

21 Q. Jumping ahead, if you will,  
22 to paragraph 127 on page 56, you say something  
23 similar?

24 A. Yes.

25 Q. "It simply is not open to one



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1 level of government to impose  
2 terms on a proponent or make  
3 a decision relating to a  
4 proponent that is within the  
5 jurisdiction of the other  
6 government."

7 Do you see that, sir?

8 A. Yes.

9 Q. Now, then, let's return back  
10 to, as I was suggesting, paragraph 163 of your  
11 report.

12 Now, you say something interesting  
13 here. You claim that Bilcon's failure to be heard  
14 by Minister Baird denied it, that is Bilcon:

15 "... the opportunity to  
16 attempt to persuade the  
17 Federal Minister that his  
18 provincial counterpart ought  
19 to reconsider his decision."

20 Is that correct?

21 A. That's right.

22 Q. Okay. Now, it seems to me  
23 that is a remarkable statement, but just let me see  
24 if I understand it.

25 Would you agree with me that there

1 is no provision under CEAA that provides a  
2 proponent, or for that matter a member of the  
3 public, with what you say is an opportunity to  
4 attempt to persuade the federal Minister that his  
5 provincial counterpart ought to reconsider his  
6 decision?

7 A. That is to say this is in the  
8 context of this argument that Mr. Smith posited  
9 about the mootness of the decision of the federal  
10 government. That is what that is responsive to.

11 Q. That is not where I am headed  
12 but --

13 A. You said it was startling, or  
14 whatever. That is what -- it was in that context  
15 the sentence appears.

16 Q. But what you're advocating  
17 here in paragraph 163 of your report -- correct me  
18 if I'm wrong -- is you are saying in this period  
19 where we talked about these letters, where it is  
20 post panel report release, but prior to the  
21 decision, Bilcon should have been granted an  
22 audience with the federal Minister so that  
23 Mr. Buxton, or whoever it would be, would convince  
24 Mr. Baird to try to persuade Mr. Parent to change  
25 his decision or to render a more favourable

1 decision?

2 A. No. The only purpose for  
3 that statement is to say there are two decisions,  
4 one federal, one provincial.

5 And the argument was made by  
6 Mr. Smith, as I understood it, that after the  
7 provincial government had made its decision, no  
8 quarry, that there was really no point. It was  
9 moot, in his terms, to proceed.

10 I am saying there are many  
11 examples where there is two federal -- there is a  
12 federal panel and a provincial panel, and what I  
13 can think of right now is the Prosperity Mine,  
14 which the federal government said no and provincial  
15 government said, yes, with mitigation, now the  
16 federal government is reviewing a new and different  
17 project coming forward.

18 The context was merely to say that  
19 I reject that -- mootness would mean there is no  
20 sense, there is no utility in trying to seek a  
21 meeting with the federal Minister, who made a  
22 decision, I think it was, 20 days, 23 days after  
23 the provincial Minister.

24 That is the context of this  
25 statement.

1                   Q.    Right.  But I just want to  
2   make sure whether or not you stand by the statement  
3   still, because, correct me if I'm wrong, but it  
4   seems to me what you are arguing here is Bilcon  
5   should have been provided with an audience with  
6   Minister Parent -- sorry, Minister Baird, the  
7   federal Minister, so that Bilcon could convince  
8   him --

9                   A.    Yes.

10                  Q.    -- to try to twist the arm or  
11   convince --

12                  A.    I reject "twist the arm" or  
13   anything of the sort.

14                  Q.    Well, attempt to persuade is  
15   what you say, sir?

16                  A.    Yes, exactly.  I don't see  
17   why that is a controversial statement.  If he  
18   wanted the opportunity, I think he is entitled to  
19   the opportunity to go to the federal Minister and  
20   say, Look, there's opportunities to reconsider.  
21   The federal government really only had jurisdiction  
22   over the marine terminal, in my opinion, and that  
23   was not terribly controversial.

24                  The quarry was the controversial  
25   part.  Why couldn't he go and try to persuade him

1 to say, Look, if you had considered mitigation  
2 measures, and so forth and so on, properly, the  
3 quarry might well have passed muster.

4 That is all I was saying, but it  
5 was in the context of saying this isn't -- I reject  
6 the notion that somehow after the federal -- after  
7 the Minister in Nova Scotia said no quarry, no  
8 project, that therefore it was all moot. That is  
9 what I was trying to say, perhaps not very clearly.

10 Q. That is where I am going  
11 next, because you bring up Prosperity and that is  
12 exactly where I was going next, because in your  
13 next paragraph, 164 -- and this is my final topic  
14 of the evening, so the Tribunal can take some  
15 comfort in that, but it is related to the previous  
16 topic, because it flows right from 163, 164.

17 At 164 you say that Nova Scotia's  
18 decision to accept the JRP's recommendation to  
19 reject the Whites Point project did not render the  
20 federal government's decision moot because, under  
21 the scheme of the two statutes, each Minister has a  
22 separate decision to make. Fair enough.

23 "It could well be the case  
24 that one level of government  
25 would be able to under its

1 constitutional jurisdiction  
2 to approve a project while  
3 the other would not."

4 Do you see that there?

5 A. Yes, that was the case in  
6 Prosperity.

7 Q. That is where I will go next.  
8 So in Prosperity, you quite rightly point out, and  
9 I think it is in that same paragraph, as an example  
10 where a province, in this case BC, conducted an EA  
11 and accepted the project while the federal  
12 government conducted its own EA and in contrast  
13 ended up rejecting that same project.

14 And then correct me if I'm wrong,  
15 because I don't want to mischaracterize you here,  
16 you go on in that same paragraph to say that the  
17 Prosperity proponent recently submitted the project  
18 for federal approval based a redesign of the  
19 tailings impoundment; is that correct?

20 A. Yes. Resubmitted, yes.

21 Q. Exactly, resubmitted. From  
22 that example, you conclude, and this is key, it is  
23 clearly not the case that once one level of  
24 government has rejected a project that it must be  
25 the end of the matter. Have I characterized you

1 correctly there?

2 A. I think you have it right,  
3 yes. Maybe I haven't, but that is what I intended.

4 Q. I just want to make sure I  
5 understand. There is two levels to this. There is  
6 the Prosperity level, and then there is the Whites  
7 Point level. So let's just make sure I understand  
8 the -- yes, the Prosperity level.

9 We can go to the documents, if you  
10 wish, but in order to save us that trouble, let's  
11 see if you agree with this, that there are two  
12 separate Prosperity EAs. Would you agree with  
13 that?

14 A. Yes.

15 Q. There is the first  
16 Prosperity. The one that I can refer to here,  
17 Mr. Connelly himself was on that panel, document  
18 C-576, and then there is the new Prosperity  
19 project?

20 A. That's right.

21 Q. That was resubmitted. That  
22 is one you were talking about that was resubmitted;  
23 right? There is a news release in the documents  
24 here, R-559 for the record. So you would agree  
25 those are two separate projects?

1                   A.    Yes, I would agree.  Well,  
2   they are not two separate projects.  One is a  
3   variation on the other.

4                   Q.    So you would not agree that  
5   they are two separate projects?

6                   A.    They have changed their -- in  
7   British Columbia, there is a very controversial  
8   project that involves the use of Fish Lake as a  
9   tailings impoundment, contrary to First Nation  
10  strong objection to it, but with some local  
11  community support in the non-aboriginal community.

12                  I am summarizing this  
13  dramatically, I admit, but this project was subject  
14  to an environmental assessment by British Columbia  
15  that said, We're okay with it; with some very  
16  specific mitigation measures we would propose, we  
17  would allow it to proceed.

18                  Whereas the federal government,  
19  Minister Prentice, decided it was not acceptable  
20  because of the destruction of the fish habitat and  
21  perhaps other reasons.  I can't recall.

22                  So therefore the proponent, having  
23  already got the support of the provincial  
24  environmental assessment process, has resubmitted  
25  it and changed the tailings impoundment.  It is not



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1 Fish Lake. It is Little Fish Lake that is now  
2 being used as the tailing impoundment, and I  
3 frankly don't know what its current status is.

4 I don't know if there's been a  
5 panel determination yet, but that was what occurred  
6 there. There were two separate processes unlike  
7 here.

8 Q. Right. And that is where I  
9 am going.

10 A. Yes.

11 Q. I just want to clarify,  
12 because my understanding is there are two separate  
13 projects.

14 A. Yes

15 Q. But also, more importantly,  
16 there were two separate EAs?

17 A. That's right.

18 Q. The one -- so there is a  
19 separate EA?

20 A. There is a difference, for  
21 sure.

22 Q. So just again on the  
23 Prosperity level of the discussion, you're not  
24 suggesting that when Prosperity submits the new  
25 Prosperity project that it is just going to

1 continue with the old EA and Mr. Connelly is going  
2 to have to go back to his panel and reconstitute.  
3 It is a separate EA. It is a new EA starting up.  
4 Okay, so we're in agreement there. I understand  
5 you entirely.

6 Now, let's bring it to the Whites  
7 Point, because I want to try to apply what you're  
8 saying there. Particularly, I said the key line  
9 from you in paragraph 164 is that it is clearly not  
10 the case that "once one level of government has  
11 rejected a project that must be the end of the  
12 matter".

13 A. Yes.

14 Q. Let's put it in this context.  
15 I want to make sure I understand what we're  
16 supposed to extrapolate as a reader from your  
17 paragraph 164.

18 Are you saying that if Nova Scotia  
19 had rejected the project, which it did, but the  
20 federal government had actually approved it, then  
21 the project, Whites Point, could nevertheless have  
22 proceeded. Is that what you're suggesting here?

23 A. No. I don't think so,  
24 because as you rightly point out the process, there  
25 were two separate environmental assessments in

1 Prosperity, and here there was just one.

2 Q. Yes.

3 A. My point, and all of this  
4 flows from this mootness point in the preceding  
5 paragraph, that there are two separate decisions,  
6 and that is all I'm trying to say.

7 Q. Yes. But what you say is  
8 that is not the end of the matter. You are  
9 basically disputing Mr. Smith's -- Mr. Lawrence  
10 Smith's view that once Nova Scotia had rendered its  
11 decision, that Mr. Smith says the issue is moot?

12 A. That's right.

13 Q. It doesn't matter what?

14 A. That is what he says, and I  
15 don't agree.

16 Q. You don't agree. So because,  
17 as far as I understand here, it is clearly not the  
18 case, you say, because once one level of government  
19 has rejected a project, that doesn't mean the end  
20 of the matter. So, in other words, does that mean  
21 that Whites Point could nevertheless have proceeded  
22 with its project if the feds said, Yes, go ahead?

23 A. If the province had said  
24 no --

25 Q. Yes.

1                   A.    -- and the federal government  
2    hadn't -- as the evidence appears to suggest now,  
3    there were some efforts to harmonize behind the  
4    scenes between officials, as I understand, Nova  
5    Scotia and British -- and Nova Scotia and Canada  
6    came out with the same general conclusion that this  
7    ought not to proceed, right?

8                   That is what I understand  
9    occurred. There were some discussions. I am  
10   simply making the point that Canada wouldn't  
11   have -- could have decided to say, Look, our  
12   jurisdiction is the marine terminal. We are not  
13   unhappy. Maybe we can go and see if this project  
14   could nevertheless fly, in the face of Nova  
15   Scotia's opposition.

16                  That is all I am trying to point  
17   out, that there is a separate decision. The way I  
18   believe it should have been was the marine terminal  
19   was the federal jurisdiction. It was not  
20   apparently as controversial as the quarry. Maybe  
21   the Government of Canada could have concluded this  
22   had economic merit, didn't accept the community  
23   core values, which was not a matter for federal  
24   jurisdiction, anyway, and decided to try to see if  
25   they could persuade their counterparts to reverse

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1     their decision or have a new project, or something  
2     else.

3                     I am just saying this is all in  
4     the context of rejecting the notion that somehow it  
5     is moot. I'm saying there are two separate  
6     decision makers.

7                     Q.    So just see if I understand  
8     you here. If the federal government said, yes, go  
9     ahead, and they only, as you say, had jurisdiction  
10    over the marine terminal, then Bilcon could have  
11    built a marine terminal, but not the quarry. So  
12    they would have had a nice dock?

13                    A.    Well, the way the federal  
14    decision seems to have been made, it is unclear  
15    they could have done that, no.

16                    I'm just saying it is a  
17    recommendation, not -- it is the recommendation to  
18    the federal government. When the federal  
19    government said this is -- the press release talked  
20    about things that I don't think the federal  
21    jurisdiction had any business to talk about.

22                    As regards the marine terminal,  
23    the federal government could have said this is  
24    acceptable. It is only so many metres of  
25    disruption to the habitat of the Bay of Fundy, and

1 provincial decision could have stood on its own.

2 I guess I am not making this very  
3 clear, but I am just trying to emphasize the fact  
4 that there are two separate decision makers, and my  
5 belief is that natural justice in these unique  
6 circumstances required an opportunity to try to  
7 persuade those decision makers that the panel  
8 report recommendations ought not to be accepted.

9 That is all I am trying to say in  
10 my convoluted way, I'm sorry.

11 Q. Let me nail it down and see  
12 if this could be the final question, depending on  
13 the answer.

14 Do you agree that the Whites Point  
15 project could not proceed after Nova Scotia said it  
16 would not give its consent to the project, or are  
17 you saying it still could have had, had the federal  
18 government said, Yes, sure, that's fine?

19 A. There were two separate  
20 decisions. The federal decision was 23 days later  
21 by a different government.

22 I'm simply saying they should have  
23 had an opportunity to tell the federal  
24 government -- to try to persuade -- Bilcon should  
25 have been given the opportunity as a matter of

1 natural justice to try to persuade the federal  
2 government not to make the decision it ended up  
3 making.

4 Q. I understand that point, but  
5 it doesn't answer my question.

6 I am asking you, in your opinion,  
7 could the project, the Whites Point project, have  
8 proceeded in the face of Nova Scotia's rejection of  
9 it?

10 A. Not without the federal  
11 government's -- if it were so inclined to try to  
12 have the decision reversed, because a decision was  
13 made by the Minister of Environment to reject the  
14 quarry, reject the project, I say.

15 Q. Are you talking about the  
16 Nova Scotia?

17 A. Nova Scotia, yes.

18 Q. Got it.

19 A. I agree. I mean, to that  
20 extent once the decision -- but I don't draw back  
21 from my points on mootness that I tried to make in  
22 the report.

23 Q. Okay. Thank you very much  
24 for your patience with my questions and my binders.

25 A. Thank you very much.

1 PRESIDING ARBITRATOR: Yes.

2 MR. KURELEK: Those are my  
3 questions.

4 QUESTIONS BY THE TRIBUNAL:

5 PRESIDING ARBITRATOR: Mr.  
6 Schwartz has a question.

7 PROFESSOR SCHWARTZ: It doesn't  
8 have to be answered today. In the course of time,  
9 if somebody could help us with one point. As  
10 everybody knows, a lot of the testimony today has  
11 been about what happened between the panel report  
12 and decisions by Ministers at the federal and  
13 provincial level, and then we have more documents.

14 Thank you for helping us with  
15 that. Just looking at Mr. Rankin's binder number  
16 3, volume 3 of 3, tab 160, R-560; R-560, volume 3,  
17 tab R-560. It is up on the screen now.

18 Yes. So towards the bottom of the  
19 document, Minister Parent says:

20 "I got your letter. I got it  
21 at three different locations  
22 and read it very, very  
23 carefully and have made notes  
24 on it."

25 Do we have the document with the



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1 notes on it in these proceedings? It doesn't have  
2 to be answered by this witness or now. I am just  
3 curious as to whether that document is something  
4 that is available to the panel.

5 THE WITNESS: I can't assist. I  
6 have not seen the document.

7 MR. LITTLE: I can advise now we  
8 don't have it.

9 PROFESSOR SCHWARTZ: Okay, thank  
10 you.

11 PRESIDING ARBITRATOR: Okay.  
12 Well, thank you. This brings to an end a long day.  
13 I thank everybody involved, especially Professor  
14 Rankin.

15 THE WITNESS: Thank you.

16 PRESIDING ARBITRATOR: You will  
17 have to appear again for the re-direct tomorrow  
18 morning.

19 MR. RANKIN: Oh, yes.

20 PRESIDING ARBITRATOR: Yes, as we  
21 all will be.

22 MR. RANKIN: I will be here.  
23 Thank you.

24 MR. NASH: In that regard,  
25 Mr. President, can we have clarification on

1    whether, with the experts, during cross-examination  
2    they are allowed to speak to anyone. The lay  
3    witnesses weren't. The experts are in a slightly  
4    different category. They have been allowed to be  
5    here through the proceeding, and they have not  
6    signed an undertaking. And our position would  
7    be -- I am interested in Mr. Little's position --  
8    is that we can both, on both sides, speak to our  
9    experts during cross-examination or at the end of  
10   cross-examination before re-direct.

11                   PRESIDING ARBITRATOR: Yes. Could  
12   I ask Mr. Little to give his view?

13                   MR. LITTLE: I think the  
14   undertakings are entirely different sphere and  
15   aspect of the hearing, and a witness is a witness.  
16   And if a witness is under cross-examination, they  
17   cannot speak with counsel in the midst of that  
18   cross-examination. So, no.

19                   MR. NASH: In this case,  
20   cross-examination is complete. It is over.

21                   PRESIDING ARBITRATOR: You are not  
22   going to --

23                   MR. NASH: We are going to do a  
24   re-direct examination, but the cross-examination  
25   itself is over. So in the case of Mr. Rankin, it

1 would not be during the course of his  
2 cross-examination. It is at the end of his  
3 cross-examination.

4 PRESIDING ARBITRATOR: Would, in  
5 your definition of the process, re-direct be a part  
6 of the --

7 MR. LITTLE: Absolutely, and there  
8 could be re-cross, and I am sure that the Tribunal  
9 has some very interesting questions for Mr. Rankin  
10 tomorrow. So I think he's in the middle of an  
11 examination process, and during that examination  
12 process he cannot consult with counsel.

13 PRESIDING ARBITRATOR: I think  
14 that is probably correct. So the Tribunal agrees,  
15 and that means that you are not supposed to have  
16 any conversation with counsel overnight. And I  
17 wish you a good night.

18 --- Laughter

19 PRESIDING ARBITRATOR: I think  
20 that brings an end to the hearing. See you  
21 tomorrow at 9:00.

22 --- Whereupon the hearing adjourned 7:00 p.m.,  
23 to be resumed on Thursday, October 24, 2013  
24 at 9:00 a.m.

25