

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

BETWEEN:

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

CLAIMANTS

- and -
GOVERNMENT OF CANADA

RESPONDENT

TRANSCRIPT OF PROCEEDINGS
HELD BEFORE JUDGE BRUNO SIMMA (PRESIDING ARBITRATOR),
PROFESSOR DONALD McRAE, and PROFESSOR BRYAN SCHWARTZ
held at the offices of Arbitration Place,
333 Bay Street, Suite 900, Toronto, Ontario
on Wednesday, February 21, 2018, at 9:04 a.m.

VOLUME 3 - FULL TRANSCRIPT {REVISED}

CONDENSED TRANSCRIPT WITH WORD INDEX
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1 Toronto, Ontario
2 --- Upon resuming on Wednesday, February 21, 2018,
3 at 9:04 a.m.
4 PRESIDING ARBITRATOR: Good
5 morning, everybody. You look very ready to me,
6 even the Canadian team. You had a little incident
7 during the night, I've heard.
8 MR. NASH: And also our team.
9 PRESIDING ARBITRATOR: Same
10 hotel?
11 MR. NASH: Same hotel. It was
12 fair and equitable.
13 PRESIDING ARBITRATOR: I am
14 very relieved to hear that.
15 And without further ado, I
16 give the floor to Mr. Geddes.
17 MR. SCOTT LITTLE: Mr. Rodney
18 Neufeld will be doing the introduction of
19 Mr. Geddes.
20 PRESIDING ARBITRATOR: Okay,
21 thank you.
22 Good morning, Mr. Geddes. You
23 have in front of you a declaration. Would you
24 please read this out?
25 WITNESS DECLARATION: PETER GEDDES.

1 MR. GEDDES: I solemnly
2 declare upon my honour and conscience that I will
3 speak the truth, the whole truth and nothing but
4 the truth, and that my statement will be in
5 accordance with my sincere belief.
6 EXAMINATION IN-CHIEF BY MR. NEUFELD:
7 Q. Thank you, Judge Simma.
8 Mr. Geddes, could you please
9 briefly describe your experience for the tribunal?
10 A. Sure. I am currently the
11 executive director of policy and planning with the
12 Nova Scotia Department of Natural Resources.
13 Prior to that, I spent 16 years at the Nova Scotia
14 Department of Environment and formerly what was
15 the Department of Environment and Labour. In that
16 time, I spent approximately 14 or 15 years working
17 on the environmental assessment program for the
18 department, including terms both as a project
19 officer for environmental assessment, so managing
20 the projects, as well as the administrator manager
21 of the program and the director of environmental
22 assessment.
23 Q. Thank you.
24 Now, you have filed two
25 reports in this arbitration; is that right?

1 A. I have.
2 Q. You have them there?
3 A. Yes.
4 Q. And would you like to
5 make any corrections to either of those reports?
6 A. I would like to make a
7 correction to chapter -- paragraph 19, sorry, of
8 my first report.
9 And if I may, specifically --
10 I mention in that paragraph that there was three
11 actual or proposed coastal quarries in the
12 province involving marine terminals. In my -- in
13 preparation, I actually determined that there was
14 a fourth coastal quarry in the province, so just
15 the change will be that there's four actual
16 proposed coastal quarries that I am aware of in
17 the province involving a marine terminal.
18 The subsequent sentence says
19 the other two are Black Point Quarry near Canso.
20 That should say, "The other three are Black Point
21 Quarry near Canso (having been approved on
22 April 26, 2016)".
23 The one I hadn't mentioned
24 before was a proposal by Northumberland Rock in
25 Georgeville which was recommended for a focus

1 report on February 28th, 1996, and subsequently
2 withdrawn by the proponent.
3 And the fourth one was the
4 Martin Marietta quarry at Porcupine Mountain,
5 which predated the environmental assessment
6 program.
7 Q. So should we perhaps
8 provide that in writing so that everybody's aware
9 of the correction?
10 PRESIDING ARBITRATOR: I think
11 that would be good.
12 MR. NEUFELD: We will do that
13 electronically for everybody.
14 Thank you very much. We will
15 turn the floor over to Mr. Nash.
16 CROSS-EXAMINATION BY MR. NASH:
17 Q. Good morning, Mr. Geddes.
18 You say that you are the director of policy and
19 planning at the Department of Natural Resources;
20 is that right?
21 A. It's executive director
22 of policy and planning and support services.
23 Q. When did you become that?
24 A. I started in April of
25 2017.

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1 Q. And you're here as a
2 full-time paid employee of the Government of Nova
3 Scotia?
4 A. That is correct.
5 Q. And you have been in that
6 for about 15 years?
7 A. About -- just over 16.
8 Q. And somebody wrote these
9 two statements for you to sign; is that correct?
10 A. The words that are in the
11 statements are my statements. I had advice from
12 counsel in preparing that.
13 Q. Did you write the
14 statements?
15 A. I did not, but -- I
16 didn't write every individual word. I worked with
17 counsel to have them put together.
18 Q. Were you presented with a
19 draft?
20 A. Yes.
21 Q. And you worked with
22 counsel to revise the draft?
23 A. Yes, correct.
24 Q. And did you read your
25 statements carefully before you signed them?

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1 any area?
2 A. By 2007?
3 Q. Yes.
4 A. I don't recall ever doing
5 that by that point in time.
6 Q. Have you appeared before
7 a court or tribunal in any proceeding as an
8 independent expert?
9 A. No.
10 Q. So you've never been
11 qualified as an independent expert in any subject
12 area before any court or tribunal; that's correct?
13 A. That's correct.
14 Q. In any jurisdiction;
15 that's correct?
16 A. Correct.
17 Q. So you are not here as an
18 impartial independent expert today; that's
19 correct?
20 A. Umm --
21 Q. You are here as an
22 employee of Nova Scotia?
23 A. I am here as an employee
24 of Nova Scotia to provide my experience with
25 environmental assessment and the decision-making

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1 A. I did.
2 Q. In 2003, you were hired
3 as an environmental assessment officer; correct?
4 A. Correct.
5 Q. And that was in the Nova
6 Scotia Department of Environment and Labour;
7 correct?
8 A. That's correct.
9 Q. You were an environmental
10 assessment officer for seven years; that's
11 correct?
12 A. That's correct.
13 Q. Until 2010?
14 A. Right.
15 Q. You were an environmental
16 officer at the time of the JRP hearings in June of
17 2007; that's correct?
18 A. I was.
19 Q. And you were an
20 environmental assessment officer in
21 October/November of 2007; that's correct?
22 A. That's correct.
23 Q. Now, by 2007, how many
24 times had you appeared before a court or a
25 tribunal to provide expert advice and opinion on

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1 process that I have seen in my time with the
2 department.
3 Q. And you are not here as
4 an impartial expert; that's correct?
5 A. Umm... Yes, that's
6 correct.
7 Q. And you say in your
8 statement at paragraph 25, in your first
9 statement, you can turn to that, that you had
10 limited involvement in the environmental
11 assessment of Whites Point Quarry; that's correct?
12 A. That's right. I was
13 involved in the -- at the beginning of the process
14 when the panel was appointed, I participated in
15 the scoping sessions that were held. And, at the
16 end of that stage, I actually moved over to a
17 different review panel that was going on.
18 Q. Right, so you had been
19 with the Nova Scotia Department of the Environment
20 for about a year, year and a half, and then you
21 were seconded to be the provincial delegate to the
22 secretariat of the JRP; that's correct?
23 A. That's correct.
24 Q. And you were there until
25 what time?

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1 A. I was there until, I
2 don't know the date, but I was there until the
3 review was completed for the Tar Ponds and Coke
4 Ovens Remediation Project, so --
5 Q. Say that again?
6 A. Are you asking me how
7 long --
8 Q. I am asking how long you
9 were with the JRP secretariat in the Whites Point
10 case?
11 A. Oh, umm, I couldn't tell
12 you in terms of months. In my mind, it's more
13 what stage the project was at. It was around the
14 time that the scoping sessions would have been
15 completed, so prior to the submission of the EIS.
16 Q. Prior to the submission
17 of the EIS.
18 A. Yeah.
19 Q. Were you there for the
20 public hearings?
21 A. I was there for hearings
22 that were done. There was two sets of hearings.
23 One was public hearings and the scoping.
24 Q. Yes.
25 A. The scoping stage, I was

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1 there for those hearings. I did not attend the
2 public hearings of the EIS.
3 PRESIDING ARBITRATOR: Could
4 you get a bit closer to the microphone, please?
5 THE WITNESS: Sure.
6 BY MR. NASH:
7 Q. There were four public
8 scoping sessions in various towns around Digby
9 Neck; that's correct?
10 A. Yes. That's right.
11 Q. And you were there for
12 those sessions?
13 A. I was.
14 Q. But you were not there
15 for the public hearings from June 16th to 30th,
16 2007; that's correct?
17 A. I think the only
18 exception to that is the day that the Nova Scotia
19 Department of Environment or Environmental Labour
20 presented. I believe I did attend that session as
21 an observer for the department.
22 Q. So they presented the
23 representatives of the Department of the
24 Environment, including Mr. Petrie presented on one
25 day in June of 2007; that's correct?

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1 A. That's correct, yeah.
2 Q. And you were there for
3 that one day?
4 A. I believe I was, yes.
5 Q. You didn't hear the rest
6 of the evidence that was before the JRP?
7 A. No, I didn't, no.
8 Q. Were you there to read
9 the EIS in its entirety?
10 A. No, I was not.
11 Q. Have you read the EIS?
12 A. No.
13 Q. Have you read
14 undertakings?
15 A. No.
16 Q. Have you read the
17 responses to information requests?
18 A. No, I haven't.
19 Q. You assert in your
20 report -- and if you wish, you can turn to page 8.
21 A. My first report?
22 Q. Your first report.
23 That in making his decision to
24 deny approval for the Whites Point Quarry, the
25 Nova Scotia Minister of the Environment could have

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1 considered socio-economic effects of the Whites
2 Point project, whether or not they were addressed
3 by the Whites Point JRP; that's your opinion?
4 A. Yes, and that's based on
5 my understanding of the Minister's authority.
6 Q. And we will come to that.
7 But you assert that the Minister's decision-making
8 process is not limited to considerations of just a
9 JRP report. You say that?
10 A. Yes.
11 Q. The top of page 8. The
12 very top of the page, you say, in practice:
13 "In practice, the
14 Minister's
15 decision-making process
16 is not limited to
17 consideration of just the
18 JRP report." [as read]
19 A. Yes, I see it.
20 Q. Now, is that your
21 opinion, or was that written for you?
22 A. No, that's my opinion.
23 Q. Was it written for you
24 before you signed your statement?
25 A. It was a combined effort.

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1 Line for line, I couldn't tell you.
 2 Q. And you assert that as a
 3 matter of law; that's correct? That the
 4 Minister's decision-making process is not limited
 5 to consideration of just the JRP report? That's a
 6 question of law that you've opined on; that's
 7 correct?
 8 A. Well, I am offering my
 9 opinion as someone that's been involved in the
 10 process for a period of time, and that's the way I
 11 have seen it, the way it's been explained to me as
 12 an employee of the department. So it's more
 13 reflecting my understanding of the practice; I am
 14 not making a legal interpretation there.
 15 Q. Right, so it's the way
 16 it's been explained to you by somebody in the
 17 department; is that right?
 18 A. Right.
 19 Q. And who is that?
 20 A. That would have been a
 21 senior, my manager, directors at the time.
 22 Q. And who was that?
 23 A. Chris Daly.
 24 Q. So your manager, Chris
 25 Daly --

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1 A. Yes. He did.
 2 Q. Back in 2003?
 3 A. Yes.
 4 Q. And to that date, how
 5 many JRPs had been held in Nova Scotia?
 6 A. To that date?
 7 Q. Yes.
 8 A. I'm aware of, umm, the
 9 offshore -- the Sable offshore project.
 10 Q. That was in 1997?
 11 A. Yes.
 12 Q. Six years before you
 13 began?
 14 A. Yeah, that's right.
 15 Q. So you don't know how
 16 that was handled?
 17 A. There was none that --
 18 there was no JRP reports during the time I was
 19 there before Whites Point Quarry, if that's the
 20 point --
 21 Q. So in Nova Scotia,
 22 there's been two JRPs; have there?
 23 A. Correct, yes.
 24 Q. One was in 1997, that's
 25 Sable gas; correct?

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1 A. Up to that point.
 2 Q. -- explained that that
 3 was the practice in the Ministry with respect to
 4 JRP reports; that's correct?
 5 A. That's right, and it was
 6 part of the understanding just generally of all
 7 environmental assessments because whether it's a
 8 joint panel review report, a report by a
 9 provincial panel or whether it's a report that's
 10 written by a staff person, there's still a step at
 11 the end where there's a briefing for the Minister
 12 on all those decisions, and the Minister can
 13 consider other things --
 14 Q. I am just talking about
 15 that sentence there.
 16 A. Yeah.
 17 Q. Which refers to the
 18 Minister's decision-making process is not limited
 19 to consider -- considerations of just the JRP
 20 report. That is the statement that you're making
 21 about a JRP report; that's correct?
 22 A. Yes.
 23 Q. Right. And Mr. Daly told
 24 you that that was the practice in the department
 25 when you started?

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1 A. Yes.
 2 Q. And that was chaired by
 3 Dr. Fournier or do you know?
 4 A. Yes, it was chaired by
 5 Dr. Fournier.
 6 Q. And the only other JRP
 7 that's been held in Nova Scotia since you arrived
 8 was the Whites Point project; isn't that right?
 9 A. Up to that time?
 10 Because --
 11 Q. To now.
 12 A. Well, the Tar Ponds and
 13 Coke Ovens Remediation.
 14 Q. Up to that time, then?
 15 A. Yes, that's correct.
 16 Q. Okay. In
 17 October/November 2007, did Minister Parent have a
 18 chief of staff?
 19 A. Umm, October of 2007?
 20 Q. October/November of 2007.
 21 A. I couldn't say that with
 22 100 per cent certainty, but I would certainly say
 23 that I can't remember Minister Parent not having
 24 an executive assistant during my time at the
 25 department.

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1 Q. It wasn't you?
2 A. It wasn't me, no.
3 Q. Did he have a
4 communications director?
5 A. Yes.
6 Q. That was also not you?
7 A. Correct.
8 Q. Did he have a personal
9 secretary?
10 A. Yes.
11 Q. Also not you?
12 A. Correct.
13 Q. Did he have any other
14 advisors or assistants in his office other than
15 the positions I've identified?
16 A. There may have been
17 someone that manages correspondence. That's the
18 only other position I can think of.
19 Q. Also not you?
20 A. Not me.
21 Q. Did he have a Deputy
22 Minister?
23 A. Yes.
24 Q. And her name was Nancy
25 Vanstone?

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1 A. That's correct.
2 Q. In 2007, there was an
3 executive director of program management in Nova
4 Scotia Department of Environment; do you recall
5 that?
6 A. Umm... I don't, I don't
7 recognize that title, umm.
8 Q. Does the name Kim MacNeil
9 mean anything to you?
10 A. Yes. Yes. He was an
11 executive director.
12 Q. He was an executive
13 director?
14 A. Yeah.
15 Q. And you were not an
16 executive director; that's correct?
17 A. Right.
18 Q. As one of the environment
19 assessment officers, you reported to a manager,
20 and at one time, that's Chris Daly; correct?
21 A. That's correct.
22 Q. And he has no
23 qualifications to express legal opinions; that's
24 correct?
25 A. I can't speak to that.

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1 A. Uh --
2 Q. In October/November 2007?
3 A. Yes.
4 Q. You didn't work in the
5 Minister's office; that's correct?
6 A. No.
7 Q. That is correct?
8 A. That is correct.
9 Q. Did the Minister have an
10 Assistant Deputy Minister?
11 A. I can't recall at the
12 time, because Nancy Vanstone had been an Assistant
13 Deputy Minister to the previous deputy, and I knew
14 she had moved into the deputy position. I can't
15 recall whether, at the time, there was an ADM at
16 the time of the decision.
17 Q. All right. There were
18 executive directors and other directors of other
19 things working under the Deputy Minister; isn't
20 that correct?
21 A. That's correct.
22 Q. And you were not one of
23 them?
24 A. No.
25 Q. That's correct?

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1 Q. He's not a lawyer?
2 A. He's not a lawyer, to my
3 knowledge.
4 Q. He's not a lawyer?
5 A. No.
6 Q. Who was the person you
7 reported to from 2003 to 2007, above you?
8 A. Umm... So there would
9 have been a few different people during that time.
10 Chris Daly, certainly.
11 Q. He was the first one?
12 A. Yes.
13 Q. Yes.
14 A. And then there was Julie
15 Towers.
16 And then I believe around the
17 time of the Whites Point Quarry decision that the
18 manager of environmental assessment or the
19 administrator of the EA program was Lorrie
20 Roberts.
21 Q. Lorrie Roberts?
22 A. Yeah.
23 Q. And so you reported to
24 Lorrie Roberts; that's correct?
25 A. That's right.

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1 Q. And would you agree with
2 me, then, that in October/November of 2007, you
3 were about ten positions removed from the Minister
4 of Environment in the hierarchy? We have gone
5 through the people in his office, we have gone
6 through the Deputy Minister, possibly an Associate
7 or Assistant Deputy Minister, we have gone through
8 program directors; would that be about 10 or 12
9 people that you are removed?
10 A. No, no, the chain would
11 be -- if you'd like me to tell you, the chain
12 would be I reported to the manager of
13 environmental assessment, who reported to the
14 executive director of Environment and Natural
15 Areas Management, who reported to the Deputy, who
16 reported to the Minister. So about five.
17 Q. About five, plus all of
18 the people in the Minister's office who would have
19 some idea of what the Minister might have in his
20 mind when he made the decision to reject the
21 project; correct?
22 A. There'd be no reporting
23 involved with those folks.
24 Q. Chief of staff, executive
25 assistant?

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1 the Environment Act; that's correct?
2 A. That's correct.
3 Q. You are not an expert of
4 any kind on the interpretation, operation and
5 application of any statutes or regulations; that's
6 correct?
7 A. On the application of
8 statutes and regulations?
9 Q. Yes. Well, let's just
10 deal with interpretation. You are not an expert
11 in that; that's correct?
12 A. That's true.
13 Q. You are not an expert in
14 the operation of statutes and regulations;
15 correct? Legal expert?
16 A. Legal expert, no.
17 Q. And you are not a legal
18 expert on the appropriate and proper application
19 of any statutes or regulations; that's correct?
20 A. I am not an expert. I
21 would be a practitioner of that but not an expert.
22 Q. So all you have is your
23 experience -- all you had up to 2007 was your
24 experience as an environmental assessment officer;
25 that's correct?

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1 A. No, no.
2 Q. Not involved at all?
3 A. No.
4 Q. No discussion between
5 chief of staff?
6 A. Not with staff.
7 Q. Okay. You have a
8 bachelor's degree in environmental planning from
9 Nova Scotia College of Art and Design?
10 A. Correct.
11 Q. That is your only
12 post-secondary education?
13 A. That's right.
14 Q. You have no legal
15 training?
16 A. Right.
17 Q. You have not studied law
18 or environmental law?
19 A. Correct.
20 Q. You are not a lawyer;
21 correct?
22 A. Correct.
23 Q. You are not a legal
24 expert in the area of interpretation, operation or
25 the application of Nova Scotia statutes, including

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1 A. That's correct.
2 Q. And how many years were
3 you seconded out of the Department of Environment
4 doing other things like being the provincial
5 delegate to the secretariat for the JRP for the
6 Whites Point project and the other project that
7 you referred to?
8 A. Umm, well, for one thing,
9 I wouldn't call it a secondment because during
10 both of those times, there was a requirement to
11 continue to work on other projects as well to --
12 Q. How many years --
13 A. We just didn't have the
14 capacity to dedicate someone to those projects.
15 Q. How many -- you didn't
16 have the capacity?
17 A. There was no capacity to
18 have a panel, a secretariat member like myself,
19 focus completely on Tar Ponds for the 18 months or
20 whatever the time frame was --
21 Q. Or on the JRP for the
22 Whites Point project for however long you were
23 with it?
24 A. That's right.
25 Q. You were very short of

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1 staff; that's correct?
 2 A. That's right. We had to
 3 work other projects at the same time.
 4 Q. Right. And at the same
 5 time as you were working other projects, you were
 6 working as an environmental assessment officer;
 7 that's correct?
 8 A. Correct.
 9 Q. And you'd agree with me
 10 that you are not an expert on ministerial powers,
 11 authority, obligations or discretion; that's
 12 correct?
 13 A. I would agree that I am
 14 not a legal expert on interpreting those things.
 15 Q. Thank you. In Nova
 16 Scotia or anywhere else; that's correct?
 17 A. Correct.
 18 Q. If you go to Tab 1 of the
 19 binder in front of you, and you go to page 3,
 20 paragraph 9, that paragraph says:
 21 "The assessment of a
 22 project can take
 23 different forms, pursuant
 24 to the Minister's powers
 25 in NSEA section 34 to

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1 request additional
 2 information, to determine
 3 that a focus report is
 4 necessary, or to require
 5 an environmental
 6 assessment report."[as
 7 read]
 8 Now, you are in no position
 9 and have no qualifications and no authority to be
 10 interpreting section 34 of the NSEA; would you
 11 agree with me?
 12 A. Well, interpreting
 13 section 34 is part of the job of being an
 14 environmental assessment officer and the manager
 15 of environmental assessment.
 16 Q. Isn't the interpretation
 17 of section 34 the job of a lawyer?
 18 A. Understanding how it
 19 works and applying it in the workplace was my job.
 20 Q. I see.
 21 A. And that's where I make
 22 the distinction.
 23 Q. And you would take
 24 instructions on that from your superiors; correct,
 25 at that time?

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1 A. Well, if there's a
 2 question of the law, we had counsel available to
 3 us within the department to advise on that.
 4 Q. But you've told us that
 5 Mr. Daly was advising you in the operation of the
 6 Environment Act. He's not a lawyer; that's
 7 correct? Were there other officials?
 8 A. Legal advice on a
 9 case-by-case basis if there's parts of the statute
 10 that we need advice for.
 11 Mr. Daly's role as a manager
 12 was to orient new employees to the department and
 13 make sure they are trained in the process and
 14 understand what their roles and responsibilities
 15 are, so that's the context I am speaking of
 16 Mr. Daly in.
 17 Q. And in the second
 18 sentence of paragraph 9, you say:
 19 "Regardless of the form
 20 of assessment, the
 21 decision to reject,
 22 approve, or approve a
 23 project with conditions
 24 ultimately rests with the
 25 Minister, who must

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1 consider all relevant
 2 factors."[as read]
 3 Now, that strikes me as being
 4 a legal opinion, Mr. Geddes; would you agree?
 5 A. I would call it an
 6 experiential opinion.
 7 Q. An experiential opinion?
 8 A. In my experience, that's
 9 what's always happened. And I was advised when I
 10 started in the department that that's the way
 11 decisions were always made; and, in fact, it's a
 12 fundamental way that we do work in environmental
 13 assessments, upon that basis.
 14 Q. So what you have said
 15 throughout your report, then, when you make
 16 statements such as these, is that it's an
 17 experiential interpretation; that's correct?
 18 A. That's right.
 19 Q. Entirely experiential;
 20 correct?
 21 A. Yes.
 22 Q. And you have said that
 23 the JRPs in Nova Scotia are rare, and you said in
 24 paragraph -- you have said that, in paragraph 10,
 25 that in your 15 years' experience with Nova

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1 Scotia, there have been only two JRPs in Nova
2 Scotia?
3 That's what you said in
4 paragraph 10. If you go to page 3, if you wish,
5 you said at the bottom --
6 A. Yes.
7 Q. You said at the bottom of
8 that paragraph, last sentence:
9 "Those two JRPs proceeded
10 by way of joint
11 assessment agreements,
12 which ensured that the
13 requirements of the NSEA
14 were fulfilled."[as read]
15 A. Yes.
16 Q. You see that?
17 A. Yes.
18 Q. And that's again an
19 experiential opinion; is that correct?
20 A. Yes.
21 Q. Now, the secretariat for
22 the Whites Point JRP had delegates from both
23 Canada and Nova Scotia; that's correct?
24 A. That's correct.
25 Q. And at the beginning,

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1 Steve Chapman was the delegate from Canada. He
2 was with CEAA; that's correct?
3 A. That's correct.
4 Q. And you worked with Steve
5 Chapman?
6 A. I did.
7 Q. Did you know that he was
8 involved from the beginning of the referral to JRP
9 by the Minister in dealing with Mr. Buxton; did
10 you know that?
11 A. I probably did know that.
12 Q. And how long did you work
13 with Mr. Chapman on the Whites Point JRP?
14 A. Umm, without seeing a
15 timeline of the steps in the process, it would be
16 difficult for me to nail down an exact time frame.
17 But, again, I think that I stopped working on
18 that, as a secretariat member, around the time
19 that the scoping sessions would have ended.
20 Q. Just going back to
21 October/November of 2007, you did not have
22 meetings with the Minister between October 22nd
23 and November 20th; that's correct, about the
24 Whites Point project?
25 A. Oh, umm... No.

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1 Q. That is correct?
2 A. That is correct, yeah.
3 Q. And you don't know
4 whether Minister Parent spoke to the Minister of
5 Natural Resources before making his decision?
6 A. I don't know that, no.
7 Q. And you don't know if he
8 spoke to the Premier or the Premier's Deputy
9 Minister; that's correct?
10 A. I don't know.
11 Q. And you don't know if he
12 spoke to any other members of cabinet?
13 A. I don't know.
14 Q. You don't know if he
15 spoke to the Minister of Natural Resources?
16 A. I don't know.
17 Q. Would you agree with me
18 that having covered the number of people that we
19 have covered so far, that there are many people
20 who would be in a far better position than you to
21 come and explain what happened within the
22 provincial government of Nova Scotia with respect
23 to the decision to reject or approve the quarry?
24 A. Uh, no, I wouldn't agree
25 with that.

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1 Q. You wouldn't agree that
2 Nancy Vanstone would be in a better position,
3 having personally dealt with it?
4 A. Sorry, maybe I didn't
5 understand your question. Are you saying people
6 that have been involved in this process or people
7 that you could have brought in here?
8 Q. People who have --
9 were -- actually experienced what actually
10 happened between October 22nd and November 20th,
11 and there were many of them, they would be in a
12 better position to come to this tribunal and give
13 evidence on what actually happened than you;
14 that's correct?
15 A. On that specific project,
16 they could give better evidence than I could on
17 what happened in the decision-making stage.
18 Q. Yes. And that would
19 include Nancy Vanstone; correct?
20 A. Yes.
21 Q. Kim MacNeil; correct?
22 A. Yes.
23 Q. Lorrie Roberts; correct?
24 A. Yes.
25 Q. Can you please turn to

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1 Tab 3 of the binder in front of you. You will see
2 that this is a letter from Mr. Buxton dated
3 October 29th to the Minister, and he is:
4 "...writing to you as
5 citizens of Nova Scotia
6 and active members of our
7 community. The
8 Environmental Assessment
9 Review Panel has now made
10 recommendations about the
11 Whites Point Quarry. We
12 are, of course,
13 disappointed with the
14 decision of the review
15 panel. We are having a
16 difficult time
17 understanding all of
18 these recommendations as
19 they were not in
20 accordance with the
21 information filed with
22 the review panel."[as
23 read]
24 And two paragraphs down:
25 "We ask that you not make

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1 a decision on this
2 environmental assessment
3 recommendation until you
4 have had an opportunity
5 to have our reviews."[as
6 read]
7 Now, when did you first see a
8 copy of that letter?
9 A. I don't recall seeing a
10 copy of this letter until these proceedings began
11 on the record.
12 Q. So you had no knowledge
13 or involvement with that letter in October of 2007
14 or November of 2007; that's correct?
15 A. I did not.
16 Q. You were not asked to
17 deal with drafting a response to the letter;
18 that's correct?
19 A. Certainly not that I can
20 recall.
21 Q. Are you aware, today, of
22 the Deputy Minister's view, Nancy Vanstone's view,
23 as communicated to Minister Parent, that it was
24 appropriate for the Minister to decide the
25 question of environmental approval based on the

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1 recommendations made to them by the panel? Are
2 you aware of that to this point?
3 A. Can you say that again?
4 Q. Are you aware of the
5 Deputy Minister's view, Nancy Vanstone, as
6 communicated by her to Minister Parent, that it
7 was appropriate for the Minister to decide the
8 question of environmental approval of the Whites
9 Point project based on the recommendation made to
10 them by the panel?
11 A. Umm, I am not surprised
12 by it, but I am not aware of it.
13 Q. And you weren't aware of
14 it at the time?
15 A. Well, that's part of the
16 responsibility of the senior officials, is to
17 clarify the Minister's decision-making authority,
18 so --
19 Q. Were you aware of that
20 recommendation at the time?
21 A. No.
22 Q. Are you now first aware
23 of it today?
24 A. Umm, yes. Yeah.
25 Q. Could you please turn to

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1 Tab 4? This is an e-mail from Nancy Vanstone to
2 Lorrie Roberts. What was her position at the
3 time?
4 A. She was the manager of
5 environmental assessment at the time.
6 Q. Above you?
7 A. Correct.
8 Q. And to Kim MacNeil and to
9 Minister Parent, and she says:
10 "Lorrie, I spoke with
11 Paul Buxton. He would
12 like to have a debrief
13 from EA staff -- "[as
14 read]
15 And this is on November 20th:
16 " -- on the panel report
17 and process, and I
18 advised him that you
19 would contact him on
20 Friday when you were back
21 in the office."[as read]
22 And just go down about four
23 lines:
24 "He felt that the panel
25 report is only one

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1 document among many
2 reports in a lengthy
3 process and that the
4 Minister's decision
5 should not have relied so
6 heavily on this report (I
7 noted -- "[as read]
8 Ms. Vanstone noted.
9 " -- that the purpose of
10 the Ministers
11 establishing the panel is
12 to review and consult on
13 all info and provide
14 their advice to the
15 Minister and that it is
16 appropriate for the
17 Minister -- "[as read]
18 Let's just underline those
19 words:
20 " -- and that it is
21 appropriate for the
22 Minister to decide based
23 on the recommendation of
24 them made by the panel).
25 He feels that the

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1 standards are not clear,
2 so industry does not know
3 what is expected of them.
4 He pointed to the focus
5 of the panel on core
6 values which is not
7 clearly defined. (I
8 replied that, although he
9 was not happy with this
10 particular decision, that
11 I believed that a look at
12 our EA process in general
13 and our decision record
14 did demonstrate a fair,
15 defined process. We
16 agreed to disagree)."[as
17 read]
18 And then go down to the bottom
19 of that paragraph:
20 "He spoke to the panel's
21 reliance on core values
22 again as the only
23 significant adverse
24 effect they identified,
25 and that the panel didn't

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1 discuss the likelihood of
2 adverse effect on the
3 core values."[as read]
4 Now, are you aware of those
5 words today for the first time?
6 A. I have never seen this
7 document before.
8 Q. Could you turn to Tab 5,
9 please? For the record, Exhibit C 603. It's a
10 transcript of a recorded telephone conversation
11 between the Minister of the Environment, Mark
12 Parent; Paul Buxton; and Josephine Monk Lowry,
13 Bilcon of Nova Scotia, on Tuesday, November 20th;
14 do you know who Josephine Monk Lowry is?
15 A. I don't.
16 Q. Did you ever speak with
17 Mr. Buxton, did you ever meet him?
18 A. I believe I did, yes.
19 Q. Way back when?
20 A. Yes.
21 Q. "JML: Who's calling,
22 please?
23 "MP: Mark Parent.
24 "JML: Just one minute,
25 please.

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1 "PB: Paul Buxton here,
2 Mr. Minister.
3 "Hi, Mr. Buxton. Thank
4 you for taking my call,
5 but I don't have good
6 news."[as read]
7 This is on November 20th:
8 "I did want you to know
9 before it became public,
10 but I will be accepting
11 Recommendation 1 of the
12 panel report. My Deputy
13 Minister is available
14 right after we speak to
15 the media to meet with
16 you and to debrief, if
17 you'd like."[as read]
18 And then if you go over to the
19 next page.
20 MP says:
21 "Yes, well, I certainly
22 can understand that you
23 feel disappointed and
24 that I wasn't involved at
25 that time, but I can

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1 certainly understand
2 that, and, it's -- but
3 what I will do is to get
4 Nancy to call you later,
5 if that's okay."[as read]
6 Just stopping there, were you
7 involved at all in this phone call?
8 A. No.
9 Q. Were you involved at all
10 in advising the Minister what to say in this phone
11 call?
12 A. No.
13 Q. "PB: I will do that.
14 I just wanted to say, you
15 know, that we are
16 committed to the
17 community and, this
18 community and the economy
19 of Nova Scotia, and, you
20 know, I am wondering what
21 the government is
22 actually telling us. Is
23 it to pack up and go back
24 to New Jersey and never
25 come back to Nova Scotia?

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1 "MP. Mark Parent: I
2 don't think that is what
3 we are saying. I am
4 simply saying that I am
5 accepting Recommendation
6 I of the seven
7 recommendations that were
8 made."[as read]
9 Now, are you, were you aware
10 before today that this phone call was held?
11 A. Yes.
12 Q. And how did you become
13 aware of that?
14 A. Just through hearing it
15 from other staff people at the time.
16 Q. So just through the
17 hallways?
18 A. Exactly.
19 Q. And --
20 A. We are a small group.
21 There is only four people on the team, so, yeah.
22 Q. So you heard that Nancy
23 Vanstone was having -- advising on a call with,
24 for Mr. Parent to make to Mr. Buxton and to say
25 that he was relying only on Recommendation Number

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1 1?
2 A. No, I heard that the
3 Minister had reached out to Mr. Buxton, and that's
4 the extent of my knowledge of the call.
5 Q. This's all you know. And
6 that was through the grapevine in your office?
7 A. That's right.
8 Q. So you provided no advice
9 to the Minister on the matter of his decision
10 immediately prior to that call or thereafter;
11 that's correct?
12 A. That's correct.
13 Q. You had no involvement
14 personally whatsoever in the call between Minister
15 Parent and Mr. Buxton; that's correct?
16 A. Correct.
17 Q. If you go, please, to
18 Tab 6, this is Exhibit C 541, it's a letter from
19 the Minister to Mr. Buxton. And just before we go
20 to the body of the letter, if you can go over to
21 the page 2, you will see that it is b.c.c.'d to a
22 number of people: Nancy Vanstone, Kim MacNeil,
23 Lorrie Roberts. Who is B. Arthur?
24 A. Bruce Arthur, regional
25 manager, the local manager in that part of the

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1 province where Whites Point Quarry would have
2 been.
3 Q. And the letter was
4 prepared by Helen MacPhail?
5 A. Yes.
6 Q. And you weren't c.c.'d on
7 the letter?
8 A. No.
9 Q. When did you first see
10 the letter; was it within these proceedings?
11 A. Umm, I am sure I probably
12 read it shortly after it was produced and posted
13 at the time, but I certainly saw it in preparation
14 for these proceedings.
15 Q. And you never had one
16 iota of involvement in the preparation of that
17 letter; that's correct?
18 A. I did not.
19 Q. That's correct?
20 A. That's correct.
21 Q. If you go down to the
22 second paragraph from the bottom, Minister Parent
23 says on the first page:
24 "I have arrived at my
25 decision following

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1 careful consideration of
2 the panel's report. I
3 have determined that the
4 proposed project poses
5 the threat of
6 unacceptable and
7 significant -- "[as read]
8 Significant.
9 " -- adverse effects."[as
10 read]
11 Now, do you have any
12 recollection of actually reading those words
13 before coming here today?
14 A. I have read this letter
15 before.
16 Q. Okay. Do you remember
17 seeing the words "unacceptable and significant
18 adverse effects"?
19 A. Yes.
20 Q. And you understood that
21 the Minister was basing his decision on those
22 words; that's correct?
23 A. That's certainly how he
24 characterized his decision in the letter.
25 Q. Thank you.

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1 now work for, to gather information about the
2 geological resources of the province and make that
3 available. That's different than the Department
4 of Environment that has a purely regulatory role
5 on quarries.
6 Q. But it is part of the
7 Government of Nova Scotia?
8 A. It is under the
9 Government of Nova Scotia.
10 Q. Yeah.
11 Whatever the Department of
12 Natural Resources and its staff, including you
13 now, are doing is part of the Government of Nova
14 Scotia; that's correct?
15 A. I would agree with that.
16 Q. And part of what the
17 Government of Nova Scotia is doing is fulfilling
18 the purpose of the Nova Scotia Environment Act;
19 wouldn't you agree with that?
20 A. The Department of Natural
21 Resources is not fulfilling the purpose of the
22 Environment Act.
23 Q. Are you serious?
24 A. That's not part of their
25 mandate. You wouldn't find that anywhere in their

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1 Now, you have said in your
2 statement that the Minister is to take into
3 account all relevant factors; do you remember
4 that?
5 A. Yes.
6 Q. And you would agree that
7 the term that you use, "all relevant factors",
8 includes those factors both militating for and
9 militating against a project; correct?
10 A. I would agree with that,
11 yes.
12 Q. And you would agree that
13 those factors include the economic development the
14 proposed project would bring to Nova Scotia;
15 that's correct?
16 A. I think that's part of
17 the Minister's consideration, yes.
18 Q. And you're aware that the
19 Department of Natural Resources, an organ of the
20 Government of Nova Scotia, has been consistently
21 promoting the development of quarries for decades?
22 A. The arm of the Nova
23 Scotia government that doesn't have a regulatory
24 responsibility for quarries, so it's a promotional
25 function in another department, the department I

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1 business plans or the objectives of the
2 department --
3 Q. It's the policy of Nova
4 Scotia; isn't that right?
5 A. What's the policy of Nova
6 Scotia?
7 Q. The Department of Natural
8 Resources is acting on behalf of the Government of
9 Nova Scotia to promote quarries in accordance --
10 A. Yes.
11 Q. -- with the purpose of
12 the Environment Act; would you not agree with
13 that?
14 A. I don't believe they are
15 doing it in accordance with the purpose of the
16 Environment Act.
17 Q. You don't believe they're
18 doing it; okay.
19 A. I have never seen a
20 document that connects the work of the Department
21 of Natural Resources to the Environment Act.
22 Q. Have you seen the purpose
23 section of the Environment Act?
24 A. Yes.
25 Q. It is twofold; is it not?

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1 A. It is.
2 Q. It is sustainable
3 development and economic prosperity?
4 A. It recognizes the
5 economic prosperity, yes.
6 Q. Right. And this is the
7 economic prosperity part; isn't it? Development
8 of quarries to produce jobs, taxes, economic
9 prosperity for Nova Scotians; isn't that right?
10 A. I would agree with that.
11 Q. Yes?
12 A. I thought you were making
13 a linkage that Natural Resources had a role
14 specific to the Environment Act legislation, and I
15 don't agree that they do.
16 Q. You would agree with me
17 that in developing or promoting the development of
18 quarries, including oceanside quarries, for the
19 export of aggregate to other places is all in
20 pursuit of one of the purposes of the Nova Scotia
21 Environment Act, economic prosperity, jobs;
22 correct?
23 A. I think it can certainly
24 further the purposes of those, yes.
25 Q. Thank you.

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1 change in the way they
2 work together. It is a
3 framework for mineral
4 resources development
5 that is economically and
6 environmentally
7 responsible --
8 sustainable."[as read]
9 Sorry.
10 Q. And it goes on:
11 "The government will
12 provide leadership by
13 implementing this policy
14 and ensuring that the
15 necessary conditions are
16 maintained for the
17 mineral industry to
18 create wealth for present
19 and future generations of
20 Nova Scotians."[as read]
21 Do you see that?
22 A. I do.
23 Q. And do you agree with
24 that? It's the 1996, the Mineral Policy for Nova
25 Scotia published the year after the enactment of

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1 If you turn to Tab 7, please.
2 Could you read out the highlighted portion under
3 Chapter 1? It starts with "the Government of Nova
4 Scotia" at the bottom of the page.
5 A. Read that section?
6 Q. Read that section,
7 please.
8 A. "The Government of Nova
9 Scotia recognizes mineral
10 exploration and mining is
11 a key sector contributing
12 to jobs, wealth and high
13 quality of life for Nova
14 Scotians. MINERALS - A
15 Policy for Nova Scotia is
16 the government's
17 blueprint to foster
18 continued growth of the
19 mineral industry and
20 careful management of our
21 mineral resources. This
22 policy defines
23 responsibilities for
24 government, industry and
25 the public and advocates

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1 the Nova Scotia Environment Act.
2 A. I do, but I would say for
3 clarity that this does not apply to aggregate.
4 This is meant to apply to minerals, so those that
5 are defined under the Mineral Resources Act, and
6 aggregate is not defined as a mineral under the
7 Mineral Resources Act.
8 Q. That --
9 A. I just wanted to provide
10 that clarity.
11 Q. That's your
12 interpretation?
13 A. Yes.
14 Q. Could you go to page 3,
15 please?
16 Have you read this policy
17 before today?
18 A. I don't recall ever
19 seeing this policy.
20 Q. But you formed the
21 impression that it doesn't apply to aggregates?
22 A. Because of my knowledge
23 of working with minerals -- mineral projects and
24 quarry projects over the years.
25 Q. I see.

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1 A. Minerals are defined
2 under the Mineral Resources Act; aggregate is not.
3 The Department of Natural Resources does not
4 regulate aggregate. The Department of the
5 Environment regulates aggregate. The one-window
6 process that was mentioned yesterday does not
7 apply to quarry projects. There has never been a
8 quarry project that's gone through the one-window
9 process, from my understanding.
10 Q. In your experience.
11 Now, you've been, until last
12 year, at the Department of the Environment. Now,
13 you're are only for less than a year at the
14 Department of Natural Resources?
15 A. Right.
16 Q. Can you go to the bottom
17 of page 2 of that document in front of you?
18 A. The same document we are
19 already on?
20 Q. The same document we are
21 on. Page 2, the bottom:
22 "Coal has long been the
23 foremost mineral product
24 of the province,
25 accounting for nearly 50

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1 policy doesn't apply to aggregates; it applies to
2 minerals. They are treated the same way for the
3 purpose of this policy; do you not agree with me?
4 A. Without reading the
5 entire policy, I can't say that with certainty.
6 Q. Would you not just agree
7 with me that --
8 A. I do agree that building
9 stone appears in the policy, for sure.
10 Q. Yes.
11 A. Yes.
12 Q. And anybody who read the
13 policy, a member of the public or a member of the
14 departments, anybody who read it could see at the
15 top of page 3 that stone, sand and gravel, and
16 crushed rock is included as part of the operation
17 of the policy; that's correct?
18 A. Yes.
19 Q. Okay. So then if you go
20 to Tab 8, please, you will see the Environment
21 Act, and you will see, at the bottom of the first
22 page, the purpose of the Act; are you with me?
23 A. Yes.
24 Q. You will see at section
25 2:

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1 per cent of the
2 province's annual gross
3 value output for mineral
4 resources. Industrial
5 minerals have been
6 consistent contributors
7 to the province's mineral
8 production for over 200
9 years."[as read]
10 And then could you read the
11 next paragraph at the top of page 3, please?
12 A. "These include gypsum,
13 salt, limestone,
14 anhydrite, dolomite,
15 barite, celestite,
16 silica, clay, shale,
17 slate, marble, building
18 stone, sand and gravel,
19 and crushed rock."[as
20 read]
21 Q. Could you just stop
22 there?
23 A. Yes.
24 Q. Building stone, sand and
25 gravel. And now you have just told me that this

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1 "The purpose of the Act
2 is to support and promote
3 the protection,
4 enhancement and prudent
5 use of the environment
6 while recognizing the
7 following goals: (a)
8 maintaining environmental
9 protection as essential
10 to the integrity of
11 ecosystems, human health
12 and the socio-economic
13 well-being of society;
14 (b) maintaining the
15 principles of sustainable
16 development, including --
17 "[as read]
18 And then if you go up over to
19 page 2 and drop down about a quarter of the page
20 to subsection 4:
21 "The principle of shared
22 responsibility of all
23 Nova Scotians to sustain
24 the environment and the
25 economy, both locally and

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1 globally, through
2 individual and government
3 actions."[as read]
4 And then down to sub 6:
5 "The linkage between
6 economic and
7 environmental issues,
8 recognizing that
9 long-term economic
10 prosperity depends upon
11 sound environmental
12 management and the
13 effective protection
14 depends on a strong
15 economy."[as read]
16 Now, would you agree with me
17 that the Mineral Policy of 1996 is entirely
18 consistent with the purpose set out in that Act?
19 A. I have never read that
20 policy, so I would have to read it in its entirety
21 to be able to agree with you.
22 Q. Would you agree with me
23 that economic development in any form is part of
24 the goal and purpose of the Environment Act of
25 Nova Scotia? That there is this balance,

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1 sustainable development and a prosperous economy;
2 would you agree with that?
3 A. I would agree with that,
4 yes.
5 Q. Now, if you go to Tab 9.
6 This is a brochure published by the Government of
7 Nova Scotia in 1996, the same year the Mineral
8 Policy was enacted. And it says:
9 "Take Advantage of
10 Mineral Exploration
11 Development in Nova
12 Scotia."[as read]
13 It says:
14 "Nova Scotia, Canada, is
15 situated on the Eastern
16 Seaboard of North
17 America. With a long
18 history of mining coal,
19 metallic minerals and
20 industrial minerals, Nova
21 Scotia offers many
22 advantages to the mineral
23 industry. For example,
24 some of the lowest costs
25 for exploration in

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1 Canada."[as read]
2 Towards the bottom of that
3 column:
4 "A one-window approach to
5 permits and regulations,
6 a skilled workforce with
7 experience in mineral
8 development."[as read]
9 I am on the last column on the
10 right.
11 And do you see that there is
12 photo, a large photo halfway down the page of a
13 major quarry; do you see that?
14 A. Yes, it appears to be.
15 Q. Have you seen this
16 document before?
17 A. I don't recall seeing
18 this document.
19 Q. Do you know that quarry
20 to be the Martin Marietta Quarry at Auld's Cove?
21 Or do you know?
22 A. Does it say that?
23 Because I --
24 Q. Whether it says it or
25 not, do you know?

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1 A. I can't tell by looking
2 at it whether it is Martin Marietta.
3 Q. Do you remember ever
4 seeing a photo of the Martin Marietta quarry on a
5 government publication?
6 A. Oh, yes, for sure.
7 Q. Okay. You are just not
8 able to say if this is one; that's correct?
9 A. Yes.
10 Q. And you see below, it's a
11 little blurred, but:
12 "Nova Scotia -- at the
13 bottom of that photo --
14 aggregate deposits enjoy
15 a tremendous advantage
16 for shipping destinations
17 around the world."[as
18 read]
19 Now, were you aware after you
20 joined the environment department that as long ago
21 as 1996, when the Mineral Policy was enacted, that
22 the government was actively promoting the
23 development of quarries for, as it says, shipping
24 to destinations around the world?
25 A. Yes, I was aware that

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1 there was promotional work from Natural Resources
2 on that, yes.

3 Q. You were aware of that,
4 yes.

5 And if you go over to the
6 third page, on the second column on the third
7 page, it says that Nova Scotia, under the heading
8 "History of the Nova Scotia Mineral Industry", and
9 the third bullet down says:
10 "Major producer and
11 exporter of salt,
12 aggregate, limestone and
13 dolomite." [as read]

14 Do you see that?
15 A. I can't, are we in the
16 third column?

17 Q. The second column, which
18 is the short column, third bullet down; do you see
19 that?

20 A. Yes, yes.

21 Q. And you would agree with
22 me that that's consistent with the 1996 Mineral
23 Policy which we have already covered; correct?
24 A. Again, I haven't read
25 that policy, so --

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1 Scotia and its -- I can short-circuit this for
2 you, Mr. Geddes, it's to the same effect. It's
3 published much later. It's not exactly clear what
4 year it's published by the Government of Nova
5 Scotia, but it appears to be 2006, and we will get
6 to another document which may give us some
7 guidance:

8 "Nova Scotia -- I'm on
9 the first page -- has a
10 long and rich mining
11 history of producing
12 fuels, metals and
13 building materials on a
14 continuous basis for 300
15 years.
16 The production of
17 minerals remains an
18 important component of
19 the provincial economy,
20 directly employing over
21 1600 people and
22 generating over
23 \$270 million worth of
24 marketable products
25 annually. Figure 1 shows

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1 Q. You can't agree with that
2 or not?

3 A. That's what I would say,
4 yeah, until I read that policy, I wouldn't
5 understand it completely whether this agrees with
6 that.

7 Q. You read the first page
8 of it or the first paragraph; was that not enough?
9 A. It certainly, it covers
10 the same types of materials, I would agree with
11 that.

12 Q. You would agree with
13 that?

14 A. Yeah.

15 Q. And you agree with the
16 policy being to promote the development of
17 minerals, including aggregates, sand, crushed
18 rock, et cetera; agreed?

19 A. Yes, yes.

20 Q. And this brochure is
21 consistent with that policy; correct?

22 A. It appears to be.

23 Q. Okay. If you go over to
24 page 10, it's a document called Mineral Resources
25 in Our Lives. The importance of minerals in Nova

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1 the location of active
2 mines and larger
3 construction aggregate
4 quarries operating in the
5 province." [as read]

6 Have you seen this document
7 before today?

8 A. I don't believe I have.

9 Q. Let's, then, go to --
10 now, would you agree with me, before we go to the
11 next document, that this would be an important
12 document for the Minister to be cognizant of in
13 making his decision as to reject or approve the
14 Whites Point Quarry?

15 A. No.

16 Q. You don't agree with
17 that?

18 A. I don't.

19 Q. You don't agree that it's
20 important for the Minister of Environment, who is
21 making a decision in accordance with the purpose
22 of the Nova Scotia Environment Act, to take into
23 account the province's active promotion of
24 quarries?

25 A. Well, that's different

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1 than asking whether the document would be
2 something the Minister would use in the decision.
3 I guess the Minister, if you look at the
4 definition of environmental effect, the Minister
5 is bound to consider positive effects, which would
6 include economic development opportunities.
7 Q. All relevant factors;
8 that's correct?
9 A. Yes, yes.
10 Q. And so if we go, then, to
11 the next document, Tab 11, have you seen this
12 document before today? It's called Opportunity
13 for Export Aggregate. Have you seen that before
14 today?
15 A. I don't recognize this
16 one either.
17 Q. It's a 2006 document.
18 It's long before you went to the Natural Resources
19 Department?
20 A. Yeah, yeah.
21 Q. And so, in your opinion,
22 as it is, I gather you haven't taken into account
23 these various documents that are part of the
24 record and are to the effect of promoting
25 aggregate development in Nova Scotia; that's

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1 correct? I don't see any reference to any of
2 them.
3 A. I understand that the
4 Department of Natural Resources has a mandate and
5 actively does gather information about the
6 geological resources of the province and is
7 interested in promoting them for resource
8 development, and I do see that clearly aligns with
9 their mandate.
10 Q. Right, but my question
11 is, have you seen these documents prior to writing
12 your first opinion and taken them into account? I
13 don't see them referred to anywhere, I don't see
14 anything about mineral policy anywhere, I don't
15 see any reference to the promotion of aggregate
16 quarries. Have you taken any of this into account
17 in arriving at the conclusions in your opinion?
18 A. No, because I assumed
19 that these are things that are considered in the
20 definition of environmental effect, and they are
21 factors the Minister has to consider.
22 Q. So you would expect that
23 the Minister has to consider, is compelled to
24 consider the policy and the expressions of that
25 policy through publications of the Government of

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1 Nova Scotia; that's correct?
2 A. Well, I think the
3 Minister has to consider information that would be
4 received in environmental assessment about the
5 potential economic advantages of a project.
6 Q. Well, you have said that
7 the Minister has to take into account all relevant
8 factors; you have confirmed that?
9 A. Right.
10 Q. Both positive and
11 negative?
12 A. Right.
13 Q. All relevant factors?
14 A. But if you are asking if
15 the Minister, in a decision, is looking at these
16 types of documents and has to be familiar with
17 them, I would say on a case-by-case basis, that
18 wouldn't happen.
19 The Minister has a general
20 understanding --
21 Q. That was not my question.
22 MR. SCOTT LITTLE: Mr. Nash,
23 let him answer the question.
24 MR. NASH: That was not my
25 question.

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1 MR. SCOTT LITTLE: He wasn't
2 finished responding to the question that you
3 asked. You should let him answer it.
4 MR. NASH: Well, with respect,
5 my question was, and it was very clear --
6 MR. SCOTT LITTLE: Judge
7 Simma, Mr. Geddes was in the process of providing
8 an explanation and he was cut off.
9 MR. NASH: It was a question
10 that wasn't asked of him.
11 BY MR. NASH:
12 Q. My question was: Did you
13 take these documents and this policy and this
14 position by the Department of Natural Resources
15 into account in writing your opinion?
16 A. No.
17 Q. Thank you.
18 And that would include Tab 12?
19 This is a Nova Scotia Mining Society AGM. The
20 theme is "Mining and Environment", and at 4:20 to
21 4:50, there is a presentation by Bob Ryan, Phil
22 Finck and Garth Prime from the Nova Scotia
23 Department of Natural Resources, "Industrial
24 Mineral Potential in Nova Scotia, Opportunities
25 for Deep Water Aggregate Quarries"?

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1 First of all, have you seen
2 this document before today?
3 A. I haven't, no.
4 Q. You didn't take it into
5 account in arriving at your opinion, obviously;
6 that's correct?
7 A. That's correct.
8 Q. If you go over to page 4,
9 you will see the beginning of some slides. Page 4
10 on the top left-hand side. Under "P. Finck",
11 that's Phil Finck?
12 A. Yes.
13 Q. Do you know him?
14 A. I know who he is, yes.
15 Q. Yes, and he was the
16 Department of Natural Resources for many years;
17 correct?
18 A. Correct.
19 Q. And he was involved in
20 promoting the development of quarries for years
21 and years; that's correct?
22 A. I know he was involved in
23 that. I don't know how long he was involved in
24 that.
25 Q. Do you know he was one of

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1 the people who squired Mr. Lizak around, who was
2 there in Nova Scotia on behalf of the Claytons in
3 this case, to show him various potential quarry
4 sites?
5 A. I didn't know it was Phil
6 Finck.
7 Q. You didn't know it was
8 Phil Finck?
9 A. I didn't know if it was
10 Phil Finck.
11 Q. You knew that Mr. Lizak
12 was toured around?
13 A. I did know that, yes.
14 Q. If you go to page 5,
15 there is a map showing Halifax, showing Nova
16 Scotia, with a lot of arrows going all around the
17 Eastern Seaboard and the United States and down
18 into the Caribbean. Were you aware of this map
19 before you wrote your opinion, which is showing
20 where all of the aggregate from Nova Scotia can go
21 to various markets? New York is right there.
22 Jacksonville. New Orleans. All the way around
23 the gulf and then down towards Jamaica and Santo
24 Domingo. Were you aware of that before you wrote
25 your reports?

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1 A. I have never seen this
2 map, but I am certainly aware of all those markets
3 through other projects I was involved with,
4 including Black Point Quarry.
5 Q. You are aware that they
6 have been cited as a way to support the aggregate
7 industry in Nova Scotia; correct?
8 A. Yes, I am aware of that.
9 MR. NASH: Thank you,
10 Mr. Geddes. Those are my questions.
11 PRESIDING ARBITRATOR: Thank
12 you, Mr. Nash.
13 MR. NEUFELD: Judge Simma,
14 could we have five minutes just to speak?
15 PRESIDING ARBITRATOR: Sure.
16 --- Off-the-record discussion.
17 MR. NASH: If I may, I have
18 one more question, two more questions.
19 BY MR. NASH:
20 Q. Just before we finish
21 off, Mr. Geddes, are you aware that the Minister's
22 officials, Minister Parent's officials, advised
23 that six of the JRP recommendations were outside
24 the mandate of the JRP?
25 A. Yes, I am aware.

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1 Q. And were you aware that
2 the JRP, in its report, thanked you generously,
3 acknowledged your assistance to the JRP?
4 A. Yes. And that would be
5 in reference to the secretariat work I had done at
6 the beginning of the process, yes.
7 PRESIDING ARBITRATOR:
8 Mr. Nash, you are finished?
9 MR. NASH: I am done.
10 PRESIDING ARBITRATOR: Okay.
11 Mr. Neufeld?
12 RE-EXAMINATION BY MR. NEUFELD:
13 Q. Mr. Geddes, I have a few
14 follow-up questions based on the cross-examination
15 questions that you were just asked.
16 I think we were all very
17 patient when Mr. Nash asked you for a fifth time
18 whether you were a lawyer. Just to confirm, you
19 are aware that Justice Tom Cromwell also filed a
20 report in this dispute?
21 A. I am aware of that, yes.
22 Q. And in your experience,
23 the way that you apply the Act --
24 MR. NASH: I object to this.
25 I didn't raise anything about Justice Cromwell's

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1 report. I didn't ask him one question about that.
2 Re-examination is intended to address matters that
3 arise in cross-examination. This did not arise.

4 MR. NEUFELD: I don't disagree
5 with that at all. I am not intending whatsoever
6 to go into Justice Cromwell's report. I would
7 simply like to ask Mr. Geddes if he is aware of
8 the report and has any disagreement with the legal
9 interpretations provided by Justice Cromwell,
10 which he, Mr. Geddes, applies on an everyday
11 basis, or applied on an everyday basis.

12 MR. NASH: Well, he is not
13 qualified to give an interpretation, in the first
14 place. And the second place, there was nothing
15 about Justice Cromwell's opinion that I raised in
16 his cross-examination.

17 MR. NEUFELD: Again, I am not
18 asking him for an interpretation. I am asking him
19 if he agrees with the legal interpretation -- from
20 his practical experience, the legal interpretation
21 that Justice Cromwell did provide on how to
22 interpret the Nova Scotia Act.

23 MR. NASH: It's just not part
24 of his evidence, and he hasn't been asked about
25 it.

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1 does it differ from a provincial panel or
2 provincial board?

3 A. Umm, well, they are
4 largely the same in the sense that you have got
5 independent experts who provide -- ultimately
6 provide advice to the Minister on potential
7 effects of a project. You know, some of the
8 procedural steps might differ between -- for
9 example, scoping hearings which were held for
10 Whites Point Quarry, provincial panels don't
11 typically do that. So some of the procedural
12 steps might differ; but, really, at the end of the
13 day, under both processes, you end up with a
14 report, a recommendation to the decision-maker, at
15 which point the Minister would ask to be briefed
16 by staff and would get staff's advice on that
17 report and make a decision.

18 Q. And you were involved in
19 those processes?

20 A. Yes.

21 Q. Provided advice to the
22 Minister in those processes?

23 A. I did, yes.

24 Q. Second, you were asked,
25 at Tab 6 of the binder in front of you, you were

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1 PRESIDING ARBITRATOR: I think
2 my impression is it's very difficult, of course,
3 to make a distinction between interpretation of a
4 document and an application just as a matter of
5 experience. So, personally, if my colleagues
6 agree, I would prefer if you stayed away from
7 that.

8 MR. NEUFELD: That's fine, I
9 don't -- we don't need to -- like I said, I wasn't
10 planning on getting into it at all. The fact is
11 that we filed, because Mr. Geddes is not a lawyer,
12 we purposefully went out and sought a lawyer to
13 provide an interpretation of the Act. That is
14 before you, so it's for you to consider that
15 interpretation, which has gone unchallenged
16 because they have chosen not to cross-examine
17 Justice Cromwell. But that's fine, I can move on.

18 BY MR. NEUFELD:

19 Q. Now, Mr. Geddes, you were
20 asked about a number of -- the number of JRPs that
21 took place in Nova Scotia; you recall that?

22 A. Um-hmm, yes.

23 Q. And, from your
24 perspective as an experienced EA administrator in
25 Nova Scotia, how does a JRP process compare, how

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1 brought to Exhibit 331, which was a letter from
2 Paul Buxton to Minister Parent, and you were asked
3 about all the relevant factors that the Minister
4 would consider. You recall those questions from
5 Mr. Nash?

6 A. Yes.

7 Q. Now, in the fifth
8 paragraph of that letter, you will see where the
9 Minister says he paid careful attention -- sorry,
10 careful consideration of the panel's report; do
11 you see that language there?

12 A. Correct.

13 Q. In your experience, is
14 this usual for the Minister to look at the entire
15 report, or would he just focus on the
16 recommendation and accept the recommendation?

17 A. I think, in my
18 experience, it would be the Minister would review
19 the entire report, would be seeking staff advice
20 at that point in time. And, you know, I have had
21 Ministers at decision-making stages, not
22 necessarily for panel reviews, ask for additional
23 research to be done by staff to further our own
24 advice to the Minister making the decision as
25 well.

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1 Q. You were also asked a lot
2 about the economic development, economic
3 development as a goal of the Nova Scotia
4 government. If you could, please, help us to
5 understand how economic interests and economic
6 concerns would be considered and balanced in the
7 EA process.

8 A. Well, I think it all
9 comes back to the definition of environmental
10 effect, which talks about both the positive and
11 negative potential effects of projects.

12 So within that, obviously the
13 Minister -- and in accordance with the overall
14 principles of the Act, to balance economic
15 developments, environmental sustainability, the
16 Minister would look at the positive impacts of a
17 project, as well as potential impacts or adverse
18 effects of the project. So both sides are
19 considered at the decision stage.

20 Q. Where do these factor in
21 in terms of the actual Act or the words that the
22 Act uses?

23 A. Again, the Minister's
24 decision is based on the potential for a project
25 to result in significant environmental effects

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1 that can't be mitigated, so that's what the
2 decision is based upon.

3 Q. This is a balancing that
4 you would call sustainable development?

5 A. Yes, correct.

6 Q. You weren't -- the reason
7 I am asking these follow-up questions is because
8 you were specifically cut off and pointed simply
9 to the promotional documents of the government,
10 which we heard you to say wouldn't necessarily
11 factor into an individual -- so just help us
12 describe, what does factor into that decision,
13 what does the Minister consider?

14 A. Well, the Minister -- if
15 we are talking in the context of a panel report,
16 whether it's a provincial panel report or whether
17 it's a joint review panel report or even if it's a
18 project that the environmental assessment has
19 managed within the environmental assessment group
20 itself in terms of developing report and
21 recommendations, the things that get considered in
22 the decision would be all the information in the
23 environmental impact statement or registration
24 document itself. If there is a report from the
25 panel, that would be considered by the Minister.

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1 Or if there's a report by the environmental
2 assessment officer that managed the Class 1
3 project, that would be considered. There's always
4 an in-person briefing with the Minister on all
5 decisions provincially where the staff and
6 administrator walk the Minister through the
7 project, answer any questions. The Ministers have
8 the opportunity to look at the public record at
9 that point in time and can ask for -- to receive
10 specific comments from government agencies or the
11 general public comment index. So there's a whole
12 range of pieces that get considered. But there's
13 also written recommendation from staff that's
14 provided to the Minister at that stage as well.

15 MR. NEUFELD: Thank you.

16 Let me just confer with my
17 colleagues for one second.

18 Thank you. Those are all my
19 questions.

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

22 Any, Mr. Nash?

23 MR. NASH: Nothing arising.

24 PRESIDING ARBITRATOR: I think
25 that gets us to tribunal questions. Professor

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1 Schwartz has the floor.

2 QUESTIONS BY THE ARBITRAL TRIBUNAL:

3 PROFESSOR SCHWARTZ: Good
4 morning. Could I take you to paragraph 9 of your
5 rejoinder report. You are talking about some
6 other projects that ended up not passing the
7 environmental due process in Nova Scotia?

8 THE WITNESS: Yes.

9 PROFESSOR SCHWARTZ: Just to
10 further my understanding, I looked at the exhibits
11 and so on, and I couldn't quite figure out a few
12 of these things.

13 The first one that's mentioned
14 there, the Blue Mountain Quarry, so there was a
15 public review process there that involved public
16 hearings?

17 THE WITNESS: Yes, it was a
18 provincial-only panel that involved public
19 hearings.

20 PROFESSOR SCHWARTZ: What did
21 the assessment board itself recommend? Did the
22 Minister do something different from the
23 assessment board?

24 THE WITNESS: The Minister
25 accepted the recommendation.

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1 PROFESSOR SCHWARTZ: Okay.
2 Now, in your practical experience -- again, I am
3 not asking a legal question because the law allows
4 Ministers to add terms and conditions or to come
5 to a different decision than the board. Were you
6 involved in some cases where the Minister
7 stipulated additional terms and conditions that
8 were different from what a board recommended, an
9 assessment board?

10 THE WITNESS: Yes. And I can
11 say there's been cases where the Minister has not
12 included conditions that were recommended by a
13 panel and decided not to include those as well,
14 too.

15 PROFESSOR SCHWARTZ: So, in
16 your experience, it's gone both ways, sometimes
17 Ministers does not proceed with the term and
18 conditions stipulated by the board and sometimes
19 the Minister adds an additional term and condition
20 that was not stipulated by the board?

21 THE WITNESS: Yes, and another
22 important piece in there is that the
23 recommendations of the panel for conditions often
24 aren't how they look when they're operationalized
25 by the department. In other words, we would often

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1 rewrite them or reorganize them to more accurately
2 reflect our ability to monitor them and ensure
3 that the proponent complies with them. In the
4 process of doing that, sometimes additional
5 conditions might present themselves to address
6 some of those issues.

7 PROFESSOR SCHWARTZ: Okay, so
8 you mentioned that sometimes the Minister would
9 tweak or add or subtract from a board
10 recommendation. What about coming to an outright
11 different conclusion, in your experience, were
12 there cases where a board recommended approval and
13 a Minister decided on rejection?

14 THE WITNESS: I have never
15 been involved in a panel report or -- either at
16 the provincial level or the two joint review
17 panels, obviously, one of the -- only one of those
18 I was involved in, where that's happened. But,
19 certainly, in Class 1 environmental assessments
20 provincially where the report and recommendation
21 was prepared by staff, I have had Ministers decide
22 to take a different course of action than what was
23 recommended by staff. So, to me, that certainly
24 reflects the fact that the Minister has -- is the
25 final decision-maker, regardless of the

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1 recommendation that's put before him or her.

2 PROFESSOR SCHWARTZ: How often
3 were there public review panels, in your
4 experience? Is that a fairly common thing, or --

5 THE WITNESS: It's not common
6 at all in Nova Scotia. I think in my 15ish years
7 with the department, there was two JRPs and, I
8 believe, three provincial panels.

9 PROFESSOR SCHWARTZ: Thank you
10 very much.

11 PRESIDING ARBITRATOR: Thank
12 you.

13 Did that lead to any -- does
14 that lead to any -- yes, Mr. Nash.

15 FURTHER CROSS-EXAMINATION BY MR. NASH:

16 Q. Just on that last point,
17 in your 15 years' experience, there were five
18 hearing panels?

19 A. Yes.

20 Q. Two JRPs and three
21 provincial?

22 A. That's correct, I
23 believe, yes.

24 Q. And that would be out of
25 approximately what magnitude of total

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1 environmental assessments in those years?

2 A. Umm...

3 Q. Are you able to provide
4 even like an estimate?

5 A. I will have to say it's
6 over 100. I couldn't give you an exact number.

7 Q. And that's in your
8 experience in that period?

9 A. Yeah, that's in my time
10 period.

11 Q. Right. And would that
12 100 be all of the environmental assessments that
13 have been conducted under the auspices, leaving
14 aside the two JRPs, the three provincial panels,
15 would that 100, is it 3 out of 100 just of yours,
16 or were there others that would have been
17 conducted over that period of time as well?

18 I have garbled the question.
19 I apologize.

20 What would be the approximate
21 total number of environmental assessments?

22 A. That is what I was
23 giving.

24 Q. That's the 100?

25 A. Yes.

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1 Q. Okay, thank you.
2 PRESIDING ARBITRATOR: Thank
3 you, Mr. Nash. I think that concludes the
4 examination of Mr. Geddes.
5 Mr. Geddes, you are relieved
6 from your obligations. You are a free person
7 again.
8 THE WITNESS: Thank you very
9 much.
10 PRESIDING ARBITRATOR: And
11 next in line is Ms. Griffiths. I just wonder
12 whether we should maybe, since we are going to
13 have a number of people, we might have two
14 10-minute breaks. Is that acceptable? So we will
15 resume again at 10:25. Okay.
16 --- Upon recess at 10:17 a.m.
17 --- Upon resuming at 10:28 a.m.
18 PRESIDING ARBITRATOR: Okay.
19 I think we can continue. Ms. Griffiths, take your
20 seat in the witness stand.
21 Would you please read out the
22 statement that should be in front of you.
23 WITNESS DECLARATION: LESLEY GRIFFITHS
24 MS. GRIFFITHS: I solemnly
25 declare upon my honour and conscience that I will

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1 speak the truth, the whole truth and nothing but
2 the truth, and that my statement will be in
3 accordance with my sincere belief.
4 PRESIDING ARBITRATOR: Thank
5 you, Ms. Griffiths. So the direct will be carried
6 out by Ms. Kam. You have the floor, Ms. Kam.
7 MS. KAM: Thank you, Judge
8 Simma.
9 EXAMINATION IN-CHIEF BY MS. KAM:
10 Q. Good morning, Ms.
11 Griffiths.
12 A. Good morning.
13 Q. Just by way of brief
14 introduction, you served as a member or chair of
15 six environmental assessment review panels?
16 A. That's correct.
17 Q. And you filed two expert
18 reports in the damages phase of this arbitration?
19 A. Yes.
20 Q. The first is dated
21 June 9th, 2017, and the second is dated
22 November 6th, 2017?
23 A. I did.
24 Q. Do you have any
25 corrections to make to these reports?

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1 A. Yes, I do.
2 So in the first report, in
3 paragraph 2, it states there that I received a
4 "masters in library studies" in 1973. That should
5 read a "masters in library service" in that same
6 date, 1973.
7 Just to explain, Dalhousie
8 University changed the name of the degree after I
9 graduated and I occasionally get muddled, but it
10 is correct in my CV so that should read "library
11 services."
12 The second correction in the
13 first report is paragraph 6, a formatting gremlin
14 got in there and, under 6A and B is actually one
15 paragraph, and that should read, the end of A
16 should read:
17 "This panel was
18 constituted under the
19 NSEA, the Nova Scotia
20 Environment Act --"[as
21 read]
22 And then the rest of the
23 sentence.
24 So there should not be a break
25 between A and B, and then everything else gets

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1 relettered accordingly, if that's okay.
2 PRESIDING ARBITRATOR: I am
3 afraid I didn't quite understand so we see 6A and
4 B, and you are saying there is a --
5 THE WITNESS: There was a
6 break after the -- at the end of A where it says
7 "NS 3." Who knows how that happened, but that
8 should read:
9 "This panel was
10 constituted under the
11 NSEA and the federal
12 environmental
13 assessment."[as read]
14 So the two sections should run
15 in together.
16 PRESIDING ARBITRATOR: Okay.
17 The B connects.
18 THE WITNESS: That's right,
19 and it's NSEA not NS3 something.
20 Then if we could turn to my
21 second report, and paragraph 58. The first two
22 sentences in 58 should be struck. This is not
23 correct.
24 And I would point out that, in
25 fact -- how that got in there I can't tell you --

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1 but in my first report there's no change needed in
2 the first report, but I would like to point out in
3 paragraph 104, I have made the correct statement
4 about the monitoring that Bilcon proposed.

5 So 104 in the first report is
6 the correct citation, and here I am asking for the
7 first two sentences to be struck, so that that
8 paragraph would then begin:

9 "It is important to
10 distinguish between
11 monitoring and
12 mitigation." [as read]

13 And those are my corrections.

14 MS. KAM: Thank you,

15 Ms. Griffiths. Those are all my questions.

16 PRESIDING ARBITRATOR: Thank
17 you Ms. Kam. Mr. Nash, you have the floor for
18 examination.

19 CROSS-EXAMINATION BY MR. NASH:

20 Q. Thank you. Good morning,

21 Ms. Griffiths. How are you today?

22 A. Good morning. I am fine,
23 thank you.

24 Q. Did you attend the Whites
25 Point JRP hearings in 2007?

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1 A. I attended one afternoon
2 session.

3 Q. What session was that?

4 A. I can't tell you. I
5 don't remember.

6 Q. Was it a session in which
7 the DFO scientists and representatives gave
8 evidence?

9 A. I really don't remember.

10 If I can explain, if I can clarify why I was
11 there. I had been invited to go down for a
12 meeting unrelated to Whites Point in the morning
13 with Dr. Robert Gibson, who I believe was one of
14 the witnesses at the hearing.

15 And because of my interest in
16 sustainability assessment and he is an author of a
17 book, I can't remember if he had even written the
18 book by that time, but I went down for the meeting
19 with Dr. Gibson just out of interest and because I
20 was down there I attended a session in the
21 afternoon. I just don't remember which session.

22 Q. How many North Atlantic
23 right whales mortalities were there between 1970
24 and 2004?

25 A. Between 19?

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1 Q. 1970 and 2004?

2 A. No, I don't know the
3 answer to that.

4 Q. Either in Canada or the
5 U.S.? You don't know the answer to that?

6 A. No, I do not know.

7 Q. You didn't know that when
8 you wrote your reports?

9 A. No.

10 Q. Of the total known North
11 Atlantic right whale mortalities in U.S. and
12 Canadian waters during the 34-year period between
13 1970 and 2004, how many known mortalities were
14 there in the Bay of Fundy?

15 A. No, I don't know the
16 answer to that.

17 Q. Do you recall in your
18 reading for this proceeding that there are
19 international shipping lanes that go through the
20 Bay of Fundy?

21 A. Yes.

22 Q. Do you recall that there
23 was a change in those shipping lanes?

24 A. Yes, I understand there
25 was.

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1 Q. Do you recall when that
2 was?

3 A. No, I think it was around
4 the time of the Whites Point Quarry assessment,
5 but I am not certain.

6 Q. Do you know what a rule
7 vessel is?

8 A. No, I can't say exactly.
9 I know it's a large vessel of some kind.

10 Q. A larger vessel of some
11 kind?

12 A. Yes.

13 Q. Do you know how large?

14 A. No, as I have said.

15 Q. Do you know whether it
16 includes oil tankers or not?

17 A. No, I do not know that.

18 Q. Do you know in 2007 how
19 many rule vessels were going through the
20 international shipping lanes in the Bay of Fundy
21 and where they were going to?

22 A. No, I don't know that.

23 For the purposes of the report that I wrote, I
24 focussed it on the information that was provided
25 by the proponent to the panel with respect to the

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1 percentage increase that they estimated after the
2 project, so it was that percentage figure.
3 Q. So you don't know how
4 many rule vessels were going through the Bay of
5 Fundy in 2007?
6 A. No, I can't give you that
7 figure.
8 Q. Do you know how many of
9 the rule vessels there were, how many were large
10 oil tankers going to St. John's?
11 A. No, I don't. I would
12 assume that it would be a significant proportion.
13 Q. Did you read the entire
14 transcript of the JRP hearing that was held from
15 June 16th to June 30th, 2007?
16 A. I read a significant
17 amount of that, of those hearings. I did -- I was
18 somewhat selective about which ones I covered.
19 And the reason being that I
20 had been asked to focus my report, my opinion, on
21 matters that pertained particularly to the CEAA
22 aspect of the panel hearing. So there was some
23 aspects of the hearings that I judged would be
24 less relevant.
25 Q. So when you say you read

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1 a significant portion, can you give us an estimate
2 of how much of those transcripts you read?
3 A. Umm... No, I don't think
4 I want to do that. But I was --
5 Q. An estimate?
6 A. But the matters in hand
7 that I actually spoke to, and, in fact, some
8 others because I didn't -- I did initially, in my
9 first draft, I wrote more extensively on other
10 issues -- decided in the end not to include that,
11 so I would have looked at the sections of the
12 transcript.
13 Q. So you have no estimate
14 of how much you read?
15 A. I think I probably, 75
16 per cent, 80 per cent, something like that.
17 Q. Did you read all of the
18 evidence of the DFO scientists who appeared in
19 front of the JRP?
20 A. I read, I looked at their
21 written submissions to the panel. I looked at the
22 sections of the hearing transcript where they
23 spoke to the panel. I looked at the undertakings.
24 I looked at the exhibits that were put on the
25 registry by the DFO scientists in support of their

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1 appearance at the hearings.
2 Q. What was the evidence
3 before the JRP regarding the percentage reduction
4 in the likelihood of right whale ship strikes in
5 the Bay of Fundy resulting from the change in the
6 international shipping lanes?
7 A. Oh, it was a large
8 percentage.
9 Q. Do you remember the
10 percentage?
11 A. Umm... I... I was -- I,
12 I was going to say 95 per cent, but I almost think
13 that was an amended figure that was quoted. But
14 it was a large percentage. I don't want to be
15 held to 95 per cent. 85 per cent? 80 per cent?
16 It was a large percentage.
17 Q. If I was to tell you that
18 there were four right whale known mortalities in
19 the Bay of Fundy, human-caused mortalities?
20 A. Um-hmm.
21 Q. Between 1970 and 2004,
22 would that accord with anything you know, or would
23 that be a surprise to you?
24 A. I don't think it would be
25 a surprise. But I have already told you I did not

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1 know that number and the emphasis is, of course,
2 on known fatalities because it's not always
3 possible to know whether a ship has hit a right
4 whale or has caused a fatality.
5 Q. If I was to say to you
6 that it's in the transcript that there were four
7 known mortalities --
8 A. Um-hmm.
9 Q. -- between 1970 and 2004,
10 would you disagree with that at all?
11 A. Well, you would need
12 to -- I don't feel I need to disagree. I imagine
13 that's correct, yes. It does not surprise me.
14 Q. Right. So that was one
15 whale mortality every eight and a half years?
16 A. Um-hmm.
17 Q. Assuming that; correct?
18 A. Yes.
19 Q. And that was 33 of those
20 34 years were when the shipping lanes were going
21 directly through the Grand Manan Basin, the
22 conservation areas for right whales; that's
23 correct?
24 A. Yes, that's right and
25 that's why they introduced the change in the

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1 shipping lanes.
2 Q. Right.
3 A. And I acknowledge that
4 that is going to cause a reduction in risk.
5 Q. Yes. So there was, you
6 were correct in your figure, the reported --
7 A. It was 95 per cent?
8 Q. The reported figure by
9 Dr. Smedbol -- do you know that name?
10 A. I didn't know it, but,
11 yes.
12 Q. He was a DFO scientist, a
13 specialist on right whales, a specialist on
14 species at risk. The reported figure was that the
15 shifting of those lanes away from the Grand Manan
16 Basin, so that the lanes were not going through
17 the heart of the right whale conservation area in
18 the Grand Manan Basin, was a reduction of 95 per
19 cent?
20 A. Yes, okay, that's correct
21 then, yes.
22 Q. Have you done the math,
23 ever, to see, comparing right whale mortalities
24 during the period before the shipping lanes were
25 changed to the period after the shipping lanes

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1 some shipping. It adds on to that new baseline.
2 It adds a small amount of risk.
3 Q. Right?
4 A. I acknowledge there was a
5 small amount of risk.
6 Q. It was a minimal risk,
7 wasn't it?
8 A. I am going to say it was
9 a small amount of risk.
10 Q. Would you not agree with
11 me that it was minimal?
12 A. No, I am got going to say
13 it was minimal.
14 Q. Would you agree with the
15 DFO if they said it was minimal; would you accept
16 that?
17 A. Umm, minimal... I prefer
18 the word "small" to "minimal." I mean, I am not
19 sure how much difference there is. "Minimal," to
20 me, suggests that you discount it. To me, it has
21 that kind of pejorative sense. I prefer to say
22 "small."
23 Q. So taking the figure of
24 four right whale mortalities in that 34-year
25 period, and taking what you acknowledge to be the

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1 were changed to calculate in how many years there
2 will be a right whale mortality, based on previous
3 history, and based on the reduction caused by the
4 shipping lane change?
5 A. No, I didn't do that
6 math.
7 Q. Okay?
8 A. And also, to be clear, in
9 my report, I acknowledge that the increase in risk
10 by the added shipping was a small increase. I did
11 not state --
12 Q. It was minimal?
13 A. Minimal, well?
14 Q. You disagree with that?
15 A. Well, a minimal increase?
16 I said a small increase. The estimate was that --
17 it depends I guess when you take your baseline,
18 but the shipping lanes were in place, so the level
19 of risk had been reduced.
20 Q. By 95 per cent?
21 A. I acknowledge that.
22 Q. Yes?
23 A. I acknowledge that.
24 Q. Yes?
25 A. And then the project adds

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1 reduction in risk by the movement of the shipping
2 lanes, we've reduced the risk from four every 34
3 years, one every eight and a half years, by 95 per
4 cent; that's correct?
5 A. Yes.
6 Q. And then the increase in
7 shipping as a result of the Whites Point project
8 being approved would be 6 per cent of rule
9 vessels; isn't that right?
10 A. Yes.
11 Q. Yes. And rule vessels,
12 as you say, are only the large vessels going
13 through the shipping lanes?
14 A. Yes.
15 Q. That is correct?
16 A. Yes.
17 Q. And were you aware of the
18 fact that the shipping lane from the international
19 shipping lane --
20 A. Um-hmm.
21 Q. -- to Whites Point was 13
22 kilometres?
23 A. Umm, I didn't know it was
24 exactly that, but that sounds right, yes.
25 Q. You didn't read any part

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1 of the transcript which said that?
 2 A. Oh, I probably did, but I
 3 don't recall it now.
 4 Q. Okay, okay. So were you
 5 aware when you gave your opinion that the DFO gave
 6 testimony before the JRP regarding that route,
 7 that 13 kilometres from the international shipping
 8 lane?
 9 A. Um-hmm.
 10 Q. To Whites Point Quarry,
 11 was not a known aggregation area --
 12 A. Yes, I remember those
 13 words, yes.
 14 Q. Just let me finish?
 15 A. Sorry.
 16 Q. That area, that 13
 17 kilometres from the international shipping lane to
 18 Whites Point, was not a known aggregation area for
 19 whales of any kind, including right whales?
 20 A. Yes, I believe I saw
 21 those words.
 22 Q. Yes, and that evidence
 23 was given by Dr. Smedbol; isn't that correct?
 24 A. Probably, yes.
 25 Q. The leading expert at DFO

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1 on right whales, their protection, species at
 2 risk, their protection; isn't that correct?
 3 A. Yes.
 4 Q. So not only the movement
 5 of the shipping lanes had reduced the probable
 6 risk of a right whale strike by a rule vessel by
 7 95 per cent, the area between Whites Point and
 8 getting to the shipping lanes was not a known
 9 aggregation areas for right whales; correct?
 10 A. Yes, and may I clarify
 11 that in my understanding of the term "aggregation
 12 area" as an area where whales come together, are
 13 known to come together as they are in the
 14 conservation area, which is a different part of
 15 the bay. But that is not the same as saying that
 16 there will never be whales in that area.
 17 Q. You are not an
 18 oceanographer, I gather?
 19 A. I am not.
 20 Q. What was the evidence
 21 that you saw before the JRP as to whether
 22 small-vessel traffic poses a risk to right whales?
 23 A. Yes, I believe there was
 24 evidence brought forward about that.
 25 Q. Yes.

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1 A. And I believe that is the
 2 case, that as far as they can tell, that there are
 3 some whale injuries and maybe fatalities -- now
 4 that I am really not sure about -- that could be
 5 caused by smaller vessels.
 6 Q. You don't recall the
 7 evidence of Dr. Smedbol where he said that there
 8 is risk to right whales from all vessels, small
 9 pleasure craft?
 10 A. Um-hmm.
 11 Q. And large vessels?
 12 A. Yes --
 13 Q. You remember that?
 14 A. -- I do, and I am pretty
 15 certain that there was also evidence that, as the
 16 size of the vessel and the speed of the vessel
 17 increase, then the risk of mortality increases.
 18 That doesn't wipe out the fact that there is some
 19 risk from smaller vessels.
 20 Q. Do you recall the
 21 evidence from Dr. Smedbol that from 2005 to 2007,
 22 in 2007, and this is the evidence at the JRP --
 23 A. Yes.
 24 Q. In June of 2007, in those
 25 two years, that there were two known right whale

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1 mortalities in that two-year period; do you recall
 2 that?
 3 A. I don't recall it, but I
 4 am sure that you are correct in saying that. In
 5 the Bay of Fundy? Was that how it was defined?
 6 Q. No, in all U.S. and
 7 Canadian waters?
 8 A. Um-hmm.
 9 Q. Yes?
 10 A. Yes.
 11 Q. Does that ring a bell to
 12 you?
 13 A. Yes, I think so.
 14 Q. And do you recall that
 15 both of those fatalities were believed to have, in
 16 one case were certain to have been caused by
 17 pleasure craft?
 18 A. Pleasure craft or
 19 entanglements?
 20 Q. Pleasure craft.
 21 A. Specifically pressure
 22 craft?
 23 Q. Pleasure craft.
 24 A. Okay.
 25 Q. Trauma by pleasure craft.

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1 A. Right.
2 Q. One in Canada, one in the
3 U.S.
4 A. Yes.
5 Q. Were you aware of that?
6 A. That umm... Umm, I am
7 not disputing it.
8 Q. Okay. Were you aware
9 when you wrote your report that it was estimated
10 that there about 2200 or 2300 smaller craft plying
11 the Bay of Fundy, pleasure craft, ferries, other
12 kinds of craft, not rule vessels? Were you aware
13 of that?
14 A. I know that there are a
15 lot of smaller vessels in the Bay of Fundy. I
16 don't dispute that.
17 Q. And that there is a risk
18 that those vessels will also have a collision with
19 a right whale; correct?
20 A. That's correct, and what
21 you are talking about is the cumulative effects
22 that could occur on whales, which is a big concern
23 for environmental assessment.
24 Q. It is a big concern. And
25 it has to be put into perspective; wouldn't you

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1 agree?
2 A. Uh, it should be assessed
3 correctly. And one of my comments in my report
4 was that I did not see evidence that, in fact,
5 there was a thorough cumulative effects assessment
6 done on the effects on whales.
7 Q. So now you know that
8 Dr. Grant, who you have known for 40 years; isn't
9 that right?
10 A. Dr. Grant on the panel?
11 Jill Grant?
12 Q. Yes.
13 A. I have known for how many
14 years?
15 Q. For 40? About. Didn't
16 you first meet her at the Nova Scotia College of
17 Art and Design?
18 A. College of Art and
19 Design? Yes, that would be fair.
20 Q. And Dr. Muecke is also a
21 friend of yours of about 40 years; is that
22 correct?
23 A. Yes.
24 Q. And you met him at the
25 Nova Scotia College of Art and Design; correct?

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1 A. To clarify for the
2 tribunal, as I said in my report, I acknowledged
3 that up front. I was -- my company was Griffiths
4 Muecke for 30 years, my environmental planning
5 consultant company. My business partner was Ann
6 Muecke. Ann is married to Dr. Gunter Muecke.
7 Q. And you have known
8 Dr. Fournier for at least 30 years; isn't that
9 correct?
10 A. Probably, yes.
11 Q. These are three highly
12 qualified, intelligent, capable people; would you
13 agree with that?
14 A. Oh, yes.
15 Q. Dr. Grant is a professor
16 of environmental planning at Dalhousie University,
17 correct?
18 A. Um-hmm. Yes.
19 Q. And has been for many
20 years?
21 A. Yes.
22 Q. Dr. Muecke was a
23 professor at Dalhousie University in geoscience
24 for 30 years; is that right?
25 A. Yes.

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1 Q. And during most of those
2 30, years you were the business partner of his
3 wife; that's correct?
4 A. That is correct.
5 Q. And Dr. Fournier is an
6 oceanography professor at Dalhousie, eminent, if I
7 may say. Has been so for 40 years; that's
8 correct?
9 A. Yes.
10 Q. And you have known
11 Dr. Fournier for at least 30 years?
12 A. I first worked with --
13 first and only time I worked with Dr. Fournier was
14 when he was heading up the task force on the
15 Halifax Harbour clean up.
16 Q. That was in 1989 to 1991.
17 A. Okay.
18 Q. Does that ring a bell?
19 A. Yes.
20 Q. So going back almost 30
21 years?
22 A. Yes.
23 Q. Now just to cover the
24 areas that you have not studied.
25 You are not a biologist;

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1 that's correct?
 2 A. That's correct.
 3 Q. You never published
 4 anything in a peer reviewed article in biology?
 5 A. No.
 6 Q. That's correct? That is
 7 correct?
 8 A. That is correct.
 9 Q. You are not an
 10 environmental studies expert; that's correct? You
 11 don't have a degree in environmental studies and
 12 there are such degrees?
 13 A. No, no I don't.
 14 Q. So you haven't made it
 15 your specialty to specialize in environmental
 16 science or ecology; that's correct?
 17 A. That is correct.
 18 Q. And you said that you are
 19 not an oceanographer. And would you agree with me
 20 that oceanographers study and deal with many
 21 things including ocean habitat management? Would
 22 you agree with that?
 23 A. Umm... Yes, I would
 24 agree.
 25 Q. Would you agree that they

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1 deal with ocean-related eco-systems and
 2 biodiversity?
 3 A. Yes.
 4 Q. Would you agree that they
 5 deal with ocean currents?
 6 A. Yes.
 7 Q. And waves?
 8 A. Yes.
 9 Q. And they deal with
 10 species at risk?
 11 A. I assume that they can
 12 do, yes.
 13 Q. And the geology of the
 14 sea floor? That would be in the area of the
 15 specialty of an oceanographer. Could be?
 16 A. Yes, it could be. You
 17 are listing a whole range of things. I presume
 18 not every oceanographer specializes in all of
 19 those.
 20 Q. Yes, right, right.
 21 And there are also -- can be,
 22 an oceanographer can be an expert in ballast
 23 water; correct?
 24 A. I really don't know.
 25 Q. Do you know whether they

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1 can be an expert in invasive species?
 2 A. Potentially. Perhaps
 3 they could be.
 4 Q. And you are not an expert
 5 in any of those areas; that is correct?
 6 A. That is correct.
 7 Q. And you are not an expert
 8 in the area of shipping or navigation; correct?
 9 A. That is correct.
 10 Q. And you have no
 11 professional scientific expertise in any of the
 12 areas we mentioned so far; that's correct?
 13 A. That's correct.
 14 Q. And you are not a
 15 geologist; correct?
 16 A. That's correct.
 17 Q. And you are not an expert
 18 in geography; right?
 19 A. I am not.
 20 Q. You are not an expert in
 21 whales?
 22 A. No.
 23 Q. Or whale migration;
 24 that's correct?
 25 A. That's correct.

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1 Q. You are not an expert in
 2 the use of explosives; that's correct?
 3 A. No -- I mean, yes, that
 4 is correct.
 5 Q. And you are not an expert
 6 in the effect of blasting on the ocean floor;
 7 that's correct?
 8 A. Correct.
 9 Q. You are not an expert and
 10 have no expertise in the effect of blasting, if
 11 any, on marine mammals; that's correct?
 12 A. That is correct.
 13 Q. Or the effect of blasting
 14 on fish or lobster?
 15 A. Correct.
 16 Q. Or on surface waters,
 17 coastal wetlands or ground water; that's correct?
 18 A. That's correct.
 19 Q. So any opinions or
 20 conclusions we might find in your reports on any
 21 of those areas are not based on your professional
 22 expertise; that's correct?
 23 A. I was asked to prepare
 24 this report. The expertise I bring is my
 25 experience in chairing federal-provincial panels

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1 in which the work of those panels is to reach
2 conclusions in many of those areas that you talk
3 about, depending on the project.

4 Q. So what I've said is
5 correct?

6 MR. SCOTT LITTLE: Mr. Nash,
7 let her finish the question before you ask the
8 next one, please.

9 MR. NASH: I thought she had.

10 MR. SCOTT LITTLE: No, she
11 hadn't. You cut her off.

12 MR. NASH: I didn't think I
13 had, but I apologize.

14 BY MR. NASH:

15 Q. The answer to my question
16 is yes?

17 A. So ask the question
18 again.

19 Q. You don't have any
20 expertise, professional expertise in those areas,
21 and that to the extent your report extends into
22 those areas, either appearing to or actually
23 expressing expert opinions, you are not qualified
24 to give them; is that correct? In those areas
25 that we have covered?

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1 A. I am not purporting to
2 have the scientific or engineering qualifications.
3 However, I am not going to agree with you that I
4 have no ability to give an opinion on these areas
5 because that's what I have to do as a member of a
6 federal-provincial panel when looking at an
7 environmental assessment.

8 Q. You are not in any
9 position to make any scientific conclusions
10 yourself; that is correct?

11 A. No, that would not be my
12 role as a member of a panel.

13 Q. Right, right. So what I
14 have said is correct?

15 A. And if I may --

16 MR. SCOTT LITTLE: Mr. Nash,
17 let her finish her answer.

18 THE WITNESS: And if I may
19 just expand on that, just to say that even
20 scientists who are on panels are not there
21 primarily to give their scientific opinion, where
22 the panel is there as a mixture of people with a
23 mixture of experiences, and we put that all
24 together to reach a conclusion.

25 BY MR. NASH:

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1 Q. So what you're, as a
2 panel member, involved with is receiving the
3 expert opinions of others, the evidence of others
4 and making an assessment of it; correct?

5 A. We receive it, we test
6 it, we explore it, and we make sure -- and this is
7 a key role in a panel -- we make sure we
8 understand.

9 So if a scientist -- I am not,
10 do not have qualification in particular scientific
11 area, I receive, I hear scientific evidence. It
12 is my duty to make sure I understand what is being
13 said and that is a key thing that happens in the
14 hearings, so.

15 Q. And Dr. Grant and
16 Dr. Muecke and Dr. Fournier would be doing exactly
17 the same thing; isn't that right?

18 A. Receiving that
19 information, testing it, asking questions? Yes,
20 and there is plenty of evidence in the hearings
21 they did exactly that. And they did, I think, a
22 thorough job too.

23 Q. And they make
24 determinations; correct?

25 A. They reach conclusions.

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1 Q. Right. And they are very
2 highly educated, capable scientists, Dr. Grant a
3 planner, who were perfectly capable in this
4 instance to make the determinations they had to
5 make? That's correct?

6 A. They certainly have
7 experience and knowledge, yes. I wouldn't
8 question that.

9 Q. And you've never
10 published anything of a legal nature? You have no
11 legal training?

12 A. No.

13 Q. Have you taken any legal
14 courses?

15 A. Oh I probably took, I
16 took one course at Dalhousie Law School when it
17 was Dalhousie Law School in environmental law.
18 That's it.

19 Q. Did you take that course
20 from Dr. Meinhard Doelle?

21 A. No.

22 Q. So just to understand,
23 you are not an expert in statutory interpretation;
24 correct?

25 A. No, I am not.

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1 Q. Had you heard of
2 Mr. Estrin before being involved in this case?
3 A. No, I don't think I did.
4 No.
5 Q. Did you read Mr. Estrin's
6 CV after becoming involved in this case?
7 A. I looked at his CV, yes.
8 Q. Did you recognize his
9 decades of involvement and skills and expertise in
10 environmental law?
11 A. Yes, I saw that in his
12 CV.
13 Q. Did you see that he has
14 been practising environmental law since you were
15 doing your library sciences degree?
16 A. Yes.
17 Q. Did you read that he was
18 the founding editor of the Canadian Environmental
19 Law Reports?
20 A. Yes, I saw that.
21 Q. Would you fairly agree
22 with me that on any matter of law, any legal
23 issue, that you would prefer Mr. Estrin's opinion
24 over yours?
25 A. I would not purport to

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1 you not fairly prefer Mr. Estrin's opinion over
2 yours on any matter at law?
3 MR. SCOTT LITTLE: Mr. Nash,
4 she gave you a response that she wouldn't purport
5 to have a legal opinion.
6 BY MR. NASH:
7 Q. The question was would
8 she prefer -- this is very improper --
9 MR. SCOTT LITTLE: For the
10 legal opinion she didn't have.
11 MR. NASH: It's very improper
12 to have this cross-examination interrupted by
13 counsel when the question has not been answered.
14 I am simply asking the same question again.
15 MR. SCOTT LITTLE: She
16 answered the question.
17 PRESIDING ARBITRATOR:
18 Mr. Little, if it's the methodology of the
19 cross-examiner to ask the same question three
20 times in a row, why not? I think we had similar
21 exercises yesterday. So you probably have no
22 problem with saying "no" three times in a row. So
23 why don't we --
24 THE WITNESS: If I may just
25 say, my understanding is that there could be a

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1 have a legal opinion.
2 Q. So you would prefer
3 Mr. Estrin's opinion over yours on any matter of a
4 legal kind --
5 A. I am not going to say
6 that necessarily. I have indicated that I do not
7 purport to put forward legal opinions. Obviously,
8 Mr. Estrin is an experienced lawyer and he is very
9 well qualified.
10 Q. So you won't agree with
11 me that you, with no legal experience, and
12 Mr. Estrin, with vast legal experience in the
13 environmental law area, that you would not prefer
14 his opinion over yours --
15 A. No --
16 MR. SCOTT LITTLE: Mr. Nash,
17 just if I may, she gave a response saying she
18 would not purport to have a legal opinion. I
19 think that's the response and that's as far as you
20 need to go.
21 MR. NASH: Well, I am not here
22 to be interrupted by Mr. Little. I asked her a
23 question and I don't have an answer.
24 BY MR. NASH:
25 Q. The question was would

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1 variety of legal opinions. This is surely why the
2 tribunal is sitting in this hearing, many legal
3 opinions. So to be asked if I prefer Mr. Estrin's
4 legal opinion, how can I answer that? I will
5 answer it, no.
6 BY MR. NASH:
7 Q. You would not prefer
8 Mr. Estrin's legal opinion over yours; is that
9 what you are saying to me?
10 PRESIDING ARBITRATOR: My
11 impression of the interpretation, Ms. Griffiths
12 was this she didn't need to answer because of the
13 way you asked the question, as a non-lawyer.
14 THE WITNESS: I don't have a
15 legal opinion. Mr. Estrin has legal opinions.
16 You are saying would I prefer, surely I would
17 prefer Mr. Estrin's legal opinion over my
18 non-legal opinion, and I am not going to say that
19 I prefer his opinion because I know there is a
20 variety of legal opinions that are possible.
21 BY MR. NASH:
22 Q. When you were retained on
23 this matter, what documents did you review?
24 A. I reviewed the EIS.
25 Q. The entire EIS, from

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1 beginning to end?
2 A. Again, if you remember
3 when you asked me about the hearing transcripts, I
4 said that I did triage that task to a certain
5 extent because I was not asked to, I had not been
6 asked to redo the panel report in any way.
7 I was asked to focus
8 particularly on federal CEAA factors relevant to a
9 CEAA panel, only a CEAA panel, so obviously that
10 meant that there was some aspects.
11 I scanned the socioeconomic
12 parts of Bilcon's EIS, but I didn't read those in
13 detail. I looked in much more detail at the bio
14 physical.
15 Q. So?
16 A. Do you want me to finish
17 because the question was what documents did I look
18 at? Do you wish me to go through the whole thing?
19 In my report I did list the
20 documents that I looked at.
21 Q. So you would agree with
22 me that you would have expected that those three
23 highly expert JRP members would have read
24 everything?
25 A. Yes, I would expect that.

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1 read many of them, yes.
2 Q. Did you read
3 Dr. Christian's report?
4 A. Dr. Christian's report.
5 Q. Yes, do you remember
6 that?
7 A. No. Remind me, please.
8 Q. You don't remember
9 Dr. Christian's report?
10 A. Can you remind me of the
11 subject, please.
12 Q. Lobster, the effect of
13 blasting on lobster?
14 A. Yes I did, yes I did.
15 Q. You saw his conclusion
16 that the effect of blasting on lobster would
17 likely be negligible?
18 A. Yes, that was his
19 opinion.
20 Q. That was his opinion.
21 And you would have expected that the JRP members,
22 those highly educated experts, would have taken
23 all of the expert opinion and read it carefully --
24 A. Um-hmm.
25 Q. -- synthesized it,

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1 Q. You would have expected
2 them to listen attentively to all of the evidence
3 given in public?
4 A. Oh, I am sure they did.
5 Q. And did you attend the
6 scoping sessions they held?
7 A. No.
8 Q. The four scoping
9 sessions?
10 Was there a transcript of the
11 scoping session that you could read for your
12 benefit for this?
13 A. Well, I did not read the
14 transcript of the scoping -- I am not sure if
15 there was. I did not read the transcript of the
16 scoping sessions. That related mainly to the
17 development of the EIS guidelines.
18 I just accepted the EIS
19 guidelines as a fact. I didn't delve behind
20 those.
21 Q. Did you read all the
22 expert reports that were submitted with the EIS?
23 A. Again, I am going to
24 qualify that. I did not have to -- I considered
25 that it was not relevant for me to read them, I

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1 understood it, and if there was a recommendation
2 to be made in respect to it, they would make such
3 a recommendation; correct?
4 A. Well, that's the big
5 question that's, I think, in front of the
6 tribunal.
7 Q. I am asking you for your
8 expectation, not the question in front of the
9 tribunal.
10 A. That I would expect that
11 they would do that?
12 Q. Yes?
13 A. I would hope that they
14 would do that. But in reality, the report that
15 was prepared seemed to have unfinished material in
16 that.
17 Q. So you would hope that
18 they would go through all this evidence very
19 carefully. You have known them for a long time,
20 many decades. You would expect them to go through
21 all the evidence very carefully; correct?
22 A. I would, and I saw
23 evidence in the hearing transcript. I thought
24 that the questioning that took place in the
25 hearing seemed to be very thorough and of the type

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1 that I would normally expect to see from a panel.
 2 Q. Before you wrote your
 3 first report, did you see DFO's undertaking
 4 response?
 5 A. 31?
 6 Q. Yes.
 7 A. I did.
 8 Q. You did. Did you see all
 9 of the undertaking responses?
 10 A. Yes, I think I read
 11 through all of the undertakings.
 12 Q. Did you read all of the
 13 responses to information requests?
 14 A. Yes, I did.
 15 Q. Would you agree with me
 16 that under the CEAA, deciding whether to --
 17 whether a project was likely to cause significant
 18 adverse environmental effects was central to the
 19 concept and practice of environmental assessments?
 20 A. Yes.
 21 Q. And you would expect that
 22 the panel members in this case would know that as
 23 a matter of course?
 24 A. Yes.
 25 Q. Would you agree with me

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1 that the central test in the CEAA was whether a
 2 project is likely to cause significant adverse
 3 environmental effects?
 4 A. Yes.
 5 Q. And you would expect the
 6 panel members to know that as well?
 7 A. Yes.
 8 Q. You would agree with me
 9 that only environmental effects that were both
 10 likely and adverse would be considered in the
 11 determinations of significance?
 12 A. Yes.
 13 Q. You would agree that the
 14 only environmental effects as defined in the Act
 15 could be considered in determinations of
 16 significance?
 17 A. I am sorry. Would you
 18 repeat that question.
 19 Q. Would you agree with me
 20 that only environmental effects as defined in the
 21 Act would be, could be considered in
 22 determinations of significance?
 23 A. Under CEAA, yes.
 24 Q. Yes. You would agree
 25 with me that the concept of significance cannot be

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1 separated from the concepts of "adverse" and
 2 "likely"; you'd agree with that?
 3 A. That's clear, yes.
 4 Q. You agree with me that
 5 term "likely" applies both to environmental
 6 effects, as the CEAA was, of a project that are
 7 both adverse and significant; correct?
 8 A. Say that again, please.
 9 Q. Would you agree that the
 10 term "likely" applied to environmental effects of
 11 a project that are both adverse and significant;
 12 correct? So there has to be "likely" adversity?
 13 A. There has to be "likely,"
 14 there has to be "significant," there has to be
 15 "adverse."
 16 Q. Yes?
 17 A. Yes.
 18 Q. And there has to be
 19 "likely significance"; you would agree with that?
 20 A. "Likely" is a factor that
 21 has to be, that is part of the terminology, yes.
 22 Q. So the determination is
 23 at least in one respect finding whether there is a
 24 likely significant adverse effect; correct?
 25 A. That's right. And also,

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1 of course, that's bringing in the question of what
 2 do you do when the likelihood is there is
 3 uncertainty around the determination of
 4 likelihood.
 5 Q. That's a different
 6 question.
 7 A. That's a different
 8 question. Okay.
 9 Q. So likely significance is
 10 central to the concept of the CEAA?
 11 A. Yes.
 12 Q. You'd agree with me that
 13 concerns about effects or potential effects are
 14 not a lawful basis for making determinations of
 15 whether effects were likely or significant and
 16 adverse after mitigation; would you agree with me?
 17 A. You better repeat the
 18 question.
 19 Q. Would you agree with me
 20 that concerns about effects or potential effects
 21 that were not a lawful basis for making
 22 determinations of whether effects were likely or
 23 significant adverse effects after mitigation; do
 24 you agree with that?
 25 A. Could you rephrase the

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1 question? I don't think I am disagreeing with
2 you, but you have got to understand that is a
3 complicated question.
4 Q. Okay, I will go slow?
5 A. Okay.
6 Q. Would you agree with me
7 that concerns about effects or potential effects
8 were not a lawful basis for making determinations
9 of whether effects were likely or significant
10 adverse effects after mitigation?
11 A. You're asking me if
12 concerns are equivalent to making a determination
13 of -- expressing concern, is it equivalent to --
14 Q. Yes, that's the essence
15 of the question.
16 A. Yes.
17 Q. You would agree with
18 that?
19 A. I do agree.
20 Q. And significance and the
21 likelihood of adverse environmental effects are
22 determined only after taking into account
23 mitigation measures?
24 A. That's right. It is the
25 significance of residual effects after mitigation

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1 However, the effect might be
2 sufficiently, the extent of the effect or the
3 concern about the effect may be such that even an
4 effect that has low likelihood might still reach
5 the threshold of being an SAEE.
6 Q. You've got a binder in
7 front of you. You may have two. If you could
8 turn to -- there are two volumes -- Volume 1,
9 tab 4.
10 A. Yes.
11 Q. This is the Reference
12 Guide for the Canadian Environmental Assessment
13 Act?
14 A. Um-hmm.
15 Q. "Determining Whether a
16 Project is Likely to Cause Significant Adverse
17 Environmental Effects"; do you see that?
18 A. Yes.
19 Q. You are very familiar
20 with this document?
21 A. I am sorry. Did you just
22 --
23 Q. You are very familiar
24 with this document?
25 A. I am familiar with it,

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1 measures that are known to be economically and
2 technically feasible.
3 Q. And would you agree with
4 me that a responsible authority making
5 significance and likelihood determinations must
6 take into account information and scientific
7 evidence and advice known to the RA?
8 A. Yes.
9 Q. And you would agree with
10 me that if there is a low probability of
11 occurrence of significant adverse environmental
12 effects, then they are unlikely?
13 A. Yes. However, may I --
14 may I --
15 Q. I am just asking you for
16 an agreement on that statement. And I think you
17 have, you would agree with me that if there is a
18 low probability of occurrence of significant
19 adverse environmental effects, then they are
20 unlikely.
21 If you need me to, I can take
22 you to the reference guide from 1994?
23 A. Yes, but what I want to
24 say about that for clarification is that you could
25 have an effect that is of low likelihood.

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1 yes.
2 Q. Could you go to page 193,
3 please. For the record, this is Exhibits C 384
4 and R 20.
5 A. Yes.
6 Q. Under "Probability of
7 Occurrence" on page 193, near the top, it says
8 "probability of occurrence"; do you see that?
9 A. Yes.
10 Q. "If there is a high
11 probability that the
12 identified significant
13 adverse environmental
14 effects will occur,
15 obviously they are
16 likely. Conversely, if
17 there is a low
18 probability of
19 occurrence, the
20 significant adverse
21 environmental effects are
22 unlikely." [as read]
23 A. Yes.
24 Q. You would agree with
25 that?

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1 A. Yes, yes, I agree with
2 that.
3 Q. And you would agree with
4 me that "significant" does not include "minimal";
5 correct?
6 A. That "significant," the
7 meaning of "significant," are you pointing to
8 something in this document?
9 Q. I am just asking you,
10 would you agree with me that the meaning of
11 significance in this context does not include the
12 word "minimal"?
13 A. No, it does not.
14 Q. That's correct?
15 A. That is correct.
16 Q. Do you also agree with me
17 that a high degree of uncertainty cannot be a
18 basis for a clear conclusion of likelihood; would
19 you agree with that?
20 A. So you are saying that if
21 there is a high degree of uncertainty, you could
22 not then say this is a likely effect?
23 Q. Well, let's just go down
24 to the paragraph under "Scientific Uncertainty"?
25 A. Okay.

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1 uncertainty cannot be a
2 basis for a clear
3 conclusion about
4 likelihood. In this
5 case, only the
6 probability of occurrence
7 criterion should be used
8 to determine
9 likelihood."[as read]
10 So the exercise is to
11 determine, is whether the probability of
12 occurrence criterion should be used to determine
13 likelihood, and the guidance says it should; do
14 you agree with that?
15 A. Umm... Do I agree that
16 only the probability of occurrence criterion
17 should be used to determine likelihood?
18 Q. The question is --
19 A. So, if you're -- I think
20 this is quite a challenging paragraph, but it's
21 all directed to what do you do when you have a
22 high degree of uncertainty.
23 Q. Do you agree with the
24 statement in the guide that high uncertainty
25 cannot be a basis for a clear conclusion about

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1 Q. The bottom of that
2 paragraph, three lines up, to the right-hand side,
3 it says "conversely"; do you see that?
4 A. No, I am sorry, I haven't
5 got that.
6 Q. So on the same page, 193?
7 A. Same page.
8 Q. "Scientific Uncertainty,"
9 you see that headline?
10 A. Yes.
11 Q. And that paragraph,
12 towards the bottom of that paragraph?
13 A. Oh, yes, okay. Let me
14 read that, please.
15 Q. Yes. Are you there?
16 A. I am reading the entire
17 paragraph. I think it's important to do. I am
18 not there yet.
19 Yes, so the question, your
20 question was?
21 Q. Just go to the last three
22 lines on the right-hand side. It says
23 "conversely"; you see that?
24 A. Yes.
25 Q. "Conversely high

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1 likelihood; do you agree with the guide when it
2 says that?
3 A. So you can't say that
4 because something is very uncertain, that it is
5 either very likely, that it's likely it will
6 happen or not likely it will happen. I believe
7 that.
8 Q. Well, the words -- every
9 environmental consultant and every member of a
10 CEAA panel and every expert in this area at that
11 time in 2007 went by the 1994 guide; that's
12 correct?
13 A. This is guidance, yes.
14 Q. Yes. And you would
15 expect that the members of the Whites Point JRP
16 would be fully familiar with all of the concepts
17 we have been discussing for the last five minutes;
18 correct?
19 A. Yes, I am still not
20 certain whether you're asking me if, in the case
21 of high uncertainty, you mean that you cannot
22 therefore draw a conclusion about likelihood.
23 Q. I am just asking you
24 whether you agree with the words, Ms. Griffiths,
25 but if you can't, that's not a problem and we will

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1 move on.
2 Would you agree with me that
3 the determination of significance and the
4 likelihood of adverse environmental effects must
5 be made, the determination of significance and the
6 likelihood of adverse environmental effects must
7 be made in accordance with the statute after a
8 panel report has been submitted?
9 A. Yes.
10 Q. So the central role and
11 function of the JRP in this case was to review,
12 analyze, evaluate and assess all of the
13 information brought before it, and to make
14 findings and determinations; that's correct?
15 A. That is correct, that's
16 what the role was.
17 Q. In accordance with its
18 mandate and methodology; that's correct?
19 A. Yes.
20 Q. In the period 2003 to
21 2007, these fundamental principles that we have
22 just been discussing was known to every
23 knowledgeable person with any background of any
24 significance in environmental planning in Nova
25 Scotia and Canada indeed; correct?

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1 additional
2 information."[as read]
3 So that's the cover letter.
4 A. Yes.
5 Q. If you go to page 6, at
6 the bottom of the page under 8.0, "Impact
7 Assessment Methodology." I am going to suggest to
8 you that what follows reflects exactly what we
9 have just been discussing under the 1994 guide.
10 "The panel will determine
11 the likelihood of the
12 project causing
13 significant adverse
14 environmental effects.
15 The panel will use the
16 systematic framework from
17 the Canadian
18 Environmental Assessment
19 Agency Reference Guide
20 --"[as read]
21 That's the document we have
22 just been referring to --
23 " -- determining whether
24 a project is likely to
25 cause significant adverse

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1 A. That's a broad statement.
2 I would assume that it would be well known by most
3 people, yes.
4 Q. Certainly it would be
5 well known by the three panel members on this JRP?
6 A. Yes, I am sure.
7 Q. And these principles are
8 consistent with the JRP's second information
9 request attached to a letter dated July 28, 2006.
10 Did you review that information request?
11 A. I did. You will have to
12 -- are you going to point to this?
13 Q. I am going to take you to
14 it, tab 3.
15 A. Tab 3?
16 Q. Yes. This is, for the
17 record, Exhibit C 549. You will see that it's a
18 letter from the joint review panel dated
19 July 28th, 2006, saying:
20 "Dear Mr. Buxton: The
21 Whites Point Quarry and
22 marine terminal project
23 JRP submits the attached
24 document to you as our
25 second request for

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1 environmental
2 effects."[as read]
3 You would understand that this
4 is the panel explaining to the proponent, this is
5 what we are --
6 A. Yes, yes. I understand
7 that.
8 Q. "The panel will assess
9 predicted residual
10 effects, the effects that
11 remain after mitigation,
12 through the application
13 of a combination of
14 criteria that are
15 appropriate to each
16 potential effect. The
17 criteria will normally
18 include the magnitude,
19 geographical extent and
20 duration of the effect,
21 and may also include the
22 frequency, reversability
23 and ecological context.
24 Each effect will
25 therefore be described in

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1 terms of a combination of
2 factors."[as read]
3 A. Yes.
4 Q. "The panel will determine
5 what would constitute a
6 significant effect on an
7 environmental component
8 using these same
9 parameters."[as read]
10 And, again, you would take
11 that as being the panel instructing the
12 proponents --
13 A. Yes.
14 Q. -- this is what we are
15 going to do?
16 A. Yes.
17 Q. And down to the following
18 paragraph:
19 "If the panel determines
20 that a component of the
21 project could cause a
22 significant adverse
23 environmental effect on
24 an environmental
25 component, it will then

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1 decide whether this
2 effect is likely by
3 determining the
4 probability of the
5 occurrence and the
6 scientific certainty
7 associated with the
8 prediction."[as read]
9 You'd agree that, again, the
10 panel is saying to the proponent, this is what we
11 are going to do?
12 A. Yes.
13 Q. And you would agree that
14 these three people, Dr. Grant, Dr. Muecke and
15 Dr. Fournier, knew exactly what they were doing in
16 setting that out?
17 A. I assume they did.
18 Q. Yes, and they were well
19 qualified to do so; wouldn't you agree?
20 A. Well qualified to write
21 these words?
22 Q. Yes, and to go through
23 that assessment with that methodology in mind?
24 A. They were very well
25 qualified panel members, yes.

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1 Q. Now, you understand that
2 DFO was the RA for the Whites Point project?
3 A. Yes.
4 Q. You understood in 2007
5 that DFO's mandate, and you understand this today,
6 included the promotion of a sustainable fishery?
7 A. Yes.
8 Q. That it was responsible
9 for oceans and habitat management?
10 A. Yes.
11 Q. That it was in 2007
12 responsible for the protection of fish and fish
13 habitat?
14 A. Yes.
15 Q. And the management of
16 fish?
17 A. Yes.
18 Q. That was it in 2007
19 responsible for maintaining safe and accessible
20 waterways?
21 A. Yes.
22 Q. And you would also agree
23 the DFO was and is responsible for conducting
24 scientific research related to oceans and
25 fisheries; correct?

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1 A. Yes.
2 Q. Including scientific
3 research related to marine mammals and lobsters?
4 A. Yes.
5 Q. You are aware the DFO
6 employs hundreds of scientists and engineers who
7 are experts in matters related to the oceans?
8 A. Yes.
9 Q. Including oceanographers,
10 physicists, biologists, shellfish biologists and
11 invertebrate biologists; correct?
12 A. I assume they do, yes.
13 Q. You are aware today that
14 DFO employs about 25 scientific experts
15 specializing in the study of marine mammals and
16 lobsters; is that right?
17 A. I do not know those
18 numbers, but that sounds quite possible.
19 Q. Sounds about right?
20 A. Yes.
21 Q. You are aware that DFO
22 scientists, including its experts on marine
23 mammals and lobsters, provide scientific advice to
24 government decision makers on ocean-related
25 matters?

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1 A. Yes.
2 Q. You are familiar with the
3 Bedford Institute of Oceanography, located in
4 Halifax?
5 A. Yes, I am.
6 Q. It's an agency of the
7 Government of Canada?
8 A. Yes.
9 Q. You are aware the Bedford
10 Institute is Canada's largest centre for ocean
11 research?
12 A. Yes, I believe I know
13 that.
14 Q. You are aware that the
15 institute has been a major centre for
16 oceanographic research for 60 years?
17 A. Yes.
18 Q. Are you aware the Bedford
19 Institute in Halifax employs hundreds of
20 scientists and engineers who study and opine on
21 matters related to the oceans?
22 A. Yes.
23 Q. Are you also aware that
24 there are other ocean-related research centres
25 across the country, including the Maurice

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1 Lamontagne Institute in Quebec, the Pacific
2 Biological Centre in Nanaimo, the St. Andrews
3 Biological Centre in New Brunswick, and the
4 Northwest Atlantic Fishery Centre in Newfoundland?
5 You're aware of that?
6 A. I am aware of all those.
7 Q. You are aware that
8 Dr. Smedbol was leading researchers at the
9 St. Andrews Biological Centre in New Brunswick?
10 A. Yes, I believe I remember
11 that.
12 Q. And you would agree, of
13 course, that the DFO scientists are a more
14 reliable source of scientific information than
15 you; correct?
16 A. Yes, I would agree with
17 that.
18 Q. You also agree that for
19 scientific information and any opinions involving
20 fisheries and oceans, you would defer to the
21 scientists at DFO?
22 A. Ah... To an individual
23 scientific opinion, I would accept that opinion.
24 Obviously, I am not a scientist. Yes.
25 Q. Were you aware that by

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1 June 9th, by the time you wrote your first report,
2 signed it, that in the years leading up to the JRP
3 report in October 2007, DFO had analyzed and
4 opined on the possible effects of the Whites Point
5 Quarry? Were you aware of that?
6 A. I am sorry, can you
7 repeat that?
8 Q. Yes.
9 A. You mean other than the
10 material that was put on the record during the
11 environmental assessment for the Whites Point
12 Quarry?
13 Q. So you were only aware of
14 what they put on the record at the Whites Point
15 Quarry?
16 A. Yes, I would say I am
17 only aware of that.
18 Q. Were you aware that
19 Dennis Wright -- are you familiar with the name
20 Dennis Wright?
21 A. No, I am not.
22 Q. Dennis Wright wrote the
23 document Guide for Blasting In or Near Canadian
24 Waters. Have you ever looked at that guide?
25 A. I am familiar with the

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1 guide, yes.
2 Q. And are you aware -- I
3 gather you are not -- that Dennis Wright was the
4 co-author of that document?
5 A. No.
6 Q. Were you aware that when
7 you wrote your opinion, that Dennis Wright had
8 been consulted with respect to a blasting plan for
9 the Whites Point Quarry and opined on mitigation
10 matters; were you aware of that?
11 A. Yes, I am aware that that
12 happened, yes.
13 Q. You are aware that that
14 happened?
15 A. Yes.
16 Q. How did you become aware
17 of that?
18 A. Uh... I believe it was
19 in the record, that it was referenced that -- and
20 believe there's some correspondence, now I think
21 of it, there is some correspondence in the record
22 with DFO with respect to the blasting plan.
23 Q. Were you aware that it
24 was Dennis Wright, the DFO expert, who said that a
25 100-metre setback would be a proper mitigation

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1 with respect to the danger to right whales and
2 lobster?
3 A. Umm...
4 Q. Well, actually I correct
5 that. Not lobster, iBoF, Inner Bay of Fundy
6 salmon and endangered species?
7 A. He may have said that,
8 yes.
9 Q. Were you aware by
10 October 2007 that the DFO had analyzed the
11 effects, if any, of shipping to and from Whites
12 Point, the effect of marine mammals?
13 A. Umm... You mean in some
14 documentation that was not put before the panel,
15 that was not on the record?
16 Q. Leaving aside the record,
17 are you aware of anything other than the record
18 before the JRP?
19 A. My familiarity is, which
20 is not total, but my familiarity is with the
21 record.
22 Q. You opine that the JRP
23 could have reasonably concluded that the project
24 would have likely resulted in significant adverse
25 environmental effects on the right whale and the

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1 American lobster from shipping and blasting.
2 That's your opinion; correct?
3 A. I think you mean -- are
4 you reading from the final part, can you draw my
5 attention to the --
6 Q. Is that opinion, that's
7 your -- I am saying that's your opinion. Does
8 that accord with your understanding?
9 A. I would like to see -- if
10 you are quoting from my report I would like to
11 know where that is, please. Otherwise I would
12 like to go to the two separate sections, to whales
13 and lobsters. I think it would be clearer.
14 Q. I will just direct you to
15 your first report, page 30, paragraph 64.
16 A. Page 30?
17 Q. Page 30, paragraph 64.
18 And I am at the top of page 30. You say:
19 "I considered the likely
20 environmental effects of
21 the Whites Point project
22 on the endangered North
23 Atlantic right whale, the
24 American lobster, surface
25 water on the quarry site

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1 and migratory birds. On
2 my review of the record,
3 I am of the opinion that
4 the JRP could have
5 reasonably concluded that
6 the project would have
7 likely resulted in
8 significant adverse
9 environmental effects on
10 the right whale and the
11 lobster taking into
12 account proposed
13 mitigation." [as read]
14 That is your opinion; correct?
15 A. That's my opinion, and I
16 explain my opinion in the later sections.
17 Q. Right. Now, we have
18 spoken about the international shipping lanes.
19 You are familiar with the Grand Manan Basin, the
20 conservation area for right whales?
21 A. Yes.
22 Q. Do you recall that 11 DFO
23 officials appeared before the JRP?
24 A. I didn't count them, no.
25 Q. Do you recall that on

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1 June 20th, 2007, Mr. Mike Murphy was in attendance
2 as a delegate from the DFO, and he was the acting
3 regional director of Oceans and Habitat?
4 A. Yes, I think so.
5 Q. Do you recall Mr. Ian
6 Marshall attending? He was the area director for
7 southwestern Nova Scotia?
8 A. Yes, I think I saw their
9 names.
10 Q. And Dr. Smedbol, you
11 remember being in attendance?
12 A. Yes.
13 Q. And you're aware today
14 that he is the DFO Population Ecology Divisions
15 manager at St. Andrews; do you remember that?
16 A. Yes.
17 Q. He leads the species at
18 risk research group at the biological station;
19 correct?
20 A. Yes, I think so.
21 Q. And his specialty -- you
22 may not know this -- is in the dynamics of at-risk
23 species. Do you know that?
24 A. No.
25 Q. That one of his

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1 specialties is national species at risk issues in
2 support of policy development, management and the
3 provision of science advice?
4 A. Um-hmm.
5 Q. Does that ring true?
6 A. Probably, yes.
7 Q. And another of his
8 specialties is the recovery for the endangered
9 North Atlantic right whale?
10 A. Yes.
11 Q. Are you aware that he was
12 DFO's leading scientist on recovery for the
13 endangered North Atlantic right whale? Are you
14 aware of that?
15 A. Yes, I believe so.
16 Q. Did you make any
17 inquiries of Dr. Smedbol regarding the past and
18 present risks to whales, including the risk of
19 fishing gear entanglements in preparation for
20 writing your report?
21 A. Did I make inquiries?
22 Q. Yes.
23 A. No, my process that I
24 used to provide this report is very clear in the
25 report. I read substantive significant sections

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1 of the record and on the record I gave an opinion.
2 I did not interrogate in any way anybody who was
3 involved in the process.
4 Q. And you took into account
5 and relied upon for your conclusions in your
6 second report the witness statement of Mark McLean
7 given in this proceeding; is that correct?
8 A. I allude to that witness
9 statement, yes.
10 Q. And you rely upon it;
11 correct?
12 A. I think it's additional
13 evidence.
14 Q. Yes?
15 A. Yes, but it was not -- my
16 original conclusion was drawn on the material that
17 was in the record on the public registry for the
18 Whites Point Quarry assessment. That's the
19 primary source.
20 Q. Did you test the
21 reliability of the Mark McLean witness statement
22 and the evidence attached to it and referred to in
23 it?
24 A. Did I test it?
25 Q. Yes.

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1 A. No.
2 Q. You didn't attempt to
3 verify it independently?
4 A. No, but I -- no, I
5 didn't.
6 Q. Do you recall that
7 Dr. John Tremblay, a PhD from 1992 and another
8 widely published DFO research scientist, who was
9 in 2007 at the Population Ecology Division at the
10 Bedford Institute, had appeared before the JRP;
11 did you read that he was there?
12 A. Sorry, repeat the name?
13 Q. Dr. John Tremblay?
14 A. Yes, I saw the name, yes.
15 Q. Are you aware that today
16 he is the DFO research scientist who is the head
17 of DFO's Atlantic Coast Crustacean Section and
18 Lobster Unit?
19 A. That may be the case.
20 Q. Yes. Did you see from
21 the JRP public transcript that Dr. Norman
22 Cochrane, who has been a PhD since 1973, and is
23 today a DFO research scientist in the Ocean
24 Physics Section at the Bedford Institute was also
25 part of the DFO delegation to the JRP?

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1 A. Yes, I saw all those
2 names.
3 Q. And David Miller, who is
4 the species at risk coordinator for Oceans and
5 Habitat?
6 A. Yes.
7 Q. And Tony Henderson, who
8 was in 2007 a DFO specialist habitat assessment
9 biologist?
10 A. Yes.
11 Q. Did you see Mark McLean's
12 name as being a member of the DFO delegation to
13 the JRP, the Whites Point JRP in June of 2007?
14 A. I believe he was, yes.
15 Q. You saw his name in the
16 transcript as a delegate?
17 A. Did I not see it in the
18 transcript? I don't know.
19 Q. You don't know. Okay.
20 And in 2007, did you know at
21 that time that Mark McLean was an environmental
22 analyst at DFO?
23 A. No, I don't know what
24 role he had.
25 Q. I'd like you to go,

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1 please, to tab 5. Which is a document provided in
2 response to undertaking 31 by DFO?
3 A. Yes.
4 Q. You have seen this
5 document before?
6 A. Yes, I have.
7 Q. At the bottom of
8 page 2620.
9 A. Yes.
10 Q. You understand that DFO
11 was asked by the JRP to provide their comments on
12 the risks to various species at risk?
13 A. Yes.
14 Q. And that one -- and they
15 cover a number of species here -- but there is a
16 section on marine mammals and turtles; do you see
17 that?
18 A. Yes.
19 Q. And do you see that there
20 is reference under "Species Information" that:
21 "The North Atlantic right
22 whale is a large blue
23 whale that occupies the
24 Bay of Fundy from at
25 least June to October,

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1 sometimes arriving
2 earlier or remaining
3 later."[as read]
4 A. Yes.
5 Q. "Grand Manan Basin is
6 considered an important
7 aggregation area and was
8 recently identify by DFO
9 science as probable
10 critical habitat for the
11 species. Right whales
12 are not commonly found in
13 the immediate vicinity of
14 the quarry. There are no
15 recorded sightings in the
16 3-minute survey grid
17 cells immediately
18 adjacent to the site."[as
19 read]
20 Now, if you take that in
21 combination with the evidence I brought to your
22 attention earlier that Dr. Smedbol said there was
23 no -- the 13-kilometre area from the quarry to
24 shipping lanes was not a known aggregation for
25 whales, would you conclude that there were whales

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1 not in the vicinity of that site?
2 A. No, I would not conclude
3 that.
4 Q. You would come to a
5 different conclusion that Dr. Smedbol?
6 A. No, I would agree with
7 Dr. Smedbol if he's saying it's not a known
8 aggregation area. The Grand Manan Basin is an
9 aggregation area.
10 However, there was evidence
11 brought before the panel that there are whales
12 throughout the lower Bay of Fundy.
13 They don't necessarily
14 aggregate, but individual whales or whales with
15 calves are found throughout that area, not in the
16 same density as you would find in the Grand Manan
17 Basin.
18 And there was also evidence
19 brought before with local residents and whale
20 watching operators, I believe, who said they have
21 seen whales in that area, not in huge numbers but
22 they are still present.
23 And we are talking about a
24 quarry that would be operating for 50 years, so
25 the likelihood of whales being in that area at

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1 times during the 50 years, I think, is quite
2 reasonable.
3 Q. Are you aware of any
4 studies that have found that blasting on land has
5 caused any right whale mortality?
6 A. I am not aware of
7 studies, but the lack of studies does not mean
8 there have not been adverse effects on whales.
9 Q. If you go over to the
10 second page, 2621, the next page, it starts out
11 under "Vessel Strikes":
12 "Right whales are known
13 to be especially
14 susceptible to vessel
15 strikes."[as read]
16 And it goes on.
17 And then go down to the last
18 four lines of that paragraph. DFO is saying:
19 "Nonetheless, given the
20 location of the quarry,
21 outside the main
22 aggregation area for
23 right whales, the
24 relatively small amount
25 of vessel traffic

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1 expected, and taking into
2 account the proposed
3 mitigation measures, the
4 potential for lethal
5 vessel strikes associated
6 with the quarry is
7 considered low."[as read]
8 A. Yes, and nothing in my
9 reports contradicts that. I did not -- I
10 acknowledge that the effect was low and I brought
11 it into my opinion in the context of being one of
12 the things contributing to cumulative effects on
13 whales, a low increase, nonetheless, an increase.
14 Q. A low likelihood?
15 A. Low likelihood that one
16 of the vessels coming to the project would strike
17 a whale? Yes, I would agree with that.
18 Q. Yes.
19 A. However, not a nil
20 likelihood.
21 Q. So your criteria for
22 whether there should be shipping in the Bay of
23 Fundy is that if there is any risk of a ship
24 striking a North Atlantic right whale there should
25 be no shipping?

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1 whales were, four whale mortalities -- if you had
2 a very large population, you might say ah, four
3 whales were killed during that period.
4 But in the context of a very
5 endangered species, a very low population, four
6 whales is nonetheless quite a concern.
7 Q. Yes, so in order to
8 completely protect that very rare species, you
9 would really have to stop all shipping because
10 there's always a possibility; isn't that correct?
11 A. Uh, uh, yes, well I
12 didn't conclude that all shipping should be
13 stopped. I mean, we are seeing now that there is
14 new regulations being brought in. They are not
15 stopping shipping, but they are talking about
16 lowering the speed still further.
17 But, you know, that's not --
18 that has happened since I wrote my report.
19 Q. That has happened since
20 you wrote your report?
21 A. Yes, yes. And there have
22 been a lot of whales killed since I wrote my
23 report, I might add.
24 Q. Yes, exactly. And they
25 haven't been in the Bay of Fundy; isn't that

Page 798

1 A. No, I did not say that in
2 my report.
3 Q. Isn't that the logical
4 extension of what you are saying?
5 A. No, that's not a logical
6 extension.
7 Q. If it's very low
8 likelihood and there's very, there's only been
9 four whale mortalities in the Bay of Fundy in 34
10 years and that reduction -- that was reduced by a
11 95 per cent factor, isn't that a very low
12 likelihood, in your opinion?
13 A. There was agreement, I
14 think, that I reflect, and I don't think that that
15 was challenged during the -- that the increase in
16 shipping would be approximately 6 per cent.
17 And I acknowledge that that
18 would be a low increase. Nonetheless, it will be
19 a small increase. Nowhere did I state that if
20 there is going to be an increase in shipping
21 caused by the project, that that is a reason why
22 the project should not go ahead.
23 I put that in the context of
24 the cumulative stresses and effects on the whale.
25 And you are saying, you know, when you say four

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1 correct?
2 A. No, which is interesting.
3 Q. Yes, it is very
4 interesting.
5 Are you aware of the
6 scientific evidence that's been produced which
7 shows that the right whale population is migrating
8 north to the Gulf of St. Lawrence and towards
9 Newfoundland, and that there were 12 right whale
10 mortalities last summer.
11 Nine of them were in the
12 St. Lawrence -- sorry, the Gulf of St. Lawrence
13 and three of them were near Newfoundland. Were
14 you aware of that?
15 A. I am aware of where the
16 mortalities took place.
17 Q. Yes?
18 A. I have heard the theory,
19 and I don't think that you and I should be
20 debating this without something in front of us,
21 and that's for other people to discuss anyway, but
22 I have heard the theory that climate change may be
23 causing whales to travel further afield in search
24 of their food supplies.
25 I have heard that theory. I

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1 think it is still at the level of a theory.
 2 Q. Have you heard the fact
 3 that there hasn't been a right whale mortality in
 4 the Bay of Fundy in 13 years?
 5 A. I don't know that, but I
 6 am not surprised --
 7 Q. Since the shipping
 8 lanes --
 9 A. Since the shipping lanes.
 10 Q. Since the shipping lanes
 11 were changed, there hasn't been one mortality in
 12 the Bay of Fundy in 13 years?
 13 A. I have to come back to my
 14 report. You are quizzing me as though I had said
 15 that the shipping by itself is a significant
 16 adverse environmental effect. I didn't. I
 17 brought it in as one of the added stresses in
 18 terms of the cumulative effect on whales.
 19 My main conclusion was based
 20 on the uncertainty around the effects of blasting
 21 on whales, which could be whales' behaviour, and
 22 that is taking into account the proposed
 23 mitigation, about which there was a lot of
 24 discussion during the hearings.
 25 And DFO participated during

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1 that discussion, and did not give that mitigation
 2 measure carte blanche.
 3 Q. And what they did say, if
 4 you recall, is that if shipping -- ships went from
 5 Whites Point into the Bay of Fundy and into the
 6 shipping lanes --
 7 A. Yes.
 8 Q. There was a low chance of
 9 a shipping collision. It was not zero, but very
 10 low. Do you recall that, Dr. Smedbol saying that?
 11 A. Yes, and can I just say
 12 that my understanding is the risk was probably not
 13 between the marine terminal and the shipping lanes
 14 because the vessels would be going at a lower
 15 speed. I understand that.
 16 Q. You understand?
 17 A. Yes, but you are adding
 18 shipping into the shipping lanes, where ships are
 19 travelling at their normal speeds. And that is
 20 where the main risk is, when those large ships are
 21 travelling at speed.
 22 Q. So when there are four
 23 whale mortalities over 34 years and there are none
 24 since the shipping lane change, and there is a 95
 25 per cent reduction as a result of the shipping

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1 lane change, that is 1 in 175 years. Did you do
 2 that math?
 3 A. No, I didn't do that math
 4 and I would need to go away and, I am not going to
 5 agree with that math. You may well be right. But
 6 those sorts of statistics require careful
 7 consideration.
 8 I just have to repeat I did
 9 not base my suggestion that there could have been
 10 a finding of SAEE solely on the risk from ships.
 11 I was very moderate in my assessment of that risk.
 12 I don't really disagree with
 13 things you are saying regarding the risk. There
 14 is an increased risk. If you increase the amount
 15 of shipping, there is an increase in the risk.
 16 Q. You would agree it is a
 17 very, very, very small risk?
 18 A. I think 6 per cent, I
 19 used the proponents' figures. If there's
 20 something different?
 21 Q. They are DFO's figures
 22 too.
 23 A. Hmm?
 24 Q. They are DFO's figures
 25 too.

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1 A. The 6 per cent increase?
 2 Q. Yes?
 3 A. Yes.
 4 Q. It's very, very, very
 5 small.
 6 A. Well it's a 6 per cent
 7 increase, you know --
 8 MR. SCOTT LITTLE: Mr. Nash,
 9 let her finish the answer, please.
 10 THE WITNESS: Well, I really
 11 probably have already spoken to this. I don't
 12 think I have any more to say. It's a low risk, I
 13 acknowledge it. It is, however, one of the
 14 factors.
 15 When you are dealing with a
 16 highly endangered species, it's not the one thing,
 17 it's the combination of all the stresses on that
 18 animal, on that population. That's clear.
 19 BY MR. NASH:
 20 Q. Including fishing gear
 21 entanglement?
 22 A. Oh, absolutely.
 23 Q. Fishing gear entanglement
 24 is responsible for a great number --
 25 A. I don't dispute that.

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1 Q. You don't dispute that?
2 A. I don't dispute that.
3 Q. Are you aware scientists
4 have being working for many years to try to find
5 different fishing gear in order to reduce
6 mortalities of right whales caught up in fishing
7 gear?
8 A. Yes, I am aware of that.
9 Q. Are you aware of the
10 evidence of Dr. Smedbol that there were 20 known
11 right whale mortalities between 1970 and 2006
12 caused by shipping in the U.S. and Canadian
13 waters, and that there were 20 known or suspected
14 mortalities of right whales caused by fishing gear
15 entanglements? Were you aware of that?
16 A. I couldn't have quoted
17 that to you; I am not surprised by that. So the
18 figures are you suggesting to me is that there was
19 equivalent risks.
20 One should always be very
21 careful that these are only known mortalities.
22 And we do not know all the mortalities that may be
23 affecting whales. It's very difficult to keep
24 track of that.
25 Q. Very difficult.

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1 am telling you I do not know in the case of Dr.
2 Grant.
3 PRESIDING ARBITRATOR: I think
4 I promised a second, although a short second
5 break. Could you indicate because we have 1 hour,
6 15 minutes left to the lunch break, when that, if
7 we could in your --
8 MR. NASH: This would be a
9 perfect time.
10 PRESIDING ARBITRATOR: Right
11 now?
12 MR. NASH: Right now.
13 PRESIDING ARBITRATOR: Okay,
14 so can we have a disciplined 10-minutes break in
15 the sense that we resume the examination at 5 to
16 12, please.
17 --- Upon recess at 11:47 a.m.
18 --- Upon resuming at 11:58 a.m.
19 PRESIDING ARBITRATOR: We will
20 resume the exercise.
21 Mr. Nash, please continue.
22 MR. NASH: Thank you, Judge
23 Simma.
24 BY MR. NASH:
25 Q. Going back to Tab 5, the

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1 Now, I am just going to go
2 back to our three eminent JRP members. None of
3 them are neophytes in environmental assessment;
4 correct?
5 A. Dr. Muecke certainly had
6 been experienced. He was a member of the Ken --
7 Ken matter -- I know this, I know this so well,
8 it's not coming to me. Anyway, he was a member of
9 that panel that didn't go completely through to a
10 hearing.
11 So Dr. Fournier had chaired
12 the table.
13 Dr. Grant? I don't know what
14 her experience was in assessment.
15 Q. She once worked for you
16 as a consultant for your firm Griffiths Muecke;
17 isn't that right?
18 A. It doesn't mean that she
19 was, had experience in environmental assessment.
20 Q. She was an environmental
21 planner. She was a professor of environmental
22 planning?
23 A. Well, that's not the same
24 thing as environment -- you asked me if all three
25 were three experienced environmental assessors. I

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1 page we were on, 2621 in Tab 5.
2 Under the title "Shipping
3 Noise".
4 "The increase in shipping
5 noise -- in the second
6 sentence of that
7 paragraph -- in right
8 whale habitat associated
9 with this project is
10 expected to be minimal
11 due to the relatively
12 small increase in traffic
13 and the location of the
14 quarry. Nonetheless,
15 monitoring of shipping
16 noise is recommended if
17 the project proceeds."[as
18 read]
19 You read those words before
20 you wrote your opinion?
21 A. Yes, I did, and I made
22 no -- reached no conclusion about shipping noise.
23 I did not address shipping noise.
24 Q. And you did address
25 blasting; right?

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1 A. I did address blasting.
2 Q. Yes. So if we go below
3 to that paragraph under "Blasting", the
4 proposed -- second sentence, actually, let's just
5 go from the top:
6 "Based on the available
7 modeling data, it is
8 believed that physical
9 harm to marine mammals
10 could occur within
11 500 meters of a blast.
12 The proposed mitigation
13 (monitoring a safety zone
14 for marine mammals prior
15 to blasting) is expected
16 to substantially reduce
17 the risk of a blast
18 occurring while a whale
19 is within a 500-meter
20 radius during good
21 weather conditions.
22 Given the location of the
23 quarry and the frequency
24 of blasting, physical
25 harm to right whales is

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1 considered very
2 unlikely."[as read]
3 Do you see that?
4 A. "If mitigation is applied
5 rigorously".
6 Q. Rigorously, within the
7 500-meter zone; correct?
8 A. Physical harm, those are
9 the key words, physical harm, very unlikely if
10 mitigation is applied rigorously.
11 Q. Right:
12 "Although sound modeling
13 beyond 500 meters has not
14 been provided, it is
15 believed that behavioural
16 effects to marine mammals
17 could occur outside this
18 zone."[as read]
19 So there's a possibility:
20 "The ability of the
21 proponent to monitor a
22 safety zone larger than
23 500 meters is uncertain,
24 and therefore behavioural
25 effects to right whales

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1 are considered possible.
2 However, these effects
3 would not necessarily be
4 adverse."[as read]
5 So there's a possibility of an
6 effect.
7 A. Yes.
8 Q. And the effect is not
9 necessarily adverse; do you agree with that?
10 A. Yes, I agree that it's
11 written here, yes.
12 Q. "Harmful effects are
13 considered unlikely, but
14 the confidence associated
15 with this conclusion is
16 low. Monitoring a
17 representative blast
18 prior to the arrival of
19 right whales would help
20 to improve the confidence
21 associated with these
22 effects predictions."[as
23 read]
24 So --
25 A. Did you have a question

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1 about this last sentence in particular?
2 Q. I am just asking if you
3 were aware of that before --
4 A. Am I aware of this
5 document?
6 Q. Yes.
7 A. I read that document,
8 yes.
9 Q. You read that document.
10 And took it into account in writing your opinion?
11 A. Yes.
12 Q. Yes, okay.
13 A. That and other opinions
14 from DFO.
15 Q. Just going back to the
16 math, four right whales over 34 years, one at
17 every eight and a half years, reduced by 95 per
18 cent, so what's left is 5 per cent. Would you
19 agree with me that that would be a risk of one
20 right whale mortality in 175 years?
21 A. No, I am not going to
22 give an opinion on that because I think it's a
23 more complicated issue than that. I would just
24 stay with my statement that, in my report, I don't
25 draw my conclusion based on the additional risk.

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1 I just say it's a small additional risk, and it
2 plays into the cumulative effects, potential
3 cumulative effects. I am just going to leave it
4 at that. I am not going to give an opinion on the
5 statistics.

6 Q. And the JRP members,
7 though, were in a position to conduct that
8 analysis; correct?

9 A. In a position in what
10 sense?

11 Q. To do the math --

12 A. They were there hearing,
13 if they wanted to --

14 Q. -- they heard the whole
15 thing?

16 A. They heard it, yes.

17 Q. They heard all the
18 evidence.

19 A. Yes.

20 Q. They had all the DFO
21 evidence?

22 A. They could draw
23 conclusions.

24 Q. Yes.

25 A. They were in a position

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1 to draw conclusions, however they might wish to do
2 that, yes.

3 Q. Yes. And you wouldn't
4 dispute that they fully understood the importance
5 of the significance analysis and the likelihood
6 analysis?

7 A. One would hope.

8 Q. That they were fully
9 capable of understanding the analytical process of
10 making determinations of significance and
11 likelihood?

12 A. They should have been,
13 yes.

14 Q. And to make
15 determinations of significance and likelihood?

16 A. I am sorry, what was the
17 last question?

18 Q. That they were fully
19 capable, these very highly intelligent,
20 well-educated experienced people, who heard all of
21 the evidence, who created guidelines, who read the
22 EIS, who went through four scoping sessions --

23 A. Yes, they could draw
24 conclusions, yes.

25 Q. Yes. They were highly

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1 capable of drawing --

2 A. They were, yes.

3 Q. -- conclusions according
4 to the criteria set out in the guide of 1994;
5 that's correct?

6 A. Yes, they were capable of
7 doing that.

8 Q. They didn't lack any
9 capacity to do that?

10 A. They did not lack
11 capacity.

12 Q. Great. And this is not
13 something they would just forget to do, you
14 wouldn't expect; that's correct?

15 A. I doubt if they'd forget
16 to do it. They might choose for some reason not
17 to do it, but I don't wish to go in that
18 direction. That would be hypothesizing. I don't
19 know what was going on when they made decisions in
20 terms of what they put in their report and what
21 they did not. However --

22 Q. You were not part of
23 their deliberations; that's correct?

24 A. No, of course not.

25 Q. So you don't know what

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1 they deliberated about in the three and a half
2 months between the end of the hearing and the
3 issuance of their report?

4 A. No, and I think
5 speculation about that is not helpful or proper.
6 With any panel, you just have to go with what's in
7 the report. The report speaks for the panel's
8 work.

9 Q. Right.

10 A. And, umm...

11 Q. Did you speak to any
12 member of the JRP about any aspect of the project
13 during the period 2003 to 2007?

14 A. No, I did not.

15 Q. Are you familiar with an
16 organization called East Coast Environmental Law?

17 A. Yes, I worked for East
18 Coast Environmental Law for a period of just over
19 a year, I think it was, yes, as a part-time
20 executive director.

21 Q. And East Coast
22 Environmental Law was founded by Professor
23 Meinhard Doelle?

24 A. Yes.

25 Q. And he is a professor of

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1 environmental law at Dalhousie University?
 2 A. Yes.
 3 Q. And you served with
 4 Dr. Doelle on the Lower Churchill JRP?
 5 A. That's correct.
 6 Q. And East Coast
 7 Environmental Law was founded in 2007 by Professor
 8 Doelle; correct?
 9 A. Yes.
 10 Q. He was its working
 11 chair -- it's founding chair? Sorry.
 12 A. Yes, I think so.
 13 Q. And East Coast
 14 Environmental Law is an environmental legal
 15 advocacy group which provides legal and advocacy
 16 support to opponents of certain environmental
 17 projects; that's correct?
 18 A. That's your description
 19 of them. I don't think it's how ECELAW, if I can
 20 say ECELAW, that's how I know them, the acronym
 21 ECELAW, that's not how they necessarily describe
 22 them. If you are saying that's what they do
 23 sometimes, I believe it is, yes.
 24 Q. You would agree with
 25 that, that they go to court --

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1 A. Yes, he would be there.
 2 Q. You are a colleague and
 3 friend of Dr. Doelle?
 4 A. I am, yes.
 5 Q. You were a supporter of
 6 East Coast Environmental Law?
 7 A. Before I was employed by
 8 them, I had nothing to do there, no.
 9 Q. But during your period of
 10 employment, you supported that organization;
 11 that's correct?
 12 A. I was working for them,
 13 yes.
 14 Q. And --
 15 A. Part-time.
 16 Q. And Professor Doelle was
 17 the long-time chair of East Coast Environmental
 18 Law; isn't that correct?
 19 A. I don't know how long he
 20 chaired it.
 21 Q. He was the chair from
 22 2007 through to the time you left; is that right?
 23 A. Probably. I don't know
 24 for sure.
 25 Q. Well, you were writing

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1 A. It's not how they
 2 define -- they go to court?
 3 Q. They go to court to
 4 oppose certain projects; isn't that right?
 5 A. Well, umm, not primarily.
 6 That role is -- they sometimes work in
 7 collaboration with Ecojustice, who play much more
 8 of that role. When I was working there, the main
 9 objective of ECELAW was to provide information
 10 about environmental law to whoever needed it in
 11 the public.
 12 Q. So you were the executive
 13 director after Lower Churchill was finished?
 14 A. Yes.
 15 Q. Yes. And you were
 16 executive director of that organization from 2011
 17 to 2013; isn't that correct?
 18 A. Yes, and that did not
 19 constitute two full years. It was much less than
 20 that.
 21 Q. Right. And you attended
 22 directors meetings?
 23 A. Board meetings, yes.
 24 Q. Board meetings, yes.
 25 With Dr. Doelle?

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1 your report for this case that's dated June 9th.
 2 Are you aware that Dr. Doelle was writing an
 3 article that was highly critical of this tribunal
 4 in this case?
 5 A. I have not read that
 6 report, that article.
 7 Q. Did you assist Dr. Doelle
 8 in reviewing a draft of that article?
 9 A. No, I don't think I did.
 10 Q. He gives you grateful
 11 acknowledgement for the very helpful feedback on
 12 an earlier draft of the document.
 13 A. Oh, then, I probably
 14 did --
 15 Q. So you read it?
 16 A. I must have read it, yes.
 17 To be honest with you, I really did not remember
 18 that.
 19 Q. And in the draft that you
 20 read, do you recall Professor Doelle describing
 21 the work of the majority of this tribunal, the end
 22 result is inevitably superficial -- "a superficial
 23 analysis that seems largely driven by the
 24 majority's intuition". Do you remember that being
 25 in the report --

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1 A. No, I don't remember.
 2 Q. -- that draft of the
 3 article?
 4 So this article was published
 5 last July.
 6 A. Um-hmm.
 7 Q. You were writing your
 8 opinion sometime in May or June of this past year;
 9 do you recall --
 10 A. I was not using that
 11 article. I genuinely had forgotten that I had any
 12 discussions or looked at a draft. I genuinely had
 13 forgotten that. It did not play into this.
 14 Q. You have no recollection
 15 at all of reviewing a draft of an article by
 16 Professor Doelle on this very proceeding?
 17 A. I actually don't remember
 18 that.
 19 Q. Are you -- do you
 20 remember that the organization of which you were
 21 the former executive director is an intervenor in
 22 proceedings involving a set-aside application by
 23 Canada --
 24 A. Yes, I heard that.
 25 Q. You heard that. So the

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1 organization that you were a recent --
 2 A. Not recent.
 3 Q. As recently as 2013, long
 4 after this NAFTA claim was commenced.
 5 A. Um-hmm.
 6 Q. And not long before the
 7 hearing of this NAFTA claim and the liability
 8 phase, that that organization, once this
 9 tribunal's decision came down in March, and
 10 subsequently, joined as an intervenor in the
 11 proceedings by Canada to set aside this tribunal's
 12 decision?
 13 A. Yes, I heard that, I
 14 heard that. Only recently did I hear that. I
 15 have not had any involvement with ECE LAW after I
 16 resigned.
 17 Q. And is it not your view,
 18 like Professor Doelle's view, that cases of this
 19 kind should not be before NAFTA tribunals?
 20 A. Is it my view that this
 21 should not come before NAFTA?
 22 Q. Yes.
 23 A. Cases of this kind?
 24 Q. Yes --
 25 A. I did not make that

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1 statement.
 2 Q. -- claims for damages.
 3 A. I have not made that
 4 statement.
 5 Q. Isn't that your view?
 6 A. No, it's not my view.
 7 Q. Do you recall the name
 8 Lisa Mitchell from East Coast Environmental Law?
 9 A. Yes, yes, she was counsel
 10 while I was there.
 11 Q. She was counsel for East
 12 Coast Environmental Law while you were the
 13 executive director?
 14 A. Yes.
 15 Q. And did your relationship
 16 with Lisa Mitchell go back to 2003?
 17 A. I knew her then, yes.
 18 Q. You knew her then?
 19 A. Yes.
 20 Q. You know that she was an
 21 environmental activist who was opposed to the
 22 Bilcon quarry?
 23 A. I know she gave
 24 testimony, yes.
 25 Q. Do you know that she

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1 received the letter of the Minister, confidential
 2 letter of the Minister referring the matter to a
 3 JRP before it was published and, in fact --
 4 A. I have no idea of that.
 5 Q. You have no idea of that.
 6 You weren't involved in opposing the quarry at
 7 that time at all?
 8 A. No, I have never been
 9 involved in opposing the quarry. My only
 10 involvement with that proceeding was, as I have
 11 explained, was going there on that day primarily
 12 to meet with Dr. Robert Gibson to talk about
 13 sustainability assessment.
 14 Q. In your preparation for
 15 writing your report, did you read any of the
 16 witness statements that are part of the evidence
 17 in this report? In this proceeding?
 18 A. Could you name some of
 19 the witness statements?
 20 Q. Tom Dooley?
 21 A. No.
 22 Q. Dan Fougere?
 23 A. No.
 24 Q. Paul Buxton?
 25 A. No.

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1 Q. Any others?
2 A. Mark McLean, we have
3 talked about that.
4 Q. Yes. That's all?
5 A. I believe that's the only
6 witness statement I have read.
7 Q. Did you come to know, in
8 any of your consideration for your analysis and
9 your opinion, that the ships going from Whites
10 Point would be replacement ships for ships already
11 going through Bay of Fundy from Bayside?
12 A. No, I heard that in --
13 that it was put forward. I believe Mr. Estrin
14 suggested that was the case. I don't know if
15 that's the case. I heard it here first. Again, I
16 did my work on the information that was provided
17 to the panel that was on the public registry. I
18 believe this was -- I was not aware that that was
19 ever cited in that information that's on the
20 public registry. It may be the case, I don't
21 know.
22 Q. Could you turn, please,
23 to Tab 10 B. And go to page 770. You see at
24 page 770 of Volume 4 of the JRP public hearings
25 transcript, and at line 2, it states:

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1 A. Yes, I do.
2 Q. So going, then, back to
3 page 770:
4 "It is considered -- "[as
5 read]
6 And I am at line 4 on
7 page 770:
8 " -- unlikely that
9 blasting would result in
10 physical effects on
11 marine mammals,
12 endangered or otherwise,
13 beyond 500 meters."[as
14 read]
15 Do you see that?
16 A. I do.
17 Q. And that, of course, is
18 reflected in the Undertaking 31 response that we
19 covered earlier; right?
20 A. Yes. But what this says
21 is that physical effects could occur --
22 Q. Right.
23 A. -- within 500 meters, but
24 they think it's unlikely the physical effects
25 would occur beyond; however, behavioural effects

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1 "While the zone of
2 disturbance of
3 marine organisms -- "[as
4 read]
5 A. Excuse me. Can we go
6 back to who was saying this?
7 Q. Sure, yes.
8 A. This is Mike Murphy, of
9 DFO?
10 Q. This is Mike Murphy, yes.
11 A. Thank you.
12 Q. And, actually, just while
13 you were on it, if you go to page 766 --
14 A. Yes.
15 Q. -- you will see that
16 list, starting at line 20, of the various eminent
17 scientists and executives. And if you go over to
18 page -- from DFO. If you go over to page 767, you
19 see Mike Murphy:
20 "I am Mike Murphy. I am
21 the acting regional
22 director of Oceans and
23 Habitat."[as read]
24 That's at line 4; you see
25 that?

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1 could. That's my -- they say that in other
2 places, yes.
3 Q. Right. And if we go over
4 to page 772. At line 21:
5 "The main mitigation is
6 in place for ship strikes
7 in the Bay is the new
8 shipping lane. The new
9 shipping lanes which came
10 into effect on July 1st,
11 2003, were expected to
12 reduce the likelihood of
13 a right whale suffering a
14 ship strike in the Bay of
15 Fundy by up to 80 per
16 cent. Now biologists at
17 the Center for Coastal
18 Studies in Provincetown,
19 Massachusetts, think the
20 reduction is closer to 95
21 per cent. Also, the
22 route from the shipping
23 lane to the quarry is not
24 a known aggregation area
25 for whales, including

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1 right whales."[as read]
2 And you had seen that
3 before you wrote your opinion; correct?
4 A. Yes. And when you asked
5 me before about percentages, I was uncertain. I
6 knew had seen 80 per cent and 90 per cent. I am
7 also commenting that what an aggregation area is,
8 it's not an area that is completely devoid of
9 right whales.
10 Q. According to you, as a
11 non-oceanographer?
12 A. Um-hmm.
13 Q. And then over to
14 page 774, at line 10.
15 A. Sorry, can I just go back
16 to that last question? So you're suggesting that
17 an aggregation area is something other than my
18 understanding of it; is that correct, just for
19 clarity?
20 Q. Well, I have recognized
21 your opinion, but it's the opinion of a
22 non-oceanographer; correct?
23 A. It's an opinion of
24 someone who thinks she knows what aggregation
25 means.

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1 incorporated into a
2 project proposal, are
3 intended to prevent or
4 avoid the destruction of
5 fish or any potentially
6 harmful effects to a fish
7 habitat that could result
8 from the use of
9 explosives. Using DFO's
10 guidelines, the proponent
11 would need to maintain a
12 setback of at least
13 33.7 meters in order to
14 meet the DFO guidelines
15 criteria of less than 100
16 kilopascals overpressure.
17 DFO has requested that
18 the proponent increase
19 the separation distance
20 by a factor of 3 to
21 100 meters when Inner Bay
22 of Fundy stock of salmon
23 and endangered species
24 would be present."[as
25 read]

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1 Q. All right. As it's
2 applied to --
3 A. In a common --
4 Q. -- oceanographical?
5 A. Well, I don't know.
6 Q. Okay. So if we go to
7 page 774 at line 10:
8 "Department of Fisheries
9 and Oceans has prepared
10 the guidelines for the
11 use of explosives in or
12 near Canadian fisheries
13 waters to provide
14 information to proponents
15 on the conservation and
16 protection of fish."[as
17 read]
18 And then down to 17:
19 "These guidelines provide
20 methods -- "[as read]
21 A. Sorry, to where, to 17,
22 yes.
23 Q. "These guidelines
24 provide methods and
25 practices which, if

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1 That is the reference I made
2 earlier to Mr. Wright. And you recall that that
3 was the evidence given by Fisheries? That the
4 setback should be --
5 A. This is not evidence
6 given by Mr. Wright?
7 Q. No.
8 A. No? Okay.
9 Q. No. But it's based upon,
10 I am telling you, based upon Mr. Wright's earlier
11 analysis and consultations with respect to the
12 Whites Point Quarry.
13 A. Yes, and this is
14 referring to fish, it refers to salmon, which I
15 did not address in my report.
16 Q. Right, and it refers to
17 an endangered species, so would you infer, then,
18 that it would also apply to any other endangered
19 species or would you not?
20 A. Oh, I don't think you
21 could draw that inference, that -- the
22 requirements to protect a particular endangered
23 species would be specific to that species, yes.
24 Q. Would be specific to that
25 species?

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1 A. I assume.
2 Q. Right. If we go to
3 page 776, there's reference to research which
4 demonstrates that adult lobster exposed to -- I am
5 at line 2 -- exposed to seismic sound levels of
6 227 decibels shows no mortality or significant
7 injury.
8 And then down to line 16:
9 "Given that some
10 uncertainty on the impact
11 of blasting on lobsters
12 remains, a monitoring
13 program with input from
14 DFO should be implemented
15 if this project
16 proceeds."[as read]
17 You saw that before you wrote
18 your opinion?
19 A. I did, yes.
20 Q. And then if you go to
21 page 790, Dr. Kent Smedbol is speaking, and at the
22 top of page 790 --
23 A. Yes.
24 Q. -- says:
25 "There was a

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1 definitive -- "[as read]
2 Line 1.
3 " -- a definitive strike
4 in Canadian waters in
5 2005 which was, we
6 actually did a necropsy
7 on in Campobello Island,
8 our US colleagues
9 actually undertook the
10 necropsy that was struck
11 and killed by what was
12 likely a small vessel,
13 probably around 50 feet,
14 based on the propellor
15 size."[as read]
16 And we spoke about that
17 earlier. Did you recall that from the evidence?
18 A. It looks familiar, yes.
19 Q. And then over to
20 page 792, at line 17, Jill Grant, at line 17,
21 asked a question:
22 "One of the elements in
23 the presentation
24 suggested that a 6 per
25 cent increase -- "[as

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1 read]
2 And that's the presentation by
3 DFO.
4 " -- 6 per cent increase
5 in traffic was not
6 significant."[as read]
7 And Dr. Smedbol answers:
8 "That's a good
9 question."[as read]
10 And, at line 25, says:
11 "6 per cent, 5 per cent
12 chance of what was really
13 being measured is what is
14 the probability of a
15 whale and a ship
16 occupying the same
17 three-minute square in
18 about the same time."[as
19 read]
20 Now, do you know what a
21 three-minute square is?
22 A. It's a grid square. I
23 don't know exactly what it is, no.
24 Q. Do you know how many
25 kilometres it represents?

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1 A. No, I do not.
2 Q. And go down to line 8 on
3 793:
4 "If that relationship is
5 linear, it's one to one.
6 If not, it is quite a
7 small increase. We have
8 already, St. John has
9 reduced the potential
10 overlap, time space
11 overlap in the same
12 squares by about 95 per
13 cent over the last three
14 years. So I guess that
15 would add 6 per cent
16 shipping to that. Do
17 your recalculation.
18 You'd have to relook at,
19 you'd have to look again
20 at the new shipping
21 distribution. Taking
22 into account that 6 per
23 cent of ships, I would
24 argue -- "[as read]
25 Dr. Smedbol says.

1 " -- that it is likely
2 not substantial. I think
3 it would actually be
4 quite low, a low increase
5 in probability of ship
6 strike, but not zero."[as
7 read]
8 And he is in the best
9 position, between you and him, to render that
10 opinion?

11 A. I don't say that those
12 words are in conflict with how I referred to it.
13 He did not say minimal, he said "low". I said
14 "low" too.

15 Q. Not zero?

16 A. Not zero.

17 Q. But low?

18 A. But low, yes.

19 MR. NASH: Thank you,

20 Ms. Griffiths. Those are my questions.

21 PRESIDING ARBITRATOR: Thank
22 you very much, Mr. Nash.

23 Redirect will be done by

24 Ms. Kam.

25 RE-EXAMINATION BY MS. KAM:

1 Q. Ms. Griffiths, you were
2 asked about your expertise in a number of areas,
3 but given your experience as a member and chair of
4 review panels, can you please explain the role of
5 review panels in conducting an EA?

6 A. Yes. The role of the
7 panel is to conduct a comprehensive and
8 transparent process that follows the mandate given
9 to the panel in the terms of reference.
10 Obviously, the legislative mandate is the
11 overriding mandate, but then that is represented
12 in terms of, in the terms of reference, and the
13 panel needs to carry out that process. The panel
14 is responsible for providing, for reviewing and
15 ensuring that the information that the proponent
16 provides in the environmental impact statement,
17 which includes all the material that is
18 subsequently filed by the proponent before the
19 hearing, that that information is, responds to the
20 EIS guidelines and that is sufficient for, to
21 proceed, for the panel to proceed to the public
22 hearing stage, so that's the kind of first major
23 step.

24 And then when the hearing, the
25 panel is responsible for carrying out -- for

1 holding a hearing that provides opportunity for
2 people to give their views and opinions and for
3 the proponent to present their information and for
4 everybody to ask questions. And they are
5 responsible for making sure that all information
6 that is provided is publicly accessible, it's
7 placed on the public registry. When the hearing
8 ends, the public registry closes, and then the
9 proponent -- sorry, not the proponent, the panel
10 is responsible for preparing a report which
11 provides advice to the two Ministers, the federal
12 and provincial Minister in the case of a JRP.

13 Q. And you mentioned the
14 panel's role in gathering information. And from
15 what sources do they gather this information?

16 A. The main source of
17 information initially comes from the proponent, so
18 the proponent is asked to provide information that
19 responds to the EIS guidelines. There is then a,
20 there is a public comment opportunity that they
21 can respond to what the proponents put forward.
22 In terms of does this meet the guidelines, is
23 there sufficient information, that's the key focus
24 of that stage. The panel is then -- seeks to
25 address any gaps that may have been identified

1 either by the panel or through -- by other
2 participants, who could be government or could be
3 the public. Any gaps that are identified, the
4 panel would then go back to the proponent and ask
5 for additional information.

6 Q. And in terms of the
7 information that is gathered, in your experience,
8 can scientific opinions differ amongst different
9 experts?

10 A. Yes, that's entirely
11 possible.

12 Q. And so Mr. Nash also put
13 to you a number of DFO submission in the Whites
14 Point EA record. Based on your experience, are
15 government submissions the only basis for a review
16 panel's determination of likely SAEE?

17 A. No, the panel is required
18 to address, carefully consider all the information
19 that comes before them. So that information could
20 come from any number of sources, including, it
21 could be local residents, it could be holders of
22 traditional ecological knowledge, Aboriginal
23 knowledge. It could be from experts who are
24 scientific experts who come forward on behalf of
25 environmental organizations or municipalities.

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1 There is a whole range of people.
 2 MS. KAM: Okay, thank you,
 3 Ms. Griffiths. Those are all my questions.
 4 PRESIDING ARBITRATOR: Thank
 5 you, Ms. Kam.
 6 Any -- no?
 7 MR. NASH: Nothing further
 8 from us.
 9 PRESIDING ARBITRATOR: So I
 10 think that gets us to the stage in which members
 11 of the tribunal may ask questions. And I ask my
 12 colleagues. No.
 13 I have one question, which is
 14 not really a question to you. I am very
 15 interested in shipping, and I have never heard the
 16 term "rule vessel" before. What does that mean?
 17 I don't know, it's not -- if you know what that
 18 means? Rule vessels? Must be vessels subjected
 19 to some rules which other ships are not subjected?
 20 Okay, Mr. Nash.
 21 MR. NASH: Judge Simma, they
 22 are large vessels, I believe it's 60 or 66 meters
 23 long or more. It would include such things as the
 24 oil tankers going through the Bay of Fundy, and
 25 they are restricted to the international shipping

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1 Okay, we are ready. So who is
 2 going to do the direct? Or read the declaration,
 3 please, would you please read the declaration that
 4 you have in front of you.
 5 WITNESS DECLARATION: ANTHONY BLOUIN
 6 DR. BLOUIN: Yes. I solemnly
 7 declare upon my honour and conscience that I will
 8 speak the truth, the whole truth and nothing but
 9 the truth and that my statement will be in
 10 accordance with my sincere belief.
 11 PRESIDING ARBITRATOR: Thank
 12 you very much.
 13 Ms. Kam, you have the floor
 14 for direct.
 15 EXAMINATION IN-CHIEF BY MS. KAM:
 16 Q. Good morning, Dr. Blouin.
 17 A. Good morning.
 18 Q. Just by way of brief
 19 introduction, you have served two terms as the
 20 appointed chair of the Nova Scotia Environmental
 21 Assessments Board?
 22 A. Correct.
 23 Q. And you also chaired
 24 three review panels for environmental assessment
 25 to Nova Scotia?

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1 lanes.
 2 PRESIDING ARBITRATOR: By some
 3 rules, and that is why they are called rule
 4 vessels?
 5 MR. NASH: I am not sure
 6 exactly of the origin of the term, but I just know
 7 the term from having read all the material in this
 8 case.
 9 PRESIDING ARBITRATOR: All
 10 right, thank you very much. Sorry for that, but
 11 at least the term was used in the official
 12 cross-examination, so it's legitimate to inquire
 13 of what it means.
 14 So that brings to an end,
 15 then, the cross-examination of Ms. Griffiths.
 16 Thank you very much.
 17 THE WITNESS: Thank you very
 18 much.
 19 PRESIDING ARBITRATOR: You are
 20 being released.
 21 And I just wonder, we have
 22 four more, there is four more experts on our
 23 agenda for today, so I think we should, without
 24 any great ado, start the next examination. Which
 25 would be the one -- Mr. Blouin.

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1 A. Yes, correct.
 2 Q. And you have also filed
 3 two expert reports in the damages phase of this
 4 arbitration; correct?
 5 A. Yes.
 6 Q. And the first is dated
 7 June 9th, 2017, and the second is November 6th,
 8 2017?
 9 A. Correct.
 10 Q. Do you have any
 11 corrections to make to either of these reports?
 12 A. I do have two corrections
 13 to note for the record. The first pertains to my
 14 first report, which was Exhibit RE 2. At
 15 paragraph 16 on page 6 of that report, in the
 16 first sentence of that paragraph, there is some
 17 material contained within brackets, and it makes
 18 reference to -- let me just get the wording for
 19 you here so I make sure it's correct.
 20 Q. Did you say paragraph 16,
 21 or --
 22 A. Paragraph 18, sorry.
 23 Q. Eighteen.
 24 A. On page 6. And it's a
 25 reference to the panel report, but, in brackets,

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1 it says "referred to as the environmental
2 assessment report", and that citation is
3 incorrect. The panel report is not referred to by
4 any other term. It's just simply the panel
5 report. So if the material within the brackets is
6 struck, then the sentence will read correctly.
7 And that also removes Footnote Number 9 on that
8 page.
9 And the second correction is
10 in my second report, Exhibit RE 10. Paragraph 3
11 on page 3. Within that paragraph, there is a
12 Footnote Number 3 which refers to the expert reply
13 report of David Estrin. And it makes reference to
14 paragraph numbers 12 and 13, and those numbers are
15 incorrect, it should refer to his report,
16 paragraph number 49.
17 And those are the corrections.
18 MS. KAM: Thank you,
19 Dr. Blouin. I have no further questions.
20 PRESIDING ARBITRATOR: Thank
21 you. The floor is for Mr. Nash.
22 MR. NASH: Thank you. We do
23 have some binders to bring up.
24 CROSS-EXAMINATION BY MR. NASH:
25 Q. Do you go by Dr. Blouin

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1 or Mr. Blouin?
2 A. Either one is fine.
3 Q. You are currently
4 employed as the manager of waterworks at the
5 Halifax water utility; that's correct?
6 A. The title is actually
7 manager of regulatory compliance at Halifax Water.
8 Q. Right. And Halifax Water
9 is the Halifax municipal water and wastewater
10 utility?
11 A. Water, wastewater and
12 stormwater, yes.
13 Q. And you are employed as a
14 manager full-time?
15 A. Yes, correct.
16 Q. And you have been
17 employed as a manager at Halifax Water as a
18 full-time manager since 1996?
19 A. No, I have been with
20 Halifax Water since 2008. Prior to that, I was
21 with Halifax Regional Municipality, since 1996 up
22 to 2008.
23 Q. Okay. So you were with
24 Halifax Regional Municipality from 1996 to 2008;
25 correct?

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1 A. Correct.
2 Q. And then you went to
3 Halifax Water as a full-time manager after that?
4 A. That's correct.
5 Q. So for the last ten
6 years?
7 A. Yes.
8 Q. And you deal with
9 sampling for drinking water and wastewater
10 treatment facilities full-time; correct?
11 A. Currently in my present
12 position, yes.
13 Q. And in that position --
14 how long have you been in that position?
15 A. That's for ten years.
16 Q. And prior to being hired
17 as a manager at Halifax water utility, and prior
18 to being with Halifax municipality, you worked for
19 ten years in St. John's, Newfoundland; that's
20 correct?
21 A. Correct.
22 Q. That was from 1986 to
23 1995?
24 A. Yes.
25 Q. For five of those ten

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1 years, you were employed as the water quality
2 manager with the Newfoundland government; correct?
3 A. Yes, Department of
4 Environment with Newfoundland.
5 Q. There are some binders in
6 front of you, and if you go to Tab 1, and in
7 particular page 45, you will find your resume.
8 A. Yes.
9 Q. Page 45. And if you turn
10 to page 46 -- well, let me just ask you, is this
11 resume complete and up-to-date and shows
12 everything about your qualifications with respect
13 to any issues in this proceeding that you are
14 dealing with?
15 A. It would have been at the
16 time of writing this report, yes.
17 Q. If you go to page 46,
18 under "Professional Experience", at the top of the
19 page, it says, 2008 to the present, manager,
20 regulatory compliance, Halifax Water, and then it
21 describes your function there as the manager of
22 regulatory compliance with Halifax Water. And
23 then it goes down to 2013/14, chair, environmental
24 assessment review panel, so you did that for one
25 year; correct?

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1 A. It spanned a course of a
2 year, yes.
3 Q. And while you were doing
4 that, were you working full-time as a manager with
5 Halifax Water?
6 A. I was.
7 Q. And then if you go just
8 down below that, it says:
9 "2004 to 2012, Chair,
10 Nova Scotia Environmental
11 Assessment Board.
12 Volunteer appointment,
13 two terms."[as read]
14 What does that mean,
15 "volunteer appointment"?
16 A. Well, just that the
17 Department of the Environment of Nova Scotia had
18 put out an advertisement for people interested in
19 serving on this board, and on a volunteer basis, I
20 put my name forward as being a candidate to do
21 that.
22 Q. So what you have been is
23 a part-time volunteer member of the -- chair of
24 the environmental assessment review panel; that's
25 correct?

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1 weekends when necessary as well.
2 Q. If you go back to
3 page 45, you will see your education. You got
4 your PhD in biology in 1985?
5 A. Yes.
6 Q. And you, as I understand
7 it, your studies focussed on the effects of lake
8 acidity; is that right?
9 A. For the PhD, correct.
10 Q. And since that time, you
11 have taken some further skills, upgrading, you
12 have got a certificate in human resource
13 management in 1994. You did a course in effective
14 negotiating and influencing skills at Saint Mary's
15 in 2005. You did a management and supervision
16 certificate at the American Water Works
17 Association in 2013. And then a Performance
18 Matters training series certificate in Halifax
19 Water, 2014.
20 A. Correct.
21 Q. That's the sum total of
22 your professional training?
23 A. It is.
24 Q. Yes. And the American
25 Water Works Association, what professional

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1 A. That would be correct,
2 yes.
3 Q. And you have been working
4 throughout that period full-time as a manager
5 either at Halifax Municipality or Halifax Water;
6 that's correct?
7 A. Both, yes.
8 But I would note that the work
9 with the Environmental Assessment Board was not
10 continuous. It would be sporadic, depending on
11 what projects are under review.
12 Q. Intermittent, here and
13 there?
14 A. Correct, yes.
15 Q. And you weren't paid for
16 it?
17 A. I was paid only to
18 compensate for days when was I actively engaged in
19 the board business; in other words, conducting a
20 review or public hearing or that sort of thing.
21 Q. Did you take a leave from
22 your Halifax Water job to go and do this?
23 A. Yes, in days when I had
24 to be away from the office, yes. Some of it would
25 have been done part-time, you know, evenings and

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1 training did that involve?
2 A. It was to do with
3 management and supervision of staff, and programs
4 in the context of water utilities.
5 Q. And your last
6 professional -- sorry, published scientific work
7 was in 1990; is that correct?
8 A. I believe that's probably
9 correct, yes.
10 Q. If you go to page 50 of
11 your resume there, under the title "Publications"
12 on page 50.
13 A. Yes.
14 Q. You'll see some articles,
15 the last one 1990, "Trophic response to phosphorus
16 in acidic and non-acidic lakes in Nova Scotia,
17 Canada"?
18 A. Yes, that's correct.
19 Q. So for 30 years, you
20 haven't been publishing any further scientific
21 work; that's correct?
22 A. Publishing, no, that's
23 correct.
24 Q. And that article was a
25 five-page article?

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- 1 A. Yes.
2 Q. Of which you were the
3 second author; is that right?
4 A. Correct.
5 Q. And then in the last 30
6 years, you have been an invited speaker at one
7 workshop and one conference; is that right?
8 A. That would probably be
9 correct. Let me just refer to the record here.
10 Q. If you go to page 52.
11 A. Yes, that's correct.
12 Q. So, as I understand it,
13 you spoke at a conference on solid waste
14 management in 1999?
15 A. Yes.
16 Q. And you spoke at a
17 monitoring workshop in 2006?
18 A. Yes.
19 Q. And you have not been
20 qualified to provide an expert opinion or give any
21 expert testimony in any legal proceeding?
22 A. Legal proceeding, no.
23 Q. On any topic in any
24 jurisdiction; that's correct?
25 A. That's correct.

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- 1 ecology in the last 30 years?
2 A. No.
3 Q. And you have no advanced
4 special expertise in the area of environmental
5 science or ecology; you would say that? Do you
6 agree with that now, today?
7 A. I haven't been -- I have
8 30 years of experience since then in what I would
9 term "environmental management", but, probably not
10 in the terms that you have raised.
11 Q. Okay. And I gather you
12 are not an oceanographer; that's correct?
13 A. I did a little bit of
14 oceanographic research when I was a student at
15 Dalhousie, but that would be the extent of it.
16 Q. And that would be 35
17 years ago?
18 A. Correct.
19 Q. And you are not an expert
20 on ballast water; that's correct?
21 A. No.
22 Q. And are you familiar with
23 the federal ballast water regulations governing
24 the exchange of ballast waters in Canadian waters?
25 A. Generally familiar, but

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- 1 Q. This is your first time?
2 A. Yes.
3 Q. You don't have any
4 education in environmental science or
5 environmental studies; that's correct?
6 A. Well, environmental in a
7 broad sense. I mean, the PhD thesis was on the
8 effects of human activity on lakes through acid
9 precipitation, so I would say it's environmental
10 management in a sense.
11 Q. Environmentally related,
12 but there are programs of study at universities
13 now where you can take a BA, a master's, a PhD in
14 environmental science?
15 A. I take your meaning, yes,
16 no, I did not do those.
17 Q. And the last time you
18 taught ecology was Introductory Ecology as a
19 part-time instructor in the 1985/'86 academic
20 year; is that right?
21 A. That would be correct.
22 Q. That was 32 years ago?
23 A. Yes.
24 Q. And you haven't taught or
25 published in the area of environmental science or

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- 1 only in the context of these proceedings.
2 Q. No expertise prior to
3 these proceedings; correct?
4 A. No.
5 Q. That's correct?
6 A. That's correct, sorry.
7 Q. And are you aware of any
8 project where a proponent has been required to
9 deviate from the ballast water regulations that
10 apply in Canada?
11 A. Well, I am not aware of
12 it, but I don't think I would be in a position to
13 be aware if that had occurred.
14 Q. And you are aware -- are
15 you aware of the Black Point project?
16 A. Yes, I am.
17 Q. Are you -- have you
18 studied the EIS or any of the documents relating
19 to the Black Point project?
20 A. I have.
21 Q. Are you aware that Black
22 Point concerns about ballast water was raised --
23 were raised and that DFO, as the responsible
24 authority, said that ballast water regulations
25 govern; are you aware of that?

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1 A. Yes, I recall that.
 2 Q. And so the way ballast
 3 water is dealt with in Canada is through the
 4 application and enforcement of the ballast water
 5 regulations by Transport Canada?
 6 A. In normal circumstances,
 7 I would agree, yes.
 8 Q. And you are not an expert
 9 in shipping or navigation or the Canada Shipping
 10 Act?
 11 A. No, I am not.
 12 I wonder, could I just draw,
 13 which I think would be a useful analogy for the
 14 information of the tribunal?
 15 Q. Please.
 16 A. In regard to expertise,
 17 to conduct an environmental assessment or to serve
 18 as a panel member, for example, it's not required
 19 that a panel member be an expert in all of the
 20 different fields and issues that will be brought
 21 before you. That would not, in fact, be even
 22 possible. The requirement is that you have
 23 sufficient knowledge and expertise to be able to
 24 evaluate the information that's brought to you to
 25 form conclusions and make recommendations. And

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1 Q. And, in your opinion, you
 2 cite no studies concluding that land blasting,
 3 blasting on land, has actually caused harm to
 4 whales; you agree with that?
 5 A. I am sorry, when you
 6 refer to my study, are you quoting my report?
 7 Q. Your opinions in this
 8 case, yes.
 9 A. Can you point me to the
 10 specific --
 11 Q. No, I am just saying
 12 there is an absence of any reference to any
 13 studies in your report.
 14 A. Oh, in my report, I see
 15 what you are saying. Yes, I agree.
 16 Q. And you are not a lawyer?
 17 A. No, I am not.
 18 Q. No experience in
 19 geography or hydrology; correct?
 20 A. I wouldn't agree in terms
 21 of hydrology. I have had some exposure to that.
 22 But geography I think was the other one, no.
 23 Q. You wouldn't call
 24 yourself an expert hydrologist?
 25 A. Expert, no.

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1 the analogy I would like to draw is to the members
 2 of the present tribunal. They are not, I believe
 3 it's fair to say, experts in environmental
 4 assessment --
 5 PRESIDING ARBITRATOR:
 6 Shipping.
 7 THE WITNESS: Shipping, okay.
 8 But I think, more technically, you would each be
 9 experts in the law, I think, broadly put, but that
 10 makes them very well qualified to judge evidence
 11 put before them to form conclusions and make
 12 decisions in their case. So expertise for
 13 environmental assessment purposes is quite broad,
 14 and it just requires that you be able to assess
 15 the information and reach conclusions.
 16 BY MR. NASH:
 17 Q. And your expertise is as
 18 a part-time volunteer chair?
 19 A. For the assessment board,
 20 yes.
 21 Q. Yes. Are you familiar
 22 with any example of blasting on land causing harm
 23 to whales?
 24 A. No, I don't have personal
 25 knowledge of that, no.

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1 Q. And you are not an
 2 expert, of course, on the use of explosives and
 3 the effect, if any, on blasting on the ocean
 4 floor?
 5 A. I am not.
 6 Q. Or blasting water?
 7 A. No.
 8 Q. Or the effect of onshore
 9 blasting, if any, on marine mammals?
 10 A. Marine mammals, no.
 11 Q. Marine.
 12 When you joined as a part-time
 13 volunteer chair of the Environmental Assessment
 14 Board, did you receive any training or
 15 orientation?
 16 A. Yes, I did.
 17 Q. And were you given a
 18 manual?
 19 A. Yes, I was.
 20 Q. Did you read the manual?
 21 A. Oh, yes.
 22 Q. And did you ever write
 23 any manuals on the interpretation, operation or
 24 application of Nova Scotia environmental laws?
 25 A. I did. At the point when

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1 I had conducted, I believe it was after the first
2 panel review that I did, I noted that, while the
3 legislation in Nova Scotia provides some degree of
4 guidance about how to conduct a review, how to
5 conduct a panel hearing, there was a lot of
6 information that I had just learned through
7 experience but was not documented anywhere, and so
8 I just took it upon myself to document essentially
9 my own experience in doing those tasks.
10 Q. So you wrote a manual?
11 A. Yes.
12 Q. Has it been published?
13 A. Not to my knowledge. It
14 resides with the department.
15 Q. You are not an expert of
16 any kind on the interpretation, operation or
17 application of any statutes or regulations?
18 A. Expert, no. I mean, I
19 have had experience in doing that. For example,
20 when I was director of environmental assessments
21 for the Province of Newfoundland, you know, the
22 day-to-day work in that position did involve the
23 application of requirements of legislation. But
24 am I an expert in that? I would say no.
25 Q. Are you aware that there

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1 is a rich body of literature on the whole question
2 of statutory interpretation; are you aware of
3 that?
4 A. Not particularly, no.
5 Q. Have you ever read
6 anything on statutory interpretation, any legal
7 cases, Supreme Court of Canada cases, any texts,
8 any articles?
9 A. No.
10 Q. You are not an expert, a
11 legal expert on the operation and application of
12 the Nova Scotia Environment Act, the regulations
13 passed pursuant to that Act; that's correct?
14 A. Legal expert?
15 Q. Yes.
16 A. No.
17 Q. You are not an expert on
18 the CEAA or any regulations passed pursuant to
19 that Act?
20 A. No, I am not.
21 Q. I don't need to take it
22 to you right now unless you need to, but in
23 paragraph 26 of your June 9th report, you compare
24 the CEAA and its operation to the NSEA and its
25 operation; do you recall that?

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1 A. Let me just have a look
2 at that. Paragraph 26?
3 Q. Paragraph 26. The first
4 report, Tab 1.
5 A. Oh, yes, I see that.
6 Q. And you state:
7 "While the consideration
8 of socio-economic
9 conditions in Nova
10 Scotia's EA review
11 process results in a
12 broader inquiry at the
13 provincial level in
14 comparison to the federal
15 EA reviews, this approach
16 is consistent with the
17 stated goals of the NSEA,
18 which recognizes the
19 'linkage between economic
20 and environmental issues
21 and that long-term
22 economic prosperity
23 depends upon sound
24 environmental
25 management'."[as read]

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1 Did you write those words?
2 A. These words, yes.
3 Q. You wrote that of your
4 own accord, independently?
5 A. Yes.
6 Q. You are not qualified to
7 make that comparison between the NSEA and the
8 CEAA?
9 A. Well, it's a comparison
10 based on my own personal understanding of both
11 pieces of legislation. It's not intended to be a
12 legal opinion.
13 Q. But you haven't made a
14 lifelong study of the CEAA or the NSEA; have you?
15 A. Lifelong, no.
16 Q. And, in fact, your only
17 exposure to the NSEA, in the context of this kind
18 of a proceeding, and the CEAA is through this
19 proceeding; isn't that right?
20 A. The NSEA, well, no, I had
21 fairly extensive exposure to it as the chair of
22 the assessment board.
23 Q. Did you have any exposure
24 to the CEAA?
25 A. The CEAA? Only in -- I

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1 guess I can cite a couple of instances. When I
2 was employed with Halifax Regional Municipality,
3 we had a major project that went through a federal
4 environmental assessment under the CEAA, so I was
5 exposed to the Act through that process as
6 probably the main proponent's representative for
7 that project.

8 Q. But you would agree with
9 me that you are not qualified to enter into a
10 statutory interpretation exercise with any
11 expertise as comparing the provincial legislation
12 to the federal legislation; isn't that right?

13 A. Statutory exercise, if I
14 understand what you mean by that, I would agree,
15 yes.

16 Q. Yes. And you published
17 no papers on the operation or interpretation or
18 application of any statutes; that's correct?

19 A. That's correct.

20 Q. You have taught no
21 courses and given no lectures on those topics;
22 that's correct?

23 A. Correct.

24 Q. In the context of a JRP
25 or a comprehensive study; that's correct?

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1 A. Correct.

2 Q. And you have not spoken
3 at any conferences on Nova Scotia environmental
4 law or Canadian environmental law or its
5 interpretation, application or operation; that's
6 correct?

7 A. That's correct.

8 Q. Did you meet any
9 environmental lawyers or professors during your
10 time as volunteer chair of the environmental
11 assessment branch?

12 A. I am sorry, environmental
13 lawyers or?

14 Q. Or professors.

15 A. Well, in a sense, I guess
16 I did meet Professor -- not of environmental law,
17 though, I will qualify that.

18 Q. No, okay.

19 Have you met along the way any
20 lawyers as distinguished in the area of
21 environmental law as Mr. Estrin?

22 A. As Mr. Estrin, well,
23 that's kind of a value judgment. When I was the
24 director of environmental assessments in
25 Newfoundland, we did have a departmental lawyer

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1 who did have some expertise in the environmental
2 law of Newfoundland.

3 Q. Yes.

4 A. I am not sure I can
5 compare those qualifications to those of
6 Mr. Estrin directly.

7 Q. Have you heard of
8 Mr. Estrin before this proceeding?

9 A. Actually, I believe I had
10 not, no.

11 Q. Did you read his CV
12 carefully before writing your opinion?

13 A. I did review it, yes.

14 Q. If you turn to Tab 1,
15 your first report at page 15, paragraph 45.

16 A. Yes.

17 Q. The beginning of
18 paragraph 45:

19 "Furthermore, I find
20 Mr. Estrin's statement
21 that 'no federal or
22 provincial government
23 agency or official took
24 the position before the
25 JRP that the WPQ should

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1 not be approved or that,
2 after mitigation, it
3 would likely cause
4 SAE' -- "[as read]

5 You say "to be unpersuasive".

6 A. Yes.

7 Q. You weren't persuaded by
8 Mr. Estrin's opinion?

9 A. That would be correct,
10 yes.

11 Q. And I am going to suggest
12 to you that you are not qualified to find anything
13 Mr. Estrin says to be unpersuasive or otherwise.

14 A. Well, in response, I
15 would only say that I believe I am qualified to
16 have a personal opinion on that matter.

17 Q. Would you be qualified to
18 have a personal opinion like anybody would be
19 qualified to have a personal opinion; fair enough?

20 A. Well, fair enough, but
21 based on some extensive experience with
22 environmental assessment in this particular
23 instance.

24 Q. But not with
25 environmental law; correct?

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1 A. Not on the law, no.
2 Q. Did you write those
3 words?
4 A. Yes.
5 Q. Independently, of your
6 own accord?
7 A. Yes.
8 Q. Would you agree with me
9 that you should properly defer to Mr. Estrin in
10 any and all matters factual and legal having to do
11 with environmental law in Canada?
12 A. I am not sure that I
13 would agree with your use of the word "defer"
14 because, to me, that implies that I would not be
15 able to hold any contrary opinion. I would
16 certainly recognize his superior expertise in
17 environmental law as compared to my own, which...
18 Q. Which is based on your
19 own personal opinion; correct?
20 A. Personal opinion and
21 personal experience.
22 Q. You're also not an
23 economist; that's right?
24 A. That's correct.
25 Q. You are not a

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1 sociologist?
2 A. No.
3 Q. You have no specialized
4 expertise and are not qualified to express any
5 expert opinion on socio-economic matters; correct?
6 A. Sorry, could you rephrase
7 that? No...
8 Q. No specialized expertise
9 and are not qualified to express any legal --
10 sorry, any expert opinion on socio-economic
11 matters?
12 A. Well, depends, I guess,
13 on how you define expert opinion. I am not an
14 expert in that field, but I think I would reserve
15 the right to be able to express an opinion on it.
16 Q. And that would be a
17 personal opinion?
18 A. Personal opinion, again,
19 based on some experience.
20 Q. Does the name Susan Sherk
21 mean anything to you?
22 A. Sorry, what?
23 Q. Susan Sherk.
24 A. Susan Sherk, yes, that
25 sounds familiar.

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1 Q. Do you know that Susan
2 Sherk was, in 2007, a leading expert in the area
3 of socio-economic effects assessment?
4 A. I don't think I could
5 make that statement, no.
6 Q. Do you know, in 2007, she
7 was one of the leading environmental consulting
8 firms at that time, AMEC Earth and Environmental?
9 A. Yes, I am familiar with
10 them.
11 Q. And do you know that she
12 was the former Assistant Deputy Minister of
13 Tourism and Economic Development for the Province
14 of Newfoundland and Labrador?
15 A. I don't believe I have
16 that knowledge, no.
17 Q. Do you know that she was
18 the socio-economic manager for a major
19 multinational, Michelin Tires Canada, for its
20 operations in Nova Scotia?
21 A. I was not aware of that,
22 no.
23 Q. Do you know that by 2007,
24 she had been a socio-economic independent effects
25 assessment expert consultant for over ten years?

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1 A. I wouldn't be able to
2 speak to that, no.
3 Q. Do you know that she
4 authored an extensive independent opinion on the
5 socio-economic effects of the Whites Point
6 project?
7 A. You'd have to point me to
8 the document. I can't say I recall that
9 specifically.
10 Q. It's not ringing a bell?
11 A. No.
12 Q. What part of the EIS did
13 you read?
14 A. The EIS document itself?
15 Q. Yes.
16 A. All of it.
17 Q. Did you read all of the
18 expert reports?
19 A. No, I was selective in
20 that.
21 Q. Which expert reports did
22 you read?
23 A. The ones that I felt
24 pertained most closely to the issues that I was
25 tasked with reviewing.

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1 Q. Did that include Susan
2 Sherk's socio-economic report?
3 A. I'd have to have a look
4 at the document. I couldn't say for certain.
5 Q. Did you know that Susan
6 Sherk gave extensive evidence before the Whites
7 Point JRP on Monday, June 25th, 2007; did you read
8 that?
9 A. I couldn't speak to the
10 date, but, as I say, the name is familiar, and I
11 believe she was involved.
12 Q. Did you read the whole
13 transcript of the JRP?
14 A. Not the whole transcript,
15 no.
16 Q. What parts did you read?
17 A. Well, those, again, that
18 I felt pertained particularly to the issues that I
19 was examining.
20 Q. And what parts were
21 those?
22 A. Well, it would have been,
23 you know, having to do with biophysical effects of
24 those particular ecosystem components that were
25 most at risk.

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1 land contaminants, the
2 air quality and country
3 foods, there are no
4 significant residual
5 adverse effects. They
6 meet the Canadian
7 guidelines, all
8 applicable guidelines.
9 So, in conclusion, the
10 socio-economic effects
11 can be managed, resulting
12 in no significant adverse
13 residual effects. The
14 beneficial effects are
15 stable, ongoing
16 employment; the benefits
17 to the economy; and also
18 to the provision of goods
19 and services from local
20 business and
21 supplies."[as read]
22 Did you take that into account
23 in writing your opinion?
24 A. I don't recall seeing
25 this specific statement, no.

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1 Q. Are you aware of
2 Ms. Sherk's conclusions as expressed to the JRP on
3 June 25th, 2007?
4 A. I would not be able to
5 cite those, no, without reference to the document.
6 Q. Could you go to Tab 8 E,
7 please?
8 A. I am sorry?
9 Q. 8 E. And go, please, to
10 page 1675 in the transcript, which is Volume 8 of
11 the JRP hearing transcript.
12 A. Yes, okay.
13 Q. And go to line 6. I am
14 just going to read this out here.
15 A. Yes.
16 Q. So we are at Tab 8 E,
17 page 1675.
18 A. And this is Ms. Sherk
19 speaking?
20 Q. It is.
21 A. Okay.
22 Q. She says at line 6:
23 "So, in conclusion, on
24 human health, drinking
25 water, the marine and

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1 Q. If you go back to
2 page 1659, just to the bottom of 1658. Line 25.
3 A. Sorry, so 1659?
4 Q. 1658, the previous page,
5 line 25, at the bottom.
6 A. Yes.
7 Q. "In terms of marine
8 transportation -- "[as
9 read]
10 And again, this is Susan
11 Sherk's evidence at the JRP.
12 A. Okay.
13 Q. " -- the Bay of Fundy
14 is a vessel and major
15 shipping route, both
16 inbound and outbound.
17 The shipping lanes are
18 approximately 13
19 kilometres offshore from
20 the proposed Whites Point
21 terminal. Currently,
22 there are 800 rule
23 vessels (in other words,
24 they have to report in
25 and out) per year

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1 entering and leaving the
2 shipping lanes, and the
3 breakdown of that is
4 approximately 600
5 tankers, transporting
6 crude and refined oil to
7 Saint John; 100 to
8 Bayside and Eastport, and
9 110 to Hantsport.
10 Non-rule vessels, which
11 includes ferries, fishing
12 vessels, government
13 vessels, tour boats, and
14 pleasure crafts, it's
15 difficult to estimate the
16 number because they
17 aren't required to say
18 where they are going and
19 what time. The analysis
20 is that this will
21 increase in terms of rule
22 vessels by 45 vessels per
23 year, approximately,
24 which is less than one a
25 week."[as read]

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1 notice of shipping
2 schedules. There will be
3 the designated shipping
4 route from the shipping
5 lanes and the docking
6 radius requirements
7 provided to fishermen and
8 tour boat operators.
9 There will be ongoing
10 public consultation
11 regarding any issues that
12 should occur, with both
13 the fishers and the tour
14 boat operators, and there
15 is going to be a
16 gear-replacement fund
17 that will be provided by
18 Bilcon if there was any
19 disturbance to the
20 lobster fishery, the
21 lobster traps, in terms
22 of equipment."[as read]
23 Then down to line 16:
24 "Again, there will be no
25 significant residual

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1 Now, did you read any of Susan
2 Sherk's testimony?
3 A. Yes, this part is
4 familiar to me.
5 Q. That's familiar to you?
6 A. Yes.
7 Q. Okay. And then going to
8 page, actually just below on that page, line 19:
9 "They will be
10 transporting rock
11 products by water. There
12 will be a 24-hour
13 turnaround time, and
14 there will be a one-mile
15 radius required for
16 manoeuvring and docking
17 of vessels, depending on
18 weather and tides.
19 There will be some
20 inconvenience that could
21 be caused to lobster,
22 herring and sea cucumber
23 fishers.
24 In terms of mitigation,
25 there will be advanced

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1 adverse effects, provided
2 that mitigation measures
3 are put in place.
4 In terms of the economy,
5 I think you're aware that
6 there will be
7 approximately 18 months
8 in length for
9 construction, where there
10 will be 225 person years
11 involved in the
12 construction period from
13 the local area."[as read]
14 Do you remember seeing that
15 before you wrote your report?
16 A. Yes, this is familiar,
17 yes.
18 Q. So no residual adverse
19 effects; right?
20 A. Yes. That's what it
21 says.
22 PRESIDING ARBITRATOR:
23 Mr. Nash, question, it's 1:05.
24 MR. NASH: Any time is good
25 for me.

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1 PRESIDING ARBITRATOR: We need
2 to have a lunch break.
3 MR. NASH: Yes.
4 PRESIDING ARBITRATOR: But I
5 am in your hands.
6 MR. NASH: This is fine, if
7 it's the rule of the tribunal.
8 PRESIDING ARBITRATOR: Is that
9 fine?
10 MR. NASH: It's absolutely
11 fine, yes.
12 PRESIDING ARBITRATOR: Okay.
13 So you are really going to experience what it
14 means not to have a free lunch because you will
15 have a sequestered lunch of some kind, I guess,
16 but not converse.
17 THE WITNESS: Understood, yes.
18 PRESIDING ARBITRATOR: All
19 right, so that means we are going to resume again
20 at 2:20.
21 --- Upon luncheon recess at 1:04 p.m.
22 --- Upon resuming at 2:21 p.m.
23 PRESIDING ARBITRATOR: I think
24 you are ready to resume the -- yes, Mr. Little,
25 you have a question?

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1 MR. SCOTT LITTLE: No, I'm not
2 finished.
3 PRESIDING MEMBER: Oh, I'm
4 sorry.
5 MR. SCOTT LITTLE: If that's
6 correct, I have some more to say.
7 PRESIDING MEMBER: Ah, okay.
8 MR. SCOTT LITTLE: We've
9 visited this issue twice before in the last few
10 weeks, and the tribunal will recall this isn't the
11 first time that we've had an attempt to just
12 introduce evidence without seeking permission, and
13 the tribunal set down some clear rules for the
14 introduction of new evidence. Procedural Order
15 25, paragraph 6.1, states that:
16 "Documents that do not
17 form part of the record
18 in this arbitration may
19 not be presented at the
20 hearing unless the
21 disputing parties so
22 agree or the tribunal,
23 having consulted with the
24 parties, exceptionally
25 authorizes their

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1 MR. SCOTT LITTLE: Yes, just a
2 matter I want to address before we move forward.
3 It's a fairly significant issue, in my view.
4 During the examination of
5 Ms. Griffiths, Mr. Nash raised with her an article
6 written by a Dr. Meinhard Doelle from July of
7 2017. And Mr. Nash quoted from the article and
8 then placed the content of that article in the
9 record by summarizing its content even though
10 Ms. Griffiths said that she didn't remember it.
11 We didn't hear an exhibit number reference for the
12 article, and we don't see it in her
13 cross-examination binder. And we have checked,
14 and there appears to be a reason for that, and
15 Mr. Nash can correct me if I'm wrong, but I don't
16 think that article is on the record.
17 PRESIDING ARBITRATOR:
18 Mr. Nash, would you --
19 MR. NASH: That's correct.
20 MR. SCOTT LITTLE: Okay.
21 So --
22 PRESIDING ARBITRATOR: It is.
23 MR. NASH: But if I can say --
24 PRESIDING MEMBER: Oh, you are
25 finished?

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1 presentation."[as read]
2 And none of that has happened
3 here. Mr. Nash has presented a document to the
4 tribunal by describing its content in detail, and
5 he purported to read from it by holding it up.
6 Now, the document was published long before the
7 claimants filed their reply submissions, and they
8 didn't exhibit it, and we feel that the
9 proceedings have been tainted as a result. So
10 there's been, again, disrespect for the rules, the
11 rules that have governed this issue that we've
12 dealt with now three times, and we're at a loss as
13 to what to do. We think that the relevant
14 testimony needs to be stricken from the record,
15 but we've also been prejudiced as a result of
16 this, and we think some other form of sanction is
17 necessary.
18 PRESIDING ARBITRATOR:
19 Mr. Nash, please.
20 MR. NASH: May I suggest,
21 Judge Simma, that we continue with the
22 cross-examination of the witnesses? We can deal
23 with this issue at another time. This is a
24 procedural issue. We've had important time
25 constraints on our dealing with witnesses today

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1 and that we defer further submission or discussion
2 on this issue until either after the hearing today
3 or after the witnesses are here or before the
4 hearing tomorrow.

5 MR. SCOTT LITTLE: Well, I'm
6 done my briefing on this. I don't think Mr. Nash
7 should be provided with additional time to prepare
8 some responding submission on this. I think the
9 question is black and white, and I think all that
10 should be left right now, unless Mr. Nash has
11 anything to say, is for the tribunal to arrive at
12 the decision.

13 MR. NASH: I'd appreciate some
14 time to consider my friend's submission and to
15 confer with our team and to make submissions at
16 another time.

17 PRESIDING ARBITRATOR: I
18 understood you are saying that immediately -- or I
19 understood what you said is that immediately after
20 the cross-examination of Mr. Blouin would be
21 finished, you would return to that issue?

22 MR. NASH: No. After today's
23 cross-examinations are finished, because we have
24 two more witnesses after Mr. Blouin, and we are
25 already -- as a hearing, we are running behind on

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1 the witnesses, and so I think that we should -- my
2 submission would be that we should make time to
3 make this procedural motion, to deal with this
4 matter at a time when witnesses are not scheduled.

5 There is no urgency to this in
6 the sense that what is on the record is on the
7 record, and it can be dealt with at another
8 appropriate time, not now.

9 PRESIDING ARBITRATOR:
10 Mr. Little?

11 MR. SCOTT LITTLE: Is the
12 issue going to continue in respect of this
13 cross-examination that's unfolding?

14 MR. NASH: There will be no
15 question about a contribution to that article. In
16 fact, there will be no reference to that article.

17 MR. SCOTT LITTLE: And will
18 there be reference to any other articles or
19 documents or materials that aren't on the record?

20 MR. NASH: No. Unless leave
21 from the tribunal is needed for the rest of the
22 cross-examinations.

23 MR. SCOTT LITTLE: If you're
24 intending to do that, I think we should be given
25 some notice, because the cross-examinations have

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1 to unfold efficiently.

2 MR. NASH: Well, we'll deal
3 with them when we deal with them.

4 MR. SCOTT LITTLE: May I ask,
5 Judge Simma, then, if there is documents being
6 referred to, documents that aren't on the
7 record --

8 PRESIDING ARBITRATOR: No.
9 It's a clear -- I mean, it's pretty clear if you
10 look at 25 -- let me read it:

11 "Documents that do not
12 form part of the record
13 in this arbitration may
14 not be presented at the
15 hearing unless the
16 disputing parties so
17 agree or the tribunal,
18 having consulted with the
19 parties, exceptionally
20 authorizes their
21 presentation." [as read]

22 This is a clear contravention
23 of that.

24 MR. SCOTT LITTLE: Exactly.
25 Exactly. And my point is that documents that

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1 aren't of the record can't be presented for entry
2 into the record in the course of a
3 cross-examination. We have four more
4 cross-examinations -- four or five we are
5 scheduled to get through today, and it's entirely
6 improper to introduce documents that aren't on the
7 record, pursuant to this provision, to have them
8 entered during the cross-examination.

9 MR. NASH: Except with leave,
10 but I would say this: My recollection is that, on
11 the procedural order dealing with the submission
12 of the reply rejoinder of the claimants, there was
13 reference to the fact that witnesses could be
14 cross-examined on those documents; that they could
15 be dealt with in cross-examination. They weren't
16 on the record, but that the issues -- and I'm
17 going by recollection now, but we'd have to go
18 back to that.

19 MR. SCOTT LITTLE: But
20 Mr. Nash has entered a document into the record
21 already.

22 MR. NASH: That's not correct.

23 MR. SCOTT LITTLE: Well, you
24 have. You have read from the document. You've
25 purported to read its contents into the record. I

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1 can read the questions that you put back right
2 now.
3 MR. NASH: Well, this --
4 MR. SCOTT LITTLE: You have.
5 MR. NASH: -- isn't a debate
6 that we --
7 PRESIDING ARBITRATOR: Are you
8 talking about the paper by the professor --
9 MR. SCOTT LITTLE: Yes, I am.
10 Yes. The contents -- some of the contents of that
11 paper are now part of the record, and that's what
12 happens when permission isn't sought beforehand.
13 PRESIDING ARBITRATOR: I think
14 -- can we return to this matter at the end of
15 today, so not tomorrow morning, but at the end of
16 the day? And...
17 MR. SCOTT LITTLE: We can, but
18 I think Mr. Nash is signalling that there's more
19 such documents that are going to form part of this
20 cross-examination.
21 MR. NASH: I will revisit --
22 PRESIDING ARBITRATOR: Is that
23 the case?
24 MR. NASH: I will revisit the
25 procedural order over a break to ensure that we

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1 letter, which is so -- well, I'm a lawyer, so I
2 could -- would be that that green light for the
3 treatment of these two witness reports does not
4 mean green light for further introductions of
5 documents.
6 MR. SCOTT LITTLE: Exactly.
7 PRESIDING ARBITRATOR: This
8 occurred to the two reports in question.
9 DR. PULKOWSKI: Right. So
10 there is -- let me hand this to you, as well,
11 Mr. Chairman.
12 PRESIDING ARBITRATOR: Let me
13 suggest that, out of fairness also to the witness,
14 I think we can continue that at the end of the
15 day. Mr. Little, would you agree?
16 MR. SCOTT LITTLE: No. I'm
17 still concerned that Mr. Nash will be introducing
18 documents that are not part of the record.
19 PRESIDING ARBITRATOR: Right.
20 So let me ask Mr. Nash: Do you, during the course
21 of this afternoon, intend to introduce some other
22 documents which are not on the record yet in
23 cross-examination?
24 MR. NASH: I intend, with
25 Mr. McLean, to test the facts in response to his

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1 comply with both the spirit and the letter of the
2 procedural order that was made in response to our
3 request to submit the reply rejoinder.
4 PRESIDING ARBITRATOR: Yes.
5 Dirk, I'm sure you've already found the passage in
6 the order or even letter.
7 DR. PULKOWSKI: Well, the
8 tribunal may want to clarify what it intended. I
9 think mention is made of the January 26th letter,
10 rejecting at the time the admission of new
11 documents or new expert evidence into the record.
12 And the operative paragraph 2 says that it is open
13 to the investors, within the constraints of
14 Procedural Order Number 25, to critique the
15 Cromwell report and the McLean statement in their
16 opening and closing statements and to probe the
17 strength of Mr. McLean's -- of the McLean
18 statement in the context of cross-examination.
19 MR. NASH: That was the
20 passage I had in mind, which is exactly what any
21 new documents would be used for, if they're used
22 at all, is to probe the veracity of Mr. McLean's
23 statement.
24 PRESIDING ARBITRATOR: But my
25 reading -- I mean, my reading of the -- this

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1 witness statement, and those facts are contained
2 in documents. I intend to put the facts to him.
3 MR. SCOTT LITTLE: And those
4 documents are not in the record?
5 MR. NASH: They are not on the
6 record, but I'm going to --
7 MR. SCOTT LITTLE: You can't
8 do it, Mr. Nash.
9 MR. NASH: With respect,
10 Mr. Little, it's the tribunal who decides these
11 things, and I don't think we should have this back
12 and forth at this stage.
13 PRESIDING ARBITRATOR: May I
14 suggest that we continue or finish the -- your
15 examination and maybe have Mr. Connelly and then
16 have a break. And within that break, before
17 McLean, we could bring this to a decision.
18 MR. NASH: I think that's the
19 proper way to go.
20 MR. SCOTT LITTLE: Again, I'm
21 going to register my concern right now that
22 Mr. Nash is going to read documents that are not
23 into the record and that might not be contained in
24 the tab -- the binders that we have been provided,
25 for a reason, because they are not forming part of

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1 the record in the course of this cross-examination
2 and Mr. Connelly's cross-examination.
3 MR. NASH: Your concern is
4 unjustified with respect to anything to do with
5 Mr. Blouin's cross-examination or Mr. Connelly's.
6 MR. SCOTT LITTLE: So no new
7 documents are going to form part of your
8 cross-examination of Mr. Blouin -- Dr. Blouin or
9 Mr. Connelly?
10 MR. NASH: That's correct,
11 yes.
12 PRESIDING ARBITRATOR: That
13 was the basis of my proposal --
14 MR. NASH: Yes.
15 PRESIDING ARBITRATOR: -- that
16 we register -- we note the concern. We are going
17 to deal with it, but maybe have the poor, in a
18 sense, Mr. Blouin sitting in front of us, and then
19 Mr. Connelly's testimony, which is not -- which
20 will not involve any document.
21 MR. NASH: Exactly.
22 PRESIDING ARBITRATOR: And
23 then we'll take care of the matter. And I think
24 you can agree with that, Mr. Little.
25 MR. SCOTT LITTLE: I can agree

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1 with that, with the assurance that Mr. Nash has
2 provided.
3 PRESIDING ARBITRATOR: Yes,
4 thank you. Mr. Nash.
5 MR. NASH: You can trust my
6 assurance, Mr. Little.
7 MR. SCOTT LITTLE: Thank you.
8 MR. NASH: I do have a report
9 to make on the definition of a rule vessel, which
10 follows up on your question this morning. And
11 that is a rule vessel is 20 metres, 56 feet, or
12 more, in length and more than 300 gross registered
13 tonnes or 330 tons. And that's in the EIS,
14 Exhibit C 1, page 018752.
15 PRESIDING ARBITRATOR: Okay.
16 Thank you. There was also a line in the
17 transcript of the JRP hearing, which said in
18 brackets rule vessel, meaning that they have to
19 register when they enter --
20 MR. NASH: Yes. Yes.
21 PRESIDING ARBITRATOR: -- and
22 register when they leave the shipping --
23 MR. NASH: The shipping lanes,
24 exactly.
25 PRESIDING ARBITRATOR: Okay.

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1 Thank you.
2 MR. NASH: Yes, thank you.
3 BY MR. NASH:
4 Q. So, Mr. Blouin, did you
5 consult with anyone besides Canada's lawyers with
6 respect to any aspect of your June 9th report
7 before you signed it?
8 A. I don't believe so.
9 There were -- I know there were meetings with the
10 Canada group.
11 Q. Yes.
12 A. And I --
13 Q. The Canada group being
14 the lawyers?
15 A. Yes, correct, sorry.
16 Q. Yeah.
17 A. But, no, I don't believe
18 there was any consultation with anyone else.
19 Q. And you conferred with no
20 Nova Scotia officials; correct?
21 A. In regard to preparing
22 these reports?
23 Q. Yes.
24 A. No.
25 Q. And no lawyers from the

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1 Nova Scotia Attorney General's department?
2 A. No.
3 Q. You saw Lesley Griffiths'
4 report before you signed your June 9th report;
5 that's correct?
6 A. I'm not sure I can
7 actually confirm that from memory.
8 Q. Could you turn to Tab 1
9 in the binder in front of you and go to
10 paragraph 15 on page 5. You say:
11 "As I noted above, my
12 comments focus solely on
13 the Whites Point JRP's
14 Nova Scotia mandate. I
15 understand the expert
16 report of Lesley
17 Griffiths addresses the
18 JRP's federal
19 mandate." [as read]
20 A. Yes.
21 Q. Does that assist you in
22 your recollection as to whether you actually saw
23 her report or was simply advised of that fact?
24 A. I guess I'd have to say
25 my recollection is that I did not see her report,

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1 but I did have an understanding of her mandate
2 from Canada in comparison to mine, and it was
3 clear that she was dealing with the federal side
4 of the assessment process where I was dealing with
5 the provincial side.

6 Q. And you did see Peter
7 Geddes' report, dated June 9th, prior to signing
8 your document. And if you go to the bottom of
9 page 5, you will see a footnote, Footnote 7. It
10 is R 5, the NSEA, section 40, and RE 4 report of
11 Peter Geddes, June 9th, 2017.

12 So had you seen Peter Geddes'
13 report before you cited it as authority for the
14 proposition at the end of paragraph 16?

15 A. Again, I'm not sure that
16 I can confirm it or not from memory, but I agree
17 that that citation does imply that I had seen it,
18 yes.

19 Q. Could it be that that
20 citation was put in by someone else other than
21 you?

22 A. I really can't say at
23 this point. I mean, when I was preparing these
24 reports, I would prepare draft material. That
25 draft material would be reviewed by the federal

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1 counsel.

2 Q. Okay.

3 A. They may have suggested
4 certain changes or additions. It would be up to
5 me whether to incorporate those or not, but for
6 this particular one, I really can't say.

7 Q. Can you, therefore,
8 confirm that you assumed that the Geddes report
9 was correct and reliable and that Mr. Geddes was
10 qualified to render the opinions that you were
11 relying upon, to the extent you were?

12 A. I mean, in a general
13 sense, yes.

14 Q. Could you turn, please,
15 in that same document to page 7, paragraph 21.

16 A. Yes.

17 Q. You say there that at the
18 top of that first sentence in that paragraph:

19 "The mandate of Nova
20 Scotia review panels is
21 governed by the
22 Provincial Act and
23 regulations." [as read]

24 And then you say:

25 "The NSEA and NSEAR are

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1 not prescriptive." [as
2 read]

3 Now, you use that word
4 "prescriptive" in your report. What is your
5 understanding of the meaning of the word
6 "prescriptive" in reference to the interpretation
7 of a statute?

8 A. Well, in this case, what
9 my meaning was that those -- the Act and
10 regulations do not set out in any real detail or
11 give guidance to a panel in terms of the scope or
12 content of the review and how it must be
13 conducted.

14 Q. Have you used the word
15 "prescriptive" in relation to the interpretation
16 of a statute or the description of a statute
17 before writing it in this report?

18 A. Ever?

19 Q. Ever.

20 A. I'm sorry. I really
21 couldn't say. It's --

22 Q. It's not a normal word
23 that you would be using around the Halifax water
24 management complex?

25 A. Prescriptive?

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1 Q. Yeah.

2 A. It's possible. I'm quite
3 familiar with the word.

4 Q. All right. Could you
5 please turn to paragraph 20 on the previous page.
6 And you say in paragraph 20, three lines from the
7 bottom:

8 "As I explain below, the
9 provincial mandate of the
10 Nova Scotia review panels
11 is broad." [as read]

12 Now, was that intended to be a
13 legal opinion?

14 A. I'm not a lawyer, so I
15 suppose, no, it's not a legal opinion.

16 Q. It's an interpretation of
17 the statute, though, isn't it?

18 A. It is on my part, yes.

19 Q. Yeah. And when you say
20 it was broad, was it broad compared to other
21 administrative bodies either in Nova Scotia or in
22 other provinces?

23 A. I would say I don't have
24 enough information to draw that conclusion.

25 Q. You have not engaged in

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1 any studies, I gather, comparing the mandate of
2 the Nova Scotia review panels to the mandates of
3 other review panels?
4 A. No.
5 Q. You haven't explored the
6 breadth of the mandate of review panels in other
7 provinces and compared it to the review panel, the
8 breadth of the review panel in Nova Scotia; that's
9 correct?
10 A. Not in terms of any
11 formal study. I mean, I do know some of the
12 aspects of legislation in other provinces just
13 from my working experience.
14 Q. But you're not an expert
15 on that, are you, sir?
16 A. No, I'm not.
17 Q. Could you turn to
18 paragraph 22, please, on page 7 -- actually,
19 paragraph 21.
20 A. Yes.
21 Q. There are some
22 definitions in the centre of the page, page 7.
23 A. Yes.
24 Q. You've put in the
25 definition of environment. You've put in the

Page 903

1 A. Well, I guess I would say
2 it's one aspect. I'm not sure that I would call
3 it the starting point, necessarily.
4 Q. Would you agree with me
5 that an environmental assessment is not about
6 concluding whether or not there are concerns about
7 a project?
8 A. Well, you've noted that
9 "concern" is not a defined term. I mean,
10 "concerns" can mean a lot of different things.
11 Part of what a panel does in conducting a review
12 is identify which environmental assets might be at
13 risk as a result of a project, what the magnitude
14 of those impacts may be, and so on. So that could
15 be called a concern.
16 Q. That can be the
17 identification of a concern?
18 A. Yes.
19 Q. But the determination in
20 terms of an environmental assessment, either in
21 Nova Scotia or in Canada, is not about determining
22 whether or not there are concerns about a project.
23 Would you agree with me that it's about
24 determining whether there are significant adverse
25 effects about a project and likely effects and

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1 definition of environmental effect.
2 Would you -- so you've
3 reviewed all of the definitions in the Nova Scotia
4 Environment Act?
5 A. I have, yes.
6 Q. You have?
7 A. Yes.
8 Q. And is "concern" defined
9 in the Nova Scotia environment Act?
10 A. "Concern"? The word
11 "concern"?
12 Q. Yes.
13 A. I don't believe it is.
14 Q. Or in the regulations?
15 A. No, probably not.
16 Q. There is no reference to
17 "concern" as a factor in the Nova Scotia
18 legislation to be determinative in a likely
19 effects assessment; that's correct?
20 A. Well, to my knowledge,
21 from my memory, no, I don't believe there is.
22 Q. And would you agree with
23 me that the identification of concerns or
24 potential concerns is the starting point of the
25 effects analysis, or can you comment on that?

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1 mitigation; is that correct?
2 A. Well, correct, yes.
3 Except I would point out that determination of
4 significant adverse environmental effects is not a
5 requirement of the Nova Scotia process.
6 Q. Would you agree with me
7 that the identification of concerns is not the
8 endpoint of an analysis of effects; would you
9 agree with that?
10 A. I do agree, yes.
11 Q. And you just expressed a
12 legal opinion about two different definitions in
13 the Act, which are significant environmental
14 effects and adverse effects.
15 A. Um-hmm.
16 Q. That's -- and when did
17 you formulate that legal opinion?
18 A. That's just my
19 understanding of the legislation based on the
20 definitions that you see there.
21 Q. So you see the words, but
22 you have no expertise in exercising a legal
23 interpretation of those words; that's correct?
24 A. That's correct. I have
25 confirmed I'm not a lawyer.

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1 Q. Could you turn to
2 paragraph 24, please, at page 8.
3 A. Yes.
4 Q. Paragraph 24 says:
5 "Pursuant to the NSEA,
6 socioeconomic conditions
7 can be assessed
8 separately and
9 independently from
10 biophysical impacts on
11 the natural
12 environment." [as read]
13 Now, you are not offering that
14 up as a legal interpretation; is that correct?
15 A. It's my interpretation.
16 Q. It's your interpretation,
17 your personal interpretation?
18 A. Yes. Based on knowledge
19 and experience, yes.
20 Q. In Footnote 2 -- sorry,
21 Footnote 20, at the bottom of that page, you cite
22 the affidavit of Chris Daly in this proceeding,
23 dated December 6, 2011.
24 A. Yes.
25 Q. And you rely upon

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1 Mr. Daly's legal opinion for support in your
2 opinion; is that correct?
3 A. Well, I'm not sure I can
4 characterize his opinion as a legal opinion. I
5 can't recall for certain, but I'm not sure if he
6 is a lawyer. I would rely on his opinion.
7 Q. Who gave you that
8 affidavit, or did you dig through all of the
9 documentation in this proceeding and discover that
10 affidavit for yourself and come to a conclusion
11 based on that affidavit as for support for your
12 conclusion?
13 A. I'm not sure I can say
14 for certain. It certainly may be that I was given
15 that document by counsel, but I can't say for
16 certain.
17 Q. Did you know that
18 Mr. Daly was a career civil servant in Nova
19 Scotia?
20 A. Well, I certainly
21 encountered him in that role, yes.
22 Q. Yes. Do you know that he
23 was the Associate Deputy Minister of Development
24 and Tourism?
25 A. I believe that's the case

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1 now, yes.
2 Q. Did you know that he is
3 the Executive Director of Business Relationship
4 Management with the Nova Scotia government and
5 that he is a trustee of the Public Service
6 Superannuation Plan?
7 A. Is that -- you're
8 referring to current status?
9 Q. Yes.
10 A. I was not aware of that,
11 no.
12 Q. And you relied upon
13 Mr. Daly's opinion for the purpose of basing it --
14 using its to support your opinion; that's correct?
15 A. That's correct. Based on
16 the fact that he had been the environmental
17 assessment administrator for Nova Scotia
18 Environment.
19 Q. At paragraph 23, you
20 state:
21 "Collectively, these
22 definitions make clear
23 that, while the potential
24 adverse effects or
25 significant environmental

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1 effects of an undertaking
2 on the natural
3 environment -- soil, air,
4 water, plants, animals
5 and their interactions --
6 must be evaluated in a
7 Nova Scotia EA, adverse
8 or significant
9 environmental effects on
10 the socioeconomic
11 conditions of potentially
12 affected communities are
13 of equal importance." [as
14 read]
15 Now, again, that's simply an
16 expression of your understanding, not a formal
17 opinion on the operation of the legislation;
18 that's correct?
19 A. That would be correct,
20 yes.
21 Q. Would you be content with
22 accepting the determination by the Minister of
23 Environment in Nova Scotia in his use of the term
24 "significance" and "adverse effects"?
25 A. I'm not sure I

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1 understand. Accept in what context?
2 Q. Well, if you go to Tab 7,
3 had you seen or heard of this document, the
4 letter, which is Exhibit C 541, from Mr. Parent to
5 Mr. Buxton, dated November 20th, 2007, before
6 today?
7 A. Sorry, I'm just having a
8 quick look at it.
9 Q. Sure. You were here for
10 Ms. Griffiths' evidence?
11 A. Yes. Yes, I was.
12 Q. Did you hear reference to
13 this document?
14 A. Yup. I did, yes.
15 I was aware of the decision,
16 but I'm not sure that I have actually seen this
17 document before today.
18 Q. Were you aware, before
19 today, of the words in the second-to-last
20 paragraph, which state:
21 "I have arrived at my
22 decision following a
23 careful consideration of
24 the panel's report. I
25 have determined that the

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1 proposed project poses
2 the threat of
3 unacceptable and
4 significant adverse
5 effects."[as read]
6 Do you see that?
7 A. I do.
8 Q. And you would agree with
9 the Minister's use of that language to describe
10 the operation of the Nova Scotia Environment Act?
11 A. I would agree that he was
12 expressing his decision and his opinion on that
13 matter. I have indicated before that a finding of
14 significant adverse effects is not a requirement
15 of the legislation, in my understanding.
16 Q. In your understanding?
17 A. Yes.
18 Q. You would agree with me
19 that all human activity can potentially have
20 adverse effects; do you agree with that?
21 A. All human activity?
22 Q. Yeah.
23 A. Adverse environmental
24 effects?
25 Q. Yes.

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1 A. That's a pretty broad
2 statement.
3 Q. Well, let's take it one
4 step --
5 A. Many of them, many of
6 them certainly can.
7 Q. Well, let's take an
8 example. You flew here from Halifax?
9 A. Yes.
10 Q. You flew on an airplane?
11 A. Yes.
12 Q. You consumed fuel?
13 A. Yes.
14 Q. Would you agree that that
15 was an adverse effect on the environment?
16 A. Yes, I would.
17 Q. And the airplane that
18 transported you landed on a runway?
19 A. Yes.
20 Q. And that runway
21 consisted, in part, of aggregate?
22 A. Yes.
23 Q. Which came from a quarry?
24 A. Correct.
25 Q. And extracting and

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1 transporting the aggregate had a potential adverse
2 environmental effect?
3 A. I don't dispute that, no.
4 Q. Did you read the
5 testimony in preparation for writing your opinion
6 of the representative of the Nova Scotia
7 Department of Natural Resources in his testimony
8 before the JRP?
9 A. I'd probably have to have
10 a look at it, but I likely did, yes.
11 Q. Okay. If you can turn to
12 Tab 8 F and turn -- this is Volume 3 of the Whites
13 Point Quarry Marine Joint Review Panel Public
14 Hearing. And turn to page 555.
15 A. Yes.
16 Q. Mr. Muecke asks the
17 representative of the natural resources
18 department -- who I believe is Don Jones?
19 A. Yes.
20 Q. "Would it be fair to say
21 that Department of
22 Natural Resources sees
23 itself, in part, in its
24 mandate, as part of its
25 mandate sees itself in

Page 913		Page 914	
1	the promotion of	1	facilitate the interests
2	aggregate export and	2	of the aggregate in
3	exploitation?"[as read]	3	mining industry?
4	Mr. Jones says:	4	"MR. JONES: Assist,
5	"Yes. Part of our	5	facilitate, and regulate.
6	mandate is to provide the	6	"MR. MUECKE: And
7	geoscience background for	7	regulate. I shouldn't
8	the knowledge of geology	8	have left that out.
9	of the province. It is	9	"Okay. So one last
10	also a mandate to see the	10	question along these
11	responsible development	11	lines: So aggregate
12	of our natural resources,	12	producers, mining
13	minerals and aggregates	13	companies regulate,
14	included.	14	consult with you in terms
15	"MR. MUECKE: And the	15	of possible future
16	promotion of the	16	projects. Have there
17	aggregate in terms of	17	been advances from
18	exporting?	18	aggregate producers other
19	"I would say yes. We	19	than Bilcon in recent
20	take on a promotional	20	years who would like to
21	initiative in our duties.	21	start coastal quarry
22	"MR. MUECKE: Okay. And	22	operations?
23	so do you and your	23	"MR. JONES: I will refer
24	colleagues see it as part	24	that to Mike.
25	of your job to assist and	25	"MR. MACDONALD: Yes.
Page 915		Page 916	
1	There have been several	1	understand that.
2	companies that have	2	"MS. GRANT: Just a
3	expressed interest, not	3	couple of follow-up
4	specific locations	4	questions on that. Can
5	necessarily, but looking	5	you explain the
6	at opportunities.	6	department's position on
7	"MR. MUECKE: By	7	how this kind of activity
8	'several,' could you just	8	contributes to
9	quantify that a little	9	sustainable development?
10	bit?	10	"MR. JONES: From the
11	"MR. MACDONALD: A	11	Department of Natural
12	number.	12	Resources, we see the
13	"An approximate number,	13	activity of mineral
14	approximately the	14	resource extracting
15	number?"	15	aggregate as a
16	"MR. MACDONALD: Perhaps	16	significant component and
17	a half a dozen.	17	part of the economic and
18	"MR. MUECKE: Thank you.	18	social well being of the
19	"DON JONES: But I think	19	province. We all
20	that refers to over the	20	probably drove here today
21	land mass of the	21	on roads that are built
22	province, so it's not	22	with aggregate in the
23	specifically down in this	23	form of concrete or
24	region.	24	asphalt and also the
25	"MR. MUECKE: Yes, I	25	subbase of that. We all

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1 live in homes where we
2 use aggregate resources
3 to provide ourselves
4 accommodation. We also
5 use cars to come here,
6 which is substantially a
7 production of the
8 minerals industry and
9 petroleum industry and
10 fuelled by fuels produced
11 by the petroleum
12 industry. We are a
13 significant component of
14 the economic well being
15 of the province and
16 taking into the respect
17 of that the activities we
18 conduct. Sometimes in
19 the past we have left
20 legacies. We are making
21 substantial strides to
22 improve our performance
23 into the future. These
24 initiatives are certainly
25 represented by a strong

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1 initiative through the
2 global mining initiative,
3 the ICMM, the Mining
4 Association of Canada,
5 and the MCAA initiatives
6 to drive these industries
7 and regulator and
8 community driven
9 initiatives to make us do
10 better in the future.
11 So, from that
12 perspective, I think we
13 have a balance. It is
14 forever a moving target,
15 and it is the initiative
16 of the industry to
17 continue to provide into
18 the economy as well as to
19 do so in an
20 environmentally
21 sustainable manner.
22 "MS. GRANT: Thanks. And
23 could you give us an idea
24 of what the value of
25 aggregate is in the

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1 province right now,
2 approximate value per
3 ton?
4 "MR. DON JONES: Yes. We
5 produce about 10 million
6 tons of aggregate, 3
7 million in the form of
8 sand and gravel, 7
9 million in the form of
10 aggregate. I guess you
11 can use a factor -- I
12 think it's a federally
13 identified number -- of
14 about \$6.5 to \$7 per
15 tonne of production, so
16 we can say in that order
17 of magnitude."[as read]
18 Now, did you read that
19 evidence before you wrote your opinion?
20 A. It does sound familiar,
21 yes.
22 Q. And you would agree that
23 Mr. Jones' comments there are factors that the
24 Minister of Environment was compelled to take into
25 account in arriving at his decision as to whether

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1 to approve or reject the Whites Point Quarry?
2 A. While I can't
3 categorically state that the Minister actually
4 read this material, I don't know that.
5 Q. But generally speaking?
6 A. Generally speaking, yes.
7 Q. It would be something
8 that idea that the development of industry, in
9 particular the aggregate industry, to promote the
10 prosperity of Nova Scotians is something that the
11 Minister of Environment would be compelled to take
12 into account in making his decision; that's right?
13 A. I think that would be
14 part of the consideration, yes.
15 Q. Could you please turn to
16 Tab 6. That's the witness statement of Dan
17 Kontak. Have you seen that witness statement
18 before today?
19 A. Daniel Kontak? No.
20 Q. So Dan Kontak was a
21 geologist with the natural resources department.
22 PROFESSOR McRAE: Which tab is
23 this?
24 MR. NASH: I'm sorry, Tab 6.
25 DR. PULKOWSKI: It's Volume 1.

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<p>1 MR. NASH: Yes. 2 BY MR. NASH: 3 Q. So, at page 2, 4 paragraph 3, Dr. Kontak states he was employed by 5 the Nova Scotia Department of Natural Resources -- 6 A. I'm sorry. I don't see 7 paragraph 3 on page 2. 8 Q. I'm sorry. I'm on the 9 second page of the document. 10 A. Second page? Okay. 11 Q. Numbered page 1. 12 A. Okay. Yes. 13 Q. "He was employed by the 14 Nova Scotia Department of 15 Natural Resources as a 16 mineral geologist. His 17 work primarily focused on 18 examining and researching 19 a variety of mineral 20 deposits and providing an 21 up-to-date documentation 22 of their setting and 23 origin in order to, among 24 other things, assist 25 proponents' interest in</p>	<p>1 their potential 2 exploitation."[as read] 3 Now, he goes on to describe in 4 paragraphs 5, 6, and 7 his work for the DNR and 5 the publishing of numerous studies on the geology 6 of the North Mountain. At paragraph 7, he says: 7 "Likewise, over the 8 years, I have published 9 numerous studies on the 10 geology of the North 11 Mountain where Bilcon 12 proposed to build the 13 Whites Point project. 14 The reason for these 15 studies was, among other 16 things, to better 17 understand what 18 controlled the 19 distribution of zeolites, 20 which is a class of 21 porous minerals used in 22 various commercial 23 applications along the 24 North Mountain. By doing 25 this work, the DNR</p>	
	Page 923	Page 924
<p>1 provided companies with 2 better information on the 3 potential for zeolites 4 and high quality 5 aggregate production from 6 rocks in the North 7 Mountain."[as read] 8 And then over to paragraph 9 9 on page 3: 10 "To attract potential 11 exploration companies to 12 the province, the DNR 13 also spent considerable 14 time and resources 15 promoting the results of 16 DNR studies and deposits 17 through a variety of 18 venues including, under 19 (a) a large DNR 20 delegation, including the 21 Minister, along with 22 prospectors subsidized by 23 the government, to attend 24 annual Prospectors and 25 Developers Conference in</p>	<p>1 Toronto; under (b), the 2 Association for Mining 3 Exploration Round Up 4 Conference, an annual 5 conference held in 6 Vancouver BC with 7,000 7 plus in attendance; under 8 (c), the DNR hosted an 9 annual open house and 10 report of activities. 11 This two-day event 12 attracted upwards of 250 13 professionals. It was 14 held for decades. It was 15 the annual showcase for 16 work done in the 17 department."[as read] 18 And over to paragraph 11, in 19 the middle of page 4: 20 "The DNR also provides 21 free consulting to 22 private companies, 23 including office 24 meetings, site visits, 25 and preparing detailed</p>	

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1 site specific studies or
2 research on materials
3 extracted from sites."[as
4 read]
5 Paragraph 12:
6 "DNR also assisted Bilcon
7 on the Whites Point
8 project. In the spring
9 of 2002, Phil Finck, a
10 DNR geologist introduced
11 me to John Lizak,
12 Bilcon's consulting
13 geologist, because I was
14 the in-house expert on
15 the basalt rocks of the
16 North Mountain."[as read]
17 Paragraph 13:
18 "To help, I spent a
19 number of days in the
20 field with him at Whites
21 Point and the immediately
22 surrounding area, showing
23 him the feature of the
24 North Mountain
25 basalt."[as read]

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1 Now, you would agree with --
2 well, are you familiar with any of this evidence
3 before today?
4 A. No. I think I -- perhaps
5 earlier in the week, I may have heard that such
6 meetings or tours took place.
7 Q. Do you know if Minister
8 Parent was aware of the facts set out by
9 Dr. Kontak or took them into account in making his
10 decision?
11 A. I don't have that
12 knowledge.
13 Q. You would agree that this
14 is the kind of information that Minister Parent
15 should take into account in making his decision to
16 reject or approve the project; correct?
17 A. Well, I'm not sure I'm
18 qualified or in a position to say exactly what the
19 Minister would take into account, but if it was
20 available to him, it would form part of the
21 information base.
22 Q. And appropriately part of
23 the information?
24 A. I would think so.
25 Q. Yes. And so you would

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1 agree with me that a reasonable environmental
2 assessment of potential environmental effect of a
3 project in Nova Scotia, including a socioeconomic
4 effect, should properly take into account the
5 goals, objectives, and reasonable expectations of
6 Nova Scotians?
7 A. In general, yes.
8 Q. And you would understand
9 that those goals, objectives, and reasonable
10 expectations are expressed collectively through
11 Nova Scotia statutes, regulations, and policies?
12 A. Yes.
13 Q. And that a fair and
14 proper environmental assessment of a project in
15 Nova Scotia must apply the stated policies of the
16 Government of Nova Scotia?
17 A. Must apply all the
18 policies.
19 Q. The stated policies of
20 the Government of Nova Scotia?
21 A. I'm not sure I can agree
22 with that statement, because I think my opinion
23 would be that some of the policies are, in some
24 sense, conflicting. I'm not sure you can apply
25 them all simultaneously to any one thing.

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1 Q. Well, would you agree
2 with me that the application of a reasonableness
3 standard to the assessment of a potential adverse
4 effect under the Nova Scotia legislation should
5 properly include what I would refer to as a
6 materiality component?
7 A. Materiality meaning?
8 Q. Materiality component
9 meaning an effect of substantial relative
10 consequence or of a material consequence; would
11 you agree with that?
12 A. Potentially, yes.
13 Q. Would you agree with me
14 that the adverse effect must be considered in
15 light of and taking into account the broad
16 requirements of Nova Scotia society as a whole?
17 A. In a very general sense,
18 yes.
19 Q. Would you agree that it
20 is fair to say that the assessment of an adverse
21 effect must take into account the requirement of
22 the balance of sustainable development, protection
23 of the environment, on the one hand, and economic
24 prosperity, on the other?
25 A. That appears directly in

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1 the Act, yes.
2 Q. And you would also agree
3 with me that a reasonable assessment of a
4 potential adverse effect in Nova Scotia, taking
5 into account that materiality component I referred
6 to, would need to consider the magnitude of the
7 effect?
8 A. Magnitude of the effect?
9 Certainly, yeah.
10 Q. The duration of the
11 effect?
12 A. Yes.
13 Q. The frequency of the
14 effect?
15 A. Yes.
16 Q. The reversibility of the
17 effect?
18 A. Yes.
19 Q. The geographic extent of
20 the effect?
21 A. Yes.
22 Q. The ecological context of
23 the effect?
24 A. Yes.
25 Q. And the likelihood of the

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1 occurrence of the effect?
2 A. Yes.
3 Q. And you would understand
4 reasonableness would require all of these factors
5 to be taken into account in the assessment of a
6 project in Nova Scotia?
7 A. Well, in the assessment
8 of the environmental impacts of the project, yes.
9 Q. Right. And also the
10 economic -- socioeconomic effects of the project;
11 correct?
12 A. Socioeconomic effects are
13 part of the analysis, yes.
14 Q. Okay. Please turn to
15 Tab 5 in the binder, Volume 1. You see that this
16 is a letter to Mr. Buxton that was referred to
17 this morning while you were in the room, I
18 believe. And if you go to page 6. And what this
19 letter is saying is this is what the JRP is going
20 to do. At 8.0, "Impact Assessment Methodology",
21 the panel, at the very bottom of that page:
22 "The panel will assess
23 predicted residual
24 effects, the effects that
25 remain after mitigation

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1 through the application
2 of a combination of
3 criteria that are
4 appropriate to each
5 potential effect. The
6 criteria will normally
7 include the magnitude,
8 geographical extent, and
9 duration of the effect
10 and may also include the
11 frequency, reversibility,
12 and ecological context.
13 Each effect will,
14 therefore, be described
15 in terms of a combination
16 of factors."[as read]
17 So you would agree with me
18 that that correctly states, as we have just heard
19 from you, the appropriate mandate for the JRP;
20 correct?
21 A. I believe, certainly,
22 that would be part of their mandate, yes.
23 Q. Yes. Were you aware
24 before -- first of all, have you seen this
25 document before today?

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1 A. It's an information
2 request?
3 Q. Yes.
4 A. Yes, I probably did. It
5 would be part of the record.
6 Q. Were you aware before
7 today, then, that the JRP told Bilcon that the JRP
8 would determine the likelihood of the project
9 causing significant adverse environmental effects?
10 A. I don't know that I can
11 say whether or not I recall it exactly.
12 Q. Okay. Would you agree,
13 now having seen at least part of this document,
14 that that's what they were intending to do?
15 A. It's apparent that that
16 was, yes.
17 Q. Were you aware before
18 today that the JRP advised Bilcon that the project
19 determined a component of the project -- sorry, if
20 the JRP determined a component of the project
21 would cause a significant adverse environmental
22 effect, that the panel would then decide whether
23 the effect was likely?
24 A. You're asking if I was
25 aware of that?

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1 Q. Yes.
2 A. Again, I can't say that I
3 recall specific wording, no.
4 Q. Okay. We reviewed --
5 were you in the room this morning when I was
6 asking questions of Ms. Griffiths?
7 A. I was.
8 Q. And you heard our
9 exchanges about various documents, including the
10 1996 Mineral Policy, the 1996 brochure, the 2006
11 brochures, and the presentation by Phil Finck and
12 others to the Mining Society 2006 meeting, along
13 with slides; do you recall that?
14 A. I do.
15 Q. And you would agree that
16 all of that information would be the kind of
17 information that the Minister should be taking
18 into account in coming to a fair and reasonable
19 decision as to whether to approve or reject the
20 quarry; correct?
21 A. Well, again, I'm not part
22 of the decision-making process of the Minister, so
23 I can't say for certain what is or is not
24 considered. But it would, I would think, be part
25 of the larger picture certainly.

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1 Q. And that was in 2006,
2 while the JRP proceeding -- panel proceeding was
3 underway. Were you aware of that?
4 A. Was I aware of this
5 presentation?
6 Q. Yes.
7 A. No.
8 Q. Were you aware of that
9 presentation before you wrote your opinion?
10 A. I don't believe so, no.
11 Q. Were you aware of any of
12 those brochures? And I can take them to you if
13 you wish?
14 A. They did not look
15 familiar to me, no. I can't say that I was.
16 Q. All right.
17 A. I would note, though,
18 that, I mean, it's a common aspect of government
19 that different departments have different
20 mandates, so the Department of Natural Resources
21 would certainly have a mandate to, as you say,
22 promote mineral development.
23 Q. Right. And your
24 understanding of it is that government speaks with
25 one voice?

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1 Q. And appropriately so?
2 A. I would say.
3 Q. Could you turn to Tab 12
4 in Volume 2. This is the Nova Scotia Mining
5 Society meeting in June of 2006. You see the
6 agenda on the front page?
7 A. I do.
8 Q. Can you go, please, to
9 page 32, which is on the top left-hand side of the
10 page.
11 A. Yes.
12 Q. There are eight sites
13 identified in this slide presentation as being
14 appropriate for the development of quarries. You
15 will see eight numbers there at different
16 locations. And you will see that Number 7 is the
17 North Mountain; do you see that?
18 A. I do.
19 Q. And if you go to the next
20 page, page 33, you will see:
21 North Mountain, Digby
22 area, unlimited amounts
23 of traprock."[as read]
24 Do you see that?
25 A. I do.

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1 A. I have spent some time in
2 government, and I'm not sure that's been my
3 experience.
4 Q. It's supposed to speak
5 with one voice?
6 A. It's supposed to? Okay,
7 supposed to.
8 Q. It's supposed to be
9 consistent within the four corners of government
10 action and policy; you would agree that it should
11 be consistent?
12 A. Ideally, perhaps.
13 Q. Right.
14 Did you know Dr. Grant or
15 Dr. Fournier or Dr. Muecke before you wrote your
16 opinion?
17 A. I don't believe I have
18 ever met Dr. Muecke or Dr. Grant. To my
19 recollection, I have had two occasions to meet
20 Dr. Fournier prior to this.
21 Q. You heard the discussion
22 this morning about their eminent qualifications?
23 A. Yes.
24 Q. And you agree that they
25 had no lack of training, qualifications,

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1 experience, intelligence, skill, and
2 infrastructure support from the governments to
3 fully understand and appreciate their duties and
4 obligations?
5 A. I believe that would be
6 the case.
7 Q. And what their duties and
8 responsibilities were in making recommendations to
9 the ministers, you'd agree with that?
10 A. I would.
11 Q. And you weren't, as I
12 understand it, actually any part of the JRP
13 proceeding; that's correct?
14 A. Not at all.
15 Q. You didn't attend the
16 hearings?
17 A. I did not.
18 Q. You didn't attend the
19 public scoping sessions?
20 A. No.
21 Q. And would you agree that
22 they were in the best position of anyone, of you,
23 Ms. Griffiths, anyone else, in the best position
24 to assess likelihood, significance, adverse
25 effects, and mitigation measures?

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1 are my questions.
2 PRESIDING ARBITRATOR: Thank
3 you, Mr. Nash. Redirect will be done by Ms. Kam,
4 yes.
5 RE-EXAMINATION BY MS. KAM:
6 Q. Dr. Blouin, during your
7 cross-examination, you were asked about whether
8 you would defer to the opinions of certain
9 experts.
10 A. Yes.
11 Q. In your experience as a
12 former review panel chair, do review panels defer
13 to the information of experts -- expert
14 information that is presented before it?
15 A. I would not use the word
16 "defer", no. Expert opinions are always included
17 in the evidence. They are given appropriate
18 weight. They are always considered. But, in the
19 end, it's the role and responsibility of a review
20 panel to assess the evidence and come to its own
21 conclusions. So I would not say defer, no.
22 Q. Okay. And during your
23 cross-examination, you were also brought to the
24 testimony of Susan Sherk with regards to certain
25 socioeconomic factors. In particular, you were

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1 A. You're referring to the
2 panel members?
3 Q. Yes.
4 A. I would say so, yes,
5 because they were there through all of it.
6 Q. Right. And you would
7 agree with me that, if the JRP could have found on
8 the evidence before them any likely SAEs, after
9 mitigation, aside from community core values, they
10 would have?
11 A. Well, I can't say that
12 they would have, because that would be at their
13 discretion. It was their decision what to do.
14 Q. Based on all of the
15 evidence; right?
16 A. What are you asking?
17 Q. I'm asking as a follow-up
18 to your answer --
19 A. Yes.
20 Q. -- that it was there for
21 them to make the recommendations based on all of
22 the evidence?
23 A. The evidence was
24 available to them, yes.
25 MR. NASH: Thank you. Those

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1 brought to her conclusions with respect to
2 drinking water, land contaminants, disruptions to
3 fishers, and her conclusion that those would
4 not -- the project would not result in likely
5 significant adverse environmental effects?
6 A. Yes.
7 Q. Based on your review of
8 the record, did you see any information that
9 contradicted her opinion?
10 A. I would say yes.
11 Q. And what types of
12 information did you find relevant that may have
13 contradicted that opinion?
14 A. Well, to a large degree,
15 it would be the conclusions and findings of the
16 JRP themselves, based on their review of the
17 evidence, but also going back to the original
18 evidence that I think there was certainly
19 indications there that there could be adverse
20 effects.
21 Q. And in terms of
22 socioeconomic effects, were there any submissions
23 from certain parties that you found particularly
24 relevant to your findings in the report?
25 A. Oh, well, there were a

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1 number of submissions in that area on the record.
2 I'm not sure I could point to any specific one at
3 the moment.
4 MS. KAM: Okay. Well, thank
5 you, Dr. Blouin. Those are all my questions.
6 PRESIDING ARBITRATOR: Thank
7 you very much, Ms. Kam. Any further?
8 MR. NASH: Nothing arising.
9 PRESIDING ARBITRATOR: Nothing
10 arising. That means questions by the tribunal.
11 No questions from the tribunal.
12 Mr. Blouin, you have survived,
13 and you are released. You are free again.
14 THE WITNESS: Thank you.
15 PRESIDING ARBITRATOR: I think
16 we should call Mr. Connelly immediately, because
17 we are quite behind.
18 Good afternoon, Mr. Connelly.
19 Would you please read out the statement that is
20 now in front of you?
21 MR. CONNELLY: Right here?
22 PRESIDING ARBITRATOR: Yes.
23 WITNESS DECLARATION: ROBERT CONNELLY
24 MR. CONNELLY: Thank you,
25 Judge Simma and Professor McRae, Professor

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1 review panels under the 1992 version of the
2 Canadian Environmental Assessment Act?
3 A. Yes, I did.
4 Q. And you also chaired six
5 EA panels under the regime that existed prior to
6 CEAA 92; correct?
7 A. That's correct. And I
8 might add that, under that previous regime, there
9 was very little difference in terms of the way
10 panel reviews were carried out between that regime
11 and under CEAA 1992.
12 Q. Thank you. And you
13 prepared two expert reports for this arbitration
14 dated June 9, 2017 and November 6, 2017; correct?
15 A. Yes, I did.
16 Q. And do you have any
17 corrections to your expert reports?
18 A. No, I do not.
19 MR. KLAVER: Okay. I will
20 cede the floor to Mr. Nash.
21 THE WITNESS: Thank you.
22 PRESIDING ARBITRATOR: Okay.
23 The floor goes to Mr. Nash.
24 MR. NASH: Thank you, Judge
25 Simma.

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1 Schwartz. Yes, I would be pleased to read this
2 out. I solemnly declare upon my honour and
3 conscience that I will speak the truth, the whole
4 truth, and nothing but the truth and that my
5 statement will be in accordance with my sincere
6 belief.
7 PRESIDING ARBITRATOR: Thank
8 you very much. Please for direct.
9 MR. KLAVER: Thank you.
10 MR. SCOTT LITTLE: It will be
11 Mr. Klaver.
12 PRESIDING ARBITRATOR: Yes.
13 EXAMINATION IN-CHIEF BY MR. KLAVER:
14 Q. Hello, Mr. Connelly.
15 A. Mr. Klaver, good
16 afternoon.
17 Q. Now, you served as the
18 acting president of the Canadian Environmental
19 Assessment Agency from 2003 to 2005; correct?
20 A. Yes, I did.
21 Q. And you were the vice
22 president for policy development for the agency
23 from 1993 to 2003; correct?
24 A. That's correct.
25 Q. And you have chaired two

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1 CROSS-EXAMINATION BY MR. NASH:
2 Q. For 35 years, you were a
3 full-time paid employee of the Government of
4 Canada?
5 A. That's correct. Well, I
6 should say it was -- there was a three-year break
7 when I joined the United Nations Economic
8 Commission for Europe, and there I was an
9 international public servant. I was not a federal
10 public servant.
11 In fact, I had to take an oath
12 of allegiance to the United Nations to make sure
13 that I was not providing advice to the Canadian
14 government or seeking their opinion.
15 Q. Can we just pause for
16 one minute so we can get the binders distributed?
17 I overlooked that.
18 So leaving aside the three
19 years at the United Nations, you were, during your
20 entire career, essentially employed by the
21 Government of Canada; that's correct?
22 A. No. I left the
23 Government of Canada in 2005. And, since then, I
24 have incorporated myself and have been doing some
25 consulting work.

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1 Q. So prior to leaving
2 government, you were with the government for
3 approximately 35 years except the three that you
4 were in the UN?
5 A. That's correct.
6 Q. And you were never
7 employed by DFO?
8 A. That's correct.
9 Q. You were always employed
10 with CEAA or its predecessors?
11 A. No. When I first
12 graduated, I worked for a consulting engineering
13 firm, and I first joined the government in 1970
14 with a department called public -- well, it's now
15 Health Canada, but National Health and Welfare. I
16 was with what was called the public health
17 engineering division, and that became part of the
18 Environmental Protection Service of Environment
19 Canada when Environment Canada was first created.
20 Q. And then it evolved into
21 another pre-CEAA panel, as I understand it,
22 pre-CEAA agency?
23 A. No. I left in 1975 to go
24 to Geneva to work for the United Nations. I
25 became very interested in the field of

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1 Q. And you left your
2 full-time position with the Government of Canada,
3 as you've said, in 2005, two and a half years
4 before the JRP report was issued; that's correct?
5 A. I left in 2005. That's
6 correct.
7 Q. And the JRP report was
8 issued about two and a half years later; that's
9 correct?
10 A. That sounds about right,
11 but, yeah.
12 Q. Okay. And you had no
13 involvement whatsoever in the actual process
14 leading up to the ministerial denial of the
15 environmental approval for the Whites Point
16 project; that's correct?
17 A. Umm, while I was at the
18 agency and was serving as acting president, I was
19 appointed by Order in Council in that role. And,
20 during that time, the only role I had -- I guess I
21 did have a small role in Whites Point in the sense
22 that I was the person who recommended to the
23 Ministry of the Environment the appointment of the
24 three panel members.
25 Q. Sorry, I'm just speaking

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1 environmental assessment, and I left the United
2 Nations. I was there on a contractual arrangement
3 and wanted to come back to Canada and came to
4 Canada, resettled in Canada in 1978, where I
5 joined the Federal Environmental Assessment Review
6 Office.
7 Q. Which was the predecessor
8 to CEAA?
9 A. That's correct.
10 Q. Right. And you left your
11 -- or just before we go to that, you've never been
12 employed with the Department of Transport; that's
13 correct?
14 A. That's correct.
15 Q. So you've never been
16 employed within the two responsible authorities
17 that we are dealing with this project, the Whites
18 Point project; that's correct?
19 A. That is correct. I dealt
20 with them a lot, of course, in my role --
21 Q. Of course.
22 A. -- in both the Federal
23 Environmental Assessment Review Office and also at
24 the agency. I dealt with many different
25 departments, including all of the RAs.

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1 after you left government.
2 A. After I left government I
3 had no involvement whatsoever.
4 Q. So, 2005 onwards, you had
5 no involvement whatsoever in the process leading
6 to the denial of the Whites Point Quarry; that's
7 correct?
8 A. I had no involvement in
9 that, no.
10 Q. And since 2007, you've
11 been operating a consulting business?
12 A. Yes.
13 Q. And you've been employed
14 multiple times as a consultant by the Government
15 of Canada?
16 A. I have on some occasions
17 and by others as well.
18 Q. You've been employed as a
19 consultant by the Department of the Environment;
20 correct?
21 A. It actually was -- no, I
22 don't think so. What are you reading from?
23 Q. Well, that's taken from
24 my recollection of your CV, but if I'm wrong, you
25 can correct me.

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1 A. Yeah. I have never
2 actually been employed by Environment Canada. I
3 was employed as a panel chair by the Canadian
4 Environmental Assessment Agency, if that's what
5 you're referring to.
6 Q. You've been employed by
7 the Department of Natural Resources?
8 A. Yes. I did some work for
9 them, the major projects management office, on --
10 I looked at -- they were quite interested in
11 understanding how environmental assessment worked
12 in other federations. So I did a review for them
13 of environmental assessment practices in other
14 federations. So that was my report to them.
15 Q. And you've been employed
16 by the Department of Foreign Affairs?
17 A. Just in this work, yes.
18 Q. You're not a lawyer and
19 have not studied law; that's correct?
20 A. I am not a lawyer.
21 Q. And you have no legal
22 training or legally-based expertise?
23 A. I have had a lot of
24 association with legal counsel and lawyers over
25 the year because of my role in policy development,

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1 Q. Did you review any
2 internal DFO documents, including e-mails within
3 DFO?
4 A. I don't believe I
5 reviewed any e-mails within DFO, no.
6 Q. Did you read any expert
7 reports that were part of the EIS?
8 A. No, I did not.
9 Q. Did you read any part of
10 the transcript of the public hearings?
11 A. I may have looked at a
12 few parts of the transcripts when reviewing some
13 of the expert reports of Ms. Griffiths and
14 Dr. Blouin, but that would be quite limited.
15 Q. And do you recall what
16 parts of the transcript you did review?
17 A. I can't recall. I would
18 have, on occasion, checked some of their
19 references, and there were references to the
20 transcript. So I just can't recall exactly which
21 ones.
22 My review of the transcripts
23 was quite limited. My role in this, of course,
24 was to provide a report on the process that -- of
25 government decision-making once a panel report is

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1 and so -- but I'm not a lawyer.
2 Q. And you have no
3 legally-based expertise in administrative,
4 environmental, or constitutional law; that's
5 correct?
6 A. That's correct.
7 Q. And you're not an expert
8 in statutory construction; that's correct?
9 A. Sorry, in what?
10 Q. Statutory construction or
11 interpretation.
12 A. That would be correct.
13 Q. And you were hired by
14 Canada in 2017 to write an opinion in support of
15 Canada's position in this phase of the
16 arbitration; that's correct?
17 A. That's correct, yes.
18 Q. And prior to writing your
19 June 9th report, what documents were provided to
20 you for your review?
21 A. Well, essentially all of
22 the documents that were on the record at that
23 point were available to me.
24 Q. Did you review the EIS?
25 A. No, I did not.

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1 submitted to the Minister and then also to give my
2 opinion on what the likely decision might be of
3 the government in looking at the report in the
4 absence of the NAFTA breach.
5 So that, of course, meant that
6 I did not review all of the material on the
7 record. It was not necessary.
8 Q. So your opinion was
9 focused on providing information and advice about
10 government procedures leading to a cabinet
11 decision after receiving a JRP report; that's
12 correct?
13 A. That is one part of my
14 report, yeah -- or my two reports, yes.
15 Q. And you're speaking about
16 this from the standpoint as having not been
17 involved at all in this JRP process and the
18 decision-making within government for this JRP
19 process, as you were not with government when this
20 JRP process was being dealt with? And I mean from
21 2005 to 2007.
22 A. I provided this advice as
23 an independent person who has had experience with
24 what happens when a panel report is submitted to
25 the Ministry of the Environment. There's lots of

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1 examples of that that occurred while I was at the
2 agency, so I had some familiarity with the
3 process, and that's what I am reported on.

4 Q. And you're reporting on
5 your past experience generally speaking, but not
6 with respect to this process; that's correct?

7 A. That's correct. Because,
8 as I said before, I wasn't with the agency at the
9 time this report was submitted to government, of
10 course.

11 Q. Could you turn, please,
12 to Tab 1 of the binder in front of you. It's your
13 report.

14 You cite Professor Doelle at
15 page 13, paragraph 34. You say at paragraph 34:

16 "I find further support
17 for my opinion in the
18 writings of Professor
19 Meinhard Doelle. As he
20 observes, in short, the
21 preamble clearly suggests
22 that the process is about
23 more than a consideration
24 of the biophysical
25 environment. What is

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1 expected is that the EA
2 process will result in
3 integrated
4 decision-making,
5 considering
6 environmental, social,
7 and economic consequence
8 of the project. The
9 purposes of the Act are
10 similarly broad. RAs are
11 to be encouraged to take
12 actions in line with
13 sustainable development,
14 again suggesting that the
15 EA process is to prepare
16 the federal
17 decision-maker to make
18 integrated decisions."[as
19 read]

20 Now, that's the opinion of
21 Professor Meinhard Doelle, as you understand it?

22 A. That's what this says,
23 yes.

24 Q. Yes. And did you discuss
25 this concept or any concept about this process

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1 with Meinhard Doelle during or after writing your
2 opinion?

3 A. I read his book.

4 Q. His book is called?

5 A. Well, I reference it
6 here. It's the Federal Environmental Assessment
7 Process, A Guide and Critique.

8 Q. And did you read the book
9 for the purpose of rendering this opinion, or did
10 you read it out of general interest?

11 A. Oh, I had read it before
12 I became engaged in this project. In fact, I have
13 -- I believe I wrote the preface to his book.

14 Q. Right.

15 A. Yeah.

16 Q. So you have known
17 Professor Doelle for 25 years?

18 A. It could be that long.
19 When I became vice president at the agency, he was
20 there working as one of my staff members for a
21 short period of time. He was assisting in the
22 development of some of the regulations that were
23 required to proclaim the Act at that time. So I
24 knew him for a short time, and I occasionally met
25 him through my work at the agency thereafter.

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1 Q. In Footnote 24, on
2 page 13, you identify Meinhard Doelle as Professor
3 of Law and Associate Dean at Dalhousie University
4 Law School. You say:

5 "He has been involved in
6 the practice of
7 environmental law in Nova
8 Scotia since 1990 and, in
9 that capacity, served as
10 a drafter of the Nova
11 Scotia Environment Act
12 and as a policy advisor
13 on the CEAA Act in
14 1992."[as read]

15 Are you somewhat of a disciple
16 of Professor Doelle?

17 A. Uh... I, umm, I would
18 say no. I'm aware of Professor Doelle, actually,
19 and his thoughts in this case are similar to mine
20 in terms of the breadth of the scope of the
21 Canadian Environmental Assessment Act.

22 Q. If you go to page 15 of
23 your report, you, again, at paragraph 36, cite
24 with approval Professor Doelle, who you say,
25 earlier on, that it's in support of your opinion.

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1 You say:
2 "He says the references
3 to the purpose, need for,
4 and alternatives to a
5 project all point to the
6 need for the EA under
7 CEAA to look beyond
8 environmental effects as
9 defined in the Act."[as
10 read]
11 Do you see that?
12 A. I do, yes.
13 Q. Yeah. So the notion here
14 is that the interpretation of environmental
15 effects should go beyond the bounds of the
16 statute, environmental effects as defined in the
17 Act; that's correct? That's what you understand?
18 A. When looking at an
19 environmental assessment, particularly in the
20 concept of an environmental assessment review at a
21 panel stage, it's very important to gain and
22 collect information that might assist Ministers in
23 making a decision down the road. That includes
24 more than just focusing on significant -- the
25 likelihood of significant adverse effects after

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1 mitigation. The reason I say that is because it
2 may well be that Ministers may have to reach a
3 determination and justify it in the circumstances
4 at some point. So information that is gathered
5 through that process is potentially broader than
6 just the statute itself, because some of that
7 information may be of use in the justified in the
8 circumstances situation.
9 Q. So that's your opinion?
10 A. Yes.
11 Q. And so it's your opinion
12 that the need for and -- the purpose, need for,
13 and alternatives to a project prescribes the need
14 for the EA to look beyond environmental effects as
15 they are defined in the Act; that's your position?
16 A. In the initial gathering
17 of information, I think that the panel review
18 allows for that broader information to be
19 gathered, given the broad purposes and the
20 preamble of the Act, yes.
21 Q. That's your
22 interpretation?
23 A. Yes.
24 Q. I asked you whether you
25 had spoken to Professor Doelle in respect to your

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1 opinion, either before or after.
2 A. On this matter?
3 Q. Yes.
4 A. I don't believe I have.
5 Q. It's possible?
6 A. I don't think so. I have
7 occasionally bumped into him in the context of
8 some of the discussions that are -- that have
9 taken place regarding the new Canadian
10 Environmental Assessment Act. The draft Bill has
11 just been tabled a few weeks ago. And I can't
12 recall discussing this with him. He was aware
13 that I believe -- I think he was aware that I was
14 engaged in this project, but I don't think I
15 discussed any of this with him.
16 Q. Were you aware before
17 today that he was the founding chair of
18 environmental -- the ECEL?
19 A. No. I just learned that
20 today. I, I didn't follow his career that closely
21 after he left the agency.
22 Q. Were you aware before
23 today that ECEL is an intervenor in a proceeding
24 in the Federal Court to set aside this tribunal's
25 decision?

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1 A. I know nothing about that
2 issue at all.
3 Q. Could you turn to,
4 please, Tab 2, at page 3, your second report,
5 page 3, paragraph 8.
6 And you state at the third to
7 last line, and I'm following the words closely:
8 "Although the JRP did not
9 expressly conclude that
10 those other effects were
11 likely SAEEs under the
12 Act, it did not declare
13 these effects not to be
14 significant."[as read]
15 Do you see that?
16 A. Yes, I do.
17 Q. Could you then go to
18 Tab 3, which is Ms. Griffiths' November 6th
19 report, at page 3, paragraph 2, last sentence:
20 "While the JRP did not
21 expressly conclude --"[as
22 read]
23 A. Sorry, Mr. Nash.
24 Q. Page 3 of Tab 3.
25 A. Yup. And what's the

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1 paragraph.
2 Q. Paragraph 2.
3 A. Paragraph 2, yes.
4 Q. The last sentence in
5 paragraph 2.
6 A. Oh, the last sentence.
7 Okay.
8 Q. "While the JRP did not
9 expressly conclude that
10 these other effects were
11 likely SAEE under the
12 CEEA, it also did not
13 declare these effects
14 were not significant." [as
15 read]
16 Now, when I read your
17 statement in paragraph 8 of your report at
18 page 3 -- sorry, your second report, and I read
19 that sentence, it appears to me at least,
20 Mr. Connelly, that the wording is virtually
21 identical. Would it appear that way to you as
22 well?
23 A. Well, let me read them
24 carefully again, please.
25 Q. Sure.

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1 A. It's been some time since
2 I looked at Ms. Griffiths' report.
3 Q. Sure.
4 A. Yes, they are similar.
5 Q. Very similar. And so my
6 question to you is that: Did you collaborate with
7 Ms. Griffiths in drafting your report?
8 A. No, I did not. But I saw
9 her report before I finished my report.
10 Q. So you adopted the
11 language in her report for your report; is that
12 how that worked?
13 A. No. I essentially agreed
14 with that statement. I think that's a correct
15 observation.
16 Q. And you did so in words
17 that are virtually, if not entirely, identical?
18 A. They're very similar,
19 yes.
20 Q. Yes. Mr. Connelly, in
21 your report, you describe in some detail the
22 process which may be followed within the federal
23 government between the time a JRP report is
24 submitted and the time the GIC, which I take to be
25 Cabinet, renders its decision with respect to

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1 environmental approval or rejection; correct?
2 A. Correct.
3 Q. And part of that process
4 involved writing a memorandum to Cabinet; correct?
5 A. Yes.
6 Q. In this case, the JRP
7 issued its report on October 22nd, 2007, and the
8 Minister of Environment issued his letter denying
9 the project on December 13th, 2007; correct?
10 A. I can't recall exact
11 dates, but I will accept your observation on that.
12 Q. Okay. And before you
13 left government in 2005, two and a half years
14 before this JRP report was received by government
15 and a decision was made, when was the last
16 memorandum to Cabinet that you had drafted?
17 A. The last one that I would
18 have been involved in drafting, I think would've
19 been associated with the amendments to the
20 Canadian Environmental Assessment Act in 2003. So
21 that's about -- that was probably the last one,
22 when I was, when I was serving as acting
23 president. I don't recall the agency had any
24 memoranda to Cabinet that they issued themselves
25 at that time.

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1 Q. So you've produced a
2 chart as part of your report, and it's at -- I'm
3 not sure where it is in your report.
4 A. I have it in front of me
5 if that's what you're referring to.
6 Q. That's what I am
7 referring to, yes.
8 A. That's a separate page.
9 Q. Yes. You've set out here
10 a diagrammatic depiction of the process within
11 government in respect to government's receipt of a
12 JRP report and the routes that it goes or can go
13 from the receipt of the report to a Cabinet
14 decision; have I got that right?
15 A. Yes. I tried to portray
16 a fairly simple step-wise approach in the process
17 to make it understandable. So that's what I was
18 attempting to do with this chart.
19 Q. And is this your original
20 work? Is this chart your work?
21 A. Yes, it is my work.
22 Q. And it was for the
23 purpose of this report?
24 A. That's correct.
25 Q. And the first step, if I

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1 understand this correctly, is at the top:
2 "The joint review panel
3 issues a report." [As
4 read]
5 And we know, in this case, it
6 was on October 22nd, 2007. And that report goes
7 to the responsible authority, by this chart, if
8 I've got that right.
9 A. Well, it is submitted
10 first to the Ministry of Environment.
11 Q. Yes.
12 A. This is obviously a
13 consolidated process, but the panel is required to
14 issue its report to the Ministry of Environment.
15 And then, of course, it's sent to the responsible
16 authorities and also made public around the same
17 time.
18 Q. Okay. So the missing
19 link right here is on the first arrow, is it first
20 goes to the Ministry of Environment, and then it
21 goes from the Ministry of Environment to the
22 responsible authority?
23 A. That's correct. And it's
24 made public at the same time.
25 Q. And the responsible

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1 authority in this case was the DFO?
2 A. There were two. As
3 Mr. Estrin has corrected his record, there was
4 Fisheries and Oceans and Transport Canada.
5 Q. Right. So there's two
6 responsible authorities. This report, you would
7 expect, would go to both of them?
8 A. Absolutely.
9 Q. Correct?
10 You don't know exactly the
11 procedure that was followed in this case, because
12 you weren't there that's correct?
13 A. That's correct. This is
14 -- this would be typical of what would normally
15 happen. I presume it happened in this case, but I
16 obviously can't confirm that.
17 Q. It's just a presumption;
18 that's right?
19 A. That's correct.
20 Q. And the responsible
21 authority consults with other departments; you see
22 that, OGDs?
23 A. Yes, yes.
24 Q. And do you know in this
25 case which other departments the responsible

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1 authorities, the two of them, consulted with?
2 A. Well, what happens
3 with --
4 Q. I just want to ask you:
5 Do you know in this case what happened?
6 A. Oh, in this case, well,
7 I, I can presume who they would have consulted
8 with.
9 Q. Okay. So let's just get
10 that straight. You don't know who they consulted
11 with?
12 A. No. As I said, I wasn't
13 involved in the process. I was gone from
14 government at that point, so how could I possibly
15 know who they were talking to?
16 Q. Right. Have you ever
17 spoken to anybody in either of the responsible
18 authorities as to what was actually done in this
19 case?
20 A. I have not. I did follow
21 up with -- and that's on the record in my report
22 -- with Transport Canada to verify an error that
23 was made in one of Mr. Estrin's reports about the
24 issuance of a navigable waters protection permit.
25 So I did follow up on e-mail by that, but that was

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1 just to clarify the nature of the permit that was
2 issued by Transport Canada at the time. And I
3 think that would be the only consultation I've
4 had.
5 Q. So you haven't had any
6 consultation or discussion or communication with
7 anybody in the responsible authorities, DFO and
8 Transport Canada, with respect to this particular
9 process?
10 A. No, I have not.
11 Q. In this case?
12 So when the responsible
13 authority consults with other government
14 departments or, in this case, the two, how many
15 people are involved in that point, at that point?
16 And I just want to get sort of the train, because
17 we have got the JRP issuing its report. We've got
18 it being received by the Ministry of Environment.
19 It's then been taken. It's sent to the two
20 responsible authorities. How many people have
21 touched that document by that stage?
22 A. Now, which document are
23 you speaking about? The joint?
24 Q. The JRP panel report.
25 A. Well, it's a public

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1 document at that point, so --
 2 Q. But within the
 3 departments? That's what I am asking now.
 4 A. Oh, within --
 5 Q. How many individuals
 6 typically would there have been, by your
 7 understanding about how it worked before you left
 8 government, how many people would it have touched,
 9 arriving at that stage, where the responsible
 10 authority has received it?
 11 A. Well, I'm sorry. I don't
 12 follow your question, when they had received it.
 13 It's distributed pretty widely within, you know,
 14 the department, in each department. So --
 15 Q. I see.
 16 A. -- there's potentially a
 17 lot of people that would have access to that
 18 document. It's a public document.
 19 Q. Approximately how many?
 20 A. Oh, my gosh, that's
 21 difficult to estimate, because what happens in any
 22 Cabinet memorandum is --
 23 Q. We're not at that stage
 24 yet.
 25 A. No. But it's in

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1 preparation. It's in preparation for that stage.
 2 Q. Yes.
 3 A. So what happens is any
 4 department that has any interest in the matter, if
 5 it's coming to a Cabinet committee, any -- every
 6 one of those Ministers that sits on that cabinet
 7 committee would want to have information on this
 8 particular issue and would need to be briefed on
 9 it. So there are a lot of people potentially that
 10 would examine the document.
 11 Q. So could we say that, by
 12 the time the responsible authority has consulted
 13 with other government departments -- it could be
 14 many government departments?
 15 A. Yes.
 16 Q. -- that there could be
 17 dozens of individual people who have actually
 18 received the document for official purposes, not
 19 just for access?
 20 A. Yes. Yes.
 21 Q. It could be dozens of
 22 people?
 23 A. Sure. Yes. Probably
 24 more.
 25 Q. And at what level would

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1 they actually be? Would they be at the Associate
 2 Deputy Minister level? Below that? Director?
 3 Director General? Is there a hierarchy here that
 4 the process would typically go through?
 5 A. Yes, yes. What would
 6 happen is, in each department, of course, there
 7 would be people that are assigned to look at this
 8 particular document and to prepare briefing notes
 9 on it, to participate in inner departmental
 10 meetings in preparation for a member of the
 11 Cabinet. Any time you are involved in a situation
 12 of preparing a memoranda to Cabinet, then there's
 13 a whole cottage industry that, in effect, comes
 14 into play here. And it's the same regardless of
 15 what the issue is.
 16 So what would happen is that
 17 it would start out at a level of, of policy and
 18 probably mid-level within the department, but it
 19 would go right up to the top. It would go right
 20 up. The briefing note eventually that would be
 21 prepared for the Minister of that particular
 22 department would be seen by the Deputy Minister as
 23 well, so it goes right up through the system, if
 24 that's what you're getting at.
 25 Q. That's what I'm getting

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1 at. So the RAs are consulting with other
 2 government departments. It may be many other
 3 government departments. Each of those departments
 4 is involved in assessing the document, looking at
 5 the document, reviewing the document, and
 6 participating in some way in the preparation of
 7 what ultimately becomes a briefing note to the
 8 Deputy Minister?
 9 A. That's correct.
 10 Q. In each department?
 11 A. In each department, yes.
 12 It's a briefing note that ultimately -- well, it
 13 would go to the Deputy Minister, but also the
 14 Minister would be aware of it in that department
 15 if that Minister sits on the particular Cabinet
 16 committee. And this one would have gone to what
 17 is known as the operations committee at that time,
 18 and it was a pretty broadly based committee.
 19 Q. Okay. Then you have got
 20 a diamond below your circle, and it says:
 21 "The responsible
 22 authority accepts the
 23 report."[as read]
 24 A. Um-hmm.
 25 Q. And that would be -- that

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1 process itself would involve how many people in
2 each responsible authority in the determination as
3 to whether to accept the report?
4 A. Again, potentially quite
5 a few, because other departments who participated
6 in this as an expert department might have some
7 thoughts on the report and whether it was a report
8 that met the requirements of the Act.
9 Q. So there could be up to a
10 dozen people at that stage who are involved in
11 considering for official purposes the content of
12 the report, the recommendations of the report, the
13 validity of the recommendations, those kinds of
14 things?
15 A. Probably more.
16 Q. More than that?
17 A. Yup.
18 Q. Perhaps 20?
19 A. Again, I'm not sure where
20 you're going with the numbers. It's really hard
21 to say.
22 Q. But it would be in the
23 many, many?
24 A. Yes. It would be a lot
25 of people involved in this.

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1 Q. Right.
2 A. These things are
3 important exercises within the decision-making
4 structure of government. Many people are involved
5 in input to a Cabinet document.
6 Q. Right. And then it can
7 either accept the report or say no. And then
8 there's an arrow going to the left saying no, and
9 there are a number of things that can be asked for
10 additional information, inadequate report,
11 clarification sought; do you see that?
12 A. Yes.
13 Q. Do you know in this case
14 whether the RAs accepted the JRP report for Whites
15 Point before seeking additional information?
16 A. Yes. That's my
17 understanding, that the RAs accepted the report,
18 because they did not seek any additional
19 information.
20 I have --
21 Q. Upon which do you base
22 that understanding?
23 A. Well, if you want to put
24 up on the screen, I can show you a document that
25 was part of that memorandum to Cabinet. I refer

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1 to it in my report. It's got a secret label on
2 it. It's called the background analysis
3 document -- or the background analysis to the
4 memorandum to Cabinet.
5 Just by way of background, I
6 also submitted as one of my references the
7 document that describes the drafting instructions
8 that the Privy Council Office issues in terms of
9 how does one prepare a memorandum to Cabinet. So
10 it outlines all of the different pieces of a
11 memorandum to Cabinet, and one of those pieces is
12 called a background analysis document. This is a
13 document that is described as a document that
14 should provide a factual description of the matter
15 and provide and support the analysis.
16 Now, we have no access to the
17 memorandum -- or, sorry, the ministerial
18 recommendation, because that is the main piece of
19 the Cabinet document, but the background analysis
20 document shows some very interesting things, I
21 think, and include -- and provides information
22 that led me to believe that, when I saw it, that
23 the RAs considered the document to be complete.
24 Now, that is document C -- or R 620, if you want
25 to put it up on the screen.

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1 Q. I'm familiar. We don't
2 have to.
3 Your understanding, from a
4 review of that document, which is not the
5 memorandum to Cabinet?
6 A. Oh, it's part of the
7 memorandum to Cabinet, yes.
8 Q. It's part of the
9 memorandum, but it's not actually -- it's not the
10 memorandum to Cabinet?
11 A. It's part of it. It is
12 an important part of it.
13 Q. It's an annex to it?
14 A. No. It's an important
15 part of it. It's not an annex; that's a separate
16 document.
17 Q. The actual memorandum to
18 Cabinet is secret?
19 A. The ministerial
20 recommendation section.
21 Q. Yes.
22 A. And in the drafting
23 instructions that the Privy Council issues, it
24 says that the background analysis document may be
25 made available to the public. And I presume,

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1 because of this particular tribunal, that
2 International Trade must have requested access to
3 it, and that was granted and became part of the
4 record at the previous hearing.
5 Q. And the actual memorandum
6 to Cabinet, the ministerial recommendation itself,
7 could be made available too?
8 A. No, no, that's secret.
9 Q. That's secret?
10 A. Yes.
11 Q. Can secrecy be waived?
12 A. Uh, umm --
13 Q. Secrecy was waived for
14 what you described.
15 A. Well, no. That is always
16 considered a document that can be made public, but
17 it is not traditional for memorandum -- sorry, the
18 ministerial recommendation to be made available.
19 Q. So Cabinet confidence is
20 claimed over that?
21 A. Correct.
22 Q. Right. And that's a
23 privilege that is in favour of the Government of
24 Canada; correct?
25 A. Yes.

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1 A. Yes.
2 Q. And then the RA -- in
3 this case, two RAs prepared a draft memorandum to
4 Cabinet. That's in the rectangular box below the
5 diamond?
6 A. Yes.
7 Q. And is that a different
8 document than the document that you're referring
9 to, which is part of the ministerial memorandum to
10 Cabinet?
11 A. No. The draft would be
12 the complete document. So it would include the --
13 it would be secret at that time, when it's being
14 drafted, so it would be the entire document, the
15 ministerial recommendation as well as the
16 background analysis. It would have a
17 communication plan, and it would also have the
18 proposed response to the government report -- or
19 to the panel report. That would all be part of
20 it.
21 But a memorandum to Cabinet is
22 always written in draft form and is circulated to
23 those departments that I spoke about that may wish
24 to brief their Minister on the content of that.
25 So that's why it appears in draft form and can be

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1 Q. And that any privilege
2 can be waived by the holder of the privilege;
3 correct? Is that your understanding?
4 A. That seems not to be the
5 practice, though, as I understand it.
6 Q. Okay. So, in this case,
7 you believe, from a review of that document, which
8 you had no part in preparing, that the RA accepted
9 the report?
10 A. Yes. I think it's quite
11 clear that that was the result. I believe that's
12 certainly indicated in the document. Again, if
13 you want to put it up, I can show you the
14 particular reference. I have referred to it in my
15 report if the tribunal wishes to find that.
16 Q. I accept what you say.
17 And that both RAs
18 recommended -- well, accepted the report?
19 A. Yes.
20 Q. After consultation,
21 vetting by, analysis of, consideration of all the
22 recommendations in the JRP report, the two RAs --
23 and all of that was synthesized, brought together,
24 and reviewed, summarized, the RAs recommended
25 acceptance of the report?

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1 modified following that procedure.
2 Q. And then that draft goes
3 to other government departments for review of the
4 draft; correct?
5 A. That's correct.
6 Q. And do the two RAs,
7 Transport and DFO, get together and compose one
8 single draft; is that how it works when you have
9 two?
10 A. The responsible authority
11 would be -- in this case we have two. The
12 responsible authority or authorities are the ones
13 that we would say hold the pen in writing the
14 document, if I could use that term. I don't know
15 in this case whether -- usually one would take a
16 lead with the input from the other. I wouldn't
17 know which one might have taken the lead in terms
18 of preparing this document.
19 Q. And after the other
20 government department review -- and I gather it's,
21 again, many people who were involved in the other
22 government departments who were reviewing the
23 draft memorandum to Cabinet that the RAs had put
24 forward -- again, would there be 20, 30, 35 people
25 in various departments that would typically be

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1 looking at this draft?
 2 A. Well, you'd see
 3 essentially the same people, again, that were
 4 involved in the first instance, yes.
 5 Q. Right. And they would be
 6 at a variety of levels through the system?
 7 A. Yeah. Well -- that's
 8 correct, yes.
 9 Q. And these are real people
 10 we are talking about; they aren't just --
 11 A. The Deputy Ministers and
 12 that level would not be engaged at this stage. It
 13 takes -- you know, it works its way up.
 14 Q. Right.
 15 A. But there are people
 16 assigned to do this kind of analysis, yes.
 17 Q. Do you know, in this
 18 case, whether that draft memorandum to Cabinet
 19 resulted in revisions to the memorandum to
 20 Cabinet?
 21 A. I would have no
 22 information on that, Mr. Nash.
 23 Q. And if it did, it would
 24 go back up, and revisions would be considered,
 25 synthesized, and try to take into account the

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1 views of other departments?
 2 A. That's correct. There's
 3 a real effort to obviously try to reach consensus
 4 on these documents.
 5 Q. Right.
 6 A. So Ministers have many
 7 issues they have to deal with, so if you can
 8 achieve a consensus, then the decision at the
 9 Cabinet table is obviously easier and quicker to
 10 make.
 11 Q. Are soundings taken from
 12 the CEAA with respect to what might be in a draft
 13 memorandum to Cabinet?
 14 A. The agency would be
 15 involved in that process, yes.
 16 Q. Right. And after you
 17 left, would that be Steve Chapman involved in that
 18 process?
 19 A. Oh, I couldn't tell you
 20 who. I really don't know who would have been
 21 involved.
 22 Q. Would Steve Chapman have
 23 been involved prior to your departure in the
 24 consideration of an RA's position with respect to
 25 accepting or rejecting a report?

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1 A. Sorry, repeat the
 2 question again.
 3 Q. It wasn't a great
 4 question. I agree.
 5 Would Steve Chapman have been
 6 involved prior to your departure in that role of
 7 having the agency be one of the government
 8 departments or one of the government agencies that
 9 considers the RAs' review of the report?
 10 A. I can't recall, I'm
 11 afraid.
 12 Q. Okay. So it either goes
 13 up and is revised, or it goes down after the other
 14 government review, which is the next diamond.
 15 It's determined to be acceptable, and it goes to a
 16 Cabinet committee?
 17 A. Yes.
 18 Q. And there are, again,
 19 people that shepherd this document through the
 20 level of governments, through the Deputy Minister
 21 to a Cabinet committee; that's right?
 22 A. Yes.
 23 Q. And the Cabinet makes a
 24 decision, and it can do, it looks like, one of
 25 three things. It can send it back to somebody

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1 with questions. And that's on the left-hand side,
 2 going back up to the clarification sought,
 3 inadequate report, additional information, or it
 4 can go to the project rejection, or it can be
 5 approved; have I got that right?
 6 A. Yes.
 7 Q. And you don't have any
 8 idea in this case what actually happened within
 9 government with respect to that part of the
 10 process; is that correct?
 11 A. No, I do not.
 12 Well, I know what's public,
 13 obviously, in terms of the result, but I do not
 14 know what happened in terms of the internal
 15 discussions.
 16 Q. Right. And in that part
 17 of the process, how many people would be involved,
 18 approximately?
 19 A. Sorry, in the?
 20 Q. In the part where it goes
 21 from the government to a Cabinet committee through
 22 to the point for a Cabinet decision.
 23 A. Well, in the actual --
 24 you mean in the actual cabinet meeting room? I'm
 25 not clear where you are talking about here.

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1 Q. Just as part of the
2 process, there are Cabinet committees. It's not
3 just Cabinet ministers that are involved in the
4 preparation to get to a cabinet committee.
5 Presumably they have staff; they have people; and
6 then they get together in confidential session
7 with a Cabinet committee presumably with support
8 structures and so on?
9 A. There are a lot of people
10 involved, again, if that's what you mean, yes.
11 Q. That's what I mean.
12 Is the consultation with other
13 government departments in the form of writing, or
14 is it verbal?
15 A. There is always an
16 interdepartmental meeting, which is verbal.
17 Sometimes, again -- and I'm talking generically
18 here. Sometimes when an issue evolves, the
19 department, along with the Privy Council Office,
20 might want to have an initial consultation before
21 any pen is put to paper. In other instances, you
22 might find that a draft document is submitted and
23 sent out to departments first for their review and
24 comment, and inevitably there is an
25 interdepartmental meeting at some point.

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1 details, as I said, because I wasn't involved.
2 But, as I mentioned, the
3 document I referred to, the background analysis
4 document, I believe, indicates that the
5 departments involved considered their report
6 complete.
7 Q. And that it complied with
8 the Act?
9 A. That would be the case,
10 yes.
11 Q. That would be the
12 inference, to be fair?
13 A. That would be the
14 inference, yes.
15 Q. And do you know whether
16 any additional information within government was
17 sought from any other sources aside -- as part of
18 this process, or are you ignorant of that?
19 A. Well, again --
20 Q. I'm asking if you know.
21 A. Yes. But, again, based
22 on my knowledge of what's on the public record, if
23 you look, again, at the background analysis
24 document that I referred to, it is very clear
25 there that there is a reference to the fact that

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1 Q. And none of that is
2 secret; that's correct?
3 A. Oh, it's all secret.
4 Q. It's all secret?
5 A. Absolutely. When you're
6 dealing with a Cabinet document, all of the
7 documents internally in government are secret.
8 Q. Unless government decides
9 that it will release it?
10 A. No, no, no. I'm talking
11 about the preparation now of the document. I
12 think that's where you're going. You're talking
13 about the preparation of the document. That's all
14 done in a secret fashion.
15 Q. All the communications
16 are done in secret?
17 A. Yes. Yes. We -- all the
18 public servants who are involved in Cabinet
19 documents have to be, umm, have to be approved to
20 handle secret documents.
21 Q. And you don't know in
22 this case what was done within government to
23 ensure that the JRP Whites Point report complied
24 with all government requirements under the Act?
25 A. I would not know the

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1 both the officials of Nova Scotia and federal
2 officials consulted with the local Aboriginal
3 community in the area. Now, I'm assuming this
4 was, of course, in response to the duty that has
5 been assigned to the federal government, so the
6 Haida case in 2004, the duty to consult and
7 accommodate. So officials from both the federal
8 and Nova Scotia government consulted with the
9 First Nations in the area to understand what their
10 concerns were about, and that is referenced in the
11 background analysis document, because that's a
12 very important factor for governments to
13 understand and for Cabinet Ministers to understand
14 as well.
15 Q. And those consultations
16 are, of course, in secret?
17 A. No, no. They would not
18 be.
19 Q. Are they in public?
20 A. Well, they would be with
21 the First Nations obviously, so I presume it was
22 just the First Nations and the government
23 officials involved.
24 Q. Yes. Not in public?
25 A. This was done prior to

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1 the release. If you look at the dates in the
2 background analysis document, this occurred prior
3 to the release of the joint review panel report.

4 Q. So very immediately after
5 it was received?

6 A. No, no. It hadn't even
7 been received. It hadn't even been received. So
8 what they were doing was they were -- they wanted
9 to make sure that they understood the concerns of
10 the First Nation in the area about this project.
11 And so the reason they wanted to do that was
12 because it would feed into the ultimate
13 decision-making process. But at that point, they
14 did not know the results of the joint panel
15 report.

16 Q. When the joint panel
17 report is received, is it common for the
18 individuals who are handling the report within the
19 responsible authority to drill down to knowledge
20 that is known within the department about a
21 particular project?

22 A. I'm sure they would
23 consult with people that had been -- I imagine
24 they would consult, anyway, with the people who
25 had been involved in the review itself, because

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1 they would have the expertise of having been
2 involved in reviewing the environmental impact
3 statement and the information that's on the public
4 record. So that would be my understanding, yes.

5 Q. And is it also your
6 understanding that they would be involved in
7 learning from other individuals who weren't part
8 of the DFO presentation but, say, to this JRP
9 panel, learning what their views were with respect
10 to the potential environmental effects of a
11 project?

12 A. Could you repeat the
13 question again, please, Mr. Nash?

14 Q. You mentioned that they
15 would probably consult with people who were
16 involved in the actual process of the
17 environmental assessment.

18 A. Yes.

19 Q. Would that extend to
20 people who were within the department who had been
21 consulted with respect to the project, but not
22 part of the process before the JRP?

23 A. Yes. Some of those
24 people would be involved as well, yes. These
25 would be people that are responsible for writing

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1 Cabinet documents and also people that are in
2 support of that whole Cabinet process.

3 Q. Do you know if Derek
4 McDonald from CEAA was consulted about the JRP
5 report?

6 A. I do not know that. I
7 would not know any individuals that might have
8 been consulted or not consulted, because I wasn't
9 involved at that point.

10 Q. The consultation process,
11 are you saying that it's also secret?

12 A. Which consultation
13 process are you talking about?

14 Q. Between the RAs and other
15 government departments?

16 A. Any -- the moment that
17 there is a commencement of a preparation for a --
18 of a Cabinet document, then that is done in a
19 secret way, yes.

20 Q. Would you agree that the
21 RA in particular in this case, the DFO, would
22 consult with the eminent scientists from the DFO,
23 who had given evidence before the JRP with respect
24 to the potential adverse -- significant adverse
25 environmental effects? That might be likely?

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1 A. They may have. I could
2 not confirm that, though, in this case.

3 Q. Would that be normal?

4 A. Uh... I can't say for
5 sure, Mr. Nash.

6 Q. Okay. Could you turn to
7 Tab 8, please. I'm sorry, Tab 9. Have you seen
8 this document before today?

9 A. What is this document,
10 Mr. Nash? Could you explain it? I don't think I
11 have seen it.

12 Q. Tab 9, it says:
13 "Memorandum for the ADM
14 Oceans and Habitat."[as
15 read]

16 Do you see that?

17 A. Yes, I see that. It
18 looks like -- is this an internal memorandum? It
19 looks like a briefing note, I suppose.

20 Q. It looks like kind of a
21 briefing note. It's an update on the
22 environmental assessment panel review for the
23 Whites Point Quarry. And if you go to the last
24 page, it appears to be a drafted, but I ask you if
25 you accept, as drafted by Mark McLean and somebody

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1 named M. Murphy; do you see that?
2 A. I don't recall ever
3 seeing this.
4 Q. Okay.
5 A. What's the date on it?
6 Q. The date is --
7 A. Oh, 2007. I guess that
8 was after I left.
9 Q. Yeah.
10 A. I don't recall seeing
11 this in the record but --
12 Q. Did you -- you didn't see
13 this before --
14 A. I don't think so. I
15 mean, it doesn't, it doesn't ring any bells. I
16 don't think I -- I would not have referenced this
17 in my report.
18 Q. Okay. You see on page 3
19 -- let's just go to page --
20 MR. SCOTT LITTLE: Excuse me.
21 Mr. Nash, could I just ask a question? Is this an
22 exhibit, this document?
23 MR. NASH: Yes. It's Exhibit
24 C 869.
25 MR. SCOTT LITTLE: C 869?

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1 habitat from blasting on
2 marine mammals, fish and
3 lobster, shipping
4 impacts, invasive
5 species, and destruction
6 activities."[as read]
7 Do you see that?
8 A. Sorry, I lost that. I
9 thought you were talking about the last bullet
10 starting on the very first page, but you jumped
11 on.
12 Q. Yeah. I was giving you
13 context. So I went back to the first page just to
14 give you a sense of what this document was.
15 A. Oh, okay. So you're
16 reading which, again, please?
17 Q. The second bullet from
18 the bottom or page 1.
19 A. Okay. "The two weeks of
20 panel hearings..."
21 Q. Yeah. Exactly.
22 A. Okay. Please proceed,
23 then.
24 Q. Yeah. So it appears to
25 be a report following those hearings that's going

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1 Thank you.
2 MR. NASH: Yes.
3 BY MR. NASH:
4 Q. And if you go to page 2
5 at the top and then go to the bottom bullet.
6 A. Sorry, page 2?
7 Q. Page 2.
8 A. Yes, okay.
9 Q. Bottom bullet?
10 A. Yes, the one starting,
11 "The 36 pages"?
12 Q. Yes. So this is a
13 memorandum to the ADM, as I read it, by Faith --
14 under the signature of Faith Scattolon, who is an
15 official in the DFO. Do you know her?
16 A. I do not know her, no.
17 Q. Reporting on the panel
18 hearings for this JRP process, and that's referred
19 to at the front page. It says:
20 "The two weeks of panel
21 hearings commenced on
22 June 16th, 2007, DFO
23 presented to the panel on
24 June 20th on the
25 potential impacts on fish

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1 up the chain from Faith Scattolon, this memo
2 drafted by Mark McLean, to the ADM Oceans and
3 Habitat; are you with me?
4 A. Yes, I see that.
5 Q. Okay. So then go over to
6 page 2, bottom bullet:
7 "The 36 pages of comment
8 from the DFO included
9 concerns with the
10 potential behavioural
11 impacts of noise on
12 marine mammals,
13 particularly impacts on
14 endangered species, and
15 the requirements under
16 the Species at Risk Act,
17 the effects of blasting
18 on lobster and conflicts
19 with the inshore fishing
20 activities. The
21 scientific research on
22 the behavioural impacts
23 of noise on these marine
24 mammals and fish are
25 limited. Therefore,

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1 conclusive opinions on
2 the potential impacts
3 from the quarry on these
4 species cannot be made at
5 this time. Given the low
6 frequency of blasting,
7 once every two weeks, and
8 the mitigation measures
9 proposed, monitoring for
10 whales prior to blasting,
11 it is expected that any
12 impacts would be minimal.
13 However, given the
14 uncertainties, DFO has
15 requested that monitoring
16 be conducted on
17 behavioural impacts, et
18 cetera."[as read]
19 Is all of this news to you?
20 Are you seeing this for the first time now?
21 A. Well, I'm seeing this
22 document for the first time, yes.
23 Q. Right.
24 PRESIDING ARBITRATOR:
25 Mr. Nash, maybe a question, how much more time did

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1 you need?
2 MR. NASH: No more than
3 five minutes.
4 PRESIDING ARBITRATOR: Okay.
5 Thank you.
6 BY MR. NASH:
7 Q. I gather you weren't
8 qualified to assess the economic viability of the
9 quarry project?
10 A. I'm not sure what you're
11 getting at there, Mr. Nash.
12 Q. Well, you've never run a
13 quarry?
14 A. I've never run a quarry,
15 no.
16 Q. You've never shipped
17 stone from anywhere to New York City?
18 A. No.
19 Q. No. So you wouldn't know
20 about the economic viability of this quarry
21 project or any other?
22 A. Well, certainly not this
23 one, but I would point out that, in any
24 environmental assessment and presumably this one
25 as well, information is provided to the panel on

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1 things like need, purpose of the project.
2 Q. Sure.
3 A. Obviously any proponent
4 will want to demonstrate to the public what the
5 benefits are in the community. These are things
6 that come into the whole array of discussions
7 before an environmental assessment panel.
8 Q. Of course.
9 A. So if I was -- happened
10 to be chair of a quarry project, I would have some
11 understanding of the economic viability, but I
12 have not developed, you know, an economic
13 viability for a quarry, if that's your question.
14 Q. Right. And you don't
15 know, really, anything about the economic
16 viability of this particular quarry; that's
17 correct?
18 A. I only know what I have
19 read in the documents that are available. That's
20 it.
21 Q. The damages document?
22 A. Well, whatever is on the
23 record that I have read.
24 Q. Okay. If Mr. Chodorow --
25 do you know Mr. Chodorow?

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1 A. I have just met him. I
2 haven't met him before.
3 Q. If he relied upon you for
4 an assessment of the economic viability of the
5 Whites Point Quarry project, that would be a
6 mistake; isn't that right?
7 A. Well, I have not provided
8 any advice on the detailed economic viability, but
9 I have pointed out in my report that mitigation
10 measures can, in fact, affect the economic
11 viability, because mitigation measures need to be
12 technically and economically viable, and if one
13 was to impose very stringent mitigation measures,
14 it's possible that that could affect the viability
15 of the project.
16 Q. But that's a possibility
17 that you haven't analyzed, considered, studied in
18 respect of the Whites Point project; that's
19 correct?
20 A. I have -- in my report, I
21 have mentioned that in a general sense, just as I
22 have now.
23 Q. Right. And aside from
24 that, you're not in any position to assess the
25 economic viability with any particularity of the

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1 Whites Point project; that's correct?
 2 A. That is not expertise
 3 that I have, yes.
 4 Q. All right. Are you aware
 5 that Mr. Chodorow replies upon you for the
 6 proposition that the project was subject to risk
 7 if not obtaining the required permits?
 8 A. I'm not aware that he has
 9 referenced my work, no.
 10 Q. Okay. Could you turn to
 11 Tab 6, please. It's a letter from Canada to our
 12 firm, in particular to me. If you go to the
 13 bottom of the first page:
 14 "Finally, as agreed by
 15 the disputing parties on
 16 April 11th, 2016, Canada
 17 provides the following
 18 stipulations in
 19 satisfaction of the
 20 claimant's Requests 37
 21 and 38. Request 37:
 22 Canada stipulates that it
 23 has no examples where a
 24 proponent of a project
 25 which received

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1 environmental assessment
 2 approval from the
 3 Government of Canada
 4 under the version of CEAA
 5 applicable to the Whites
 6 Point EA and applied to
 7 the Department of
 8 Fisheries and Oceans,
 9 Transport Canada, or
 10 Natural Resources Canada
 11 for any permits,
 12 licences, or
 13 authorizations required
 14 for the operation of the
 15 project was denied those
 16 permits, licences, or
 17 authorizations."[as read]
 18 Have you seen this letter
 19 before today?
 20 A. No, I don't think I have.
 21 Q. Okay. Did you seek any
 22 advice from Professor Doelle or speak with him
 23 with respect to who would be appropriately
 24 appointed to the JRP in this case?
 25 A. No, I did not.

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1 MR. NASH: Thank you. Those
 2 are my questions.
 3 THE WITNESS: Thank you,
 4 Mr. Nash.
 5 PRESIDING ARBITRATOR: Thank
 6 you, Mr. Nash. Redirect?
 7 Mr. Klaver, I give you the
 8 floor.
 9 RE-EXAMINATION BY MR. KLAVER:
 10 Q. Mr. Connelly, Mr. Nash
 11 referred to your reference to Ms. Griffiths at
 12 paragraph 8 of your second report, so why don't we
 13 just go there right now.
 14 A. Paragraph 8 of my second
 15 report?
 16 Q. Yes. Now, in this
 17 paragraph, are you simply summarizing the views of
 18 Ms. Griffiths?
 19 A. Let me just read it again
 20 first before I answer you, Mr. Klaver.
 21 Q. Particularly the first
 22 sentence.
 23 A. Well, some of these are
 24 my views as well, but Ms. Griffiths, I do state --
 25 I'm sorry. Your question again maybe just so I

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1 understand it?
 2 Q. No problem. So just
 3 looking at this, and Mr. Nash seemed to suggest
 4 that you were using very similar language. And
 5 I'm just looking at the wording, and I'm wondering
 6 if you were merely summarizing her conclusions at
 7 this point in your report.
 8 A. No. In that particular
 9 sentence, that was, that was my view as well.
 10 Q. Okay.
 11 A. It may be that the words
 12 look similar, but I certainly did not attempt to
 13 plagiarize them in any way.
 14 Q. No, not to suggest you
 15 were plagiarizing. I was just wondering if it was
 16 a summary.
 17 A. Yeah. Well, no, I
 18 believe that that's indeed the case. They did not
 19 declare these effects to be not significant.
 20 Q. Right. Now, Mr. Nash
 21 also asked you if the two RAs that considered the
 22 report considered it to be acceptable without
 23 seeking more information. Is it your view that,
 24 in the absence of the NAFTA breach with CCV
 25 removed from the report, government

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1 decision-makers would consider it to be complete
2 and acceptable?

3 MR. NASH: That's a new
4 opinion. We haven't covered that.

5 PRESIDING ARBITRATOR:
6 Mr. Nash, could you repeat?

7 MR. NASH: That's a request
8 for an opinion that I did not cross-examine
9 Mr. Connelly on.

10 MR. KLAVER: Well, Mr. Nash
11 was asking about whether the RAs considered the
12 report to be complete. Mr. Connelly's analysis is
13 on what happens in the absence of the NAFTA
14 breach. And so I'm just wondering if his view is
15 that the RAs would consider it to be complete in
16 that circumstance.

17 MR. NASH: This opinion is
18 already in the report. There's nothing new
19 arising from cross-examination in respect to it.
20 This is an objectionable question.

21 PRESIDING ARBITRATOR: Could
22 you maybe skip the question and go to the next
23 one?

24 MR. KLAVER: Okay.

25 BY MR. KLAVER:

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1 Q. Now, following up from
2 the question about Ms. Griffiths' comments and
3 Mr. Nash's question about government
4 decision-makers not seeking further information,
5 is it your view that they do have the authority to
6 seek further information?

7 A. Yes, they do. If at any
8 point the RAs would, you know, feel that a report
9 is not complete, the Ministry of the Environment,
10 for example, might well determine that the panel
11 has not met its terms of reference in submitting a
12 report and might ask for more information be
13 provided or clarification to be provided, that
14 sort of thing, yes.

15 Q. Okay. And would that
16 involve potentially completing analysis on certain
17 topics?

18 A. It -- you mean by the JRP
19 in this instance?

20 Q. Yeah.

21 A. Yes. It would require
22 them to perhaps offer clarification with some of
23 their recommendations, or, in some instances, they
24 might have to gather more information.

25 Q. Okay. Now, Mr. Nash also

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1 asked you about the department's consultations on
2 the effects of the project. Is it your view that
3 government decision-makers can make determinations
4 of significance on the effects of the project
5 independent of the report?

6 MR. NASH: Well, that's a
7 directly leading question. This is redirect
8 examination. The witness is being asked for a new
9 opinion. There's no new opinion admissible at
10 this stage, and it's a leading question.

11 PRESIDING ARBITRATOR: Could
12 you please rephrase the question?

13 MR. KLAVER: Sure.

14 BY MR. KLAVER:

15 Q. So Mr. Nash asked about
16 the department's consultations on the effects of
17 the report. What type of decisions can the
18 departments make regarding the effects?

19 A. Right. Well, the -- as I
20 have indicated in my report, the Governor in
21 Council has, in my view, a fair bit of discretion,
22 and the Honourable John Evans has, in his report,
23 which has not -- for which he has not been
24 cross-examined has, of course, concluded the same
25 thing. So, yes, a department or the responsible

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1 authorities under CEAA 1992 are required to, first
2 of all, respond to the report and seek the
3 approval of the Governor in Council. So they may
4 or may not agree with the findings of the joint
5 review panel. They might say, "Look, there are
6 additional significant adverse effects here, or,
7 in our view, there are not", because I know when
8 the Act was first developed, it was very clear.
9 No department, no Minister wanted to give an
10 environmental assessment panel the authority to
11 make decisions. They wanted these panels to be
12 advisory, so, therefore, they have the opportunity
13 to say yes or no, we agree or disagree with your
14 findings. And I do cite in my report the -- an
15 example of that, which is the Northern Gateway
16 Project, where the Governor in Council, in fact,
17 found additional significant adverse environmental
18 effects beyond those found by the joint review
19 panel.

20 Q. Okay. Now, Mr. Nash also
21 asked you about, following from this question,
22 looking beyond the environmental effects under the
23 Act. Can you explain what such factors would be
24 and how they would play into Cabinet's
25 decision-making process?

1 A. Yes. Some of those would
2 be examples that are referenced in that background
3 analysis document, the memorandum to Cabinet that
4 I referenced. If you look at that, you will see
5 there's considerations of public concern. There's
6 considerations, as I mentioned, also of the
7 concerns of Aboriginal people. There's also
8 reference to sustainable development, the
9 benefits/disbenefits of the project. There's also
10 reference to the implications of the decision on
11 the province, in this case the province of Nova
12 Scotia. So, again, an indication of some of the
13 broader elements that would be taken into account
14 by the Governor in Council each -- and in that
15 respect, of course, each level of government has
16 to make its own decisions, but, nevertheless, the
17 federal government, as is quite clear in that
18 document, was very much interested in looking at
19 what were the implications to either approving or
20 rejecting this project on Nova Scotia.
21 Q. Okay. And Mr. Nash also
22 asked you about GIC discretion. Now, if there is
23 no finding of SAEE by the panel, what's your
24 understanding of section 37 and whether the --
25 there is a discretionary process there for

1 you, Mr. Klaver. Mr. Nash.
2 FURTHER EXAMINATION BY MR. NASH:
3 Q. You indicated in response
4 to Mr. Klaver's questions that the Governor in
5 Council can accept or reject recommendations from
6 a joint review panel; correct?
7 A. The simple chart shows
8 that, but...
9 Q. Isn't that your
10 understanding?
11 A. As I clarified with -- in
12 response to Mr. Klaver and as I cite in the
13 Northern Gateway Project, we actually have an
14 example there where the Governor in Council found
15 additional significant adverse environmental
16 effects beyond those found by the joint review
17 panel, so...
18 Q. So the Governor in
19 Council can -- are you saying can do whatever it
20 wants?
21 A. Well, it has to operate,
22 obviously, within the limitations of the statute.
23 Q. Right.
24 A. There has to be some
25 linkage to the statute. And it would appear that,

1 government decision-makers?
2 MR. NASH: I didn't ask
3 Mr. Connelly anything about section 37, and so
4 this --
5 MR. KLAVER: I can retract the
6 reference to 37.
7 BY MR. KLAVER:
8 Q. Mr. Nash asked about the
9 -- Canada's decision with regards to the project
10 effects if there is no SAEE. What level of
11 discretion do decision-makers have in that
12 circumstance?
13 A. Where a panel concludes
14 there's no SAEE?
15 Q. Um-hmm.
16 A. Well, as I said earlier,
17 it's possible that they could conclude otherwise,
18 and they have the discretion to do that under
19 37(1.1). And that, as I mentioned, has been
20 confirmed by the Honourable John Evans as well in
21 his report. There's no restrictions, as he said,
22 on the Governor in Council in that regard.
23 MR. KLAVER: Okay. I have no
24 further questions for now.
25 PRESIDING ARBITRATOR: Thank

1 in this instance, I referred to with Northern
2 Gateway -- this is the pipeline project proposed
3 from Alberta to Kitimat and for oil from the oil
4 sands in Alberta, a very controversial project
5 obviously. And, in that particular case, it looks
6 to me like the Governor in Council, on the basis
7 of the evidentiary record, did find additional
8 significant adverse effects beyond those
9 recommended by the panel.
10 In fact, that panel had found
11 two significant adverse environmental effects on
12 grizzly bears and caribou but, in spite of that,
13 had recommended the project be justified in the
14 circumstances. The present government looked at
15 that more carefully and found additional
16 significant adverse environmental effects and
17 concluded it was not justified in the
18 circumstances and refused the project's approval.
19 Q. Understood. How many JRP
20 reports have gone to Cabinet?
21 A. Well, every one would.
22 Q. Yeah. How many is that?
23 A. When I last looked at the
24 agency website, I believe I counted 38 panels.
25 Now, that would be in total. I think that would

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1 include -- that would include JRPs and federal
2 only panels, but most of them are joint these
3 days.
4 Q. Right. My understanding
5 is that there were 27 joint review panel reports
6 that went to Cabinet.
7 A. That is possible. As I
8 say, my count was 38 of all of those listed in the
9 Registry right now.
10 Q. And my understanding is
11 -- and I could be corrected, and correct me if I
12 am wrong --that 23 of those reports recommended
13 approval? Do you know that or not?
14 A. I couldn't confirm that.
15 I did not look at that level of detail, Mr. Nash,
16 but I will --
17 Q. Does that sound about
18 right?
19 A. That sounds reasonable, I
20 would think.
21 Q. And that four were
22 recommended not to be approved by JRPs?
23 MR. SCOTT LITTLE: Mr. Nash,
24 are you providing evidence?
25 MR. NASH: I'm asking

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1 you, Mr. Nash. So questions from the tribunal?
2 No questions, so that terminates the witness
3 examination of Mr. Connelly. Thank you very much.
4 You are relieved.
5 And we are having, first of
6 all a break, which we deserve, I think. So I
7 think we are already three experts in arrears. So
8 the break will end at 16:40, 20 minutes to five,
9 and then we will go into the matter of the
10 document. Thank you.
11 --- Upon recess at 4:28 p.m.
12 --- Upon resuming at 4:46 p.m.
13 PRESIDING ARBITRATOR: So we
14 resume the sitting, and we will deal with the
15 question of the article criticizing the first part
16 of our award first, and then we will deal with the
17 issue of future, so a reference to documents that
18 are not on the record, if that is --
19 MR. SCOTT LITTLE: That's
20 fine. May I provide a bit of additional
21 information?
22 PRESIDING ARBITRATOR:
23 Additional information?
24 MR. SCOTT LITTLE: Yes. So at
25 the end of Mr. Connelly's examination, there were

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1 Mr. Connelly if he can confirm, not the exact
2 number, the broad range.
3 THE WITNESS: There would be
4 some approved and some that were rejected, yes.
5 BY MR. NASH:
6 Q. Right. And, for example,
7 the Lower Churchill Hydro Project that
8 Ms. Griffiths was involved in recommended that the
9 project not be approved?
10 A. I --
11 Q. Or do you remember?
12 A. Well, I'm not sure that
13 that would be the exact wording. I'd have to look
14 at the report in terms of recommendations. They
15 may have simply concluded that there were
16 significant adverse environmental effects and let
17 the responsible authorities and the Governor in
18 Council make the ultimate decision as to whether
19 those effects were justified in the circumstances.
20 I do not know but --
21 Q. The Governor in Council
22 did approve that project?
23 A. Yes, I'm aware of that.
24 MR. NASH: Okay. Thank you.
25 PRESIDING ARBITRATOR: Thank

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1 some numbers put to Mr. Connelly about JRP reports
2 that had been published and the number that
3 recommended approval. Mr. Nash said there were 27
4 review panel reports that went to cabinet and 23
5 of those reports recommended approval.
6 Now, I objected to Mr. Nash
7 putting that into the record because it sounded
8 like evidence, and it was. Specifically comes
9 from evidence that was not allowed to be filed
10 back in January. I won't go any further because I
11 don't want to read that evidence in the record
12 because it has been disallowed. But this is now
13 the third time, it's the second time today that
14 evidence, new evidence has been introduced without
15 permission, and we are just wondering, when is
16 this going to stop? There is a complete disregard
17 for the rules.
18 Your decision, Judge Simma, of
19 January 26th provided:
20 "With respect to the
21 reply rejoinder reports,
22 the investors' request
23 for leave to file
24 additional rebuttal
25 evidence and legal

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1 authorities is denied.
2 The documents attached to
3 and made available for
4 download in the
5 investors' messages of
6 January 17 and 22, 2018,
7 shall not form part of
8 the record and may
9 accordingly not be relied
10 upon at the forthcoming
11 hearing."[as read]
12 So pursuant to that paragraph,
13 those documents are not supposed to be relied upon
14 in the hearing. They have been. They just were.
15 And my understanding is that there's an intention
16 to rely upon them in the upcoming
17 cross-examination, and they shouldn't be.
18 So, in addition to the request
19 that I have made with respect to the Doelle
20 report, we have the same request that this
21 evidence be stricken from the record, and we have
22 the same request about some kind of sanction
23 because this has to stop at some point.
24 PRESIDING ARBITRATOR: Okay,
25 but I -- let us take up the issue of this

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1 particularly going to a witness' essential
2 credibility.
3 And, in our submission, as a
4 matter of fundamental domestic and international
5 law principle, the scope of cross-examination is
6 necessarily broad, and a broad scope is essential
7 for cross-examination to properly serve its
8 function as an engine of truth finding.
9 Cross-examination is critical, more specifically,
10 for testing the veracity, truthfulness and the
11 credibility of a witness. And information, in our
12 submission, relevant to a witness' veracity,
13 truthfulness and credibility is a proper basis for
14 questions on cross-examination and should not be
15 barred, particularly for procedural purposes.
16 It goes directly, in our
17 submission, to the tribunal's ability to fully
18 assess the reliability of the testimony that's put
19 before you.
20 Indeed, in our submission, the
21 breadth and the scope of cross-examination is, in
22 fact, reflected in Procedural Order 25. Under
23 section 4.3, the only limitation on the scope of
24 cross-examination is "to issues relevant to the
25 witnesses' or experts' written or oral evidence",

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1 morning's reference to the document and to the
2 possible future reliance on documents.
3 And, Mr. Nash, I would like to
4 give you the floor on this morning's happening or
5 reference to Professor Doelle's paper.
6 MR. NASH: I am going to give
7 the floor, in turn, to my colleague Brent Johnston
8 who will make the submissions on this point
9 because I am losing my voice, and Mr. Johnston is
10 much better at this.
11 MR. JOHNSTON: I will just
12 start, Judge Simma, and members of the tribunal,
13 with the reference Mr. Little made to the letter.
14 With respect, in our submission, the reference to
15 Mr. Pulkowski's January 26th letter, and
16 specifically it's at page 3 of 3 where there is
17 reference to the use of cross-examination to probe
18 the strength of the claim statement, in our
19 submission, refers to cross-examination in the
20 ordinary course. And, in our submission, that's
21 what this issue really is about. And Canada's
22 objection is fundamentally misconceived. The
23 issue is not fundamentally the presentation of new
24 evidence, but the issue, in our submission, is the
25 proper breadth and scope of cross-examination

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1 that's the expressed limitation on
2 cross-examination. And, in our submission,
3 there's nothing in Procedural Order 25, 4.3, that
4 precludes the use of outside writings in
5 formulating cross-examination questions or
6 approaches or that provides any additional
7 constraints on counsel's approach to
8 cross-examination. And there are measures to
9 control fairness, I am going to come to that.
10 Procedural Order 25, section
11 6.1, deals, of course, with documents. And while
12 it prohibits a document from being presented,
13 that's the term, "presented", at a hearing -- at
14 the hearing, absent agreement or leave of the
15 tribunal, Procedural Order 25, section 6.1, does
16 not define the term "present" and nor does it
17 address cross-examination. If you look, though,
18 in our submission, Judge Simma and members of the
19 tribunal, to Procedural Order 25, section 5.4,
20 there's a distinction made there between
21 presenting documents and referring to documents.
22 And that distinction is in the context of the
23 parties leading their valuations. And there,
24 Procedural Order 25, section 5.4, prohibits each
25 party's valuation experts in their principal

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1 presentations from referring, referencing, to any
2 new evidence or document not already on the
3 record.

4 And, in our submission, the
5 use of the term "refer" in that provision is
6 material and is important, and it's distinct from
7 "present". It's referring to documents not in the
8 record. That is expressly prohibited.

9 Procedural Order 25, 5.4, does
10 not deal with cross-examination. It does not
11 contain a similar express prohibition against the
12 party referring to any new documents not already
13 on the record on cross-examination.

14 Now, fairness and
15 implications, and I say this about implications
16 first, that if a party refers, in the course of
17 cross-examination, as an approach or a line of
18 cross-examination, to some outside document and
19 suggests something to a witness, the party runs
20 the risk that the witness is going to reject or
21 dispute or simply deny that the witness recalls or
22 has any involvement. And without having put that
23 document on the record, the party then will be
24 necessarily precluded from using the document to
25 attempt to challenge the witness.

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1 would certainly include the procedure for dealing
2 with witnesses on cross-examination, dealing with
3 the appropriate and proper approach to
4 cross-examination.

5 So those procedures are there
6 to ensure fairness.

7 The tribunal may, of course,
8 take into account the fact that a witness has been
9 asked about some fact or some document that's
10 outside of the record in evaluating the weight
11 ultimately to be given to that witness' evidence
12 in response to that line of cross-examination.
13 Again, that, in my submission, would be a
14 fundamental principle applicable to the conduct of
15 cross-examination in an adversarial process.

16 But, in summary, Canada's
17 objection, in our submission, is without merit.
18 Ms. Griffiths' evidence should remain intact.

19 However, if the tribunal is
20 minded otherwise, respectfully, then the investors
21 submit that any remedial measure that might be
22 applied in respect of the investors'
23 cross-examination of Ms. Griffiths must also be
24 applied in respect of Canada's cross-examination
25 of Mr. Forestieri.

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1 And, frankly, in our
2 submission, Canada has itself engaged in this
3 conduct. During the cross-examination of
4 Mr. Forestieri, you will recall, Mr. Forestieri
5 was asked about changes to the US Tax Act. That's
6 not in the record. He was asked about those
7 questions; no objection was taken. He dealt with
8 them as a matter of cross-examination, and that
9 was -- it was taken that it was a line of
10 cross-examination that Canada chose, and I note as
11 well that Canada referenced those amendments in
12 their opening statement.

13 Now fairness. And fairness,
14 in our submission, to the other party and to the
15 witness is ensured by Procedural Order 25, 4.3,
16 which, of course, provides that a party may
17 re-examine on matters arising.

18 And Procedural Order 25, 4.5,
19 provides that, and I quote:

20 "The tribunal shall at
21 all times have complete
22 control over the
23 procedure for hearing a
24 witness."[as read]

25 And, in our submission, that

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1 And those are our submissions.
2 PRESIDING ARBITRATOR: Thank
3 you.

4 Mr. Little?

5 MR. SCOTT LITTLE: I have just
6 a couple of brief points. First of all, I don't
7 think you can apply the same exercise to the
8 cross-examination of Mr. Forestieri because we put
9 no evidence on the record or in the record, we
10 didn't seek to put any new evidence in the record,
11 we put no new tax code into the record, for
12 example.

13 More importantly and more
14 fundamentally for the cross-examination that's
15 coming up, there is a fundamental question of
16 fairness here. My understanding is that there are
17 documents that are not on the record that are
18 going to be put to Mr. McLean.

19 MR. NASH: That is incorrect.

20 PRESIDING ARBITRATOR: Sorry,
21 have you finished your statement?

22 MR. SCOTT LITTLE: No, I am
23 not finished.

24 PRESIDING ARBITRATOR: Please.
25 MR. SCOTT LITTLE: As we noted

1 in our correspondence to the tribunal objecting to
2 the filing of the reply rejoinder reports, in
3 order to prevent the taints of the testimony by
4 what is clearly inadmissible evidence, Canada has
5 ensured that, like the tribunal, none of its
6 experts or witnesses have been provided or
7 reviewed the newly filed material. That stands to
8 this day. They have no knowledge of this
9 material. So to the extent that any of the
10 material in that attempted submission is going to
11 form part of the cross-examination, then it simply
12 should not be allowed. It cannot be relied upon
13 at this hearing. Now, Mr. Nash might correct me
14 and assure me that that kind of material is not
15 going to be put forward, but if it is, it
16 shouldn't be.

17 Now, on the more general
18 proposition that documents that do not form part
19 of the record that can be put to a witness for
20 cross-examination, it's trial by ambush. It is
21 not fair. It does not ensure a fair and orderly
22 efficient cross-examination that can be informed
23 by what has been put on the record. So it
24 shouldn't be allowed.

25 PRESIDING ARBITRATOR: I think

1 story of the paper and Ms. Griffiths having
2 proofread or something. It will simply disappear.
3 We will not go beyond this and engage in anything
4 like punishment. I think this is an adequate,
5 let's say, reaction to what happened.

6 With regard to the, what's in
7 the future, now, I think there are two, there are
8 two parts in our letter of 26 January which are
9 relevant. First of all, there is a reference --
10 there is a paragraph which says that no new
11 documents may be, let's say the parties are not
12 authorized to introduce new documents, but there
13 is what -- the tribunal may, in exceptional
14 circumstances, grant the -- Dirk, I am talking
15 under your control, but I think that's right.

16 DR. PULKOWSKI: You have PO
17 25.

18 PRESIDING ARBITRATOR: Okay,
19 6.1:

20 "Documents that do not
21 form part of the record
22 may not be presented
23 unless the disputing
24 parties agree or the
25 tribunal, having

1 I have a pretty clear memory of the points
2 referring to Mr. Forestieri because of my personal
3 interest in the US tax situation, and I think I am
4 right in remembering that no figure was -- I think
5 there was no answer given in the sense, yeah,
6 according to the new rules, that they would have
7 to pay less taxes. There were figures in the
8 room, 39 per cent, et cetera, but those were
9 figures according to the old, I don't know whether
10 the new tax law is already in force in the United
11 States, but I don't think there was any, let's
12 say, comprehensive information given as to the
13 situation under the new tax.

14 In the case before us now, we
15 of course, we have something very tangible. We
16 have that paper or that comment on the liability
17 award, and so I think there is a, there is a
18 difference there. And with regard to this paper,
19 I think we have discussed the matter in the
20 intermission, and we would like to make the
21 following decision, that the document is stricken
22 from the record, the reference to that document is
23 stricken from the record, so the record as, how
24 should I say, kind of manipulated is probably a
25 bit of an ambiguous word, will not refer to this

1 consulted with the
2 parties, exceptionally
3 authorizes their
4 presentation."[as read]

5 And the second relevant
6 paragraph will be a reaction by the tribunal to
7 this matter of McLean and, well, Henry VIII,
8 sorry.

9 MR. KLAVER: Cromwell.

10 PRESIDING ARBITRATOR:

11 Mr. Cromwell. Sorry, you know what I mean, this
12 is not meant to in any way --
13 (Laughter)

14 PRESIDING ARBITRATOR: It's
15 just a memory aid for me.

16 In reaction to these two
17 gentlemen's, first, I think it's a statement;
18 secondly, it's a report, the letter says that the
19 other party's counsel may probe the strength of
20 the arguments, and I think we have to decide what
21 that means, "probe the strength of the arguments",
22 if that includes the, let's say, reference to
23 documents. And with regard to this document,
24 we -- to this question, we have decided that we
25 would like to see the new documents that you are

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1 going to refer to, I think in case of Mr. McLean,
2 and to render a judgment whether there is any,
3 let's say, prejudice involved or unfair or lack of
4 fairness.

5 So, again, to make a long
6 story short, the tribunal would like to see the
7 documents that Mr. Nash wants to refer to and
8 assess these documents before we finally decide
9 what to do with them.

10 MR. SCOTT LITTLE: My reaction
11 is that we would, indeed, request a recess in the
12 event that those documents can be relied upon so
13 that we can review them with Mr. McLean.

14 PRESIDING ARBITRATOR: I think
15 that's probably fair. Unfortunately/fortunately,
16 it's late again, so that might be, that might be
17 feasible. Could we maybe have Mr. Cromwell --
18 Mr. Cromwell is not involved with this, so could
19 we then turn the sequence and hear Mr. Cromwell
20 and maybe then have --

21 MR. SCOTT LITTLE: I believe
22 it was Mr. Bickford.

23 PRESIDING ARBITRATOR: Or
24 Mr. Bickford, and maybe have Mr. McLean tomorrow
25 morning after you have had a chance to --

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1 MR. NASH: May I make the
2 suggestion, Judge Simma.

3 PRESIDING ARBITRATOR: Yes.

4 MR. NASH: Shall we leave it
5 that, today, we will not refer Mr. McLean to any
6 new documents, so, for today's purpose, no new
7 documents will be presented or referred to
8 specifically. I will simply ask him questions
9 regarding factual matters. If there's something
10 arising from those factual matters and his answers
11 to those questions that relates to the documents,
12 we can deal with that tomorrow. And, in the
13 meantime, if there was something from our
14 perspective that might require, in order to have
15 procedural fairness, to have another document or
16 documents entered into as exhibits, even for
17 identification purposes, and, of course, to have
18 my friends and the tribunal review them beforehand
19 and to make submissions on them, I think we can
20 deal with that separately from the actual
21 cross-examination because the facts that I am
22 going to ask Mr. McLean questions about, indeed,
23 are confirmed in documents, and I want to ask him
24 questions about those things, and it may be that
25 he confirms exactly what's in the documents. And

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1 these are documents that refer to matters that
2 were raised, from our perspective, for the first
3 time in his statement, in his rejoinder statement.
4 But for today's purpose, I won't refer to any
5 documents. I will ask him about facts, and then
6 we will see where we are. And it may be that
7 there's no issue.

8 PRESIDING ARBITRATOR: Is that
9 acceptable?

10 MR. SCOTT LITTLE: No, I still
11 have a concern. Because the facts, just as we saw
12 earlier today, could be derived from the report,
13 the reply, rejoinder reports that were attempted
14 to be filed as evidence and were not allowed in.
15 And that paragraph 1 of the January 26th of the
16 letter says they may not accordingly be relied
17 upon at the forthcoming hearing.

18 And as I have already noted,
19 we have been very careful not to provide these
20 documents, the reports and all the supporting
21 exhibits to our witnesses so that they don't get
22 tainted by these documents that shouldn't have
23 been filed in the first place or attempted to be
24 filed without leave.

25 So I am caught in kind of a

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1 concerning situation here because all indicators
2 are, because these documents that were attempted
3 to be filed and they've dealt with the McLean
4 report, the facts that Mr. Nash is going to put to
5 Mr. McLean are based on those documents. And,
6 again, I will say it one more time, we did not let
7 any of our witnesses see those documents, to avoid
8 tainting the process. So I do have a concern with
9 respect to that approach.

10 PRESIDING ARBITRATOR: Well,
11 since there doesn't seem to come about any
12 agreement on that point, I think I fall back on
13 my, the idea before, that maybe -- not maybe, but
14 that, today, we now turn to Mr. Cromwell -- and if
15 necessary -- again, problem? Or Mr. Bickford, I
16 think. And then you have all evening and night to
17 find a solution to the document problem, and we
18 have Mr. McLean the first witness tomorrow
19 morning.

20 MR. SCOTT LITTLE: I guess my
21 question is what process is going to be followed
22 now tonight with respect to the intended cross of
23 Mr. McLean? I am in your hands, but I have
24 registered my concern.

25 PRESIDING ARBITRATOR: Maybe

1 first thing we do once we are through with the
2 examination of two gentlemen or at the end of our
3 exercise tonight, if we could -- if Mr. Nash could
4 provide us with the documents.

5 MR. NASH: Absolutely.

6 PRESIDING ARBITRATOR: Then we
7 could, on the spot, make the decision on the,
8 let's say, acceptability, fairness, et cetera, and
9 present that to you before we leave here. Is
10 that --

11 MR. SCOTT LITTLE: By
12 "documents", do you mean --

13 PRESIDING ARBITRATOR: The new
14 evidence that Mr. Nash wants to refer to in his
15 examination of Mr. McLean.

16 MR. SCOTT LITTLE: I guess the
17 concern I still have is that if these documents,
18 facts are based on those reports that were
19 attempted to be filed back in January 17th, the
20 tribunal's already ruled on this issue. They
21 can't be relied upon in the hearing. That's what
22 paragraph 1 of January 26th letter from the
23 tribunal says. So I am left at a loss as to what
24 there is to explore.

25 PRESIDING ARBITRATOR: But

1 they are not going to -- maybe I misunderstood,
2 but we don't want to go into -- divide up the
3 examination of Mr. McLean into a, let's say,
4 innocuous phase and more problematic phase
5 tomorrow, that was the proposal by Mr. Nash, and
6 that eventually, he would have to come back to
7 that tomorrow, that is not our -- I think we need
8 to decide that, and I think, for the moment, let's
9 continue.

10 --- Upon recess at 5:10 p.m.

11 --- Upon resuming at 5:22 p.m.

12 PRESIDING ARBITRATOR: We will
13 resume the meeting.

14 The tribunal would like to
15 enter into the cross-examination -- first of all,
16 I have to apologize, I made a mistake. I am
17 somehow fascinated by the name Cromwell for the
18 reason that came out through my reference, and I
19 totally overlooked, of course, that Mr. Cromwell
20 will not be cross-examined. So the two persons I
21 had in mind were Mr. Buxton and Bickford. Yes,
22 these two, and we would like to immediately start
23 with Mr. Bickford. And then spend some time on
24 figuring out the problem of the document after
25 that, maybe after leaving, depending on how we go,

1 how much time we need, or to have Mr. Buxton,
2 tonight and then go back to this issue.

3 But for the moment, have the
4 cross of Mr. Bickford, we will see how long that
5 takes, Mr. Buxton, and then back to this question.

6 I think we are ready to spend
7 until 7 o'clock with these matters.

8 MR. SCOTT LITTLE: Okay, I
9 guess the question about Mr. McLean, should he be
10 sent home -- or sent to his hotel?

11 PRESIDING ARBITRATOR: Yes,
12 Mr. McLean should not be here.

13 MR. SCOTT LITTLE: He can be
14 released from his isolation?

15 PRESIDING ARBITRATOR: I think
16 he can be released, yes.

17 MR. NASH: What do you mean
18 "released from isolation"? He is still not in the
19 hearing room, but he is released for the evening.

20 PRESIDING ARBITRATOR: For
21 tonight.

22 MR. NASH: Yes.

23 PRESIDING ARBITRATOR: Yes, of
24 course. Okay, so then we turn to the
25 cross-examination of Mr. Bickford.

1 Good evening, Mr. Bickford.

2 MR. BICKFORD: Good afternoon.

3 It is evening; isn't it?

4 PRESIDING ARBITRATOR: I don't
5 know how you handle that in Canada.

6 MR. BICKFORD: I don't either.

7 PRESIDING ARBITRATOR: Could
8 you please read the statement that you find in
9 front of you?

10 WITNESS DECLARATION: GEORGE BICKFORD

11 MR. BICKFORD: I solemnly
12 declare upon my honour and conscience that I will
13 speak the truth, the whole truth and nothing but
14 the truth.

15 PRESIDING ARBITRATOR: Thank
16 you. And, it's for claimant to direct.

17 MR. JOHNSTON: Thank you,
18 Judge Simma.

19 EXAMINATION IN-CHIEF BY MR. JOHNSTON:

20 Q. You are George Bickford?

21 A. I am.

22 Q. You signed two statements
23 for this arbitration?

24 A. That is correct.

25 Q. And your first statement,

1 sir, is dated December 8, 2016, and your second
 2 statement, your reply statement, is dated
 3 August 8, 2017?
 4 A. That is correct.
 5 Q. And in 1992, you
 6 co-founded LB&W Engineering?
 7 A. That is correct.
 8 Q. And LB&W Engineering is
 9 an engineering firm that specializes in minerals,
 10 processing engineering, including aggregate plant
 11 design and materials handling?
 12 A. That's correct.
 13 Q. And you were president of
 14 LB&W Engineering until your retirement in 2015?
 15 A. I was.
 16 Q. And throughout its
 17 existence, LB&W has designed and engineered all
 18 aspects of materials handling systems, including
 19 systems for processing and handling aggregate?
 20 A. Yes.
 21 Q. And you have personally
 22 worked professionally in the engineering field
 23 since 1963?
 24 A. Correct.
 25 Q. And you have personally

1 specialized in quarry design and in bulk material
 2 handling since approximately 1971?
 3 A. Yes.
 4 Q. And in late 2003, LB&W
 5 was engaged to design and engineer the aggregate
 6 crushing and sizing facility for the Whites Point
 7 Quarry?
 8 A. That is correct.
 9 Q. And, sir, have you had
 10 any -- do you have any corrections that you would
 11 like to make to your statements?
 12 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
 13 5:27 P.M.
 14 THE WITNESS: Yes, in
 15 preparation, I found some typos, minor but
 16 nonetheless inaccuracies, in my witness statement
 17 and in the statement that -- my rebuttal
 18 statement. I have made notes, if somebody would
 19 like to see them.
 20 MR. JOHNSTON: Thank you,
 21 Mr. Bickford. It may assist to have the clean
 22 copies of Mr. Bickford's statements put in front
 23 of him. And also, I note we are in closed
 24 session, confidential session, members of the
 25 tribunal, thank you.

1 THE WITNESS: Thank you.
 2 BY MR. JOHNSTON:
 3 Q. So with reference to your
 4 witness statements, Mr. Bickford, would you please
 5 identify the corrections that need to be made?
 6 A. Yes, in the witness
 7 statement on page 11, Item 54.
 8 Q. This is your first
 9 witness statement, dated December 8, 2016?
 10 A. That is correct.
 11 And it's the only one I have
 12 found in there, although it will repeat again in
 13 the following.
 14 Item 54, page 11. It says [REDACTED]
 15 [REDACTED] on the second line. [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 Q. And perhaps for the
 21 benefit of those who may not be familiar with the
 22 term, Mr. Bickford, [REDACTED]
 23 A. [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED] Second, from there, you can go
 3 right into the reply witness statement.
 4 That has a few more. Page 4,
 5 Item ix says on the last line where [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 Q. Thank you.
 11 A. Page 4, Item x, second
 12 line, it says [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 Page 6, Item I is the same
 18 problem in line 1, is an [REDACTED]
 19 [REDACTED]
 20 Page 6, Item 3 under that I, [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 Q. So that's the line --
 25 just to ensure we are on the correct location,

1 that's the line that reads [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 A. Number 4 -- excuse me,
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 So they are the alterations
 20 that I have noted. I recognize that there is
 21 probably not a great significance, and I apologize
 22 for not having caught them earlier.
 23 Q. And before I ask my
 24 friend to begin her questions, again, just for the
 25 sake of assisting the parties in the room who may

1 not understand some of the terminology that's
 2 specific to your industry, [REDACTED]
 3 [REDACTED]
 4 A. Indeed.
 5 Q. Are you able to give us
 6 an approximation of [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 A. Well, since I rarely
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 Thank you.
 5 So that's the issue. [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 So those, for me, I know that
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 Q. Thank you, Mr. Bickford.
 17 I will ask that you answer Canada's lawyer's
 18 questions now, please.
 19 MS. ZEMAN: Judge Simma,
 20 before I get up there, I would just request a
 21 brief recess. [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 PRESIDING ARBITRATOR: Yes, go

1 ahead.
 2 MS. ZEMAN: Thank you.
 3 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
 4 5:35 p.m.
 5 --- Upon recess at 5:35 p.m.
 6 --- Upon resuming at 5:51 p.m.
 7 PRESIDING ARBITRATOR: I think
 8 what we are going to do now is we are going to
 9 release Mr. Bickford. We may not have any other
 10 or any further witness examination tonight. And
 11 we are going to spend the -- turn to the issue of
 12 evidence in 25 and letter of 26 January in the
 13 matter instantly. So Mr. Bickford, I am very
 14 sorry, but you will have your opportunity
 15 tomorrow, and I hope you have a pleasant evening.
 16 THE WITNESS: Absolutely,
 17 thank you.
 18 MR. JOHNSTON: Just to be
 19 clear --
 20 PRESIDING ARBITRATOR: You
 21 should not discuss matters --
 22 MR. JOHNSTON: Judge Simma, it
 23 may be of assistance for Mr. Bickford, the
 24 cross-examination has not yet begun. May I
 25 suggest that he is then not considered to be under

1 cross-examination at this point because it has not
2 begun?
3 PRESIDING ARBITRATOR: That is
4 right. That means you are fine.
5 MR. JOHNSTON: Thank you.
6 PRESIDING ARBITRATOR: Right,
7 I think we are ready to go into, to return to the
8 discussion of the problem that we had before, and
9 I give the floor to my colleague.
10 PROFESSOR McRAE: Thank you,
11 Mr. President.
12 We took a bit of time before
13 because we are not entirely sure that we
14 understood all of the issues that were involved.
15 We gave our ruling in respect
16 of what has already been said in cross-examination
17 this morning in relation to Ms. Griffiths.
18 But the question is now, how
19 do we go ahead? As we understand it -- maybe I am
20 misunderstanding something. As we understand it,
21 the question now is to learn from Mr. Nash what is
22 it in terms of potential documents or new evidence
23 he plans to use in the cross-examination of
24 Mr. McLean. And then if we know that, we can then
25 get a better assessment of whether it falls under

1 PROFESSOR McRAE: I guess it
2 was the lack of clarity as to what he is going to
3 rely on that wouldn't allow us to even get to that
4 point. We are trying to get to the point where we
5 can actually discuss that, so Mr. Nash.
6 MR. NASH: Thank you,
7 Professor McRae.
8 In cross-examination, both
9 sides can ask questions which go to the issues in
10 the case which refers to written evidence or oral
11 evidence of a witness. And as Mr. Johnston said,
12 it goes to questions of credibility about what's
13 in a statement, and it's cross-examination. And
14 just as Mr. Forestieri had put to him a
15 proposition that the Canada/US tax treaty had been
16 revoked or was about to be revoked, which came up
17 yesterday, and had put to him specific tax
18 treaties going from 39 per cent to 37 per cent,
19 not in evidence, there's no document in evidence
20 to support that, it's our position that we can put
21 to Mr. McLean certain facts on cross-examination.
22 He either confirms those facts or he does not
23 confirm those facts.
24 If he confirms the facts,
25 there is no issue.

1 the rules of procedure or at least to hear Canada
2 on that, whether it falls under the rules of
3 procedure or whether it falls under the decision
4 the tribunal already made. But in order to get
5 that, to that point, I think we need to understand
6 what it is we are talking about. Are we talking
7 about documents, are we talking about evidence
8 that is going to be relied upon? That wasn't
9 entirely clear to us.
10 Now, is that a way to proceed,
11 then, if we hear from Mr. Nash first, or has
12 Canada still got concerns about even proceeding
13 this way?
14 MR. SCOTT LITTLE: The
15 tribunal has made a ruling on both the reports and
16 the documents, so everything that was contained in
17 the January 17th e-mail with reply rejoinder
18 reports, the tribunal has made a ruling on that.
19 That information, documents, witness statements,
20 evidence, was not entered into the record. The
21 tribunal's already made a ruling on that, so I am
22 not sure how Mr. Nash can convey that information
23 to you now if it's already been rejected for
24 filing without prejudicing or potentially tainting
25 the process.

1 If he does not confirm those
2 facts, then the question becomes, should there be
3 documents considered, even as exhibits for
4 identification, which is often done before they
5 are admitted into evidence, should documents be
6 considered which controvert the facts that he has
7 attested to? And it's only at that stage when the
8 documents become any issue at all.
9 The question of the facts,
10 they relate to the issues in this case, they
11 relate to his witness statement, they relate to
12 the facts in his witness statement. He can be
13 cross-examined on those facts without reference to
14 any documents. It's if he fails to agree with
15 certain facts which are in documents and can be
16 confirmed to be in documents, in some cases DFO
17 documents, which he should be considered to be
18 aware of or can confirm, then the issue of what to
19 do with the documents arises, and only then.
20 So we can go through the
21 entire cross-examination without reference to one
22 document, we can refer to statements made, we can
23 refer to facts. This particularly concerns the
24 migration of right whales. I will give you some
25 forewarning. The question of DFO's knowledge

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1 about the migration of right whales from Bay of
2 Fundy up north, the eastern side of Nova Scotia
3 into the Gulf of St. Lawrence, which is an
4 unexplained phenomenon, but it is a phenomenon
5 that the right whales have exited the Bay of
6 Fundy. It affects the question of the impact of
7 shipping on the case of a risk of harm to right
8 whales, shipping from Whites Point as distinct,
9 for example, shipping on the eastern side of Nova
10 Scotia, which is where Black Point is located.

11 And there's evidence from
12 Mr. McLean and there's a document, I believe it's
13 Exhibit R 769, which shows a map with a heavy
14 concentration of right whale sightings in the Bay
15 of Fundy, and there's all sorts of disclaimers to
16 that map, very few sightings around Black Point,
17 and so he makes the distinction that there is,
18 it's a different environment, it's a different
19 situation you are dealing with and, therefore,
20 right whale situations can be dealt with
21 separately and differently by the authorities,
22 whether it be a JRP or a comprehensive study for
23 Black Point. And the map shows just a few dots.
24 But there's another side to that story, and that
25 side is not told in his witness statement and it's

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1 credibility of his witness statement.
2 PROFESSOR McRAE: Can I ask
3 you just one question. Does this potential -- I
4 understand the process you have laid out as a way
5 to proceed, but does this potentially involve
6 asking the tribunal to reconsider what it's
7 already said about documents that were put forward
8 and then not allowed by the tribunal to be added
9 to the record?

10 MR. NASH: It may. I am
11 thinking likely not. But we would cross that
12 bridge when we came to it. That would be my
13 suggestion of proceeding forward in an orderly
14 way. And it would be at that point, there
15 wouldn't be -- if my friends from Canada wish to
16 do some re-examination on those documents, that
17 would be another possibility. The tribunal may
18 say at the end, we are not allowing those
19 documents in. Of course, we respect that, but
20 it's a decision, in my submission, that does not
21 have to be made now because we are looking at an
22 abstract, potential non-problem. And so the
23 timing, in my submission, for dealing with this is
24 at the end of Mr. McLean's cross-examination.

25 And, in the meantime, I give

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1 an incomplete story, and we have not had an
2 opportunity, because of the fact that that witness
3 statement was first introduced as part of the
4 rejoinder memorial, we have not had an opportunity
5 to test the facts, and those are just some of
6 them, in Mark McLean's witness statement.

7 So that's what it's about, and
8 it doesn't require the introduction of new
9 documents unless there's disagreement with the
10 facts, the evidence, in those documents that is
11 required. So my, my suggestion is that we do the
12 cross-examination and we see where we are at the
13 end of the cross-examination, and that if there's
14 further submission to be made on the introduction
15 for procedural fairness to the investors on
16 whether certain documents should be admitted, and
17 they can be introduced as, say, exhibits for
18 identification, then, then the hour or so that we
19 have invested in this procedural issue, I think,
20 becomes a non-issue. But I think we can deal with
21 it at the end of the cross-examination.

22 And I don't intend to refer
23 specifically to documents. I intend to refer to
24 facts that are perfectly and properly put before
25 the witness to test the reliability and

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1 my assurance that I will not refer to actual
2 documents in terms of "you said in this document
3 or somebody said in this document", I won't be
4 doing that.

5 PRESIDING ARBITRATOR:
6 Mr. Little?

7 MR. SCOTT LITTLE: I think
8 this is just allowing for a tainted process to
9 unfold. The tribunal's already made a ruling on
10 these documents and these facts that Mr. Nash
11 might wish to read into the record in order to do
12 the cross-examination of Mr. McLean. It's too
13 late once they have been introduced. And if it
14 was unfair to us three weeks ago to have them
15 introduced as information, it's certainly more
16 unfair now for the information to be allowed into
17 the record and then for cross-examination to
18 unfold and then for a decision to be made after
19 the cross-examination as to whether those facts or
20 those documents that might be put into the record
21 should have been put into the record. So I don't
22 view that as an acceptable solution.

23 Mr. Nash is certainly entitled
24 to probe the strength of the McLean statement as
25 the ruling states, as any cross-examiner would,

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1 but he shouldn't be allowed to read into the
2 evidence, as the basis for his questioning, to
3 read into the evidence that goes in before this
4 tribunal as a basis of his question -- of his
5 questioning, new facts, new facts that can be
6 derived from documents or facts that can be
7 derived from anything that was contained in the
8 materials that were attempted to be filed and were
9 not allowed to be filed.

10 MR. NASH: If I could just
11 say, in my submission, that position is completely
12 wrong. In any ordinary cross-examination, you can
13 put a fact to a witness. He either agrees with it
14 or she agrees with it or he or she doesn't. An
15 example is the proposition that was put to
16 Mr. Connelly regarding the number of JRPs. He
17 either confirms it or not. It's a fact that can
18 be, is relevant to this case, it's relevant to --
19 very relevant to a number of aspects of this case.
20 He either confirms it or he does not, and that's
21 the end of it.

22 In the case of the question of
23 the tax treaty and the taxation rate and the
24 revocation of the treaty, that's not in the
25 record. There's no document. There's no question

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1 asked questions about documents that were not on
2 the record and no objection should be made in this
3 regard. They are facts, that's all. And it goes
4 to credibility and reliability of the witness'
5 evidence.

6 PRESIDING ARBITRATOR: Give us
7 a moment. We don't need to go out.
8 --- Off-the-record discussion.

9 PRESIDING ARBITRATOR:
10 Mr. Nash, so this is a problem, but so you are
11 going to ask questions, right, all you do is ask
12 questions?

13 MR. NASH: Correct.

14 PRESIDING ARBITRATOR: If the
15 witness gives a reply in a way which doesn't
16 satisfy you, you are not going to do what you did
17 with the number of JRPs; that is, well, if I tell
18 you there were this and this, but you will keep
19 that, you will retain that for a separate stage?

20 MR. NASH: Yes.

21 PRESIDING ARBITRATOR: At the
22 end of the cross-examination?

23 MR. NASH: Yes.

24 PRESIDING ARBITRATOR: Which
25 means the cross-examination, as such, would go

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1 of it being improper to ask Mr. Forestieri about
2 whether or not the tax treaty has been revoked,
3 that has implication for the case. He was asked
4 that, he gave his answer, he either does know or
5 he doesn't know, and that's it, that's what's on
6 the record.

7 So the fact that it's put to a
8 witness with respect to a proposition made in
9 cross-examination is just that, it's a fact that's
10 put to a witness. And the witness can either
11 confirm it or he says he doesn't know or he denies
12 it and says, no, that's wrong. That's the purpose
13 of cross-examination. It has a broad scope. It
14 has a broad scope within the context of the issues
15 in the case and the issues that the witness has
16 attested to. And to now constrain the scope of
17 cross-examination under some false notion that
18 there were documents that related to it that the
19 documents themselves are not in the record, that's
20 one thing, but to constrain the cross-examination
21 under the guise of document rejection is
22 completely wrong, in my submission. There's no
23 merit to that. My friends have not followed that
24 procedure, we have not followed that procedure.
25 No objection was made when Mr. Forestieri was

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1 without that the problem arising, and it could be
2 to your satisfaction.

3 MR. NASH: Yes.

4 PRESIDING ARBITRATOR: And
5 then we would, the issue would be moot; is that
6 correct?

7 MR. NASH: That's my
8 intention.

9 PRESIDING ARBITRATOR: So then
10 I just wonder whether we couldn't just engage in
11 the cross-examination and see whether you really
12 master that task. If not, you wouldn't go beyond
13 asking questions.

14 MR. NASH: I will do my best.

15 And I am sure my friends will be on to me, I am
16 sure Mr. Little will be on to me if I don't master
17 it, but I -- and this is, by the way, it's a
18 distinct part of the end of the cross-examination.
19 It's 10 per cent of the cross-examination, 90 per
20 cent of it doesn't --

21 PRESIDING ARBITRATOR:
22 Time-wise?

23 MR. NASH: Time-wise. Ninety
24 per cent of it doesn't deal with this at all.

25 PRESIDING ARBITRATOR: Okay.

1 And at the end of the cross-examination, we are
2 back at square one, and we will continue this kind
3 of slug-out?
4 MR. NASH: Well, we are back
5 at square one, but we may be over the finish line.
6 Square one may be over the finish line in the
7 sense that Mr. McLean has confirmed the facts that
8 are put to him or he has not. And if he has not,
9 then we deal with it. If he has, we are done.
10 PRESIDING ARBITRATOR:
11 Mr. Little, what do you have to say to that?
12 MR. SCOTT LITTLE: Well, we
13 will be on to Mr. Nash, if the cross-examination
14 just proceeds as we are discussing right now, we
15 will be on to Mr. Nash. But I guess what I will
16 say is that, when that cross-examination is done,
17 I think the issue's been decided, I have already
18 said that. The issue of what you call the
19 slug-out, it pertains, I think, to documents that
20 were already at issue in the January 26th ruling,
21 so I don't see how the tribunal can revisit that,
22 and I don't see how prejudice isn't going to fall
23 upon Mr. McLean and Canada if that kind of
24 questioning is allowed, for the very reasons that
25 were outlined in the tribunal's January 26th

1 on.
2 Take the floor.
3 MR. SPELLISCY: I do have a
4 request for clarification on Mr. Bickford, and
5 that is related to the --
6 PRESIDING ARBITRATOR: Up to
7 the technical --
8 MR. SPELLISCY: We will
9 explore that tomorrow, but it relates also to his
10 examination has begun, he did his direct
11 testimony, so I would like to confirm that he is
12 now under examination as sequestered.
13 PRESIDING ARBITRATOR: I think
14 you might not have been in the room yet, so we
15 decided or we found that he was not yet -- I think
16 it's reasonable, just kind of considering the
17 questions, that what was -- what he talked about,
18 to just release him, and that's what we did. And
19 you are going to come up with a solution for -- or
20 the -- this mesh versus millimetres thing
21 tomorrow?
22 MR. SPELLISCY: We will
23 have -- we will certainly have questions on it.
24 Whether or not there is a solution apparent for
25 this correction, which is a substantial revision

1 ruling.
2 PRESIDING ARBITRATOR: So
3 should we give matters a chance and hope for the
4 best that the cross will not lead to the problem
5 at all? That would be -- I know it's not a great
6 solution, but maybe a way to get out before the
7 thing will come down on you. You know, you
8 remember the knocking, maybe --
9 MR. NASH: A sign.
10 PRESIDING ARBITRATOR: Maybe
11 that the team should get out of here at that time.
12 Is that -- I think that is a
13 feasible way. So that means that tomorrow
14 morning, we will return to the cross-examination
15 of Mr. Bickford or --
16 MR. NASH: May I suggest that
17 we just go and finish --
18 PRESIDING ARBITRATOR: Or
19 McLean.
20 MR. NASH: Deal with McLean.
21 PRESIDING ARBITRATOR: Return
22 to the original order of things.
23 MR. NASH: Yes.
24 PRESIDING ARBITRATOR: Have
25 Mr. McLean, followed by Bickford and Buxton and so

1 to the report, we will see. We will see whether
2 that will require potentially even supplemental
3 reports, but we will see.
4 PRESIDING ARBITRATOR: May I
5 suggest that tomorrow morning, we start again at
6 nine?
7 MR. NASH: Yes.
8 PRESIDING ARBITRATOR: I think
9 that -- okay. So I think we finish the meeting
10 for tonight and meet again tomorrow at nine sharp.
11 MR. NASH: Thank you.
12 --- Whereupon proceedings adjourned at 6:15 p.m.,
13 to be resumed Thursday February 22, 2018, at 9:00 a.m.
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