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 AND 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 Thursday, February 22, 2018 at 9:05 a.m.

VOLUME 4 - FULL TRANSCRIPT {REVISED}

CONDENSED TRANSCRIPT WITH WORD INDEX

APPEARANCES:

Gregory Nash on behalf of the Claimants
Brent Johnston
Chris Elrick
Alex Baer
Alex Little
Randy Sutton
Frank Borowicz, Q.C.

Scott Little on behalf of the Respondents
Shane Spelliscy
Rodney Neufeld
Krista Zeman
Susanna Kam
Mark Klaver

ALSO PRESENT:

Lorinda Edmunds, Alison Burns, Raman Bath, Chelsea MacDonald, Annie Ronen, Tyler Lalande, Darian Parsons, Benjamin Tait, Derek Hehn

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CONFIDENTIAL February 22, 2018

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Toronto, Ontario

Upon resuming on Thursday, February 22, 2018

at 9:05 a.m.

PRESIDING ARBITRATOR: I think we are

ready to proceed.

12.

(613) 564-2727

I would like to start by just kind of reading out a few things that might be of importance for the further course of the cross-examination.

Mr. Nash has then asked for the floor, but first I will just read this out. I think in light of the discussion we had yesterday, it is good to, first of all, remind ourselves of paragraph 6.1 of PO25, but I don't have to read out that text because by now it is ringing in our heads.

Then we have 4.3, according to which the scope of cross-examination shall relate to issues relevant to the witnesses' or experts' written or oral evidence, and the tribunal is of the view that paragraph 4.3 does not deal with the question or at least not -- whether cross-examination must be exclusively based on information that is already on the record.

The tribunal has also made up its mind of the following point and I am going to read that out. It relates to questions led by counsel:

to the extent that counsel allege or mention facts or events in their questions, the tribunal does not regard that as evidence and the tribunal will not

regard that as evidence and the tribunal will not rely or place any weight on such assertions by counsel.

If the witness is unfamiliar with any facts asserted by counsel, the witness should simply say so. The tribunal will not be influenced in its decision by counsel's questions. Thus, the tribunal makes a distinction between an assertion of a fact in a cross-examination question and an attempt to place a new document on the record. With regard to that, the tribunal says that as an exception to the previous principle, a party must not circumvent the prohibition against placing new documents on the record without the tribunal's leave, by reading into the record or providing a detailed summary of documents that are not already in the record.

I think these principles should be helpful in our further course of work, and having said that, I give the floor to Mr. Nash who wants to raise a procedural issue.

MR. NASH: Thank you, Judge Simma.
I wish to raise the issue of the use of the word "taint." Taint.

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PRESIDING ARBITRATOR: Case? MR. NASH: "Taint" by Mr. Little yesterday.

PRESIDING ARBITRATOR: "Taint"?
MR. NASH: He asserted that either
this proceeding was or might be or could have been
"tainted" by the exchange with Ms. Griffiths
yesterday. That is a very strong word. That smells
of corruption. It smells of spoiling, defiling,
contamination, and it is a very charged word.

By Canada's wish in the procedures of this proceeding, this is an open, transparent proceeding. Words like that are completely inappropriate to describe the exchanges that we had yesterday, which related to objections about evidence, objections that happen every day in every court before every tribunal. They are routine, they are regular. They don't taint a proceeding.

It is fundamentally wrong to characterize what went on yesterday as having anything to do with tainting this proceeding. This proceeding has been conducted fairly, to both sides, from the beginning and it continues to be. It has not been tainted by anything.

This proceeding, we know, it is no

surprise to anyone, can be used and indeed, is being used for another agenda. It is very important how this proceeding is conducted. It is very important how this proceeding is described. There is a NAFTA negotiation going on right now. This very proceeding is the subject of considerable controversy. The entire record of the previous phase of this proceeding, the liability phase, went before the Federal Court. The entire record of this proceeding may go back before the Federal Court. There are interests in this country and beyond which have an interest in mischaracterizing what has gone on and what is going on in this proceeding.

So I would ask the tribunal to have any reference to the word "taint" be stricken from the record. I'd ask the tribunal to direct Mr. Little and his colleagues not to use that word. It is an inappropriate word. It has meaning. It can be used irresponsibly.

We have responsibilities to have an open proceeding. There is a responsibility to attach with that, and that is to ensure that we take every reasonable step to ensure that this pleading cannot be used for an ulterior purpose beyond the merits that are being determined in this proceeding.

	Page 1068		Page 1069
1	This is a damages hearing. We have important legal	1	PRESIDING ARBITRATOR: The tribunal
2	issues to deal with. We are dealing with them in a	2	has taken note of that. The question of what will
3	methodical way.	3	happen to the word "taint" will have to be decided,
4	There was, recall, no objection taken	4	but not now.
5	to the line of questioning of Ms. Griffiths	5	I think we can start the
6	yesterday on the point that was raised, no objection	6	cross-examination and I think we decided to return
7	taken at the time. There was no interruption.	7	to the original order in that regard and that means
8	Nobody got up and said, "This shouldn't be	8	that it's now Mr. McLean who will be examined.
9	happening." It was allowed to happen and it was	9	AFFIRMED: MR. MARK McLEAN
10	characterized after-the-fact as tainting the	10	PRESIDING ARBITRATOR: Good morning,
11	proceeding and I take strong objection to that.	11	Mr. McLean.
12	It is wrong and should not be	12	THE WITNESS: Good morning.
13	allowed.	13	PRESIDING ARBITRATOR: This is your
14	PRESIDING ARBITRATOR: Thank you,	14	cross-examination. Will you please read out the
15	Mr. Nash.	15	statement that you have in front of you on that
16	Mr. Little.	16	piece of paper.
17	MR. SCOTT LITTLE: I really don't	17	THE WITNESS: This one here? Yes.
18	have any comment other than to say I see no reason	18	I solemnly declare upon my honour and
19	to remove the word "taint" from the transcript.	19	conscience that I will speak the truth, the whole
20	Mr. Nash said that this hearing has been conducted	20	truth and nothing but the truth.
21	fairly. Indeed it has because evidence that	21	PRESIDING ARBITRATOR: Right. Thank
22	shouldn't have been admitted into testimony	22	you.
23	yesterday was stricken from the record. That's all	23	You might get the microphone a bit
24	I will say. I think that's all that needs to have	24	closer.
25	been done.	25	THE WITNESS: Okay. Is this better?
	Page 1070		Page 1071
1	PRESIDING ARRITRATOR: That's better	1	•
1 2	PRESIDING ARBITRATOR: That's better, ves. Okay Mr. Nash	1 2	dated November 6th, 2017; correct?
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2	yes. Okay, Mr. Nash. MR. NASH: I think he is going to	2	dated November 6th, 2017; correct? A. That's correct, yes. Q. Do you have any corrections that
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	Page 1072		Page 1073
1	PRESIDING ARBITRATOR: Okay. That	1	marine mammals?
2	was the only	2	A. So my expertise is working for
3	THE WITNESS: That's the only	3	DFO for the past 13 years to review projects for
4	correction.	4	impacts on fish and fish habitat including marine
5	PRESIDING ARBITRATOR: So, Mr. Nash,	5	mammals.
6		6	
7	it is your turn. CROSS-EXAMINATION BY MR. NASH:	7	Q. You are not a research scientist with the DFO; that is correct?
8		8	
9	MR. NASH: Mr. McLean, you appeared	9	A. That's not my job. My job is to
	before this tribunal in October of 2013 in the	10	review for impacts. I work with research scientists
10	jurisdiction and liability phase; that is correct?	11	at DFO.
11	A. That's correct.	12	Q. Who know much more about the
12	Q. You were a manager with DFO then?	13	science than you; is that correct?
13	A. That's correct.	_	A. They would be primary researchers
14	Q. And you are still a manager at	14	on documents but I would review that literature in
15	DFO; that is correct?	15	reviewing impacts to projects on marine mammals.
16	A. That is right.	16	Q. And you are a manager?
17	Q. Do you recall having signed two	17	A. That's correct.
18	affidavits in the jurisdiction and liability phase?	18	Q. Do you recall telling the
19	A. I do, yes.	19	tribunal in 2013 that the DFO, including you, relied
20	Q. Do you recall that we went	20	on DFO scientists to provide a scientific
21	through those affidavits in detail at your last	21	understanding of the migration patterns of marine
22	appearance before this tribunal?	22	mammals?
23	A. I do, yes.	23	A. That's correct.
24	Q. Do you recall in the first phase	24	Q. And that's true today?
25	confirming that you had no special expertise in	25	A. That's correct.
	Page 1074		Page 1075
			1 age 1075
1	Ç	1	· ·
1 2	Q. Do you recall admitting to the	1 2	with the staff that would have had involvement in
2	Q. Do you recall admitting to the tribunal in October of 2013 that you described	2	with the staff that would have had involvement in those events.
2 3	Q. Do you recall admitting to the tribunal in October of 2013 that you described certain events in your affidavit to the tribunal	2 3	with the staff that would have had involvement in those events. Q. "No personal involvement", were
2 3 4	Q. Do you recall admitting to the tribunal in October of 2013 that you described certain events in your affidavit to the tribunal having had no personal involvement in those events?	2 3 4	with the staff that would have had involvement in those events. Q. "No personal involvement", were your words; do you recall that?
2 3 4 5	Q. Do you recall admitting to the tribunal in October of 2013 that you described certain events in your affidavit to the tribunal having had no personal involvement in those events? A. I'm not sure of the question.	2 3 4 5	with the staff that would have had involvement in those events. Q. "No personal involvement", were your words; do you recall that? A. No personal involvement in the
2 3 4 5 6	Q. Do you recall admitting to the tribunal in October of 2013 that you described certain events in your affidavit to the tribunal having had no personal involvement in those events? A. I'm not sure of the question. Q. Well, I'll just repeat it: Do you	2 3 4 5 6	with the staff that would have had involvement in those events. Q. "No personal involvement", were your words; do you recall that? A. No personal involvement in the discussions that would have happened prior to 2005.
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	Q. Do you recall admitting to the tribunal in October of 2013 that you described certain events in your affidavit to the tribunal having had no personal involvement in those events? A. I'm not sure of the question. Q. Well, I'll just repeat it: Do you recall telling the tribunal in 2013 that you described certain events in your affidavit having had no personal involvement in those events? If I can refresh your memory, do you recall that when you arrived at DFO in 2005 A. Right. Q you reviewed the file and you described a narrative in your affidavit having reviewed the file, having selected documents to insert and to review the file in a narrative form in your affidavit? A. Right. So there was, prior to my arrival in 2005 at DFO I wasn't involved, obviously, with the department in reviewing Whites Point Quarry from that perspective. Q. Do you recall telling the	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	with the staff that would have had involvement in those events. Q. "No personal involvement", were your words; do you recall that? A. No personal involvement in the discussions that would have happened prior to 2005. Q. Well, let's just go to tab 13 of the document in front of you, the binder, page 289, line 9. A. Yes. Q. I state: "Let's start at paragraph 13. You say: "As Nova Stone's application involved the use of explosives in close proximity to the Bay of Fundy, NSDEL contacted a DFO advisor on marine mammals to request that DFO consider whether the proposed engaged concerns under DFO's jurisdiction'." That was your sworn affidavit, sworn
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	Q. Do you recall admitting to the tribunal in October of 2013 that you described certain events in your affidavit to the tribunal having had no personal involvement in those events? A. I'm not sure of the question. Q. Well, I'll just repeat it: Do you recall telling the tribunal in 2013 that you described certain events in your affidavit having had no personal involvement in those events? If I can refresh your memory, do you recall that when you arrived at DFO in 2005 A. Right. Q you reviewed the file and you described a narrative in your affidavit having reviewed the file, having selected documents to insert and to review the file in a narrative form in your affidavit? A. Right. So there was, prior to my arrival in 2005 at DFO I wasn't involved, obviously, with the department in reviewing Whites Point Quarry from that perspective. Q. Do you recall telling the tribunal that you had described certain events in	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	with the staff that would have had involvement in those events. Q. "No personal involvement", were your words; do you recall that? A. No personal involvement in the discussions that would have happened prior to 2005. Q. Well, let's just go to tab 13 of the document in front of you, the binder, page 289, line 9. A. Yes. Q. I state: "Let's start at paragraph 13. You say: "As Nova Stone's application involved the use of explosives in close proximity to the Bay of Fundy, NSDEL contacted a DFO advisor on marine mammals to request that DFO consider whether the proposed engaged concerns under DFO's jurisdiction'." That was your sworn affidavit, sworn evidence in your affidavit; do you recall that?
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	Q. Do you recall admitting to the tribunal in October of 2013 that you described certain events in your affidavit to the tribunal having had no personal involvement in those events? A. I'm not sure of the question. Q. Well, I'll just repeat it: Do you recall telling the tribunal in 2013 that you described certain events in your affidavit having had no personal involvement in those events? If I can refresh your memory, do you recall that when you arrived at DFO in 2005 A. Right. Q you reviewed the file and you described a narrative in your affidavit having reviewed the file, having selected documents to insert and to review the file in a narrative form in your affidavit? A. Right. So there was, prior to my arrival in 2005 at DFO I wasn't involved, obviously, with the department in reviewing Whites Point Quarry from that perspective. Q. Do you recall telling the	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	with the staff that would have had involvement in those events. Q. "No personal involvement", were your words; do you recall that? A. No personal involvement in the discussions that would have happened prior to 2005. Q. Well, let's just go to tab 13 of the document in front of you, the binder, page 289, line 9. A. Yes. Q. I state: "Let's start at paragraph 13. You say: "As Nova Stone's application involved the use of explosives in close proximity to the Bay of Fundy, NSDEL contacted a DFO advisor on marine mammals to request that DFO consider whether the proposed engaged concerns under DFO's jurisdiction'." That was your sworn affidavit, sworn

	Page 1076		Page 1077
1	"I take it from what you've told	1	"Again, you had no involvement in
2	me so far that you actually had	2	that process for the request of
3	no involvement in that; is that	3	the inclusion of the two clauses
4	correct?	4	in the approval; correct?"
5	Answer: That's correct.	5	Answer: That is correct." [As
6	Question: Going on, it states	6	read.]
7	'DFO expressed concern regarding	7	A. Right.
8	the potential impact of blasting	8	Q. And then, just going over, there
9	on marine mammals such as the	9	is a couple more examples, but go over to page 291.
10	North Atlantic Right Whale."	10	line 9:
11	And I quote again from your	11	"So you had basically been
12	affidavit. And I say at line 4 at page 290:	12	through the file, you had seen
13	"And again, you have no	13	these communications, drawn the
14	first-hand knowledge of that.	14	conclusions that you draw here
15	That is something that has either	15	from those documents but you
16	been told to you or you concluded	16	actually have no first-hand
17	from a document?	17	knowledge of any of the
18	Answer: That's correct, yes.	18	communications leading up to
19	Question: 'In light of this	19	them; is that correct?
20	concern' this is a quote from	20	Answer: That's correct, yes."
21	your affidavit 'DFO requested	21	Now, the answers that you give to the
22	that two clauses be added to the	22	tribunal, in October of 2013 were true; is that
23	industrial approval that be	23	correct?
24	granted to Nova Stone."	24	A. Yes.
25	End quote. Line 15.	25	Q. And there were many more examples
	Page 1078		Page 1079
1	of that; do you recall that?	1	A. That's correct.
2	A. I do, yes.	2	Q. And you were hired by DFO in
3	Q. So, going back to your	3	October of 2005, one year after the JRP commenced
4	background, you were at the Nova Scotia Environment	4	its work, that's correct?
5	Department from 1999 to 2002 when you went on a	5	A. Yes.
6	one-year exchange to DFO; correct?	6	Q. And you were hired as an
7	A. That's correct.	7	environmental analyst in 2005; is that correct?
8	Q. And on April 1st, 2003 you	8	A. Yes.
9	returned to the Nova Scotia Environment Department;	9	Q. And you were DFO environmental
10	that's correct?	10	analyst with the habitat management division from
11		1.1	
	A. That's correct.	11	October of 2005 to June 2009; that's correct?
12	A. That's correct.Q. And you were at the Nova Scotia	12	October of 2005 to June 2009; that's correct? A. Yeah, the correct title of the
	Q. And you were at the Nova Scotia Environment Department not the DFO in the summer of	12 13	A. Yeah, the correct title of the group was Environmental Assessment in Major Projects
12	Q. And you were at the Nova Scotia	12 13 14	A. Yeah, the correct title of the group was Environmental Assessment in Major Projects Division but within the Habitat program, yes.
12 13 14 15	Q. And you were at the Nova Scotia Environment Department not the DFO in the summer of	12 13 14 15	A. Yeah, the correct title of the group was Environmental Assessment in Major Projects
12 13 14 15 16	Q. And you were at the Nova Scotia Environment Department not the DFO in the summer of 2003, that's correct? A. That's correct, yes. Q. And that summer of 2003 was when	12 13 14 15 16	A. Yeah, the correct title of the group was Environmental Assessment in Major Projects Division but within the Habitat program, yes. Q. Your position was as a DFO environmental analyst; is that correct?
12 13 14 15 16 17	Q. And you were at the Nova Scotia Environment Department not the DFO in the summer of 2003, that's correct? A. That's correct, yes. Q. And that summer of 2003 was when the Whites Point Project was referred to a Joint	12 13 14 15 16 17	A. Yeah, the correct title of the group was Environmental Assessment in Major Projects Division but within the Habitat program, yes. Q. Your position was as a DFO environmental analyst; is that correct? A. That's correct, yes.
12 13 14 15 16 17	Q. And you were at the Nova Scotia Environment Department not the DFO in the summer of 2003, that's correct? A. That's correct, yes. Q. And that summer of 2003 was when	12 13 14 15 16 17 18	A. Yeah, the correct title of the group was Environmental Assessment in Major Projects Division but within the Habitat program, yes. Q. Your position was as a DFO environmental analyst; is that correct?
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12 13 14 15 16 17 18 19 20 21	Q. And you were at the Nova Scotia Environment Department not the DFO in the summer of 2003, that's correct? A. That's correct, yes. Q. And that summer of 2003 was when the Whites Point Project was referred to a Joint Review Panel; is that correct? A. Yes. Q. And in January 2004 you left Environment to join CEAA; do you recall that?	12 13 14 15 16 17 18 19 20 21	A. Yeah, the correct title of the group was Environmental Assessment in Major Projects Division but within the Habitat program, yes. Q. Your position was as a DFO environmental analyst; is that correct? A. That's correct, yes. Q. And that was during the course of the rest of the environmental assessment of the Whites Point Project which concluded in 2007, including the time when the JRP held public hearings
12 13 14 15 16 17 18 19 20 21 22	Q. And you were at the Nova Scotia Environment Department not the DFO in the summer of 2003, that's correct? A. That's correct, yes. Q. And that summer of 2003 was when the Whites Point Project was referred to a Joint Review Panel; is that correct? A. Yes. Q. And in January 2004 you left Environment to join CEAA; do you recall that? A. Yes.	12 13 14 15 16 17 18 19 20 21 22	A. Yeah, the correct title of the group was Environmental Assessment in Major Projects Division but within the Habitat program, yes. Q. Your position was as a DFO environmental analyst; is that correct? A. That's correct, yes. Q. And that was during the course of the rest of the environmental assessment of the Whites Point Project which concluded in 2007, including the time when the JRP held public hearings and issued its report; that's correct?

	Page 1080		Page 1081
1	A. That's correct.	1	scientists who specialize in the study of fish and
2	Q. And today the DFO employs	2	lobster; that's correct?
3	hundreds of scientists and engineers who are experts	3	A. Yes.
4	in matters related to the ocean; is that correct?	4	Q. And you are not one of those?
5	A. Yes.	5	A. I am working closely with those
6	Q. Including oceanographers,	6	to prepare information like this, and the evaluation
7	physicists, biologists and experts on species at	7	of projects.
8	risk; correct?	8	Q. You are not one of those people,
9	A. Yes.	9	that's correct?
10	Q. And you are aware today that the	10	A. I do not prepare primary research
11	DFO employs 25 scientific experts specializing in	11	document on things like lobsters and whales. I do
12	the study of marine mammals; that's correct?	12	apply scientific knowledge, both my educational
13	A. Yes, and I work closely with	13	background and experience in the review of projects.
14	those scientists that	14	Q. You are not Dr. Kent Smedbol; is
15	(Simultaneous speakers - unclear)	15	that correct?
16	Q. I'm sure you do. But they are	16	A. I'm pretty sure I'm not, no.
17	the scientific experts, aren't they?	17	Q. He is a decades-long expert in
18	A. They would be part of the	18	species at risk, in the north and the North
19	scientific team that would look at projects and	19	Atlantic Right Whale in particular, isn't that
20	produce primary publications and research for	20	correct?
21	support of management decisions.	21	A. He has some background in North
22	Q. Yes. You manage, they research,	22	Atlantic Right Whale, yes, he has done research in
23	they study; that's correct?	23	that area.
24	A. That's correct.	24	Q. He has got a background?
25	Q. And there are many other	25	A. That's part of his research.
	Page 1082		Page 1083
1	He's done numerous other things as well.	1	Q. And you were aware that in 2007,
2	Q. He is a leading distinguished	2	DFO scientific experts analysed and opined on the
3	scientist	3	potential effects of the Whites Point Project;
4	A. Yes.	4	that's correct?
5	Q at the DFO?	5	A. That's correct, yes.
6	A. Yes.	6	Q. The effects, if any, of shipping
7	Q. Who leads the team, the research	7	to and from Whites Point on marine mammals; that's
8	team on species at risk, isn't that correct?	8	correct?
9	A. Not currently, no.	9	A. That is correct.
10	Q. As of last year?	10	Q. The effects, if any, of blasting
11	A. He's the section head of	11	at Whites Point on marine mammals; that's correct?
12	population ecology.	12	A. Yes, that's correct.
13	Q. He's got decades of experience	13	Q. The effects, if any, of blasting
14	dealing with species at risk, and in particular the	14	at Whites Point on lobster; is that correct?
15	North Atlantic Right Whale; isn't that's correct?	15	A. Yes, I would have been working
16	A. Yes, he has experience in the	16	with all those staff in preparing the documents in
17	North Atlantic Right Whale.	17	preparation for presentation to the panel.
1/	Q. And you don't have those	18	Q. Could you turn to tab 3, please.
	•	19	It's your affidavit, one of your
18	qualifications: is that correct?	20	affidavits from the first stage of this proceeding.
18 19	qualifications; is that correct? A. I don't have any direct research		arriantia from the first stage of this proceeding.
18 19 20	A. I don't have any direct research		If you could go to page 2 paragraph 4 You say
18 19 20 21	A. I don't have any direct research publications on North Atlantic Right Whale, that's	21	If you could go to page 2, paragraph 4. You say:
18 19 20 21 22	A. I don't have any direct research publications on North Atlantic Right Whale, that's correct.	21 22	"I worked there, NSDEL, until
18 19 20 21 22 23	A. I don't have any direct research publications on North Atlantic Right Whale, that's correct. Q. You manage; that's correct?	21 22 23	"I worked there, NSDEL, until October of 2005 when I
18 19 20 21 22	A. I don't have any direct research publications on North Atlantic Right Whale, that's correct.	21 22	"I worked there, NSDEL, until

	Page 1084		Page 1085
1	Habitat Management Division of	1	A. That's correct.
2	DFO's Maritimes Regional office.	2	Q. And who is that person?
3	Here I was" and I focus on	3	A. Ted Potter.
4	these words	4	Q. Who did that person, Ted Potter,
5	"I was also involved in the EA of	5	report to?
6	the Whites Point Project." [As	6	A. He would have reported to the
7	read.]	7	director of we've changed our names so many times
8	Was that true at that time?	8	I can't remember whether it was the Oceans Habitat
9	A. Sorry, this was in 2005?	9	Species at Risk director.
10	Q. Yes.	10	Q. A director?
11	A. Yes.	11	A. Yes.
12	Q. Here you say:	12	Q. So you were analyst, you reported
13	"When I was transferred to the	13	to a manager, the manager reported to a director?
14	DFO, I was also involved in the	14	A. That's correct.
15	EA of the Whites Point Project."	15	Q. What position did the person hold
16	[As read.]	16	that that person, Mr. Potter reported to?
17	That's correct?	17	A. Who was the individual that was
18	A. That's correct.	18	there?
19	Q. Now, as an environmental analyst,	19	Q. Yes.
20	what was the position of the person that you	20	A. I believe at the time it was
21	reported to in 2005 to 2007?	21	Carol Ann Rose.
22	A. He would have been the manager	22	Q. Carol Ann Rose, and what was the
23	for Environmental Assessment and Major Projects	23	position?
24	Division.	24	A. She was the director for Oceans
25	Q. So there was a manager above you?	25	Habitat Species at Risk.
	Page 1086		Page 1087
1	Q. Who did the director report to?	1	Habitat branch; do you recall who that was?
2	A. It would have been the Regional	2	A. Again, it's changed many times.
3	Director General.	3	Could have been I'm trying to think.
4	Q. And was that person Mike Murphy	4	Q. Does David Miller
5	at the time?	5	A. Yes, David Miller, I think was
6	A. I think at that time it was	6	there at that time, yes.
7	Mike oh, sorry, sorry, the Regional Director	7	Q. Could you turn, please, to tab 12
8	General?	8	at page 767.
9	Q. Yes.	9	PRESIDING ARBITRATOR: 67?
10	A. No, sorry, Mike Murphy was not	10	MR. NASH: 767.
11	the Regional Director General. I believe it was	11	The lead researcher for the DFO
12	Faith Scattalon.	12	Species at Risk research team of scientists in 2007
13	Q. Faith Scattalon. And Mike Murphy	13	was Dr. Kent Smedbol; correct?
14	was a person between the other person and Faith	14	A. That's correct, yes.
15	Scattalon, the Regional Director of Oceans and	15	Q. And if you go back to page 766
16	Habitat?	16	this is an excerpt for the transcript of the JRP
17	A. Sorry, they've changed so many	17	proceedings on June 20th, 2007, volume 4.
18	times. I think I've gone through a dozen directors	18	You will see that Dr. Kent Smedbol is
19	since I've been with the program. Carol Ann Rose	19	referred to as one of the scientists who appeared
20	was there when I first started. She was the	20	before the JRP and he was stationed at the very
21	director and then I think Mike Murphy took over	21	bottom, of 766, line 25, he was a the lead
22	somewhere between 2005, and probably 2008 it	22	research the lead region's research team for
23	switched between Carol Ann Rose and Mike Murphy.	23	Species at Risk at that time, working out of the St.
24	Q. All right. There was a Species	24	Andrews biological station; is that correct?
25	at Risk Coordinator at that time for the Oceans and	25	A. Yes. Yes, and as with a lot of
25	at Risk Coordinator at that time for the Oceans and	1 25	A Vec Vec and as with a lot of

	Page 1088		Page 1089
1	positions, this changed. He was actually the	1	Q. He was at that time one of many
2	manager of my program before I took over in 2013.	2	scientists who had deep knowledge of the migration
3	Q. Interesting, but by the time	3	patterns of Right Whales; correct?
4	at the time of the actual JRP hearings, he was the	4	A. He would be one of them, yes.
5	region's lead for the research team for Species at	5	Q. And for expert scientific
6	Risk; correct?	6	information and opinions involving the Fisheries and
7	A. Yes, he was.	7	Oceans, would you defer to Dr. Smedbol has having
8	Q. And under that team there was a	8	superior knowledge and information and understanding
9	lot of scientific research going on with respect to	9	of migration patterns for Right Whales; correct?
10	the Right Whale which was one of the leading	10	A. That's right. So within the
11	Species at Risk; correct?	11	department, that would be the person we would defer
12	A. DFO has some research capacity	12	to at that time.
13	and at that time there was research going on in	13	Q. And he continues to be the leader
14	North Atlantic Right Whales as well as other	14	of the research team researching Species at Risk,
15	organizations which we partner with to do research	15	that's correct?
16	on North Atlantic Right Whales.	16	A. I don't believe that's his title
17	Q. Is what I've said correct or	17	at this time. Things have changed.
18	incorrect?	18	Q. Is that his function, though?
19	A. That he was one of the lead	19	A. His function is he's the
20	researchers? At the time, yes, he was leading that	20	section head for the Population Ecology Division.
21	Species at Risk program from the science	21	We don't
22	perspective.	22	Q. Which includes
23	Q. He was the region's lead for the	23	MR. SCOTT LITTLE: Mr. Nash, let
24	research team for Species at Risk?	24	Mr. McLean finish his answer.
25	A. That's correct.	25	MR. NASH: Which includes significant
	Page 1090		Page 1091
1	study of the North Atlantic Right Whale and their	1	have referred to Dr. Hilary Murphy-Moors [sic] who
2	migration patterns; correct?	2	is now sort of the lead for marine mammals with DFO.
3	A. So under the population ecology	3	Q. Dr. Hilary?
4	division we would have biologists that would look at	4	A. Murphy-Moors.
5	marine mammals sections, yes. So he would be the	5	Q. So she is a knowledgeable
6	section head but he's not the primary research lead		
		6	scientist in the DFO?
7	for marine mammals at this time.	6 7	
7 8	for marine mammals at this time.		scientist in the DFO? A. Yes.
	for marine mammals at this time. Q. Have you looked at your website	7	scientist in the DFO? A. Yes. Q. And she is knowledgeable about
8	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website?	7 8	scientist in the DFO? A. Yes.
8 9	for marine mammals at this time. Q. Have you looked at your website	7 8 9	scientist in the DFO? A. Yes. Q. And she is knowledgeable about Right Whale migration patterns?
8 9 10	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it.	7 8 9 10	scientist in the DFO? A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes.
8 9 10 11	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it. Q. Are you familiar with how	7 8 9 10 11	scientist in the DFO? A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes. Q. And she could come here today and
8 9 10 11 12	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it. Q. Are you familiar with how Dr. Smedbol is characterized on that website?	7 8 9 10 11 12	scientist in the DFO? A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes. Q. And she could come here today and give evidence to this tribunal on a scientific basis
8 9 10 11 12 13	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it. Q. Are you familiar with how Dr. Smedbol is characterized on that website? A. I haven't looked at it lately,	7 8 9 10 11 12 13	scientist in the DFO? A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes. Q. And she could come here today and give evidence to this tribunal on a scientific basis on the question of the migration of North Atlantic
8 9 10 11 12 13 14	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it. Q. Are you familiar with how Dr. Smedbol is characterized on that website? A. I haven't looked at it lately, but I'm not sure if that's been updated or not.	7 8 9 10 11 12 13 14	scientist in the DFO? A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes. Q. And she could come here today and give evidence to this tribunal on a scientific basis on the question of the migration of North Atlantic Right Whales; is that correct?
8 9 10 11 12 13 14 15	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it. Q. Are you familiar with how Dr. Smedbol is characterized on that website? A. I haven't looked at it lately, but I'm not sure if that's been updated or not. Unfortunately with government we seem to lag behind	7 8 9 10 11 12 13 14 15	A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes. Q. And she could come here today and give evidence to this tribunal on a scientific basis on the question of the migration of North Atlantic Right Whales; is that correct? A. That's correct, along with other
8 9 10 11 12 13 14 15	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it. Q. Are you familiar with how Dr. Smedbol is characterized on that website? A. I haven't looked at it lately, but I'm not sure if that's been updated or not. Unfortunately with government we seem to lag behind sometimes in updating our websites.	7 8 9 10 11 12 13 14 15 16	A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes. Q. And she could come here today and give evidence to this tribunal on a scientific basis on the question of the migration of North Atlantic Right Whales; is that correct? A. That's correct, along with other staff such as our Species at Risk staff also have
8 9 10 11 12 13 14 15 16	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it. Q. Are you familiar with how Dr. Smedbol is characterized on that website? A. I haven't looked at it lately, but I'm not sure if that's been updated or not. Unfortunately with government we seem to lag behind sometimes in updating our websites. Q. His qualifications haven't gotten	7 8 9 10 11 12 13 14 15 16	A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes. Q. And she could come here today and give evidence to this tribunal on a scientific basis on the question of the migration of North Atlantic Right Whales; is that correct? A. That's correct, along with other staff such as our Species at Risk staff also have information on this.
8 9 10 11 12 13 14 15 16 17	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it. Q. Are you familiar with how Dr. Smedbol is characterized on that website? A. I haven't looked at it lately, but I'm not sure if that's been updated or not. Unfortunately with government we seem to lag behind sometimes in updating our websites. Q. His qualifications haven't gotten any staler with time; is that correct?	7 8 9 10 11 12 13 14 15 16 17	A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes. Q. And she could come here today and give evidence to this tribunal on a scientific basis on the question of the migration of North Atlantic Right Whales; is that correct? A. That's correct, along with other staff such as our Species at Risk staff also have information on this. Q. And did you rely upon any of
8 9 10 11 12 13 14 15 16 17 18	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it. Q. Are you familiar with how Dr. Smedbol is characterized on that website? A. I haven't looked at it lately, but I'm not sure if that's been updated or not. Unfortunately with government we seem to lag behind sometimes in updating our websites. Q. His qualifications haven't gotten any staler with time; is that correct? A. No.	7 8 9 10 11 12 13 14 15 16 17 18	A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes. Q. And she could come here today and give evidence to this tribunal on a scientific basis on the question of the migration of North Atlantic Right Whales; is that correct? A. That's correct, along with other staff such as our Species at Risk staff also have information on this. Q. And did you rely upon any of those other staff to put together your affidavit or
8 9 10 11 12 13 14 15 16 17 18 19 20	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it. Q. Are you familiar with how Dr. Smedbol is characterized on that website? A. I haven't looked at it lately, but I'm not sure if that's been updated or not. Unfortunately with government we seem to lag behind sometimes in updating our websites. Q. His qualifications haven't gotten any staler with time; is that correct? A. No. Q. Did you make any inquiries of	7 8 9 10 11 12 13 14 15 16 17 18 19 20	A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes. Q. And she could come here today and give evidence to this tribunal on a scientific basis on the question of the migration of North Atlantic Right Whales; is that correct? A. That's correct, along with other staff such as our Species at Risk staff also have information on this. Q. And did you rely upon any of those other staff to put together your affidavit or your witness statement in this proceeding?
8 9 10 11 12 13 14 15 16 17 18 19 20 21	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it. Q. Are you familiar with how Dr. Smedbol is characterized on that website? A. I haven't looked at it lately, but I'm not sure if that's been updated or not. Unfortunately with government we seem to lag behind sometimes in updating our websites. Q. His qualifications haven't gotten any staler with time; is that correct? A. No. Q. Did you make any inquiries of Dr. Smedbol regarding the past and present risk to	7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes. Q. And she could come here today and give evidence to this tribunal on a scientific basis on the question of the migration of North Atlantic Right Whales; is that correct? A. That's correct, along with other staff such as our Species at Risk staff also have information on this. Q. And did you rely upon any of those other staff to put together your affidavit or your witness statement in this proceeding? A. I did, yes.
8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	for marine mammals at this time. Q. Have you looked at your website recently, the DFO's website? A. I've looked at parts of it. Q. Are you familiar with how Dr. Smedbol is characterized on that website? A. I haven't looked at it lately, but I'm not sure if that's been updated or not. Unfortunately with government we seem to lag behind sometimes in updating our websites. Q. His qualifications haven't gotten any staler with time; is that correct? A. No. Q. Did you make any inquiries of Dr. Smedbol regarding the past and present risk to Right Whales including the risk of fishing gear	7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	A. Yes. Q. And she is knowledgeable about Right Whale migration patterns? A. Yes. Q. And she could come here today and give evidence to this tribunal on a scientific basis on the question of the migration of North Atlantic Right Whales; is that correct? A. That's correct, along with other staff such as our Species at Risk staff also have information on this. Q. And did you rely upon any of those other staff to put together your affidavit or your witness statement in this proceeding? A. I did, yes. Q. How many other staff did you rely

	Page 1092		Page 1093
1	Marriman [sic] with the Species at Risk management	1	scientific opinion on the effect, potential effect
2	division.	2	of the Whites Point Project on lobster?
3	Q. And Cathy Marriman, her	3	A. At the time when we were
4	qualifications are?	4	reviewing the project, yes.
5	A. I don't have her qualifications	5	Q. Recently?
6	in front of me. But she has worked extensively on	6	A. Not recently, no.
7	North Atlantic Right Whales.	7	Q. Dr. Tremblay is another eminent
8	Q. She's a scientist?	8	and distinguished member of the research team, he's
9	A. She is.	9	a scientist, head of the DFO's currently
10	Q. And Dr. Hilary Murphy-Moor, she	10	Atlantic Coast Crustacean and Lobster Unit; that's
11	is a scientist as well?	11	correct?
12	A. She is.	12	A. Yes.
13	Q. Highly qualified?	13	Q. He has published widely since
14	A. Yes.	14	2000 with a focus on research and study of lobster,
15	Q. If you go back to the page we	15	of the lobster population in the Maritimes; that's
16	were looking at, 767, this is a listing of the 11	16	correct?
17	representatives of DFO who appeared before the JRP.	17	A. That's correct.
18	The next one I'd like to turn to is Dr. John	18	Q. And you didn't consult him for
19	Tremblay. He identifies himself at line 12 of 767	19	the purpose of your witness statement, did you?
20	as a research scientist with the Population Ecology	20	A. No, it wasn't required. We were
21	Division at the Bedford Institute of Oceanography.	21	looking at published data as far as the information
22	Do you know him?	22	that we would present.
23	A. Yes, I work with Dr. John	23	Q. What you were looking at in part
24	Tremblay before in the past.	24	was the comparison between Black Point and Whites
25	Q. Did you ask him about his	25	Point and the effects of one project on lobster as
	Page 1094		D 1005
	Tage 1074		Page 1095
1	_	1	•
1 2	opposed to the effects of another project on	1 2	Q. Were there any other people that
	opposed to the effects of another project on lobster. That was in part what you were looking at;		Q. Were there any other people that you consulted with in order to put together your
2	opposed to the effects of another project on lobster. That was in part what you were looking at; correct?	2	Q. Were there any other people that you consulted with in order to put together your witness statement for this proceeding within the DFO
2 3	opposed to the effects of another project on lobster. That was in part what you were looking at; correct? A. We were looking at the	2 3	Q. Were there any other people that you consulted with in order to put together your
2 3 4	opposed to the effects of another project on lobster. That was in part what you were looking at; correct?	2 3 4	Q. Were there any other people that you consulted with in order to put together your witness statement for this proceeding within the DFO whose information you relied upon? A. For the lobster information?
2 3 4 5	opposed to the effects of another project on lobster. That was in part what you were looking at; correct? A. We were looking at the certainly the abundance of lobster between those two locations.	2 3 4 5	Q. Were there any other people that you consulted with in order to put together your witness statement for this proceeding within the DFO whose information you relied upon? A. For the lobster information? Q. For the lobster.
2 3 4 5 6	opposed to the effects of another project on lobster. That was in part what you were looking at; correct? A. We were looking at the certainly the abundance of lobster between those two	2 3 4 5 6	Q. Were there any other people that you consulted with in order to put together your witness statement for this proceeding within the DFO whose information you relied upon? A. For the lobster information?
2 3 4 5 6 7	opposed to the effects of another project on lobster. That was in part what you were looking at; correct? A. We were looking at the certainly the abundance of lobster between those two locations. Q. When you have say "we were	2 3 4 5 6 7	Q. Were there any other people that you consulted with in order to put together your witness statement for this proceeding within the DFO whose information you relied upon? A. For the lobster information? Q. For the lobster. A. I don't I think that was it,
2 3 4 5 6 7 8	opposed to the effects of another project on lobster. That was in part what you were looking at; correct? A. We were looking at the certainly the abundance of lobster between those two locations. Q. When you have say "we were looking at", who were "we"?	2 3 4 5 6 7 8	Q. Were there any other people that you consulted with in order to put together your witness statement for this proceeding within the DFO whose information you relied upon? A. For the lobster information? Q. For the lobster. A. I don't I think that was it, for the lobster.
2 3 4 5 6 7 8 9	opposed to the effects of another project on lobster. That was in part what you were looking at; correct? A. We were looking at the certainly the abundance of lobster between those two locations. Q. When you have say "we were looking at", who were "we"? A. So I would have gotten	2 3 4 5 6 7 8 9	Q. Were there any other people that you consulted with in order to put together your witness statement for this proceeding within the DFO whose information you relied upon? A. For the lobster information? Q. For the lobster. A. I don't I think that was it, for the lobster. Q. So, you didn't consult with any
2 3 4 5 6 7 8 9	opposed to the effects of another project on lobster. That was in part what you were looking at; correct? A. We were looking at the certainly the abundance of lobster between those two locations. Q. When you have say "we were looking at", who were "we"? A. So I would have gotten information that was I'm trying to remember	2 3 4 5 6 7 8 9	Q. Were there any other people that you consulted with in order to put together your witness statement for this proceeding within the DFO whose information you relied upon? A. For the lobster information? Q. For the lobster. A. I don't I think that was it, for the lobster. Q. So, you didn't consult with any research scientist for the purpose of doing your
2 3 4 5 6 7 8 9 10	opposed to the effects of another project on lobster. That was in part what you were looking at; correct? A. We were looking at the certainly the abundance of lobster between those two locations. Q. When you have say "we were looking at", who were "we"? A. So I would have gotten information that was I'm trying to remember exactly who provided the information but we had	2 3 4 5 6 7 8 9 10	Q. Were there any other people that you consulted with in order to put together your witness statement for this proceeding within the DFO whose information you relied upon? A. For the lobster information? Q. For the lobster. A. I don't I think that was it, for the lobster. Q. So, you didn't consult with any research scientist for the purpose of doing your analysis?
2 3 4 5 6 7 8 9 10 11	opposed to the effects of another project on lobster. That was in part what you were looking at; correct? A. We were looking at the certainly the abundance of lobster between those two locations. Q. When you have say "we were looking at", who were "we"? A. So I would have gotten information that was I'm trying to remember exactly who provided the information but we had statistics information on the lobster catches in the	2 3 4 5 6 7 8 9 10 11	Q. Were there any other people that you consulted with in order to put together your witness statement for this proceeding within the DFO whose information you relied upon? A. For the lobster information? Q. For the lobster. A. I don't I think that was it, for the lobster. Q. So, you didn't consult with any research scientist for the purpose of doing your analysis? A. No, we used the information that
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	Page 1096		Page 1097
1	I'm just going to expand on it, so	1	A. Yes, currently still is.
2	Q. Let's just get to the answer	2	Q. And he still is.
3	first and then you can expand on it. Did you	3	And Dr. Cochrane got his PhD in 1973;
4	consult with any other scientist, any scientist?	4	is that correct to the best of your knowledge?
5	A. No, for the reason that we were	5	A. To the best of my knowledge, yes.
6	looking at lobster catches for the area so that	6	Q. And today he is a DFO research
7	information is published within documents and	7	scientist in the Oceans Physics Section of the
8	journals so there was no need to go to research	8	Bedford Institute; is that correct?
9	scientists for that information.	9	A. That's correct.
10	Q. That's all you looked at?	10	Q. There is another delegate there
11	A. They would just refer us to that	11	we've covered, David Miller and he was the if you
12	information anyway for what we were looking for.	12	go down to the bottom of page 767, line 25, he was
13	Q. So you had something you were	13	the Species at Risk coordinator for the Oceans and
14	looking for and you simply asked them where to find	14	Habitat branch; that's correct?
15	it; you already knew where to find it?	15	A. He would have been the manager of
16	A. Yes.	16	the Species at Risk division at that time, yes.
17	Q. And Dr. Norm Cochrane is also	17	Q. And Tony Henderson who is
18	referred to as being a member of the delegation; do	18	referred to on page 767 at line 10, he was a habitat
19	you remember Dr. Norm Cochrane attending the JRP	19	assessment biologist; that's correct?
20	hearing in June of 2007 and do you remember that	20	A. That's correct, yes.
21	first of all, do you remember that?	21	Q. Now, in reviewing these names
22	A. Yes, I do.	22	from the bottom of page 766 to 768, I don't see your
23	Q. And he was a was and is a	23	name mentioned as being a delegate from the DFO?
24	research scientist with the Oceans Physics	24	A. That's right.
25	Section at the Bedford Institute; is that correct?	25	Q. And you were, you've said, the
23	Section at the Bedford Histitute, is that correct:	23	Q. And you were, you've said, the
	Page 1098		Page 1099
1	Page 1098 lead person	1	Regional Manager for Habitat Protection, Sustainable
1 2	•	1 2	_
	lead person		Regional Manager for Habitat Protection, Sustainable
2	lead person A. Yes.	2	Regional Manager for Habitat Protection, Sustainable Marine Development, and then a whole cast of
2 3	lead person A. Yes. Q on the team?	2 3	Regional Manager for Habitat Protection, Sustainable Marine Development, and then a whole cast of scientists were there?
2 3 4	lead person A. Yes. Q on the team? A. Yes.	2 3 4	Regional Manager for Habitat Protection, Sustainable Marine Development, and then a whole cast of scientists were there? A. So my job would have been to prepare all those people for the panel presentation, including preparing the presentation itself, having
2 3 4 5	lead person A. Yes. Q on the team? A. Yes. Q. You are not a delegate. Is that	2 3 4 5	Regional Manager for Habitat Protection, Sustainable Marine Development, and then a whole cast of scientists were there? A. So my job would have been to prepare all those people for the panel presentation,
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	Page 1100		Page 1101
1	you said in 2011 was true, you were not the lead,	1	Right Whales?
2	responsible person for the review of the Whites	2	A. That's right.
3	Point Project?	3	Q. The effects of blasting at Whites
4	A. For DFO, I was.	4	Point on North Atlantic Right Whales?
5	Q. Do you deny what I've said?	5	A. That's right.
6	A. Do I deny that I was not the	6	Q. The effects of blasting on
7	lead?	7	lobster?
8	Q. Yes.	8	A. That's right, yes.
9	A. I was the lead for that project,	9	Q. Being the lead reviewer, you
10	as well as other projects.	10	would also be completely familiar with all of the
11	Q. Why did you not say that in 2011,	11	evidence relevant to the effects analysis that may
12	when you said you were involved?	12	or may not have been presented to the JRP?
13	A. That's, I guess, semantics at the	13	A. That's correct, yes.
14	time and stuff, but I was the lead for the project.	14	Q. Have you read the transcript of
15	Q. So being the lead reviewer as	15	the JRP, where the DFO gave evidence?
16	you've described, you would know the scientific	16	A. I did, yes.
17	evidence that DFO compiled for presentation to the	17	Q. When did you read that?
18	JRP regarding the North Atlantic Right Whales;	18	A. As soon as it was published, for
19	correct?	19	one, and probably several times since then.
20	A. That's correct.	20	Q. And whose responsibility was it
21	Q. Regarding their migration	21	in DFO to ensure that the Minister of Fisheries and
22	patterns?	22	Oceans was aware of all of the relevant facts known
23	A. Yes.	23	within the DFO before Cabinet made a decision
24	Q. Regarding the effects of	24	whether to approve or reject the project?
25	shipping, boating and fishing on North Atlantic	25	A. So it would have been part of the
	Page 1102		Page 1103
1	regional lead for providing that information.	1	assigned by Faith Scattelon which is to the
2	Q. Was that Faith Scattelon?	2	Associate Deputy Minister; do you recall that?
3	A. She would have been the Regional	3	A. Yes, that sounds accurate.
4	Director General, yes, and we would have been	4	Q. Do you recall that there were
5	feeding up through Ottawa for the briefing material	5	international shipping lanes in the Bay of Fundy?
6	for the Minister.	6	A. Yes.
7	Q. And it was important for the	7	Q. Do you recall hearing the term
8	Minister of Fisheries before the Cabinet made the	8	"rule vessel"?
9	decision whether to approve or reject the project to	9	A. Yes.
10	have all of the relevant material available,	10	Q. Do you know what a rule vessel
11	information in front of him so he could make a	11	is?
12	reasonable and proper decision; that is correct?	12	A. My understanding is that it's
13	A. Yes, we do briefings for projects	13	applied to those vessels that need to apply to the
14	for ministerial decisions.	14	shipping lane.
15	Q. The answer to my question is	15	Q. How many of these vessel, rule
16	"yes."	16	vessel were going through the shipping lanes in
17	A. Yes.	17	2007?
18	Q. And would that report from Faith	18	A. I believe the number was 800.
19	Scattelon go up to the Associate Deputy Minister?	19	Q. What was the increase in shipping
20	A. I believe it would, but I	20	provided by rule vessels as a result of the opening
21	after it goes from the RDT, I'm not sure sort of who	21	of the if the Whites Point Quarry operated, what
22	sees it, but it's typically would go up through the	22	was the increase in shipping?
23	associates.	23	A. 6 per cent.
24	Q. Didn't you draft a memorandum	24	Q. And what was the evidence before
25	after the Whites Point JRP hearings that was	25	the JRP with respect to the approximate number of

Page 1104		Page 1105
smaller vessels going through the Bay of Fundy?	1	of Fundy and North Atlantic Right Whales during the
A. I can't recall that number and	2	period 1970 to 2004?
stuff but it was obviously substantially larger.	3	A. What was the evidence?
Q. Do you know the range?	4	Q. What was the evidence before the
A. Again, I can't recall it off the	5	JRP?
top of my head, no.	6	A. You are looking for the specific
Q. How many fishing vessels were	7	numbers or
operating in the Bay of Fundy in 2007?	8	Q. I am.
A. Oh, I again, I don't have that	9	A. Again, I don't recall that off
number in front of me or off the top of my head.	10	the top of my head.
Q. What was the distance between the	11	Q. If I was to say to you in 34
shipping lanes and the Whites Point Quarry?	12	years there had been four Right Whale mortalities as
A. Shipping lanes, again, I can't	13	a result of a collision with vessels going through
recall but I would say 20 kilometres or less.	14	the Bay of Fundy in that 34 years?
	15	A. That's that sound accurate, I
	16	think the number that I seem to recall is around 7
ships travelling through the Bay of Fundy and North	17	in sort of Canadian waters, but that may extend
Atlantic Right Whales during the period 1970 to	18	beyond sort of the Bay of Fundy. Again, that's the
2004?	19	ones that are recorded and documented, yes.
A. Again, you're testing my	20	Q. What was the evidence before the
	21	JRP with respect to the effect of the relocation of
	22	the shipping lanes in 2003?
	23	A. So, some of the scientific
	24	analysis determined that there would be a
collisions between ships travelling throughout Bay	25	90 per cent reduction in collisions as a result of
Page 1106		Page 1107
moving the shipping lane.	1	We have not yet turned on the feed because you had
	2	no prior notice, but I would suggest that we now
	3	request the technicians to turn on the feed because
	4	the viewer has arrived and that counsel then pay
	5	attention to the confidentiality signals as
	6	previously noted.
	7	MR. NASH: Thank you. I don't expect
	8	to have any confidential areas for this purpose.
	9	You were aware, I take it of the
	10	evidence before the JRP that Right Whale mortalities
	11	can result from collisions with vessels of all
· · · · · · · · · · · · · · · · · · ·	12	sizes, including small vessels?
	13	A. Yes, but the mortality is
	14	obviously less with small vessels.
	15	Q. Mortalities can result from
	16	vessels of any size; correct?
•	17	A. Yes, but typically the smaller
	18	vessels, the rate of mortality would be considered
	19	lower.
	20	Q. Were you aware of Dr. Smedbol's
	21	evidence that between 2005 and 2007, there were two
	22	known Right Whale mortalities in all Canadian and US
move on, sorry to interrupt, I understand that our	23	waters, one in Canadian waters, one in the US
viewer, who was registered today to follow the	24	waters, and that by and that one was certain to
	A. I can't recall that number and stuff but it was obviously substantially larger. Q. Do you know the range? A. Again, I can't recall it off the top of my head, no. Q. How many fishing vessels were operating in the Bay of Fundy in 2007? A. Oh, I again, I don't have that number in front of me or off the top of my head. Q. What was the distance between the shipping lanes and the Whites Point Quarry? A. Shipping lanes, again, I can't recall but I would say 20 kilometres or less. Q. What was the evidence before the JRP with respect to the number of collisions between ships travelling through the Bay of Fundy and North Atlantic Right Whales during the period 1970 to 2004? A. Again, you're testing my knowledge but I would say that there was seven deaths in Canadian waters, I believe in that time. Q. No, my question is: What was evidence before the JRP as to the number of collisions between ships travelling throughout Bay Page 1106 moving the shipping lane. Q. Dr. Smedbol's evidence was that the figure was thought to have been around 80 per cent, but by the time of the JRP hearing it was it is thought to be 95 per cent. A. All right. Q. Have you ever done the math? If there were four deaths between 1970 and 2004, and the mortalities were reduced by 95 per cent, and the four mortalities were reduced by 95 per cent, and the reduction would be by applying the 5 per cent figure? A. No. Q. If I was to say that that would be 175 mortalities one in 175 years, would that ring true to you? A. Yes, I mean that would be based on the numbers available at the time. Q. And that would be minimal? A. That would be considered low. DR. PULKOWSKI: Mr. Nash, before you	stuff but it was obviously substantially larger. Q. Do you know the range? A. Again, I can't recall it off the top of my head, no. Q. How many fishing vessels were operating in the Bay of Fundy in 2007? A. Oh, I again, I don't have that number in front of me or off the top of my head. Q. What was the distance between the shipping lanes and the Whites Point Quarry? A. Shipping lanes, again, I can't recall but I would say 20 kilometres or less. Q. What was the evidence before the JRP with respect to the number of collisions between ships travelling through the Bay of Fundy and North Atlantic Right Whales during the period 1970 to 2004? A. Again, you're testing my knowledge but I would say that there was seven deaths in Canadian waters, I believe in that time. Q. No, my question is: What was evidence before the JRP as to the number of collisions between ships travelling throughout Bay Page 1106 moving the shipping lane. Q. Dr. Smedbol's evidence was that the figure was thought to have been around 80 per cent, but by the time of the JRP hearing it was it is thought to be 95 per cent. A. All right. Q. Have you ever done the math? If there were four deaths between 1970 and 2004, and the mortalities were reduced by 95 per cent, and the four mortalities in 34 years was one in eight and a half years, did you ever do the math as to what the reduction would be by applying the 5 per cent figure? A. No. Q. If I was to say that that would be 175 mortalities one in 175 years, would that ring true to you? A. Yes, I mean that would be based on the numbers available at the time. Q. And that would be minimal? A. That would be considered low. DR. PULKOWSKI: Mr. Nash, before you

	Page 1108		Page 1109
1	was likely caused by a pleasure craft given the	1	whether there was any interruption and I think it
2	wounds on the whale; are you aware of that evidence?	2	has gone quite well until now. So nothing compared
3	A. Yes.	3	to some of the things that happened at earlier days
4	Q. And that there were none caused	4	so let's Mr. Nash, you are, of course very much
5	by large rule-size vessels; are you aware of that	5	aware of that and so let's do our best.
6	evidence?	6	Could you maybe speak up just a
7	A. At that time, of course now since	7	little bit.
8	2017, the summer we've had, we're up to 12	8	THE WITNESS: Sure, yes, sorry.
9	Q. We'll get to that.	9	MR. NASH: Could I have the last
10	MR. SCOTT LITTLE: Mr. Nash, he	10	question read out, please.
11	wasn't finished.	11	(Record read.)
12	MR. NASH: No, he wasn't, but he	12	I ask you that question again: In the
13	wasn't at all answering my question.	13	period of 2005 to 2007, the evidence is that there
14	MR. SCOTT LITTLE: He was providing	14	were no Right Whale mortalities recorded, human
15	context to his answer. I would appreciate if you	15	caused in US or Canadian waters caused by large
16 17	would let him finish his answer.	16 17	size, rule-sized vessels; do you agree with that?
18	MR. NASH: We can spend a lot of	18	A. None that I'm aware of, correct.
19	time, Judge Simma	19	Q. Were you aware of the evidence
20	MR. SCOTT LITTLE: I've let you go	20	before the JRP that DFO reported that for a 36-year period, from 1970 to 2006, there were 68 known Right
21	for a long time, Mr. Nash. Don't interrupt his answer.	20 21	Whale mortalities identified in all Canadian and US
22	PRESIDING ARBITRATOR: I have the	22	waters; were you aware of that?
23	impression, of course we have to we have to	23	A. Yes.
24	listen to what the witness says, and how it kind of	24	Q. And were you aware that there
25	fits, et cetera, but I also made an effort to see	25	were 21 for which there was not a known cause; does
	nts, et cetera, but i also made an errort to see		were 21 for which there was not a known cause, does
	Page 1110		Page 1111
1	that ring true?	1	Right Whale mortality in the Bay of Fundy since
2	A. It sounds approximate, yes.	2	2007; is that correct?
2	Q. That there were 20 mortalities	1 2	
3	Q. That there were 20 mortanties	3	A. That sounds correct, yes.
3 4	from known or suspected fish entanglements; does	4	Q. And there were was it 12 or 15
	from known or suspected fish entanglements; does that ring true?	4 5	Q. And there were was it 12 or 15 in the Gulf of St. Lawrence last year?
4 5 6	from known or suspected fish entanglements; does that ring true? A. That sounds correct.	4 5 6	Q. And there were was it 12 or 15 in the Gulf of St. Lawrence last year? A. I believe the number was 12 in
4 5 6 7	from known or suspected fish entanglements; does that ring true? A. That sounds correct. Q. And that there were 21 that were	4 5 6 7	Q. And there were was it 12 or 15 in the Gulf of St. Lawrence last year? A. I believe the number was 12 in Canadian waters, and then five in US waters. For a
4 5 6 7 8	from known or suspected fish entanglements; does that ring true? A. That sounds correct. Q. And that there were 21 that were believed to be due to vessel strikes?	4 5 6 7 8	Q. And there were was it 12 or 15 in the Gulf of St. Lawrence last year? A. I believe the number was 12 in Canadian waters, and then five in US waters. For a total of 17.
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4 5 6 7 8 9 10 11	from known or suspected fish entanglements; does that ring true? A. That sounds correct. Q. And that there were 21 that were believed to be due to vessel strikes? A. Right. Q. In all Canadian and US waters. So there was an equal number of suspected or known	4 5 6 7 8 9 10	Q. And there were was it 12 or 15 in the Gulf of St. Lawrence last year? A. I believe the number was 12 in Canadian waters, and then five in US waters. For a total of 17. Q. So, 12 in the Gulf of St. Lawrence (unclear) Newfoundland, last year alone?
4 5 6 7 8 9 10 11	from known or suspected fish entanglements; does that ring true? A. That sounds correct. Q. And that there were 21 that were believed to be due to vessel strikes? A. Right. Q. In all Canadian and US waters. So there was an equal number of suspected or known fish entanglement mortalities as vessel-related	4 5 6 7 8 9 10 11 12	Q. And there were was it 12 or 15 in the Gulf of St. Lawrence last year? A. I believe the number was 12 in Canadian waters, and then five in US waters. For a total of 17. Q. So, 12 in the Gulf of St. Lawrence (unclear) Newfoundland, last year alone? A. Yes.
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Page 1112 Page 1113 1 1 A. That's correct. A. Yes. 2 2 Q. Dr. Moira Brown is probably the Q. And there hasn't been a whale 3 3 mortality in the Bay of Fundy for 13 years, that's lead researcher with respect to Right Whales in 4 correct? 4 North America, would you agree with that? 5 5 A. None reported. A. Yes. Q. None known to be caused? 6 6 Q. She's at the New England 7 7 A. That's right. Aquarium; correct? 8 8 O. And that suggests to you A. Yes. 9 something that the Right Whales, which used to go 9 Q. A large scientific body which 10 10 primarily to the Bay of Fundy have migrated north, studies Right Whales. In fact, Dr. Moira Brown was along the east coast into the Gulf of St. Lawrence? 11 11 influential and perhaps determinative in the 12 12 movement of the shipping lanes in 2003; is that A. There's -- I guess that's a bit 13 of a misconception. There have always been North 13 correct? 14 Atlantic Right Whales that would use the Gulf of 14 A. That's correct. 15 15 St. Lawrence, the population and the numbers vary Q. Have you come across any of her 16 16 year to year depending on food source and writings or any of the reports about her that have 17 17 availability, so whether that's a permanent change said that there is an unexplained scientific reason 18 or it's just something that happened in 2017 over 18 that no one knows yet as to why the Right Whales 19 the last couple of years, it could go back to, 19 have left the Bay of Fundy and they're being seen in 20 again, higher numbers in the Bay of Fundy next year. 20 far fewer numbers than they ever were, and that 21 21 It's -- these are highly mobile species and they are they've now migrated to the Gulf of St. Lawrence up 22. chasing food sources, so where they end up we can't 22 the east coast of Nova Scotia to get to the Gulf of 23 predict from one year to the next. 23 St. Lawrence thus resulting in these significant 24 24 Q. Have you heard of Dr. Moira whale strikes that had never historically been 25 25 Brown? found; are you familiar with that? Page 1114 Page 1115 1 1 A. Yes. entanglement scars; do you recall that statistics? 2 O. So, if I can refer now to fishing 2 A. Yes. 3 gear entanglements. Did you review the statistics 3 Q. And are you aware of the evidence 4 cited by the DFO to the JRP regarding the incidents 4 before the DFO that identified eight Whales that 5 of Right Whale entanglements in fishing gear? 5 were then -- evidence before the JRP. DFO's 6 A. I would have looked at that, yes. 6 evidence, identified eight Whales that were then 7 7 O. Did vou review the DFO's evidence currently entangled and that 33 had previously been 8 before the JRP that the Right Whale consortium, of 8 identified as entangled Whales were then gear free; 9 9 which Dr. Jerry Conway is a member, that's right? do you recall that evidence? A. Yes. 10 10 A. Yes, and again, whale 11 Q. So Dr. Jerry Conway, the same 11 entanglement in fishing gear is not uncommon. 12 Dr. Jerry Conway who said in December of 2002 that 12 Q. It's a huge issue? 13 he had no problem with the Whites Point Bilcon 13 A. Yes. 14 blasting plant with respect to marine mammals, and 14 Q. And Dr. Moira Brown has reported 15 that was in December of 2002, that same Dr. Jerry 15 on the efforts to, not to ban fishing, not to ban Conway is now a member of the Right Whale 16 16 shipping, but particularly not to ban fishing, but 17 17 consortium: correct? to have fishing gear redesigned so that it poses 18 18 less of a risk of harm to Right Whales; correct? A. That's correct. 19 19 Q. And the Right Whale consortium is A. Right. So the proposal is to put 20 devoted to the preservation of the Right Whale; 20 in additional mitigation for fishing gear at a cost 21 correct? 21 to the fishing industry to redesign to reduce the 22 22 A. Yes, that's correct. entanglement so that would be a mitigation measure 23 23 sort of specifically applied in areas that, most Q. And the Right Whale consortium 24 24 and the New England Aquarium, reported that 71 per importantly, North Atlantic Right Whales would be 25 cent of photographed Right Whales had fishing gear 25 found.

	Page 1116		Page 1117
1	Q. Right. So, the result of the	1	couple of weeks was to actually potentially close
2	knowledge that fishing gear entanglement does occur	2	fishing activity or have fishers remove their gear
3	poses a serious risk of harm to North Atlantic Right	3	from an area if there are known Right Whales in that
4	Whales, leads to the development of mitigation	4	location.
5	measures to attempt to reduce the risk of harm to	5	Q. Well, was there a moratorium
6	the North Atlantic Right Whale; that's correct?	6	implemented last summer or at some point last year,
7	A. Yes. So in a case, for any	7	to close part of the fishery in the Gulf of
8	project, if you have mitigation measures that are	8	St. Lawrence after it was 98 per cent complete?
9	possible, then the department will be looking at	9	A. Right, so it was closed, ended
10	applying those, so whether that's fishing industry	10	early, yes.
11	or industrial activities, they would have tried to	11	Q. It ended early?
12	apply those mitigation measures to reduce harm.	12	A. Yes.
13	Q. So in the case of risk of harm to	13	Q. 98 per cent of it was done but it
14	a recognized endangered species of which there are	14	ended early; is that correct?
15	350 or 320 depending on the statistics you read?	15	A. Yes, and that's typical for any
16	A. Yes.	16	fishing season, particularly crustaceans, is that
17	Q. In the case of that species, a	17	most of the fishing, most of the capture takes place
18	highly endangered species, the response of the DFO	18	in the first couple of weeks anyway.
19	is not to ban shipping or to ban fishing, it's to	19	Q. And there has been no banning of
20	look for reasonable mitigation measures which can	20	shipping in the Bay of Fundy; is that correct?
21	reduce the risk of harm to that species; that's	21	A. Correct.
22	correct?	22	Q. And there has been no reduction
23	A. That's correct. In some cases	23	in speed limits in the Bay of Fundy; that is
24	for fishing, so one of the measures that's recently	24	correct?
25	discussed and was announced just within the last	25	A. That's correct.
	Page 1118		Page 1119
1	Page 1118 Q. And there has been a reduction in	1	Page 1119 mitigate those.
1 2		1 2	•
	Q. And there has been a reduction in		mitigate those.
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WILLIAM	RALPH CLAYTON ET AL v. GOVERNMENT OF CANADA		February 22, 2018
	Page 1120		Page 1121
1	environmental assessment of the Irving Oil LNG	1	The purpose of this map first of
2	Terminal in 2004?	2	all, who put together this map?
3	A. No, I wasn't involved with that	3	A. So this was put together with the
4	project.	4	data from DFO science and one of my staff who is a
5	Q. Are you aware at all either from	5	JIAS [phon] analyst plotted the information on this
6	your own involvement, which you didn't have	6	map.
7	involvement, apparently, but from the records of	7	Q. And this map was prepared for the
8	DFO, that this terminal project was to result in 100	8	purpose of this proceeding?
9	to 150 of LNG super tankers travelling the shipping	9	A. It was, yes.
10	lanes through the Bay of Fundy every year?	10	Q. And this map is intended to show,
11	A. Again, I wasn't involved with the	11	if you look at Whites Point on the left-hand side,
12	review of that project. My counterpart who works in	12	do you see Whites Point Quarry and Marine Terminal?
13	the New Brunswick would have been reviewing that	13	A. Yes.
14	file.	14	Q. This map is intended to show
15	Q. If there was a DFO document that	15	there were many, many, many more Right Whales in the
16	said that you would stand by that?	16	Bay of Fundy; correct?
17	A. I would have to see the document.	17	A. It shows the relative sightings
18	Q. Are you aware that the project	18	of Right Whales in that area.
19	was this LNG project was approved under CEAA	19	Q. It shows the sightings?
20	taking the effects on Right Whales into account?	20	A. Yes.
21	A. Again, I'm not familiar with the	21	Q. Over what period?
22	project itself.	22	A. So this would go from 1975 up to
23	Q. Could I take you to tab 2. This	23	2015.
24	is exhibit R-769. This is a Government of Canada's	24	Q. So for a 40-year period it shows
25	exhibit.	25	the sightings?
	Page 1122		Page 1123
1	A. That's correct.	1	A. These would just be actual
2	Q. Now, Right Whales have been known	2	sightings. So this isn't a sort of evaluation of
3	for decades to aggregate in the Grand Manan Basin?	3	the unit effort. These are just actual sightings.
4	A. That's correct, yes.	4	Q. These are actual sightings as
5	Q. And there was a large	5	reported?
6	conservation area created to assist and protect and	6	A. Yes.
7	reduce the risk in harm to Right Whales; correct?	7	Q. Sightings are only sightings if
8	A. Yes, and it has now been since	8	people see them and they are looking for them;
9	identified as the critical habitat area, one of the	9	correct?
10	two, yes.	10	A. Yes.
11	Q. Do you know that the ships that	11	Q. So there can be areas which don't
12	would be travelling from Whites Point to New York	12	show a lot of sightings because there is no nobody
13	and/or New Jersey would not be going through the	13	looking for them there; isn't that correct?
14	conservation area and were never planned to go	14	A. Yes, and so obviously, I mean
15	through the conservation area?	15	that is the the issue with sightings is that you
16	A. That's correct, yes, yeah.	16	would have more where people are looking, where
17	Q. I'm going to suggest to you that	17	there's more effort. Now, the sighting is not just
18	this map is intended to show that there are many,	18	done by scientific opportunity; it would be done by
19	many more North Atlantic Right Whales in the Bay of	19	fishing vessels, whale-watching operations, marine
20	Fundy than there are in other locations?	20	mammals observers on commercial vessels. So the
21	A. Right. That would show there are	21	data would be collected from a number of different
22	sightings outside those conservation areas, so the	22	sources.
23	critical habitat area.	23	Q. And the purpose of putting this
24	Q. Now, sightings are measured by	24	map together by you was to illustrate, was it not,
25	unit effort: that's correct?	25	to contract the number of cightings of North

25

unit effort; that's correct?

25

to contrast the number of sightings of North

Page 1124		Page 1125
Atlantic Right Whales in the Bay of Fundy over that	1	A. And that it was 2017, this data
40-year period?	2	goes up to 2015, so if we are able to once the
A. Yes.	3	map is updated then it's obviously going to show
Q. As compared to the sightings	4	more sightings within the Gulf of St. Lawrence.
along the east coast of Nova Scotia and if you	5	Q. Right. So this just goes to
follow up, you will see Black Point and a star	6	2015?
towards the top of Nova Scotia, just near the Cape	7	A. That's correct, yes. And we
Breton Island; do you see that?	8	did I did get the data, unfortunately it didn't
A. That is correct, yes.	9	come out in time for this, but for 2016, which shows
Q. And it was to show that there	10	additional plots in the Gulf of St. Lawrence.
have been many, many more sightings in the Bay of	11	Q. I think we better just leave that
Fundy than there have been on that shipping route up	12	off the record.
the east coast of Nova Scotia to the Black Point?	13	A. Okay.
A. That's correct, yes.	14	Q. Because this is what you
Q. And we see too that there are	15	presented and this is what we are dealing with.
very, very few red dots in the Gulf of St. Lawrence;	16	Can you go to page 2?
do you see that?	17	PRESIDING ARBITRATOR: Sorry. Could
A. That's correct, yes.	18	you just repeat what you just said. I didn't
Q. Very few recorded sightings of	19	understand it. I think
Right Wales in the Gulf of St. Lawrence that the DFO	20	MR. NASH: He was about to give
has.	21	evidence on some updating of this document, and I
A. Yes, so that data	22	said we better leave that off the record because
Q. And we know that 12 Right Whales,	23	this is the document we are referring to.
there were 12 Right Whale mortalities in one summer,	24	PRESIDING ARBITRATOR: Thank you.
last summer	25	MR. NASH: If you go to page 2, let's
Page 1126		Page 1127
review a few of the caveats and disclaimers in this	1	A. That's right.
map. At the very top:	_	
man. At the very top.	2	O. Number 2:
"Please note that the data do not	3	Q. Number 2: "A sighting does not include the
"Please note that the data do not		"A sighting does not include the
"Please note that the data do not include sightings from the North	3	"A sighting does not include the number of individuals seen, just
"Please note that the data do not include sightings from the North Atlantic Right Whales consortium	3 4	"A sighting does not include the number of individuals seen, just that a sighting occurred at the
"Please note that the data do not include sightings from the North Atlantic Right Whales consortium settings database that are	3 4 5	"A sighting does not include the number of individuals seen, just that a sighting occurred at the location." [As read.]
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"Please note that the data do not include sightings from the North Atlantic Right Whales consortium settings database that are included in the species distribution models. We are not allowed to publicly share that	3 4 5 6 7 8	"A sighting does not include the number of individuals seen, just that a sighting occurred at the location." [As read.] So, there is no indication of the number of Right Whales, but just that there was a sighting; is that right?
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	40-year period? A. Yes. Q. As compared to the sightings along the east coast of Nova Scotia and if you follow up, you will see Black Point and a star towards the top of Nova Scotia, just near the Cape Breton Island; do you see that? A. That is correct, yes. Q. And it was to show that there have been many, many more sightings in the Bay of Fundy than there have been on that shipping route up the east coast of Nova Scotia to the Black Point? A. That's correct, yes. Q. And we see too that there are very, very few red dots in the Gulf of St. Lawrence; do you see that? A. That's correct, yes. Q. Very few recorded sightings of Right Wales in the Gulf of St. Lawrence that the DFO has. A. Yes, so that data Q. And we know that 12 Right Whales, there were 12 Right Whale mortalities in one summer, last summer	A. Yes. Q. As compared to the sightings along the east coast of Nova Scotia and if you follow up, you will see Black Point and a star towards the top of Nova Scotia, just near the Cape Breton Island; do you see that? A. That is correct, yes. Q. And it was to show that there have been many, many more sightings in the Bay of Fundy than there have been on that shipping route up the east coast of Nova Scotia to the Black Point? A. That's correct, yes. Q. And we see too that there are very, very few red dots in the Gulf of St. Lawrence; do you see that? A. That's correct, yes. Q. Very few recorded sightings of Right Wales in the Gulf of St. Lawrence that the DFO has. A. Yes, so that data Q. And we know that 12 Right Whales, there were 12 Right Whale mortalities in one summer, last summer Page 1126 review a few of the caveats and disclaimers in this

	Page 1128		Page 1129
1	the middle of New Brunswick, you would probably	1	Most data have been gathered from
2	remove that from the database and say that that is	2	platforms of opportunity that
3	not a correct data entry.	3	were vessels-based." [As read.]
4	Q. Who typed up this page, by the	4	What does that mean?
5	way, was that you or was it somebody else?	5	A. So these aren't specific
6	A. This is the standard caveats that	6	whale-sighting activities and so we would have,
7	would go with the data that's provided because this	7	whether that be fishing vessels, whether that be
8	data would be provided for numerous projects or	8	seismic off-shore vessels that would have marine
9	information so, whether that's someone doing	9	mammal observers, so these aren't specific to sort
10	environmental assessment for a project would get	10	of looking for whales; these would be opportunistic,
11	access to this data to produce an environmental	11	someone sighting whales as part of some other work
12	assessment report, they would provide this standard	12	that they were undertaking.
13	caveat with this data every time.	13	Q. Number 4:
14	Q. Let's run through these caveats:	14	"Sighting effort has not been
15	"The sighting data have not been	15	quantified, that is the numbers
16	error checked."	16	cannot be used to estimate true
17	I am at number 1.	17	species density or abundance for
18	"The quality of some of the	18	an area. Lack of sightings do
19	sighting data is unknown. Most	19	not represent lack of species
20	sightings are collected on an	20	present in a particular area."
21	opportunistic basis and	21	[As read.]
22	observations may come from	22	A. Yes.
23	individuals with a variety of	23	Q. And that would be the case for
24	expertise in marine mammals	24	the eastern coast of Nova Scotia; isn't that right?
25	identification experiences.	25	A. That's right. So if we don't
	Page 1130		Page 1131
1	have efforts like whale-watching activities,	1	represent an amalgamation of
2	although whale-watching activities tend to aggregate	2	sightings from a variety of years
3	around where actual whales are, then you would have	3	and seasons. Effort is not
4	less effort in those areas, it doesn't mean that	4	necessarily consistent among
5	there is no effort in those areas because we would	5	months, years, and areas. There
6	have shipping vessels that would have been coming	6	are large gaps between years."
7	out of the Strait of Canso that would have people	7	[As read.]
8	sighting for marine mammals.	8	It gets back to my point about
9	Q. Well, that's your logical	9	effort. There are there is a measure of
10	conclusion but that's not anywhere in the evidence.	10	scientific measure of sightings called sightings per
11	What this is saying is that lack of	11	unit effort, SPUE?
12	sightings do not represent lack of species present	12	A. Correct, yes.
13	in a particular area, and you would agree with that?	13	Q. And these data would that take
14	A. That's right. That's right, yes.	14	that into account; correct?
15	Q. And number 5:	15	A. That's correct, yes.
16	"Numbers of sightings have not	16	Q. So if there is a significant
17	been verified, especially in	17	effort to see that there are whales in a particular
10	light of significant differences	18	area such as the Grand Manan Basin where they are
18		19	known to go, that would increase the sightings per
18	in detectability among species."	17	into the co go, that would interest the signings per
	in detectability among species." [As read.]	20	unit effort; correct?
19		1	
19 20	[As read.]	20 21 22	unit effort; correct?
19 20 21	[As read.] So there is another qualification.	20 21 22 23	unit effort; correct? A. Right, yes.
19 20 21 22	[As read.] So there is another qualification. These numbers haven't been verified.	20 21 22	unit effort; correct? A. Right, yes. Q. And if there is a particular lack
19 20 21 22 23	[As read.] So there is another qualification. These numbers haven't been verified. A. That's correct, yes.	20 21 22 23	unit effort; correct? A. Right, yes. Q. And if there is a particular lack of effort for sightings in another area, it doesn't

	Page 1132		Page 1133
1	has been less effort in trying to sight them;	1	have come here today to explain all of that in great
2	correct?	2	detail based upon his decades of scientific research
3	A. Correct, but I'll sort of explain	3	and knowledge about the area; right?
4	sort of the way it works, that there would be more	4	A. He could, or several others in
5	sightings, obviously, where there are more whales.	5	the department could.
6	The other thing to understand with	6	Q. Several scientists, people who
7	this data too is that it is really just to provide a	7	work with this all the time.
8	relative distribution of whales in the area, so it	8	Dr. Moira Brown could be brought here
9	doesn't provide abundance. But we also use other	9	today to explain this mystery or to understand the
10	things like spatial distribution models and those	10	mystery of why they are going from the Bay of Fundy
11	spatial distribution models are not just based on	11	to the Gulf of St. Lawrence. She could be brought
12	sighting information, but also based on availability	12	here today to explain all of this on behalf of
13	of food sources.	13	Canada; is that correct?
14	So we have detailed information on	14	A. But she did say earlier that she
15	phytoplankton abundance and phytoplankton is used as	15	couldn't explain why they were moving to
16	a surrogate to determine productivity in an area, so	16	Q. She couldn't explain why they
17	we know where these upwellings that cause	17	were moving but she could explain her understanding
18	phytoplankton blooms and therefore secondary product	18	as a renowned scientist, specialist on the North
19	activity such as copepods which are cell plankton,	19	Atlantic Right Whale, leading researcher and
20	which the whales feed on, those densities would also	20	scientist as to what's happening with the North
21	reflect likelihood of where those whales would be.	21	Atlantic Right Whales and how they are getting to
22	So, when you overlay that data along	22	the Gulf of St. Lawrence.
23	with the sighting data there is a high level of	23	Is it the position and knowledge that
24	correspondence.	24	the Right Whales are going up the eastern coast of
25	Q. Yes, and Dr. Smedbol could easily	25	Nova Scotia; isn't that correct?
	Page 1134		Page 1135
		1	
1	A. To get to the Gulf of	1	for there is likely to be errors when you collect
2	A. To get to the Gulf of St. Lawrence? Yes.	1 2	for there is likely to be errors when you collect 115,000 data points, but it is the 40 years of data
	St. Lawrence? Yes.		115,000 data points, but it is the 40 years of data
2	St. Lawrence? Yes. Q. Yes. And at the very bottom,	2	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the
2 3	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user:	2 3	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely
2 3 4	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the	2 3 4	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the
2 3 4 5	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the limitations" apparently of	2 3 4 5	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be
2 3 4 5 6	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the	2 3 4 5 6	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be precise that somebody isn't sort of using a single
2 3 4 5 6 7	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the limitations" apparently of which there are many" of the data and understand that DFO does	2 3 4 5 6 7	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be
2 3 4 5 6 7 8	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the limitations" apparently of which there are many" of the data and understand that DFO does not warrant or guarantee the	2 3 4 5 6 7 8	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be precise that somebody isn't sort of using a single point and saying well, there was definitely a Right
2 3 4 5 6 7 8 9	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the limitations" apparently of which there are many" of the data and understand that DFO does not warrant or guarantee the accuracy, completeness or	2 3 4 5 6 7 8 9	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be precise that somebody isn't sort of using a single point and saying well, there was definitely a Right Whales here, we can't do anything, that error point
2 3 4 5 6 7 8 9	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the limitations" apparently of which there are many" of the data and understand that DFO does not warrant or guarantee the	2 3 4 5 6 7 8 9	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be precise that somebody isn't sort of using a single point and saying well, there was definitely a Right Whales here, we can't do anything, that error point may be incorrect.
2 3 4 5 6 7 8 9 10	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the limitations" apparently of which there are many" of the data and understand that DFO does not warrant or guarantee the accuracy, completeness or currency of the data for any	2 3 4 5 6 7 8 9 10	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be precise that somebody isn't sort of using a single point and saying well, there was definitely a Right Whales here, we can't do anything, that error point may be incorrect. Now, if there are 50, 60, 70 points
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2 3 4 5 6 7 8 9 10 11 12 13 14	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the limitations" apparently of which there are many" of the data and understand that DFO does not warrant or guarantee the accuracy, completeness or currency of the data for any specific use." [As read.] That's correct? A. That's correct. So, and I guess	2 3 4 5 6 7 8 9 10 11 12 13 14	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be precise that somebody isn't sort of using a single point and saying well, there was definitely a Right Whales here, we can't do anything, that error point may be incorrect. Now, if there are 50, 60, 70 points in that area, it provides a higher degree of confidence that that trend is reflected in the data. Q. Those are the limitations of the
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the limitations" apparently of which there are many" of the data and understand that DFO does not warrant or guarantee the accuracy, completeness or currency of the data for any specific use." [As read.] That's correct? A. That's correct. So, and I guess this is to explain how scientific data is collected and used, and so in a case like this, there is a lack of precision, and science deals in precise	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be precise that somebody isn't sort of using a single point and saying well, there was definitely a Right Whales here, we can't do anything, that error point may be incorrect. Now, if there are 50, 60, 70 points in that area, it provides a higher degree of confidence that that trend is reflected in the data. Q. Those are the limitations of the data? A. Yes. MR. NASH: Right.
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the limitations" apparently of which there are many" of the data and understand that DFO does not warrant or guarantee the accuracy, completeness or currency of the data for any specific use." [As read.] That's correct? A. That's correct. So, and I guess this is to explain how scientific data is collected and used, and so in a case like this, there is a lack of precision, and science deals in precise measurements when they are producing documents, or	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be precise that somebody isn't sort of using a single point and saying well, there was definitely a Right Whales here, we can't do anything, that error point may be incorrect. Now, if there are 50, 60, 70 points in that area, it provides a higher degree of confidence that that trend is reflected in the data. Q. Those are the limitations of the data? A. Yes. MR. NASH: Right. So, Judge Simma, I see that it's
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the limitations" apparently of which there are many" of the data and understand that DFO does not warrant or guarantee the accuracy, completeness or currency of the data for any specific use." [As read.] That's correct? A. That's correct. So, and I guess this is to explain how scientific data is collected and used, and so in a case like this, there is a lack of precision, and science deals in precise measurements when they are producing documents, or providing information and data, and so there could be errors in this and there are likely errors in	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be precise that somebody isn't sort of using a single point and saying well, there was definitely a Right Whales here, we can't do anything, that error point may be incorrect. Now, if there are 50, 60, 70 points in that area, it provides a higher degree of confidence that that trend is reflected in the data. Q. Those are the limitations of the data? A. Yes. MR. NASH: Right. So, Judge Simma, I see that it's 10:25. Would now be an appropriate time for the morning break? I do have a few more questions.
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the limitations" apparently of which there are many" of the data and understand that DFO does not warrant or guarantee the accuracy, completeness or currency of the data for any specific use." [As read.] That's correct? A. That's correct. So, and I guess this is to explain how scientific data is collected and used, and so in a case like this, there is a lack of precision, and science deals in precise measurements when they are producing documents, or providing information and data, and so there could be errors in this and there are likely errors in this.	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be precise that somebody isn't sort of using a single point and saying well, there was definitely a Right Whales here, we can't do anything, that error point may be incorrect. Now, if there are 50, 60, 70 points in that area, it provides a higher degree of confidence that that trend is reflected in the data. Q. Those are the limitations of the data? A. Yes. MR. NASH: Right. So, Judge Simma, I see that it's 10:25. Would now be an appropriate time for the morning break? I do have a few more questions. PRESIDING ARBITRATOR: How many?
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	St. Lawrence? Yes. Q. Yes. And at the very bottom, number 9, you, the user: " recognize the limitations" apparently of which there are many" of the data and understand that DFO does not warrant or guarantee the accuracy, completeness or currency of the data for any specific use." [As read.] That's correct? A. That's correct. So, and I guess this is to explain how scientific data is collected and used, and so in a case like this, there is a lack of precision, and science deals in precise measurements when they are producing documents, or providing information and data, and so there could be errors in this and there are likely errors in this. The information that we go on is the	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	115,000 data points, but it is the 40 years of data collected, seeing the trends which provides the information basis to understand where the likely whale sightings will be. So the caveats are in there to be precise that somebody isn't sort of using a single point and saying well, there was definitely a Right Whales here, we can't do anything, that error point may be incorrect. Now, if there are 50, 60, 70 points in that area, it provides a higher degree of confidence that that trend is reflected in the data. Q. Those are the limitations of the data? A. Yes. MR. NASH: Right. So, Judge Simma, I see that it's 10:25. Would now be an appropriate time for the morning break? I do have a few more questions. PRESIDING ARBITRATOR: How many? MR. NASH: I probably have I could

	Page 1136		Page 1137
1	the break now?	1	A. Sorry, in which year?
2	MR. NASH: If that's the will of the	2	Q. In 2012. That only 42 Right
3	tribunal.	3	Whales were seen in the Bay of Fundy?
4	PRESIDING ARBITRATOR: Of course. So	4	A. I'm I haven't seen that,
5	we are going to have the coffee break from up to	5	but
6	10:40.	6	Q. Would you accept it?
7	Recess taken at 10:22 a.m.	7	A. Yes. Yeah, so there have been
8	Upon resuming at 10:44 a.m	8	I can't remember the percentages, but they it's
9	PRESIDING ARBITRATOR: I think we are	9	like 20 per cent of the population in some years.
10	ready to continue, Mr. Nash, you have the floor	10	So it's gone up over 50 per cent. Some years down
11	again.	11	to, in the range of 10 to 20 per cent and then gone
12	MR. NASH: Mr. McLean, were you aware	12	up again so it varies, fluctuates from year to year.
13	when you signed your statement first of all, can	13	Q. So for that year, the 42 Right
14	I ask you this: Do you know Lee Harris?	14	Whale sightings in the Bay of Fundy was concluded by
15	A. Yes.	15	Lee Harris to be the lowest number recorded since
16	Q. Lee Harris is a biologist with	16	1988; would you dispute that?
17	DFO?	17	A. No.
18	A. Yes.	18	Q. And that was before the change in
19	Q. And is he a research biologist	19	the international shipping lanes; correct?
20	with DFO?	20	A. That's correct, yes.
21	A. She is, yes.	21	Q. Were you aware when you signed
22	Q. And were you aware when you	22	your statement that DFO had reported in 2016 that
23	signed your statement that Lee Harris concluded that	23	95 per cent of Right Whale incidents in Atlantic
24	in 2012, in that year, only 42 Right Whales were	24	Canada in the years 2008 to 2014, that were
25	seen in the Bay of Fundy?	25	reported, the incidents that were reported involved
	Page 1138		Page 1139
1	fishing gear entanglements; would you dispute that?	1	Q. And so you and Mr. Murphy drafted
2	A. No.	2	this memo together?
3	Q. Does that sound correct?	3	A. That's correct.
4	A. That sounds correct.	4	Q. And it was drafted for Faith
5	Q. Could you turn, please, to tab	5	Scattelon who was the was she the Director
6	10. This is a memorandum for the ADM Oceans and	6	General at that time?
_			General at that time?
7	Habitat?	7	A. She was the Regional Director
7 8		7 8	
	Habitat? A. Right. Q. Sorry, have you got it?		A. She was the Regional Director
8	A. Right.	8	A. She was the Regional Director General, yes.
8	A. Right.Q. Sorry, have you got it?	8 9	A. She was the Regional Director General, yes. Q. And so this is a memorandum from
8 9 10	A. Right.Q. Sorry, have you got it?A. Yes, yeah.	8 9 10	A. She was the Regional Director General, yes. Q. And so this is a memorandum from Faith Scattelon, Regional Director General to the
8 9 10 11	A. Right.Q. Sorry, have you got it?A. Yes, yeah.Q. And this is Exhibit C-869. And	8 9 10 11	A. She was the Regional Director General, yes. Q. And so this is a memorandum from Faith Scattelon, Regional Director General to the Associate Deputy Minister of Oceans and Habitat
8 9 10 11 12	 A. Right. Q. Sorry, have you got it? A. Yes, yeah. Q. And this is Exhibit C-869. And when we see ADM, is that Associate Deputy Minister 	8 9 10 11 12	A. She was the Regional Director General, yes. Q. And so this is a memorandum from Faith Scattelon, Regional Director General to the Associate Deputy Minister of Oceans and Habitat which is drafted by you and Mr. Murphy and signed by
8 9 10 11 12 13	A. Right. Q. Sorry, have you got it? A. Yes, yeah. Q. And this is Exhibit C-869. And when we see ADM, is that Associate Deputy Minister or Assistant Deputy Minister?	8 9 10 11 12 13	A. She was the Regional Director General, yes. Q. And so this is a memorandum from Faith Scattelon, Regional Director General to the Associate Deputy Minister of Oceans and Habitat which is drafted by you and Mr. Murphy and signed by her?
8 9 10 11 12 13 14	A. Right. Q. Sorry, have you got it? A. Yes, yeah. Q. And this is Exhibit C-869. And when we see ADM, is that Associate Deputy Minister or Assistant Deputy Minister? A. The Associate Deputy Minister.	8 9 10 11 12 13 14	A. She was the Regional Director General, yes. Q. And so this is a memorandum from Faith Scattelon, Regional Director General to the Associate Deputy Minister of Oceans and Habitat which is drafted by you and Mr. Murphy and signed by her? A. Yes.
8 9 10 11 12 13 14 15	A. Right. Q. Sorry, have you got it? A. Yes, yeah. Q. And this is Exhibit C-869. And when we see ADM, is that Associate Deputy Minister or Assistant Deputy Minister? A. The Associate Deputy Minister. Q. And the way I read this, but you	8 9 10 11 12 13 14 15	A. She was the Regional Director General, yes. Q. And so this is a memorandum from Faith Scattelon, Regional Director General to the Associate Deputy Minister of Oceans and Habitat which is drafted by you and Mr. Murphy and signed by her? A. Yes. Q. And if we go back to the first
8 9 10 11 12 13 14 15 16	A. Right. Q. Sorry, have you got it? A. Yes, yeah. Q. And this is Exhibit C-869. And when we see ADM, is that Associate Deputy Minister or Assistant Deputy Minister? A. The Associate Deputy Minister. Q. And the way I read this, but you can confirm, if you go to the final page of the	8 9 10 11 12 13 14 15 16 17	A. She was the Regional Director General, yes. Q. And so this is a memorandum from Faith Scattelon, Regional Director General to the Associate Deputy Minister of Oceans and Habitat which is drafted by you and Mr. Murphy and signed by her? A. Yes. Q. And if we go back to the first page, the way I understand this, and you can correct
8 9 10 11 12 13 14 15 16 17	A. Right. Q. Sorry, have you got it? A. Yes, yeah. Q. And this is Exhibit C-869. And when we see ADM, is that Associate Deputy Minister or Assistant Deputy Minister? A. The Associate Deputy Minister. Q. And the way I read this, but you can confirm, if you go to the final page of the document, I read this as being a document that was	8 9 10 11 12 13 14 15 16 17	A. She was the Regional Director General, yes. Q. And so this is a memorandum from Faith Scattelon, Regional Director General to the Associate Deputy Minister of Oceans and Habitat which is drafted by you and Mr. Murphy and signed by her? A. Yes. Q. And if we go back to the first page, the way I understand this, and you can correct me if I'm wrong, if you go into that box, the
8 9 10 11 12 13 14 15 16 17	A. Right. Q. Sorry, have you got it? A. Yes, yeah. Q. And this is Exhibit C-869. And when we see ADM, is that Associate Deputy Minister or Assistant Deputy Minister? A. The Associate Deputy Minister. Q. And the way I read this, but you can confirm, if you go to the final page of the document, I read this as being a document that was drafted, at least in part, by you?	8 9 10 11 12 13 14 15 16 17	A. She was the Regional Director General, yes. Q. And so this is a memorandum from Faith Scattelon, Regional Director General to the Associate Deputy Minister of Oceans and Habitat which is drafted by you and Mr. Murphy and signed by her? A. Yes. Q. And if we go back to the first page, the way I understand this, and you can correct me if I'm wrong, if you go into that box, the summary box, the second bullet from the bottom, it
8 9 10 11 12 13 14 15 16 17 18	A. Right. Q. Sorry, have you got it? A. Yes, yeah. Q. And this is Exhibit C-869. And when we see ADM, is that Associate Deputy Minister or Assistant Deputy Minister? A. The Associate Deputy Minister. Q. And the way I read this, but you can confirm, if you go to the final page of the document, I read this as being a document that was drafted, at least in part, by you? A. That's correct.	8 9 10 11 12 13 14 15 16 17 18	A. She was the Regional Director General, yes. Q. And so this is a memorandum from Faith Scattelon, Regional Director General to the Associate Deputy Minister of Oceans and Habitat which is drafted by you and Mr. Murphy and signed by her? A. Yes. Q. And if we go back to the first page, the way I understand this, and you can correct me if I'm wrong, if you go into that box, the summary box, the second bullet from the bottom, it says:
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8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	A. Right. Q. Sorry, have you got it? A. Yes, yeah. Q. And this is Exhibit C-869. And when we see ADM, is that Associate Deputy Minister or Assistant Deputy Minister? A. The Associate Deputy Minister. Q. And the way I read this, but you can confirm, if you go to the final page of the document, I read this as being a document that was drafted, at least in part, by you? A. That's correct. Q. Was it who was M. Murphy an assistant to you or A. He would have been the	8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	A. She was the Regional Director General, yes. Q. And so this is a memorandum from Faith Scattelon, Regional Director General to the Associate Deputy Minister of Oceans and Habitat which is drafted by you and Mr. Murphy and signed by her? A. Yes. Q. And if we go back to the first page, the way I understand this, and you can correct me if I'm wrong, if you go into that box, the summary box, the second bullet from the bottom, it says: "The two weeks of panel hearings commenced on June 16th, 2007 and in Digby Nova Scotia, DFO

	Page 1140		Page 1141
1	blasting on marine mammals, fish	1	blasting once every two weeks,
2	and lobster, shipping impacts on	2	and the mitigation measures
3	marine mammal invasive species	3	proposed, monitoring for whales
4	and constructive activities." [As	4	prior to blasting, it is expected
5	read.]	5	that any impacts would be
6	The way I'm reading this is that this	6	minimal." [As read.]
7	memo was drafted after those hearings and was a	7	Now was that your characterization or
8	report from Ms. Scattelon to the Associate Deputy	8	was that the characterization of scientists working
9	Minister on the status after those hearings?	9	at DFO?
10	A. That's correct, yes.	10	A. That was the characterization of
11	Q. And what went on in those	11	us at DFO looking at all of the evidence and then
12	hearings?	12	qualified that with the uncertainties around the
13	A. That's correct, yes.	13	ability to monitor, detect whales within that
14	Q. And if you go to the second page,	14	blasting zone.
15	the last bullet at the bottom. In your draft signed	15	Q. And that's handled by the next
16	by Ms. Scattelon you described that there were six	16	sentence:
17	pages of comments from DFO including concerns about	17	"However, given the
18	the potential behaviour impacts of noise on marine	18	uncertainties, DFO has requested
19	mammals, particularly on endangered species and the	19	that monitoring be conducted on
20	requirements under the Species at Risk Act, effects	20	behavioural impacts to marine
21	of blasting on lobster and conflicts with in-shore	21	mammals, particularly for Species
22	fishing activities, and if you go down to the third	22	at Risk and for any impact on
23	line, fourth line from the bottom on the right-hand	23	lobster if the project proceeds.
24	side it says:	24	Monitoring for impacts on Species
25	"Given the low frequency of	25	at Risk is also a requirement of
	Page 1142		Page 1143
1	Species at Risk Act." [As read.]	1	the Minister or not.
2	So the recommendations from the DFO	2	MR. NASH: Thank you, Mr. McLean,

Species at Risk Act." [As read.]
So the recommendations from the DFO
through up through to the Associate Deputy Minister
was for to minimize impacts, to have monitoring and
to have continuous monitoring to see what the impact
was after the project began; that's correct?

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A. If the project had proceeded and there was a recommendation, then we would certainly want to see mitigation measures and monitoring in place to ensure that impacts didn't happen.

Q. And so this information, you would expect to go up the chain to the Deputy Minister of Fisheries?

A. I'm not sure once it goes up to the ADM. I'm assuming, but I have no knowledge or information to determine how far this memo went beyond the ADM.

Q. And would it be fair to project that the information, in some form or another, whether by this memo or in another form would somehow find its way before the eyes of the Minister of Fisheries and Oceans?

A. I have no way of determining, sort of how far -- once it leaves sort of the regional, it is up to them whether they bring it to

MR. NASH: Thank you, Mr. McLean, those are my questions.

PRESIDING ARBITRATOR: Thank you, Mr. Nash. So re-direct will be done by Mr. Klaver. RE-EXAMINATION BY MR. KLAVER:

MR. KLAVER: Mr. McLean, Mr. Nash noted numerous times that you are a manager of research scientists. Could you please explain what level of scientific understanding you need in order to manage the primary researchers?

A. To manage the primary researchers? So just to clarify, so my position, I don't manage research scientists. I manage the biologists and I'm a biologist myself. I manage those biologists that do the impact assessments of projects.

We also have a separate DFO science team that we work in collaboration with that would do, again, primary research on species. On the management side, we take that primary research and apply it to potential impacts of projects that would have impacts on fish, fish habitat, marine mammals and such.

Q. And in managing the scientists,

Page 1144 Page 1145 1 1 would you need a certain level of scientific be working with our science team to collect 2 2 information, doing the evaluations myself, understanding? A. Yeah. So our classifications is 3 3 collecting a lot of the primary literature around 4 as biologists within the department and so even my 4 impacts. So impacts of blasting on lobster, we 5 5 would have reviewed that. Myself specifically made classification as a manager, and as a manager it's 6 6 not just, you know, doing paperwork and finances and determinations on sort of level impact, reviewed 7 7 stuff. I wish I just had to do that. But I also do that with the science team and then provided all the 8 8 review the assessment of project impacts as I have material in preparation for the hearing, as well as 9 done since starting my career, even with Nova Scotia 9 any correspondence with the Canadian Environmental 10 10 Environment. So most of my staff would either have Assessment Agency. 11 11 a BSC-in biology or a lot of them have Masters Q. Now, Mr. Nash also asked you 12 12 degrees and that's on the application and then, about Right Whales moving up to the Gulf of St. 13 13 obviously, in the science side a lot of the Lawrence from the Bay of Fundy. Is the Bay of Fundy 14 14 researchers would have PhDs in their areas of still a critical habitat for the Right Whales? 15 15 A. So the two areas of critical specialization. 16 16 Q. Now, Mr. Nash asked you about habitat that are identified would be the Grand Manan 17 being the lead role for DFO at the Whites Point 17 Basin that was on the map that was put up, as well 18 18 Project. And he referred to paragraph 4 of your as the Roseway Basin which is off the southwest of 19 19 first statement about the time you returned to DFO Nova Scotia. 20 in 2005. 20 Q. Now, Mr. Nash asked you about 21 21 fishing nets and other causes of Right Whale Could you explain your role as the 22 lead role of DFO for the Whites Point Project? 22 mortality or behavioural effects. He discussed 23 23 mitigation measures for these effects. A. So as environmental analyst with Could you explain what type of 24 the major projects group, I was responsible for all 24 25 the evaluation and coordination. And so that would 25 mitigation measures could apply for the broader Page 1146 Page 1147 1 1

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range of potential impacts on whales from a project like this, including shipping and blasting?

A. So mitigation measures that would be applied?

O. Yes.

A. So obviously similar to the mitigation measures that were applied in the Gulf of St. Lawrence, they could potentially put speed restrictions on vessels transiting through areas that may have endangered species like the North Atlantic Right Whale. And it could go to various things like having only blasting during conditions when Right Whales could be sighted. So in fog or bad weather conditions, if visibility was poor, they could put restrictions around activities such as blasting.

Some of the challenges around mitigation measures for this type of project, because these type of operations aren't necessarily in control of shipping operations and so they wouldn't necessarily have control over a vessel once it left the port so we've had concerns in the past about how able either DFO or Canadian Environmental Assessment Agency is to enforce these mitigation measures.

Q. Okay. Mr. Nash also asked about the data behind the whale sightings map.

So, Derek, I'm wondering, could we pull that map up on the screen please?

Now, Mr. Nash asked about some of the caveats to this map. Could you explain what level of scientific certainty underlines the data in this map?

A. Yeah. And, again, this is really just based on sighting information but the information is then backed up with doing spacial distribution models which give us a higher degree of certainty where those species are found. So as discussed earlier, you know, there are locations where we would have low numbers of sighting availability and part of that becomes, you know, we have whale-watching on vessels that operate obviously in the Bay of Fundy. They are not along sort of the eastern shore of Nova Scotia for the reason that there are very few whales there and so these operations don't exist there.

But this information is then backed up, as I mentioned, with spacial distribution model using prey abundance for whales and specifically for North Atlantic Right Whales we would have a good

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Page 1148 indication of where those prey species would occur based on ocean temperature, oceanographic conditions. And so areas like the outer Bay of Fundy is a prime area, but also the Gulf of St. Lawrence where you have mixing of fresh water and sea water, you have these deep water upwellings that provide nutrients and these nutrients feed that secondary production which the whales are looking Q. Can you explain how DFO screens and collects the data behind this map?

A. So, for most of the time the information is provided in data sheets, again, from opportunistic, like fishing vessels, commercial vessels, whale-watching opportunities but also scientific data that they would provide information on the whale, the sighting information, species identification if that's available and that's not always available depending on conditions. And so that information is provided to DFO, it goes into a database, that database is then checked twice annually for any errors that may be evident within the data, and then once it's cleaned, then it goes into the final database.

O. Okay.

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A. And it's -- I should add too that the data has a scoring as well. And so depending on the source of the information, so, something like a whale-watching operation which obviously has years of experience in identifying whales or marine mammal observers on commercial vessels would have specific training in whale identification, those data points get a higher sort of score of reliability.

If it's questionable about whether or not this is a North Atlantic Right Whale that is identified, then that just goes into general whale sighting. So we are more confident in the data when we are looking at species identification because we are only using the most reliable data for the sighting information.

Q. Okay. And Mr. Nash also asked you about the effects of the project, the projects at Whites Point and Black Point on the lobsters.

To prepare your statement, were you asked to assess the actual effects of the project or the relative abundance of lobster in the lobster fishery between the two sites?

A. I was asked to look at the relative lobster abundance between the two locations, Black Point Quarry and Whites Point

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Page 1151

Quarry.

(613) 564-2727

MR. KLAVER: Thank you.
PRESIDING ARBITRATOR: Thank you,
Mr. Klaver.

Any comment by Mr. Nash? You can also speak from where you are.

MR. NASH: I don't want to speak behind Mr. McLean's back.

THE WITNESS: You wouldn't be the

FURTHER CROSS-EXAMINATION BY MR. NASH:

MR. NASH: Were you instructed to pose only that question as between Whites Point and Black Point?

A. That's the question that was presented to me was the relative difference between those two locations.

MR. NASH: Right. Thank you.
PRESIDING ARBITRATOR: Thank you,
Mr. Nash.

QUESTIONS FROM THE ARBITRAL TRIBUNAL:

PRESIDING ARBITRATOR: I have two questions. And the first one, could you just -- the use of the term "unit efforts" wasn't clear to me. That was used in -- is like something the sightings

were measured by units efforts. What precisely does that mean?

THE WITNESS: So when you are collecting any data, you look at the unit effort that is used to collect the data so the number of, for example, vessels that would be in the area relative to the amount of sightings. So an area that had low vessel traffic if we were talking about marine mammal would have, if you came up with a number of one sighting, well, that's based on how many hours that vessel was in the area. The vessel was there longer, saw the same, then the more effort put in relative to the amount of species that you are finding.

The same would go with any type of sampling. So if you were laying out a net, if the net was out for three days, it is to compare the relative amount of information. So if you had two locations, you set a net for three days, you caught three fish and you went to another location and set it out for three weeks, the effort there is much higher. So you want to be able to relatively compare the two data sets based on the amount of effort you take in sampling.

PRESIDING ARBITRATOR: My second

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Page 1152 question as a personal background, I have a grandson who is becoming a scientist and studies marine biology in Australia. And he sent me a few draft papers and said, "Opa, could you just kind of review my English, et cetera?" And that brings me to the following question: What do you mean when you say that as a -- that you say that you assess reports or projects by scientists as a nonscientist. What do you do as a nonscientist when you assess -- let's say, documents, project research, results, et cetera by scientists? A. So, no, my job is to assess project proposals. I review primary literature so science publication literature or draft literature. I don't provide comments or feedback on primary research document by science. What I do is review project proposals by proponents for industry and provide comment and feedback on that.

Often I use publication literature or research data such as, like the unpublished data, like the whale distribution to evaluate potential impacts. But I'm not a, you know, a reviewer. I have reviewed literature document, like published literature documents as part of science reviews in the past and will provide feedback on that, but

those are the ones that I would have been involved in.

PRESIDING ARBITRATOR: I think, Professor, it has been for me quite a while since I left academia under these practical considerations, but a lot of what professors now do is assessing projects of others or projects of the, let's say, people under their, more or less -- in their institutions?

A. Yes.

PRESIDING ARBITRATOR: But I understood you as saying you are doing more than just assessing a project with regard to the duration of a project.

Is it reasonable for that project to be finished within two years? As you are doing more. You said you study primary research --

THE WITNESS: Research document.
PRESIDING ARBITRATOR: -- scientific

research?

THE WITNESS: Yes, that would apply to a project. So a good example would be we review oil and gas seismic surveys and these are -- seismic surveys would be using noise in the marine environment, determine oil and gas deposits. So you

Page 1154

have a vessel with air guns behind them. So we review a lot of the primary research literature on things like noise propagation, responses to marine mammals, those things, in order for us to have that knowledge to evaluate the potential impacts of those

So we are applying what would be scientific literature to a very specific project and using that as part of the evaluation, as well as working with those research scientists that have that direct knowledge through their primary research.

projects on species such as whales.

PRESIDING ARBITRATOR: And there is no problem, you don't see a problem in non-biologists, non-mineralogists, et cetera, engage -- studying primary, and then giving an assessment of what the experts, the real experts have said and done and proposed in their papers?

THE WITNESS: Well, I am a biologist so my undergraduate degree is in biology. I have my Masters in Environmental Studies. So the application of science and the review of projects. So I've spent close to eight years at university studying and doing this kind of work including areas in the Bay of Fundy. So my qualifications along

Page 1155

with close to 20 years of doing environmental impact assessments can apply that knowledge and so I feel comfortable in reviewing and I did this is a part of my undergraduate degree, reviewing and producing sort of internal papers, not for publication, but for evaluation.

And so my background, as well as my the background among my staff are well qualified to do evaluations and then we are just supported through either the primary literature, all the stuff that's documented or through our research scientists as to any specific questions as to the application of it.

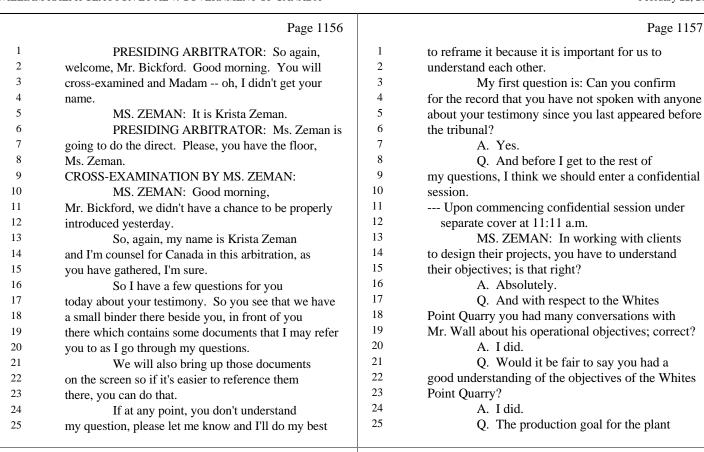
PRESIDING ARBITRATOR: Thank you. THE WITNESS: You're welcome. PRESIDING ARBITRATOR: No further questions. That brings to an end the cross-examination. Thanks for your cooperation -- your presence and cooperation.

I think we should, without further ado, ask for Mr. Bickford, correct?

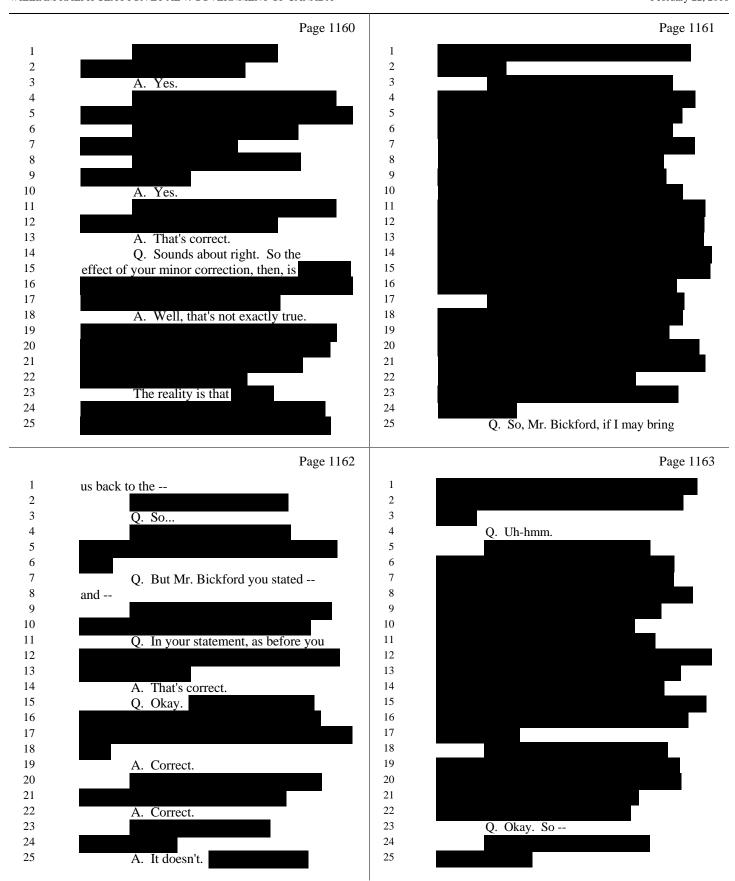
Welcome back, Mr. Bickford.

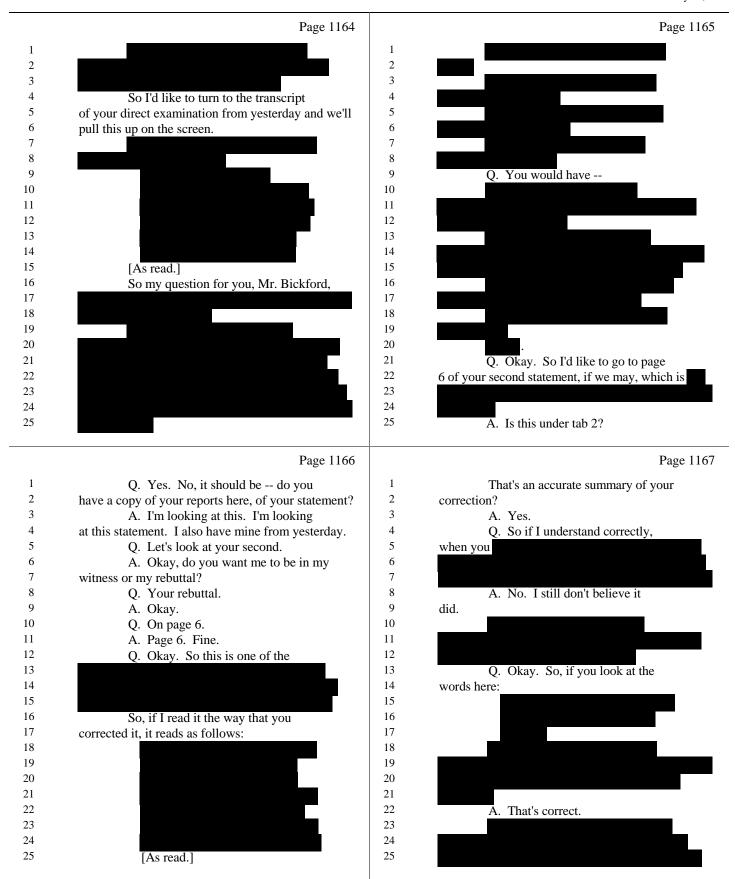
THE WITNESS: Now I can say "good morning."

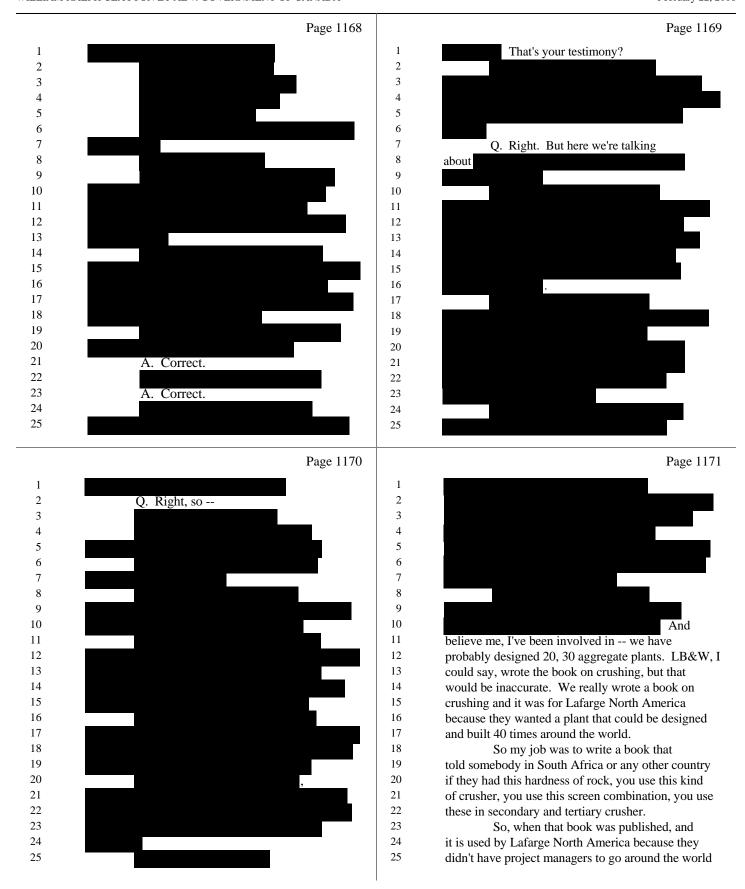
AFFIRMED: MR. GEORGE BICKFORD

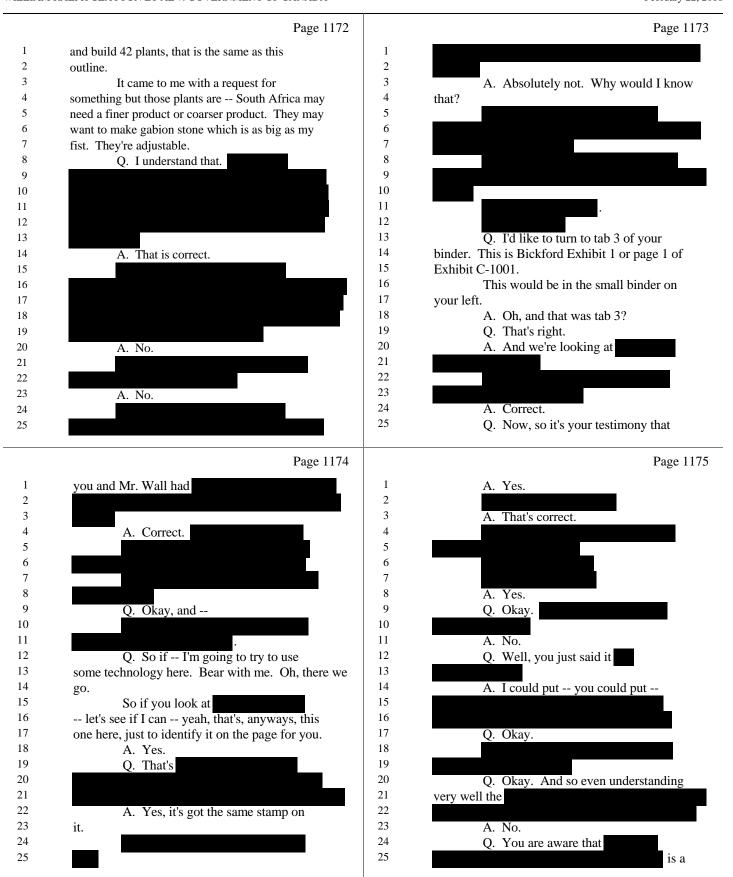


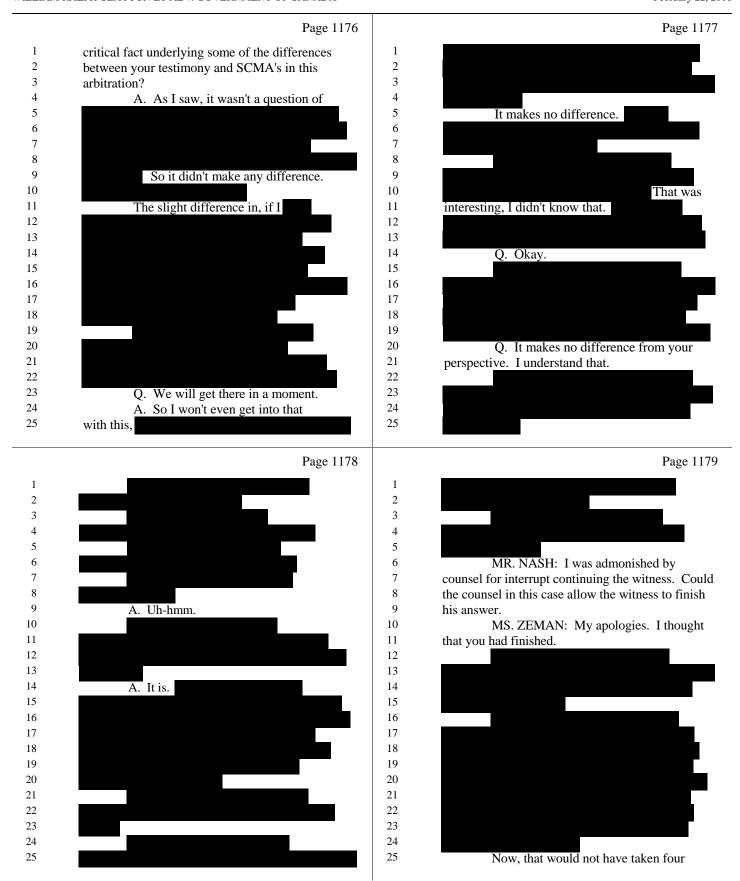
Page 1159 Page 1158 was approximately 2 million tons of aggregate per year; correct? A. That's correct. A. Correct. Q. So, I think we have you have a pretty good sense of A. That is correct. A. Correct. Q. And as you said yesterday, A. Correct. A. Correct. A. Correct. A. Correct. Q. Okay. So I'd like to talk about the corrections that you made yesterday to your witness statement which I think I you called "typos". In particular,

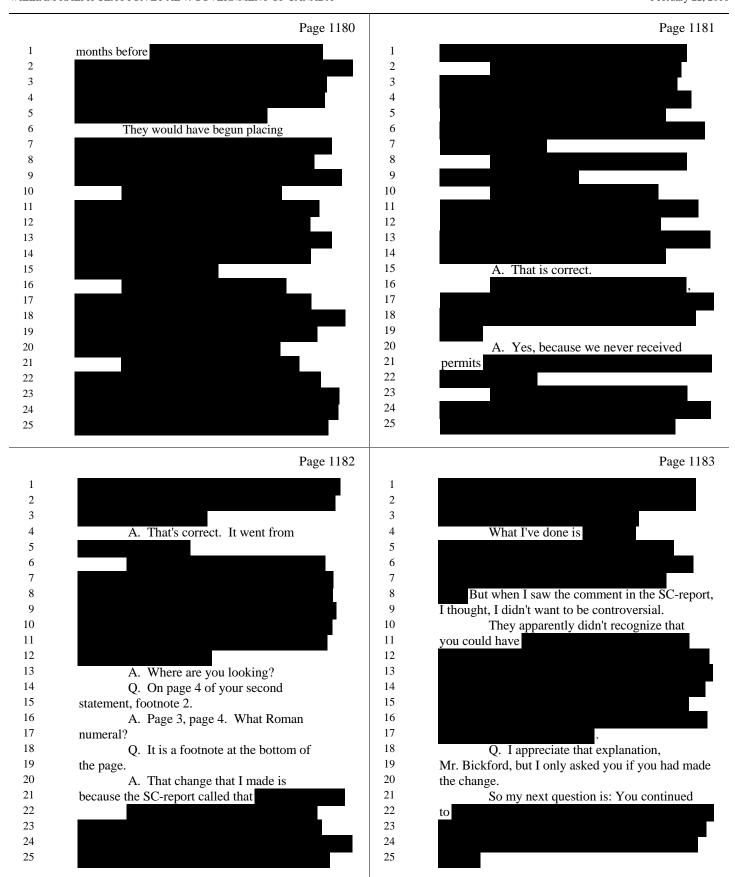


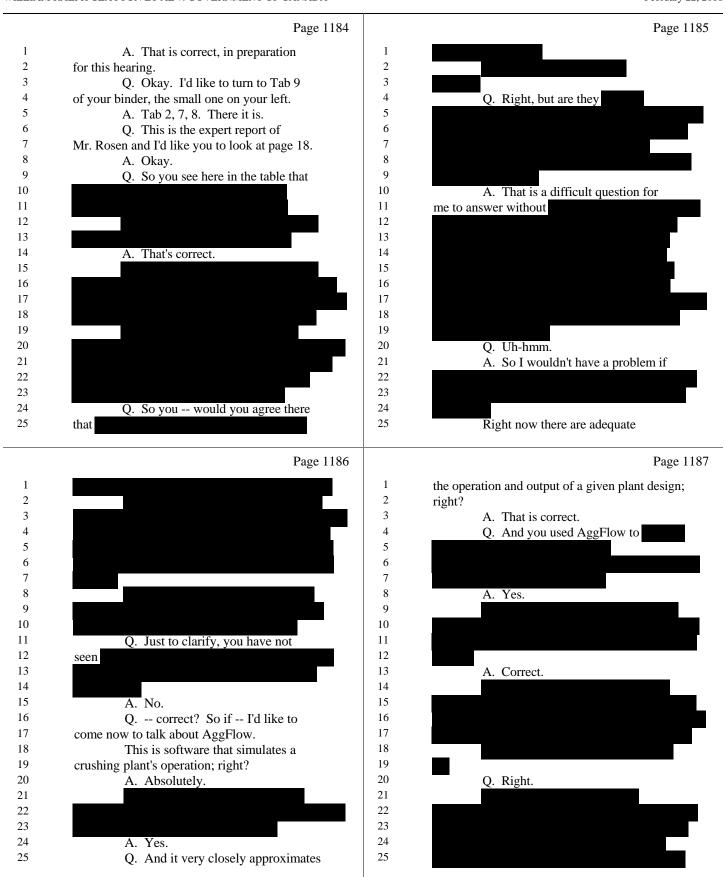


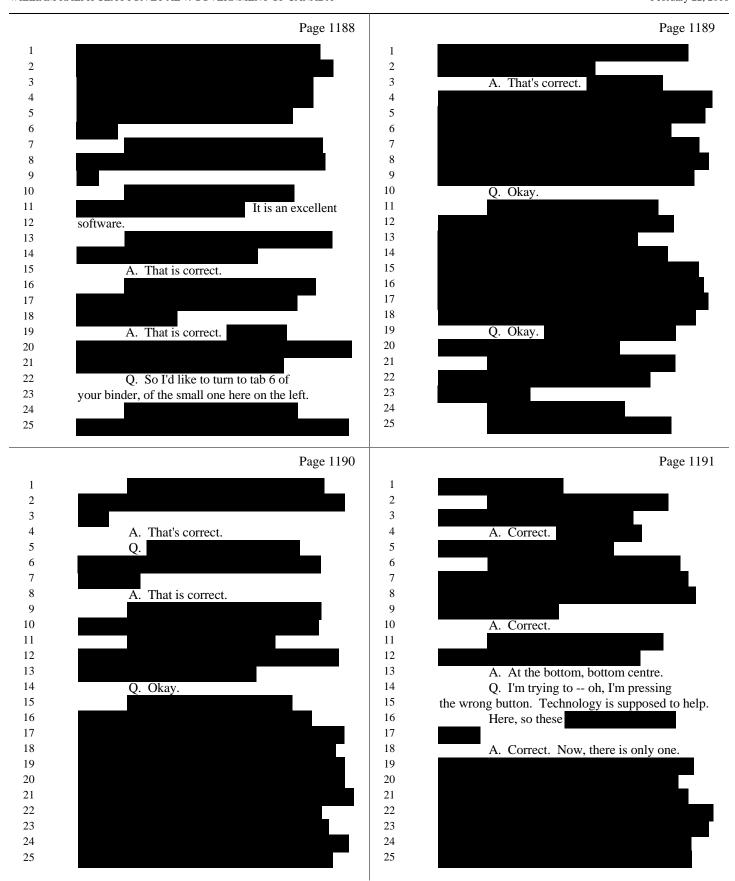


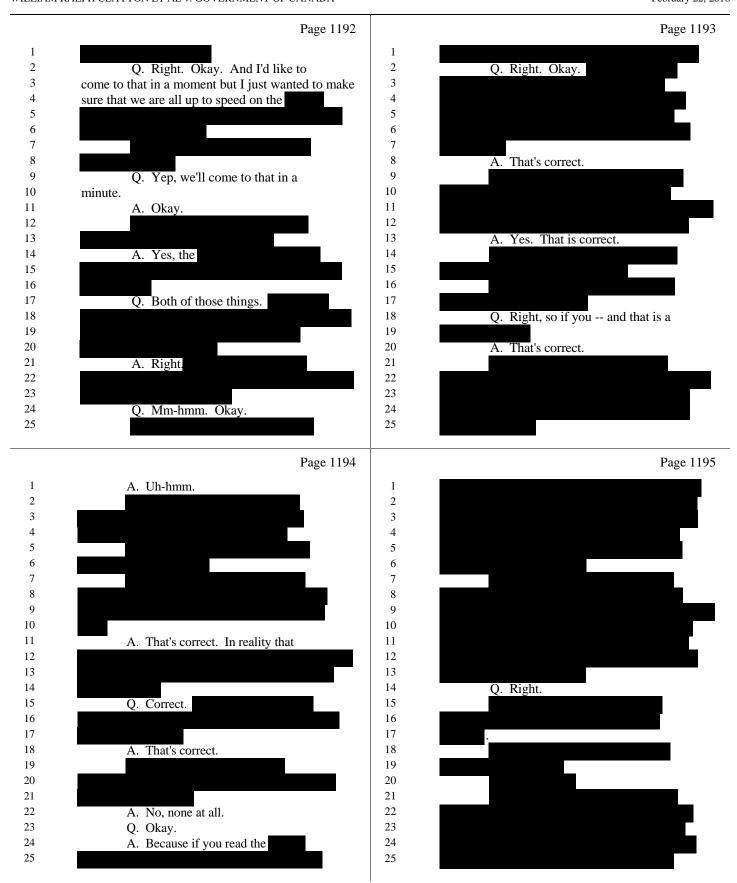




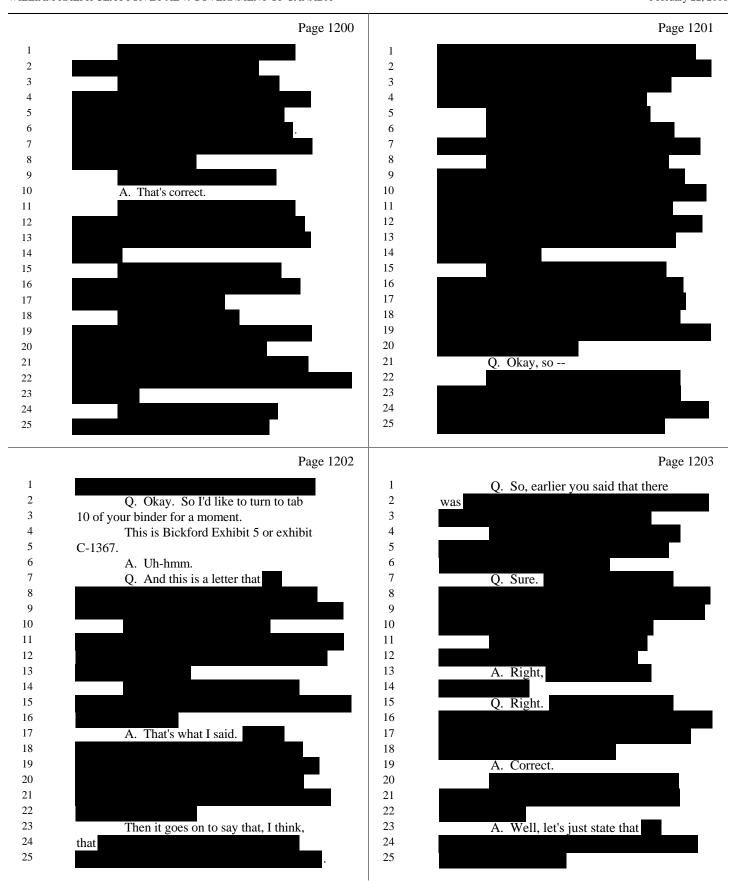




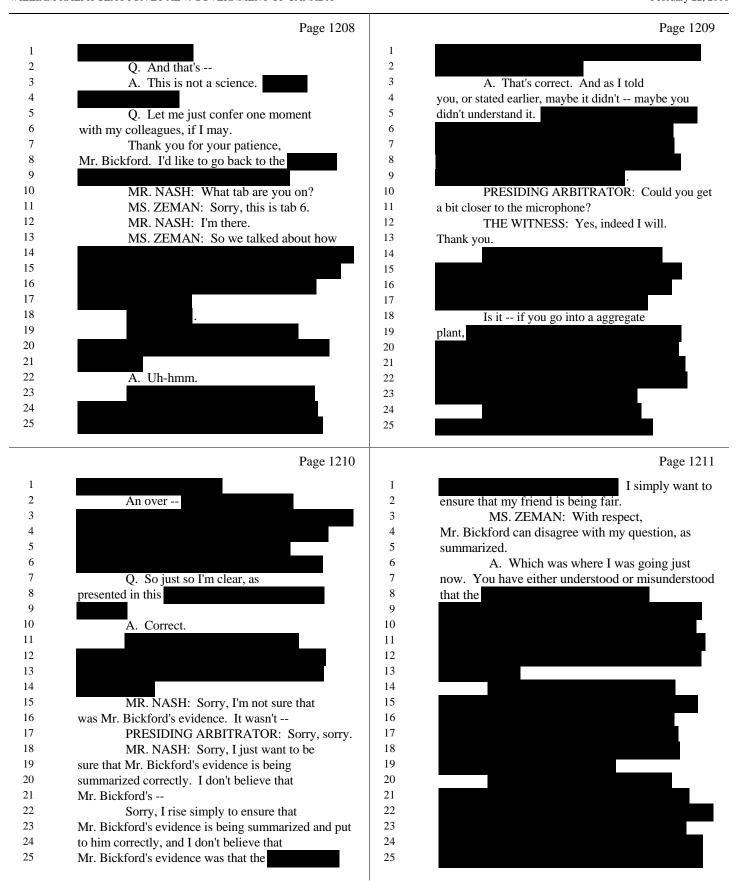


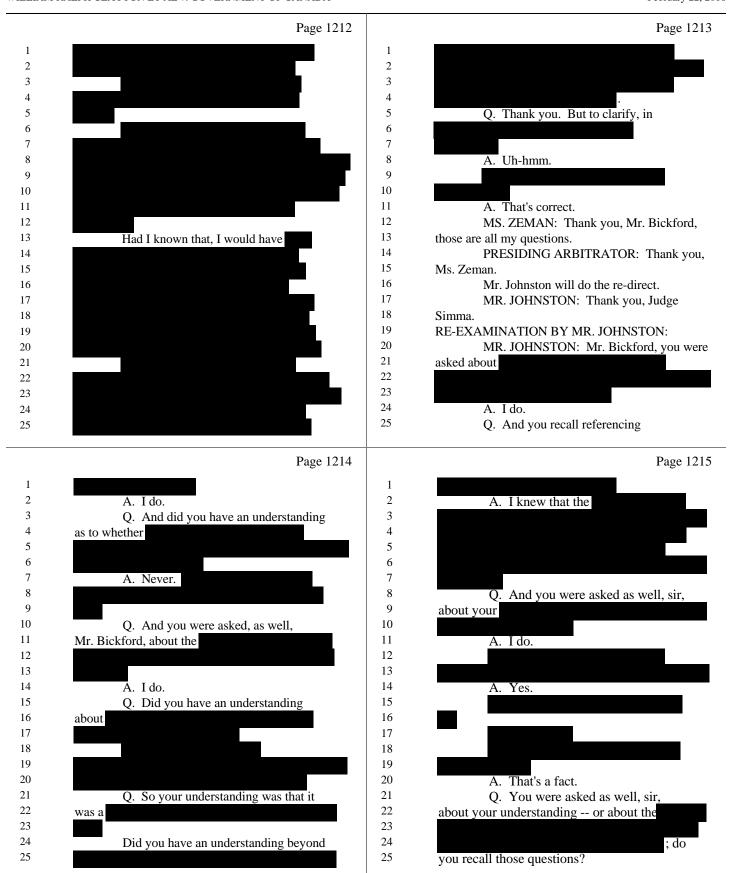


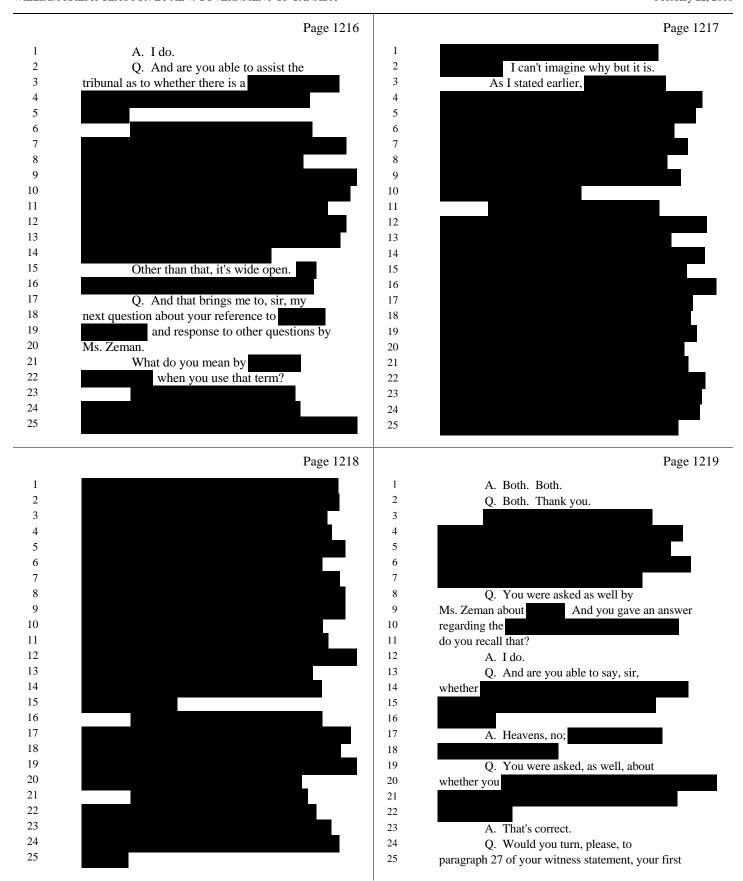


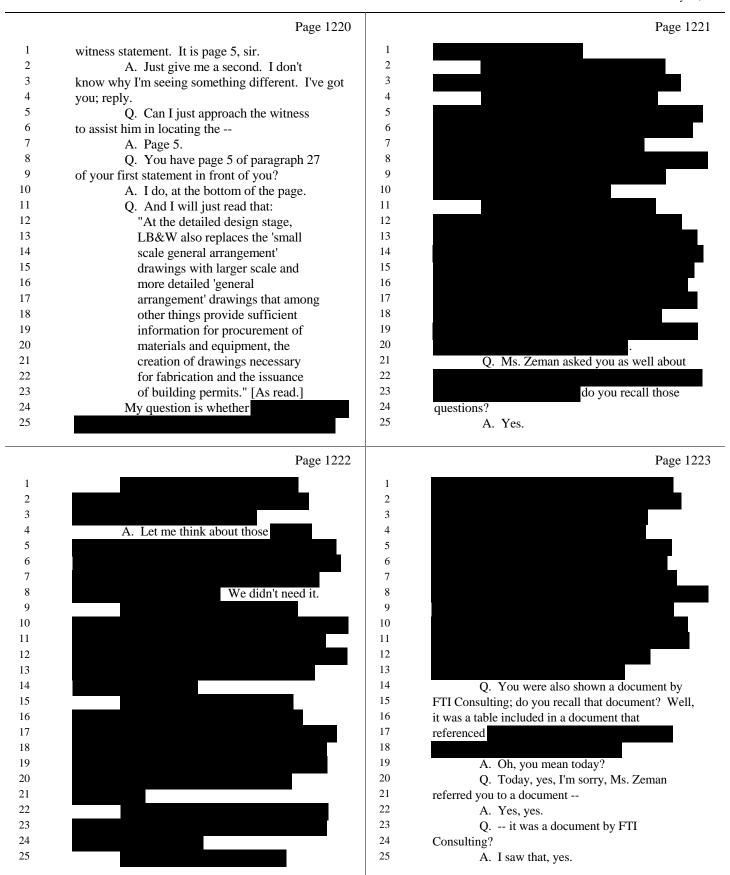


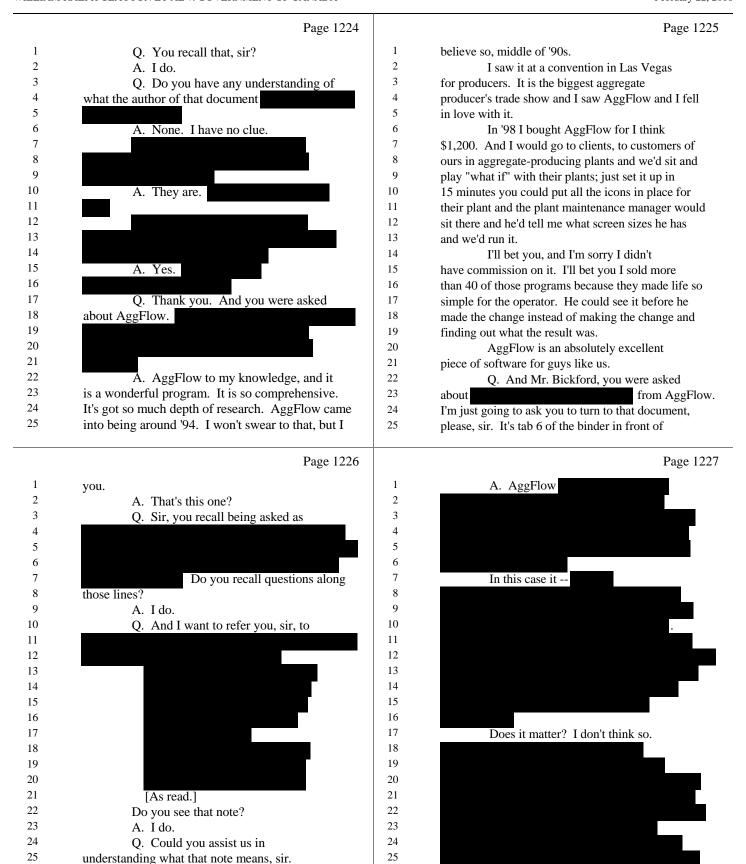


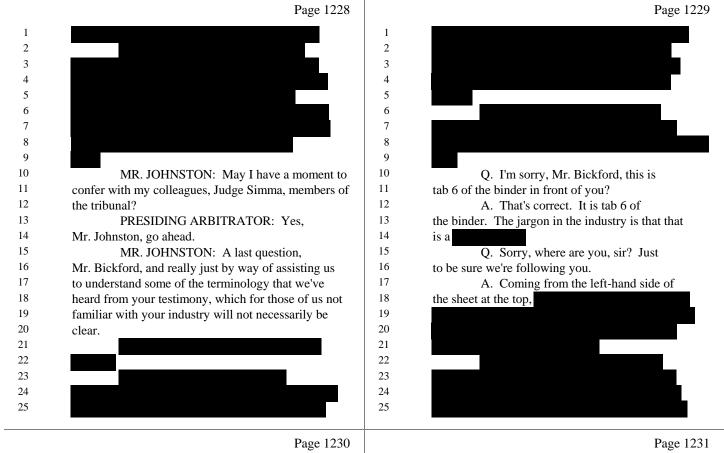


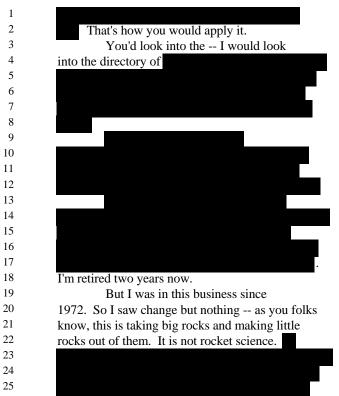












(613) 564-2727

MR. JOHNSTON: Thank you,
Mr. Bickford.
PRESIDING ARBITRATOR: Thank you,
Mr. Johnston. Any requests? No. No questions? N

Mr. Johnston. Any requests? No. No questions? No questions.

Then brings to an end your cross-examination. And I'd like to thank you in the name of both parties for your presence and all the expertise you have demonstrated and you are a free man now.

THE WITNESS: Thank you for your courtesy.

PRESIDING ARBITRATOR: Pleasure. And the question is, I think, we have 15 minutes. Probably makes no sense to call Mr. Buxton before the lunch break. So I think we are going to have our lunch break now which means a quarter to one to a quarter to -- to 2:00.

Yes, actually. So we are going to resume at 2:00 o'clock.

- --- Lunch recess taken at 12:46 a.m.
- --- Upon resuming at 2:04 p.m.
- --- Public transcript begins at 2:04 p.m.

PRESIDING ARBITRATOR: I think we are

	Page 1232		Page 1233
1	all set. Welcome, Mr. Buxton.	1	Q. You were a professional engineer
2	THE WITNESS: Thank you.	2	and had been for almost forty years in 2013?
3	PRESIDING ARBITRATOR: Good to see	3	A. Pretty close.
4	you again.	4	Q. You remain a professional
5	Would you please read out the	5	engineer?
6	statement that you have in front of you?	6	A. I do, yes.
7	MR. BUXTON: I solemnly declare on my	7	Q. And you remain working actively
8	honour and conscience that I will speak the truth,	8	as a professional engineer in Nova Scotia?
9	the whole truth and nothing but the truth.	9	A. Yes, I am.
10	PRESIDING ARBITRATOR: Thank you very	10	Q. And you signed two witness
11	much. I give the floor to Mr. Nash for direct.	11	statements in the damages phase. One was
12	AFFIRMED: MR. PAUL BUXTON	12	December 13th, 2016?
13	EXAMINATION-IN-CHIEF BY MR. NASH:	13	A. Yes, that is correct.
14	MR. NASH: Mr. Buxton, you appeared	14	Q. And the other, the second was on
15	before the tribunal in the merits phase back in	15	August 18th, 2017?
16	October of 2013?	16	A. That is correct.
17	A. Yes.	17	MR. NASH: Those are my questions.
18	Q. And just to refresh everyone's	18	PRESIDING ARBITRATOR: The floor is
19	memory, you were the project manager throughout the	19	to Ms. Kam for cross-examination.
20	development environmental assessment phase of the	20	CROSS-EXAMINATION BY MS KAM:
21	development of Whites Point?	21	MS. KAM: Good afternoon, Mr. Buxton.
22	A. That is correct.	22	A. Good afternoon.
23	Q. And you worked with John Wall on	23	Q. As a witness in this arbitration,
24	the Whites Point Project throughout?	24	you are aware of your obligation not to talk to
25	A. Yes, I did.	25	anyone about the evidence that has been provided in
	D 1001		
	Page 1234		Page 1235
1		1	_
1 2	this hearing that has been provided to date?	1 2	in the damages phase.
	this hearing that has been provided to date? A. I am. I remember it from the		in the damages phase. Just for reference, this part of your
2	this hearing that has been provided to date? A. I am. I remember it from the first day. Thank you.	2	in the damages phase. Just for reference, this part of your witness statement is titled "Environmental Impact
2 3	this hearing that has been provided to date? A. I am. I remember it from the first day. Thank you. Q. Could I get to you confirm that	2 3	in the damages phase. Just for reference, this part of your witness statement is titled "Environmental Impact Statement", and I will just be referring to the
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	this hearing that has been provided to date? A. I am. I remember it from the first day. Thank you. Q. Could I get to you confirm that you have not spoken to anyone about the arguments or the testimony and the hearing prior to your testimony? A. I can confirm that. Q. You just stated that you were the project manager for the Whites Point Project? A. Yes. Q. And the Whites Point Project was the first time that you acted as a project manager for a Quarry and Marine terminal project? A. That is correct. Q. And was it the first time that you were involved in a project that underwent a review panel environmental assessment? A. That was the first time, yes. Q. Have you been involved in any environmental assessments that have undergone a review panel assessment since?	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	in the damages phase. Just for reference, this part of your witness statement is titled "Environmental Impact Statement", and I will just be referring to the Environmental Impact Statement as the EIS. A. Yes. I wonder if you'd mind turning your microphone up or speaking louder. I'm afraid my hearing is not as good as it used to be. Q. Let me know if you can't hear me and I'll do my best to speak louder. A. Thank you. Q. And as a project manager for the Whites Point Project, you were responsible for preparing Bilcon's EIS? A. Yes, I was, yes. Q. And so you were also responsible for drafting the EIS? A. Yes, I was. Q. And you were also responsible for commissioning studies for the EIS? A. Yes. Q. Okay. And in paragraph 20 of
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	this hearing that has been provided to date? A. I am. I remember it from the first day. Thank you. Q. Could I get to you confirm that you have not spoken to anyone about the arguments or the testimony and the hearing prior to your testimony? A. I can confirm that. Q. You just stated that you were the project manager for the Whites Point Project? A. Yes. Q. And the Whites Point Project was the first time that you acted as a project manager for a Quarry and Marine terminal project? A. That is correct. Q. And was it the first time that you were involved in a project that underwent a review panel environmental assessment? A. That was the first time, yes. Q. Have you been involved in any environmental assessments that have undergone a review panel assessment since? A. No, I have not.	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	in the damages phase. Just for reference, this part of your witness statement is titled "Environmental Impact Statement", and I will just be referring to the Environmental Impact Statement as the EIS. A. Yes. I wonder if you'd mind turning your microphone up or speaking louder. I'm afraid my hearing is not as good as it used to be. Q. Let me know if you can't hear me and I'll do my best to speak louder. A. Thank you. Q. And as a project manager for the Whites Point Project, you were responsible for preparing Bilcon's EIS? A. Yes, I was, yes. Q. And so you were also responsible for drafting the EIS? A. Yes, I was. Q. And you were also responsible for commissioning studies for the EIS? A. Yes. Q. Okay. And in paragraph 20 of your witness statement, you describe the EIS as a
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	this hearing that has been provided to date? A. I am. I remember it from the first day. Thank you. Q. Could I get to you confirm that you have not spoken to anyone about the arguments or the testimony and the hearing prior to your testimony? A. I can confirm that. Q. You just stated that you were the project manager for the Whites Point Project? A. Yes. Q. And the Whites Point Project was the first time that you acted as a project manager for a Quarry and Marine terminal project? A. That is correct. Q. And was it the first time that you were involved in a project that underwent a review panel environmental assessment? A. That was the first time, yes. Q. Have you been involved in any environmental assessments that have undergone a review panel assessment since?	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	in the damages phase. Just for reference, this part of your witness statement is titled "Environmental Impact Statement", and I will just be referring to the Environmental Impact Statement as the EIS. A. Yes. I wonder if you'd mind turning your microphone up or speaking louder. I'm afraid my hearing is not as good as it used to be. Q. Let me know if you can't hear me and I'll do my best to speak louder. A. Thank you. Q. And as a project manager for the Whites Point Project, you were responsible for preparing Bilcon's EIS? A. Yes, I was, yes. Q. And so you were also responsible for drafting the EIS? A. Yes, I was. Q. And you were also responsible for commissioning studies for the EIS? A. Yes. Q. Okay. And in paragraph 20 of

	Page 1236		Page 1237
1	A. That is correct, yes.	1	the second paragraph, it states that:
2	Q. Let's turn now to tab 3 which is	2	"Bilcon of Nova Scotia
3	an excerpt of Exhibit R-580, so tab 3 of the binder	3	Corporation is a private
4	in front of you.	4	family-owned business."
5	A. I'm sorry, this binder?	5	Do you see that?
6	Q. This binder. Yes. It's volume 7	6	A. Yes, I do, yes.
7	of the EIS. It's just an excerpt so if you flip the	7	Q. Could you please read out the
8	page, you'll get to page 10 of the document. Under	8	rest of the paragraph for the record?
9	the heading "Section 1004", it states that:	9	A. (Reading):
10	"The Whites Point Project was	10	"Its parent company, Clayton
11	designed to supply Bilcon's	11	Concrete Block and Sand,
12	parent company Clayton Concrete	12	manufactures concrete products in
13	Block and Sand with washed	13	New Jersey, USA. Bilcon needs a
14	aggregates to be used in the	14	source of raw aggregate materials
15	current concrete and block	15	that is not subject to market
16	operations in New Jersey." [As	16	fluctuations or market
17	read.]	17	disruptions. The development of
18	Correct?	18	the Whites Point Quarry could
19	A. Yes. Yes, it does say that, yes.	19	satisfy this need for the next 50
20	Q. So the plan was to supply Clayton	20	years. Thus, the fundamental
21	Concrete Block and Sand with washed aggregates for	21	rationale for development of this
22	their operations in New Jersey; is that correct?	22	quarry is to supply a stable
23	A. Yes.	23	fixed market with the raw
24	Q. Let's turn now to page 7 of the	24	material necessary for the their
25	document at tab 1 of the binder which starting in	25	manufacturing processes. The
	Page 1238		Page 1239
1	importance of achieving market	1	understood from the beginning, and let me just sort
2	stability cannot overstated.	2	of back up a little bit and say that when this
3	Clayton Concrete Block and Sand	3	project was undertaken and we're going back now
4	presently purchase aggregate on	4	to April 2002, when the original 3.9-hectare quarry
5	the open market. In order to	5	was to be expanded my job at that time was to
6	ensure a dependable uninterrupted	6	carry out whatever environmental assessment
7	supply not subject to	7	processes were required. At that time we were not
8	inconsistencies, Clayton Concrete	8	in a joint panel review, but I knew that we would
9	Block and Sand, through Bilcon,	9	trigger, at the very least, a comprehensive study.
10	intends to develop and control	10	So, my job is to assemble the
11	their own supply of aggregate	11	information to enable us to get into that
12	exclusively for Clayton Concrete	12	environmental assessment process. I did not need to
13	Block and Sand.	13	know all the details. I needed to know the
14	In essence, this stability of a	14	fundamentals, the basics. What are we going to do?
15	guaranteed market eliminates the	15	We're going to crush aggregate, we're going to ship
16	instability of the competitive	16	aggregate. So I need to know some fundamental
17	marketplace which has contributed	17	things, what size in general terms is the ship going
18	to the demise of other mining	18	to be. It could have been a barge at that stage for
19	ventures in Nova Scotia." [As	19	all I knew. So we had to work through this process
20	read.]	20	of defining what it was we were actually going to
21	Q. Thank you, Mr. Buxton. And does	21	do, what our footprint was so that we could conduct
22	this paragraph represent or reflect your	22	a complete environmental assessment process.
23	understanding of the rationale for the Whites Point	23	So, my job then was to seek that
24	Duning 40	24	information and move forward with it. I was not
25	Project? A. In general terms, yes. I	25	interested at that stage in the details, all the

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details of a crushing plant or anything else. I needed to know, in general terms, the size of the ship. Can we bring the -- can we bring a ship in here? What size ship can we bring in here at reasonable cost?

So those were the sorts of things that I needed to know. I did not really need to know precisely where the ship was going except, in general terms, the depth of the port to which it was going; in other words, is it going into port that can support 20,000 tons or 40,000 tons, 45,000 tons, simply in general terms, so that we could then coordinate the activities of the shipping to the arrival of the ship in the port.

So those were the sorts of questions that I was asking at that time. And did I need to know everything about the Clayton operation? No, I didn't.

Q. Okay. Mr. Buxton, thank you for the explanation. My question was just if this paragraph reflected your understanding of the project. We'll get into the other details in the EIS shortly but I just -- if you could stick to answering my questions. Our time is, unfortunately, limited.

A. Well, I was trying to answer your question. At the time that this was written -- and let me, perhaps, explain a little bit to you. This is from the project description. The project description was first drafted, I would say the first elements of it were set down in December 2002, okay?

Q. Okay.

A. 2006 is when it was presented as a document to a Joint Review Panel but we knew that -- I knew that I would need to indicate to the regulatory authorities, federal and provincial, first question they are going to ask is: "What are you going to do? What is this thing? How big is the quarry in general terms? Are you going to ship, marine terminal," et cetera, et cetera.

O. Mr. Buxton, we don't need to know all the steps.

A. Let me finish, let me please finish. Excuse me, I'm trying to explain. We're into a process here.

MR. SCOTT LITTLE: Judge Simma, Judge Simma, if I may, I can go back and read the question that Ms. Kam asked.

THE WITNESS: I understand the question.

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MR. SCOTT LITTLE: And the explanation that Mr. Buxton is providing has nothing to do with that question.

PRESIDING ARBITRATOR: I think we all remember the question. And, Mr. Buxton, I'm sorry, I think you should really keep to answering the question in a succinct way and maybe in the further course of the examination, you will have a chance to deal with the points.

THE WITNESS: Fair enough, fair enough.

MR. NASH: If I may just say so, Judge Simma, the question was a very broad question. It was: Was that your understanding of the project? And Mr. Buxton is giving his answer to that very broad question, what was his understanding of the project.

MR. SCOTT LITTLE: If I may clarify, the question was: Was that your understanding of the rationale for the project, not "the project", and Mr. Buxton provided a far broader response than needed to be provided to that.

PRESIDING ARBITRATOR: I think it's not worth going into a fight about over that. Mr. Buxton, I think you've got the

idea.

THE WITNESS: Yes, yes, I wrote it Mr. President, so, yes.

PRESIDING ARBITRATOR: Please. Okay. Thank you.

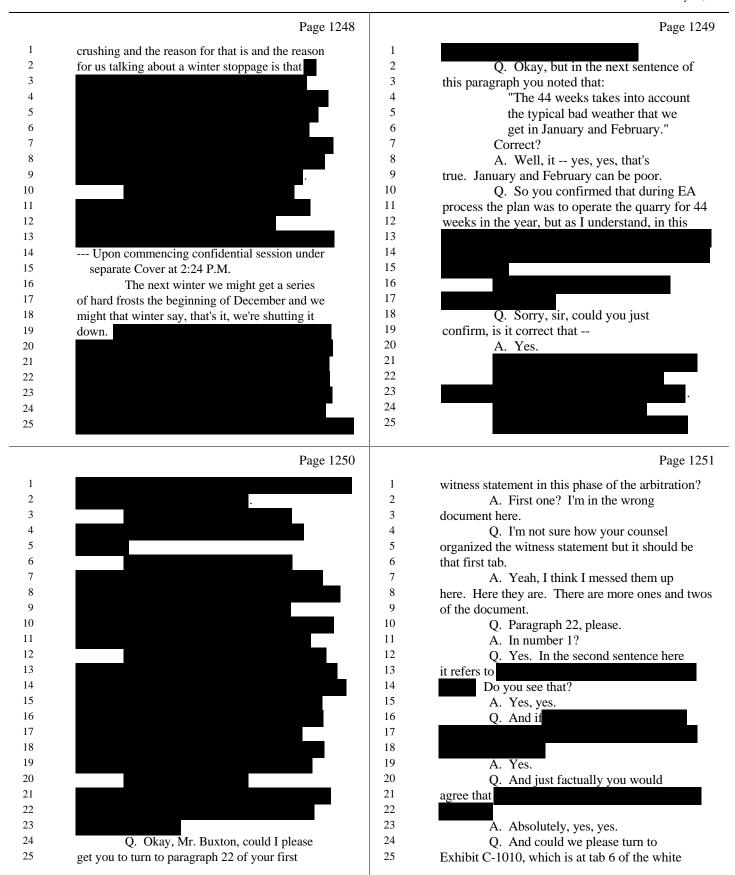
BY MS. KAM:

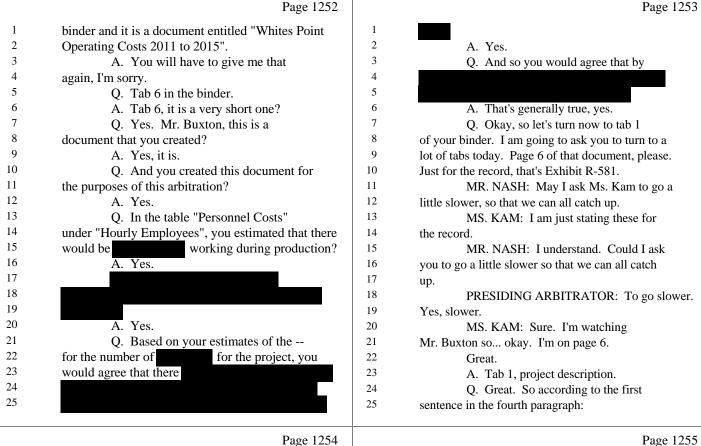
O. Thank you. Well, Mr. Buxton, our time is just limited, so thank you.

In terms of this statement, I'm going to suggest to you that you are informed that the aggregate from the project was to be shipped exclusively for captive production for the Clayton Concrete Block and Sand companies, based on the statement that: "Bilcon intends to develop and control their own supply of aggregate exclusively for Clayton Concrete Block and Sand"?



	Page 1244		Page 1245
1		1	we needed to deal with the issue invasive species,
2		2	yes.
3		3	Q. And you would agree that where a
4	Q. And according to the second	4	ship is coming from would be an important factor in
5	sentence in the paragraph, you understood Clayton	5	the risk assessment for invasive species?
6	Concrete Block and Sand to be located in New Jersey;	6	A. Coming from or going to?
7	correct?	7	Presumably, you mean where it's picking up ballast
8	A. Yes.	8	water.
9	Q. Okay. Could you please turn now	9	Q. Picking up ballast water?
10	to tab 4 of your binder, which is Exhibit C-392.	10	A. Yes, yes, of course.
11	This is a study that was prepared for	11	Q. Could you please read the title
12	Global Quarry Products; correct?	12	of the study out for the record?
13	A. Yes, yes.	13	A. "A preliminary assessment of the
14	Q. And as project manager, did you	14	risks of introducing nonindigenous phytoplankton,
15	commission this study?	15	zooplankton species or pathogens/parasites from
16	A. Yes.	16	South Amboy, New Jersey, Raritan Bay, into Whites
17	Q. And the purpose of this study was	17	Point, Digby Neck, Nova Scotia."
18	to conduct a risk assessment of invasive species	18	Q. Thank you, Mr. Buxton. So based
19	from ships loading at the Whites Point Project site?	19	on your understanding that the aggregate would be
20	A. Yes, yes.	20	shipped to New Jersey, you specifically commissioned
21	Q. And the issue of invasive species	21	the study that identified South Amboy, New Jersey as
22	was relevant to the environmental assessment of the	22	a point at which the ballast water would be taken on
23	project, was it not?	23	for this project?
24	A. It certainly it certainly came	24	A. Yes, Raritan Bay, in general
25	up as a question. We expected it as a question so	25	terms, yes.
	Dage 1246		Page 1247
1	Page 1246	1	Page 1247
1	Q. And this was the only study that	1	is at tab 5 of your binder and that's at volume 1 of
2	you commissioned for the study of invasive species	2	the hearing transcript.
3	for the	3 4	A. All right, I'm in tab 5.
4 5	A. Yes.	5	Q. Great. Could you please turn to
6	Q environmental assessment.	6	page 54 of the transcript.
7	I'll just ask if you could let me finish the	7	You would agree that page 54 refers
8	question so our court reporter can keep track of all	8	to your testimony at the Whites Point hearing. If
9	of us in her transcript.	9	you look at the top right-hand corner of the page, it says "Paul Buxton"?
10	Now, I'd like to turn to tab 1 of your binder which is the revised project	1	it says Faul Buxton?
11		10	A Voc Voc
12	•	10	A. Yes. Yes.
	description, Exhibit R-581, and if you could please	11	Q. And starting at line 8 of this
	description, Exhibit R-581, and if you could please turn to page 40 of that document. Are you there?	11 12	Q. And starting at line 8 of this page, you state that:
13	description, Exhibit R-581, and if you could please turn to page 40 of that document. Are you there? A. I'm on page 40. "Description",	11 12 13	Q. And starting at line 8 of this page, you state that: "The quarrying and ship-loading,
13 14	description, Exhibit R-581, and if you could please turn to page 40 of that document. Are you there? A. I'm on page 40. "Description", yes.	11 12 13 14	Q. And starting at line 8 of this page, you state that: "The quarrying and ship-loading, we anticipate that will continue
13 14 15	description, Exhibit R-581, and if you could please turn to page 40 of that document. Are you there? A. I'm on page 40. "Description", yes. Q. According to the second sentence	11 12 13 14 15	Q. And starting at line 8 of this page, you state that: "The quarrying and ship-loading, we anticipate that will continue for 44 weeks of the year."
13 14 15 16	description, Exhibit R-581, and if you could please turn to page 40 of that document. Are you there? A. I'm on page 40. "Description", yes. Q. According to the second sentence in the last paragraph on this page:	11 12 13 14 15 16	Q. And starting at line 8 of this page, you state that: "The quarrying and ship-loading, we anticipate that will continue for 44 weeks of the year." Do you see that?
13 14 15 16 17	description, Exhibit R-581, and if you could please turn to page 40 of that document. Are you there? A. I'm on page 40. "Description", yes. Q. According to the second sentence in the last paragraph on this page: "Bilcon's proposal during the EA	11 12 13 14 15 16 17	Q. And starting at line 8 of this page, you state that: "The quarrying and ship-loading, we anticipate that will continue for 44 weeks of the year." Do you see that? A. Yes.
13 14 15 16 17 18	description, Exhibit R-581, and if you could please turn to page 40 of that document. Are you there? A. I'm on page 40. "Description", yes. Q. According to the second sentence in the last paragraph on this page: "Bilcon's proposal during the EA process is that the quarry	11 12 13 14 15 16 17 18	Q. And starting at line 8 of this page, you state that: "The quarrying and ship-loading, we anticipate that will continue for 44 weeks of the year." Do you see that? A. Yes. Q. So Bilcon's proposal during the
13 14 15 16 17 18	description, Exhibit R-581, and if you could please turn to page 40 of that document. Are you there? A. I'm on page 40. "Description", yes. Q. According to the second sentence in the last paragraph on this page: "Bilcon's proposal during the EA process is that the quarry operate for approximately 44	11 12 13 14 15 16 17 18 19	Q. And starting at line 8 of this page, you state that: "The quarrying and ship-loading, we anticipate that will continue for 44 weeks of the year." Do you see that? A. Yes. Q. So Bilcon's proposal during the environmental assessment process was that the quarry
13 14 15 16 17 18 19 20	description, Exhibit R-581, and if you could please turn to page 40 of that document. Are you there? A. I'm on page 40. "Description", yes. Q. According to the second sentence in the last paragraph on this page: "Bilcon's proposal during the EA process is that the quarry operate for approximately 44 weeks of the year with an 8-week	11 12 13 14 15 16 17 18 19 20	Q. And starting at line 8 of this page, you state that: "The quarrying and ship-loading, we anticipate that will continue for 44 weeks of the year." Do you see that? A. Yes. Q. So Bilcon's proposal during the environmental assessment process was that the quarry would operate for 44 weeks of the year and that
13 14 15 16 17 18 19 20 21	description, Exhibit R-581, and if you could please turn to page 40 of that document. Are you there? A. I'm on page 40. "Description", yes. Q. According to the second sentence in the last paragraph on this page: "Bilcon's proposal during the EA process is that the quarry operate for approximately 44 weeks of the year with an 8-week maintenance period during the	11 12 13 14 15 16 17 18 19 20 21	Q. And starting at line 8 of this page, you state that: "The quarrying and ship-loading, we anticipate that will continue for 44 weeks of the year." Do you see that? A. Yes. Q. So Bilcon's proposal during the environmental assessment process was that the quarry would operate for 44 weeks of the year and that included both quarrying and ship-loading; correct?
13 14 15 16 17 18 19 20	description, Exhibit R-581, and if you could please turn to page 40 of that document. Are you there? A. I'm on page 40. "Description", yes. Q. According to the second sentence in the last paragraph on this page: "Bilcon's proposal during the EA process is that the quarry operate for approximately 44 weeks of the year with an 8-week maintenance period during the winter months." [As read.]	11 12 13 14 15 16 17 18 19 20 21 22	Q. And starting at line 8 of this page, you state that: "The quarrying and ship-loading, we anticipate that will continue for 44 weeks of the year." Do you see that? A. Yes. Q. So Bilcon's proposal during the environmental assessment process was that the quarry would operate for 44 weeks of the year and that included both quarrying and ship-loading; correct? A. Not necessarily, although it does
13 14 15 16 17 18 19 20 21 22	description, Exhibit R-581, and if you could please turn to page 40 of that document. Are you there? A. I'm on page 40. "Description", yes. Q. According to the second sentence in the last paragraph on this page: "Bilcon's proposal during the EA process is that the quarry operate for approximately 44 weeks of the year with an 8-week maintenance period during the	11 12 13 14 15 16 17 18 19 20 21	Q. And starting at line 8 of this page, you state that: "The quarrying and ship-loading, we anticipate that will continue for 44 weeks of the year." Do you see that? A. Yes. Q. So Bilcon's proposal during the environmental assessment process was that the quarry would operate for 44 weeks of the year and that included both quarrying and ship-loading; correct?





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1 "Bilcon proposed during the EA 2 process that project activities 3 would include ship-loading of 4 approximately 40,000 tons of 5 aggregate weekly." [As read.] 6 A. Yes. 7 Q. Is that still your position now? 8 9 10 11 12 13 14 15 16 17 18 19 Q. Do you know what your position 20 now is in terms of the amount of tons of aggregate 21 that would be produced weekly for this project? 22 23 24 25

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On the other aspect of this, we have the marine terminal. My experience over the years is that people change their minds over time when the project is being developed. Their initial concept changes, and I wanted to make absolutely sure that we, in fact, provided a facility that would be practical and would not run into technical problems of size deficiency. So, for example, you will see in the EIS I talked about a Panamax-size vessel.

Q. Sorry, Mr. Buxton, if you could just limit --

A. This is important if you want to know the answer.

Q. I just wanted to know what your current estimate of the number of tons of aggregate that would be produced weekly would be now. I -just a number figure. I don't really -- I'm not asking about how you derived that figure.

	Page 1256		Page 1257
1	Q. Okay. Okay. Thank you. Well,	1	That question is not properly stating what the
2	let's look up now at the second paragraph on this	2	document says. Can you read the statement from the
3	page.	3	document please?
4	A. Still on page 6?	4	MS. KAM: So the document states, if
5	Q. Yes.	5	you need a quote:
6	A. Yes.	6	"The Whites Point Quarry is a
7	Q. Here it states that annual	7	small, basalt rock quarry
8	production of aggregate product is estimated to be	8	designed to produce 40,000 tons
9	2 million tons?	9	of aggregate per week and
10	A. Yes.	10	approximately 2 million tons per
11	Q. If you turn to page 24 of this	11	year over a 50-year project
12	document, it states here, under the first paragraph,	12	life." [As read.]
13	that:	13	Is that correct?
14	"The Whites Point Quarry was	14	A. Yes, yes.
15	designed to produce an	15	Q. So you would agree that Bilcon's
16	approximately 2 million tons per	16	position in its submission was that it expected to
17	year over a 50-year project	17	produce 2 million tons per year over the 50-year
18	life." [As read.]	18	life of the project?
19	A. Yes.	19	MR. NASH: Well, she's left out a
20	Q. Do you see that? So you would	20	word.
21	agree that Bilcon consistently represented in its	21	MR. SPELLISCY: He can answer the
22	submissions to the government and to the EA process	22	question. I believe we've had this discussion
23	that it expected to produce 2 million tons per year	23	already, Mr. Nash.
24	over the 50-year life of the project?	24	MR. NASH: The word that is in the
25	MR. NASH: I object to that question.	25	document
	Page 1258		Page 1259
1	PRESIDING ARBITRATOR: Wait a minute,	1	She read the text of the document word for word and

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then she asked Mr. Buxton the question.

If we are going to have counsel coaching witnesses on how to respond, it's going to be a problem.

PRESIDING ARBITRATOR: I think both sides have made their point and I think we will continue the examination, keeping in mind the precision with which these things have to be handled.

Ms. Kam, please continue.

MS. KAM: Mr. Buxton, I will just repeat my question to you. So Bilcon consistently represented in its submissions that it expected to produce 2 million tons per year over the 50-year life of the project?

A. Actually, I would have to disagree with that,

wait a minute. So as I understood it, Ms. Kam repeated what the substance of the first sentence in her own words.

MS. KAM: I did.

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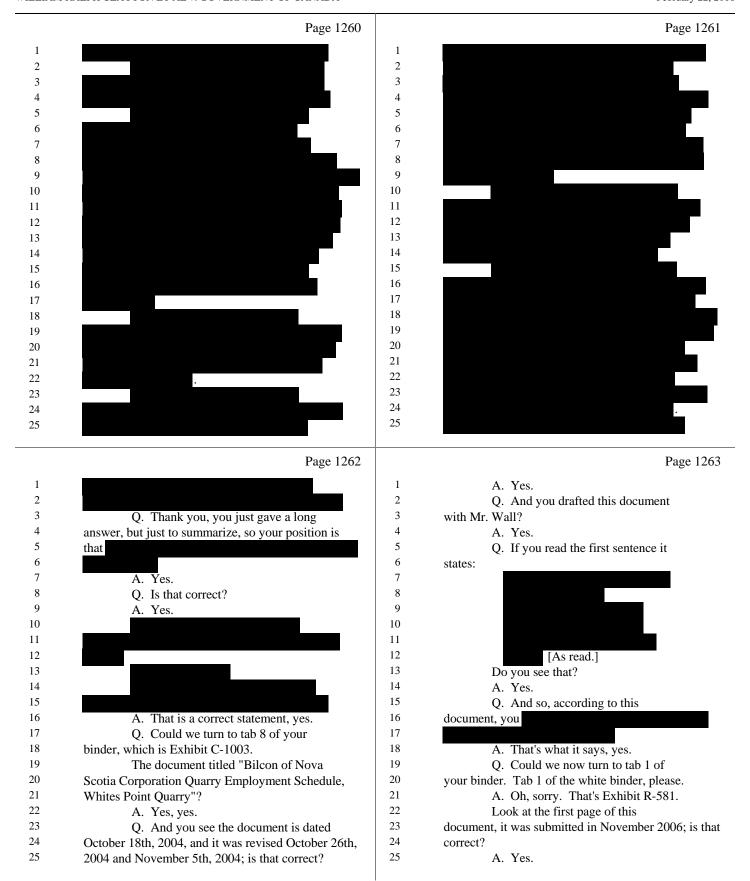
PRESIDING ARBITRATOR: But she didn't change the 40,000 or 50 years or 2 million, so I don't see anything wrong with that.

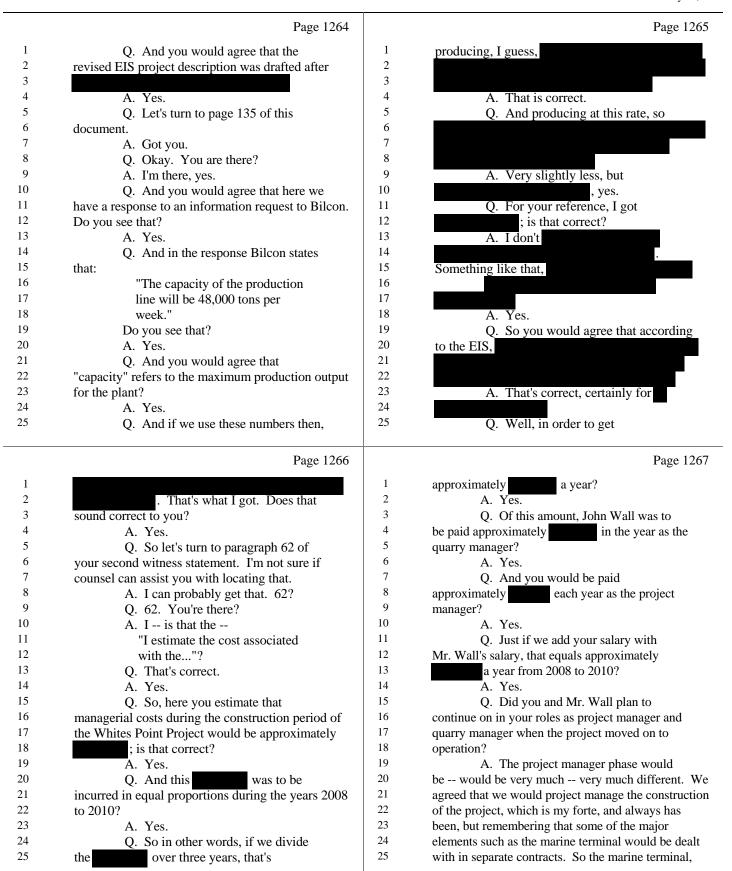
MR. NASH: She left out the word "approximately."

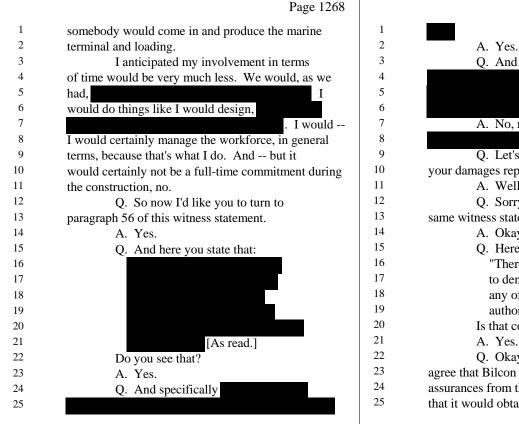
MR. SPELLISCY: That is wonderful coaching of his witness, which is completely inappropriate. As Mr. Nash has been instructed, we can put statements of facts, and this was his position, we can put a statement of facts to the witness and he can agree or disagree. What he's done right now is actually coach the witness to point to a word; it is inappropriate.

MR. NASH: It is entirely appropriate. When you put a document, the text of a document, to a witness and then you leave out an important word, it is improper.

MR. SPELLISCY: This is exactly what we've had for this past few days, where Mr. Nash has read documents without putting them to the witness.







Q. And just to be clear, in terms of A. No, no. That would Q. Let's turn now to paragraph 6 of your damages reply witness statement. A. Well -- sorry? Q. Sorry, it's paragraph 6 of the same witness statement. A. Okay. Q. Here you state that:

"There could be no honest basis to deny the Whites Point Quarry any of its permits, licenses and authorizations." [As read.] Is that correct?

Q. Okay, but Mr. Buxton, you would agree that Bilcon of Nova Scotia didn't obtain any assurances from the federal or provincial government that it would obtain all licenses, permits and

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authorizations had the project received approval? A. No, they gave us no assurances

that they would give all the permits, no. --- Upon commencing public session at

2:50 p.m.

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BY MS. KAM:

Q. Can we now just turn to your second witness statement, paragraph 47 under the heading "judicial review."

A. Yes.

Q. Here you estimate that only about 10 to 20 per cent of the information in the first JRP process would have been useful in a second JRP process had the project been judicially reviewed; is that correct?

A. Yes.

Q. But you don't provide any evidence to support this statement; is that correct?

A. I didn't provide any evidence, but if you are interested or if the tribunal is interested, what I can say is this: There were 74 different valued environmental components. I went through them carefully and I judged which ones would have to be repeated. Most of those which involved any biological process, whether it was flora or

fauna or most of them that involved any human effects, would need to be repeated. There were 54 of those. I judged that 20 could probably stand pretty much as we had in the original document because they were things like the geology, the soils, the things which don't change over time and

so they would be largely the same. Two of them were sort of vague and

> maybe they would need to be repeated, maybe they wouldn't. But in terms of time, in my view, in my view I'd say no more than 10 per cent but I'm quite happy if somebody can say or somebody would say it's actually 20 per cent could be used, but I am convinced that no more than 20 per cent of the original EIS could be used in a second EIS process.

> Q. Okay, and Mr. Buxton, earlier on you confirmed that the Whites Point Project was the only environmental assessment that you were involved in that underwent a review panel assessment?

A. That is correct.

Q. And the Whites Point Project was not subject to a judicial review; is that correct?

A. No, it was not subject to a judicial review.

Q. Okay, and so you would agree that

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	Page 1272		Page 1273
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1	you don't have any experience being involved in an	1	repeat what you said.
2	environmental assessment that was referred back to a	2	MR. NASH: Yes.
3	review panel by a Canadian court?	3	Could you turn to your witness
4	A. Well, I could also say that	4	statement of December sorry, August 18th, 2017.
5	there's never been a quarry ever before that's ever	5	Could you turn, please, to paragraph 20, which was
6	done a Joint Review Panel, so it would have been	6	put to you in your cross-examination.
7	rather difficult for me to have any experience. And	7	A. Yes, I have that.
8	so, further than that, had this being the only	8	Q. Paragraph 20 states:
9	one that has ever gone through a Joint Review Panel,	9	"It was widely known and
10	I could hardly have any experience of one either	10	understood by those involved in
11	going or not going for a judicial review afterwards.	11	the environmental assessment
12	MS. KAM: Okay. Well, thank you,	12	process in the 2000s that an EIS
13	Mr. Buxton, those are all my questions.	13	was drafted at an early stage of
14	PRESIDING ARBITRATOR: Thank you,	14	the project, was intended to be
15	Ms. Kam.	15	conceptual and was naturally
16	I will give the floor to Mr. Nash for	16	focussed on the environmental
17	the re-direct.	17	effects of a project and
18	RE-EXAMINATION BY MR. NASH:	18	mitigation measures not the
19	MR. NASH: Mr. Buxton, can you refer	19	specifics of the projects'
20	in the witness statement binder to your statement	20	business model or design."
21	August 18th, 2007. You might have it in front of	21	[As read.]
22	you.	22	A. Yes.
23	A. Yes.	23	Q. With that in mind, which Ms. Kam
24	Q. Could you turn to	24	put to you, can you comment on the specific figures
25	PRESIDING ARBITRATOR: Could you	25	that are in the EIS with respect to such things as
	Page 1274		Page 1275
1	40,000 tons or 2 million tons, 40,000 tons for	1	project which is important, what are you going to
2	shipping or 2 million approximately	2	do? Now, if you were to say if you were to say
3	2 million tons, how does that play into the question	3	to me, "Well, what about if you went to 8 million?"
4	of the EIS being at an early stage conceptual	4	Then I'd say, "Now you've got a point" because now
5	design?	5	your footprint changes. The whole the whole size
6	A. Yes, I I think I was trying in	6	of the crushing area, and the noise, and the size of
7	my rambling explanation of the first question to	7	the load, everything changes, the number of ships,
8	sort of come to this.	8	that's another EIS. All right? But the difference
9	It's not only it's not only	9	between 2 million tons, 2.1 million tons,
10	understood to be done in the conceptual phase of the	10	2.4 million tons, is irrelevant when you are going
11	project, but it's an absolute requirement that it's	11	back to the purpose of the EIS, which is to define
12	done then because one of the purposes of an	12	effects and define how you are going to get rid of
13	environmental impact statement is to determine what	13	those effects, to nullify them.
14	the effects are, and most importantly, when you come	14	That's the purpose of an EIS, not to
15	up with an effect which has some negative	15	drive a proponent to describe exactly how he's going
16	implication, that you deal with the mitigation at	16	to build this or that, or the size of this crusher
17	that stage, before you get to the detailed design.	17	or the size of that conveyer; it is irrelevant.
18	So, you know, you recognize that something is going	18	Sorry, I tend to get carried away on that subject.
19	to happen so we're going to deal with it. That's	19	Q. Is the EIS, from your
20	what an EIS is all about, is defining effects and	20	perspective, a business plan?
21	then managing adequate mitigation to multiply these	21	perspective, a business plan?

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A. No.

business plan.

Q. Does it matter --

A. No, it has nothing to do with a

Q. Does it matter from an

then proposing adequate mitigation to nullify those

And, really, it matters very little

per ship or whatever, it is the footprint of the

whether you are producing 40,000 tons or 41,000 tons

effects. That's what it's all about.

Page 1276 Page 1277 1 1 environmental impact statement, impact assessment Unfortunately, most of them are suggestions. And 2 2 point of view, whether the ship is going to and from ships captains can ignore suggestions. However, we 3 3 New Jersey or New York? thought that we would provide some background and 4 4 A. It doesn't matter. And, in fact some useful information for the Department of 5 5 Fisheries and Oceans so we knew we were coming and indeed, you will find, with a little more 6 careful reading of the transcript of the panel 6 somewhere from that area, in Raritan Bay, in the 7 7 hearings and the EIS, that New York is widely embayment area of New York and New Jersey harbours, 8 described as being one of the terminals. 8 and so we commissioned a study to at least be able 9 9 to say, "This is what is in the water." All right. 10 10 Now, DFO basically said if our ships 11 11 follow the guidelines and regulations under The East River comes down 12 one side, the Hudson comes down the other side, 12 Transport Canada, they have no problem with that. 13 13 there is an embayment, and half of that embayment is And we assured them in our EIS, in one of the 14 14 called Raritan Bay. Within a few kilometres, that commitment statements, that we would ensure -- we 15 is where that ship would be going, whether it was 15 would hire a carrier that, in fact, adhered to those 16 16 going to New Jersey or whether it was going to New regulations and guidelines. 17 York. 17 Q. And to your knowledge, did CSL 18 18 adhere to those regulations and guidelines? Q. Would it have any effect from a 19 19 A. I'm quite sure that C-SL would. ballast standpoint? 20 A. I can't say that. We had had 20 That's their business, hauling from 21 21 quite lengthy discussions with the Department of Canada to New York, and further down the coast to 22 Fisheries and Oceans with respect to ballast water. 22 Atlanta, all the way around to Tampa, and you bet 23 23 We had looked at the regulations. The regulations your boots they would comply. 24 24 are set by Transport Canada. Any ship that comes O. That was Paul Martin's company at 25 25 into a Canadian port is bound by those regulations. the time; correct? Page 1279 Page 1278 1 1 A. Well, certainly, he owned the 50 per cent partner and is the 2 company at one time. At that time I can't tell you 2 managing partner." [As read.] 3 but certainly close to it. 3 Q. And if you could also then go to 4 4 the next document which is part of Exhibit C-001 and MR. NASH: Could I ask my colleague, 5 5 Mr. Little, to distribute some documents that relate I would ask you to refer to that second full 6 6 to this very issue, what was said in the EIS. paragraph which starts out "bulk carriers" and then 7 7 I'm going to ask you first to refer go down to the last sentence in that paragraph. 8 8 to the transcript page in front of you, which should A. I'm sorry, you lost me. 9 9 be page 132 from the JRP transcript, and direct your Q. Sorry, it is the second full 10 paragraph. It starts out "bulk carriers are 10 attention to line 16. And if you could read that 11 paragraph out, please. 11 proposed..." 12 A. (Reading): 12 A. Okay. Sorry, I'm on the wrong 13 "Mr. Paul Buxton. The 13 page. 14 14 involvement in New Brunswick is Q. That's okay. "Bulk carriers are 15 15 proposed ..." extremely peripheral, if I can put it that way. The Bayside 16 16 Looking at that paragraph. 17 17 Quarry is operated by other than A. Yes. 18 18 Clayton interests, however, the Q. Then going down to the third from 19 19 Claytons have a marketing last line, the sentence stated there, "The primary 20 distribution on Brooklyn Sand and 20 destination..." 21 Gravel which operates out of New 21 A. (Reading): 22 York and a fair amount of the 22 "The primary destination of the 23 23 rock products is the New quantity of material from Bayside 24 24 York/New Jersey area, and more goes to New York. In that 25 25 specifically, the ultimate operation, Clayton is a

	Page 1280		Page 1281
1	destination is South Amboy	1	asked the Claytons the questions that I needed to
2	New Jersey."	2	complete the design and the environmental impact
3	Because that's where the grits would	3	statement. I got clear, concise answers, but I
4	have gone.	4	never asked them any of their business, what their
5	Q. Now, in 2006 when the EIS was	5	business interest were or anything like that. Since
6	submitted, you were not an employee of the Claytons;	6	then, I have known them better and I know a little
7	that's correct?	7	bit more about their operations, but at that time I
8	A. I was never at any time an	8	didn't need to know and I didn't ask.
9	employee of the Claytons.	9	Q. Did you need to know exactly
10	Q. You were retained as an	10	which company would be receiving the aggregate
11	independent consultant?	11	coming from Whites Point, for environmental
12	A. That is correct.	12	purposes, did you need to know, and which company
13	Q. Were you privy to all of the	13	would be receiving it either in New York or in
14	internal dealings with respect to I'll just ask	14	New Jersey?
15	to go into a closed session for a moment.	15	A. Oh, it was irrelevant to me.
16	Upon commencing confidential session under	16	Q. Was it irrelevant from the
17	separate cover at 3:05 p.m.	17	standpoint of any aspect of the environmental
18	MR. NASH: Were you privy to all of	18	assessment impact process in terms of knowing
19	the internal dealings with respect to the internal	19	exactly what company it was going to and exactly
20	relationships of the various Clayton corporations	20	where it would be located in the New Jersey/New York
21	and exactly which company from the Clayton Block and	21	area?
22	Sand group, as it was known, was going to be dealing	22	A. I really can't think of any major
23	with this aggregate coming from Nova Scotia and for	23	changes that would be made to an EIS because it was
24	what purpose?	24	going 15 miles further down the coast or 10 miles
25	A. It was none of my business. I	25	further down the coast.
	·		
	Page 1282		Page 1283
1	Q. Or to this company or to that	1	is concerned about costs and he's concerned about
2	company?	2	
			this and that.
3	A. It made no difference to the EIS.	3	this and that.
4	Q. You referred to VECs, valued, I	3 4	
	Q. You referred to VECs, valued, I think, environmental components?	3 4 5	we are going
4 5 6	Q. You referred to VECs, valued, I think, environmental components? A. Yes.	3 4 5 6	we are going to mitigate all of that noise so that, at the very
4 5 6 7	Q. You referred to VECs, valued, I think, environmental components? A. Yes. Q. How were those handled in the	3 4 5 6 7	we are going to mitigate all of that noise so that, at the very worst, we'll be 65 decibels at the property line.
4 5 6 7 8	Q. You referred to VECs, valued, I think, environmental components? A. Yes. Q. How were those handled in the EIS?	3 4 5 6 7 8	we are going to mitigate all of that noise so that, at the very worst, we'll be 65 decibels at the property line. That's the mitigation.
4 5 6 7 8 9	Q. You referred to VECs, valued, I think, environmental components? A. Yes. Q. How were those handled in the EIS? A. Well, in my view, they were	3 4 5 6 7 8 9	we are going to mitigate all of that noise so that, at the very worst, we'll be 65 decibels at the property line. That's the mitigation. Now we come to the next very
4 5 6 7 8 9	Q. You referred to VECs, valued, I think, environmental components? A. Yes. Q. How were those handled in the EIS? A. Well, in my view, they were handled in the proper way to handle a VEC. Each VEC	3 4 5 6 7 8 9	we are going to mitigate all of that noise so that, at the very worst, we'll be 65 decibels at the property line. That's the mitigation. Now we come to the next very important thing in an EIS or an environmental
4 5 6 7 8 9 10 11	Q. You referred to VECs, valued, I think, environmental components? A. Yes. Q. How were those handled in the EIS? A. Well, in my view, they were handled in the proper way to handle a VEC. Each VEC was identified specifically, whether it was	3 4 5 6 7 8 9 10	we are going to mitigate all of that noise so that, at the very worst, we'll be 65 decibels at the property line. That's the mitigation. Now we come to the next very important thing in an EIS or an environmental assessment and that is to say: What is the residual
4 5 6 7 8 9 10 11 12	Q. You referred to VECs, valued, I think, environmental components? A. Yes. Q. How were those handled in the EIS? A. Well, in my view, they were handled in the proper way to handle a VEC. Each VEC was identified specifically, whether it was biological, human, physical, whatever. And each VEC	3 4 5 6 7 8 9 10 11 12	we are going to mitigate all of that noise so that, at the very worst, we'll be 65 decibels at the property line. That's the mitigation. Now we come to the next very important thing in an EIS or an environmental assessment and that is to say: What is the residual effect? What is it when we've done all the
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4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	Q. You referred to VECs, valued, I think, environmental components? A. Yes. Q. How were those handled in the EIS? A. Well, in my view, they were handled in the proper way to handle a VEC. Each VEC was identified specifically, whether it was biological, human, physical, whatever. And each VEC was then described. What is it? What are we doing? If we're crushing rock, we're making a noise. That's the effect. So we deal with the effect. How much noise are we making? How long is the noise going on? What is the decibel range at the boundary of the property? What's the decibel range for the safety of the employees? That's the effect. Now we come to the most important	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	we are going to mitigate all of that noise so that, at the very worst, we'll be 65 decibels at the property line. That's the mitigation. Now we come to the next very important thing in an EIS or an environmental assessment and that is to say: What is the residual effect? What is it when we've done all the mitigation, what is the residual effect? But if we can say, well, there's no more noise that is going to be above the 65 decibel and I'm talking 65 decibel now way, way on the property line. So we've done our job and we would say, yes, it is an adverse effect because we are making some noise but it is not significant. Then we come to the next important
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4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	Q. You referred to VECs, valued, I think, environmental components? A. Yes. Q. How were those handled in the EIS? A. Well, in my view, they were handled in the proper way to handle a VEC. Each VEC was identified specifically, whether it was biological, human, physical, whatever. And each VEC was then described. What is it? What are we doing? If we're crushing rock, we're making a noise. That's the effect. So we deal with the effect. How much noise are we making? How long is the noise going on? What is the decibel range at the boundary of the property? What's the decibel range for the safety of the employees? That's the effect. Now we come to the most important	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	we are going to mitigate all of that noise so that, at the very worst, we'll be 65 decibels at the property line. That's the mitigation. Now we come to the next very important thing in an EIS or an environmental assessment and that is to say: What is the residual effect? What is it when we've done all the mitigation, what is the residual effect? But if we can say, well, there's no more noise that is going to be above the 65 decibel and I'm talking 65 decibel now way, way on the property line. So we've done our job and we would say, yes, it is an adverse effect because we are making some noise but it is not significant. Then we come to the next important

So then I meet with Mr. Wall. He's

going to manage this quarry. And he has -- he has

other interests, perhaps, than mine at the time; he

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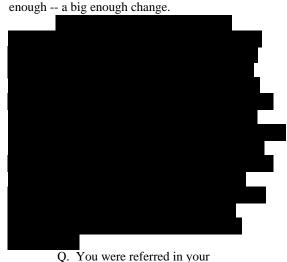
going to monitor the noise 24 hours a day with

they will be recorded permanently for records

recorders around the periphery of the property and

	Page 1284		Page 1285
1	purposes. That is the procedure which is	1	know, so.
2	fundamental to any environmental assessment. If	2	MR. SPELLISCY: Excuse me, we are way
3	that is not done, you don't have an environmental	3	beyond the scope of cross-examination now. I
4	assessment. I'm sorry, you don't.	4	understand Mr. Buxton mentioned in an answer that
5	And we did not we did not get	5	wasn't answering the question VECs, but we just had
6	that; our EIS was not I'm sorry, I'm going	6	a question about environmental assessment that's way
7	further was not treated to that respect. And	7	beyond the scope.
8	then what you do as a as a furtherance is one	8	MR. NASH: Well, he was answering a
9	collects all the mitigation together and you put it	9	question about VECs and he explained why they would
10	in a mitigation table, you collect all the	10	have to be the reports would have to be re-done
11	monitoring together, you put it into a monitoring	11	in the case of a judicial review and so that raises
12	table, and those become commitments. And if the	12	the issue of VECs, how they're developed, how
13	panel wants to say, okay, your mitigation looks okay	13	they're used, and what the process is to arrive at a
14	but we're going to hold you to that, so, Mr	14	conclusion.
15	Mr. Government, if you are going to give these	15	MR. SPELLISCY: No, that has to do
16	people a permit, those should go in as commitments:	16	with the question was, "How did you arrive at or
17	They must do this, and they must do that.	17	how did you come at this 10 to 20 per cent number?"
18	That's the process.	18	In fact, the question was: "You didn't introduce
19	Q. Was that process conducted in	19	any evidence of it?" And he said, "No, I did not."
20	this case in conjunction with regulatory authorities	20	And then we allowed him to elaborate on that.
21	such as DFO?	21	You've now gone into questioning on
22	A. Well, of course. We what you	22	what a VEC is, how you do it, we're into
23	have to do is you have to find the best advice that	23	environmental assessment, none of which was in the
24	you can get, the best experts that you can get,	24	cross-examination.
25	because you don't want to get caught short, you	25	MR. NASH: I take your point.
	Page 1286		Page 1287
1	Page 1286 If you could go, Mr. Buxton, to tab 1	1	Page 1287 respect to the wash operation,"
1 2		1 2	_
	If you could go, Mr. Buxton, to tab 1		respect to the wash operation,"
2	If you could go, Mr. Buxton, to tab 1 of the big white binder to your left. I'm referring to a part of the environmental impact statement and information request that's at the top of the page:	2 3 4	respect to the wash operation," Which you've alluded to earlier on in
2 3	If you could go, Mr. Buxton, to tab 1 of the big white binder to your left. I'm referring to a part of the environmental impact statement and information request that's at the top of the page: "Confirm the rate of shipment per	2 3 4 5	respect to the wash operation," Which you've alluded to earlier on in your evidence. And: "The capacity of the production line will be 48,000 tons per week
2 3 4 5 6	If you could go, Mr. Buxton, to tab 1 of the big white binder to your left. I'm referring to a part of the environmental impact statement and information request that's at the top of the page: "Confirm the rate of shipment per week and the annual total."	2 3 4 5 6	respect to the wash operation," Which you've alluded to earlier on in your evidence. And: "The capacity of the production line will be 48,000 tons per week thus allowing flexibility in
2 3 4 5 6 7	If you could go, Mr. Buxton, to tab 1 of the big white binder to your left. I'm referring to a part of the environmental impact statement and information request that's at the top of the page: "Confirm the rate of shipment per week and the annual total." And the response which I believe	2 3 4 5 6 7	respect to the wash operation," Which you've alluded to earlier on in your evidence. And: "The capacity of the production line will be 48,000 tons per week thus allowing flexibility in shipments to provide the required
2 3 4 5 6 7 8	If you could go, Mr. Buxton, to tab 1 of the big white binder to your left. I'm referring to a part of the environmental impact statement and information request that's at the top of the page: "Confirm the rate of shipment per week and the annual total." And the response which I believe Ms. Kam took you to is the design annual	2 3 4 5 6 7 8	respect to the wash operation," Which you've alluded to earlier on in your evidence. And: "The capacity of the production line will be 48,000 tons per week thus allowing flexibility in shipments to provide the required 2 million tons." [As read.]
2 3 4 5 6 7 8 9	If you could go, Mr. Buxton, to tab 1 of the big white binder to your left. I'm referring to a part of the environmental impact statement and information request that's at the top of the page: "Confirm the rate of shipment per week and the annual total." And the response which I believe Ms. Kam took you to is the design annual PRESIDING ARBITRATOR: What page?	2 3 4 5 6 7 8 9	respect to the wash operation," Which you've alluded to earlier on in your evidence. And: "The capacity of the production line will be 48,000 tons per week thus allowing flexibility in shipments to provide the required 2 million tons." [As read.] So it was that last part that was put
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Q. You were referred in your
August 18th, 2017 witness statement to the question
of -- if you go to paragraph 6, page 2 of that
statement, Ms. Kam took you to the fourth line of
paragraph 6, which states, where you state:

"There could be no honest basis
to deny the Whites Point Quarry
any of its permit, licenses and

authorizations including the

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Navigable Waters Protection Act and the Fisheries Act authorizations."

And Ms. Kam asked you: Were you given any promises or assurances that you would get those permits, and you said, "no."

Can you advise the tribunal of what your expectations were at the time?

A. I think my expectations are set out in this paragraph, and I think there are four similar paragraphs where I use the word "honest", and I use the word "honest" in this paragraph and four other paragraphs after significant thought.

"Honest" means free of deceit, it means trustworthy and sincere. And it is one of those adjectives which cannot suffer gradation, it is an absolute. It's words like sincere, legitimate, honourable, if you like, they are absolute. So because they are absolute, they are not capable of partial diminution. You can't be a little bit honest, just as you can't be a little bit pregnant. You are either honest or you're not.

I'm saying if we had an honest process in the second part for all the other permits that we required, the industrial permit, permits

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required under Section 35 of the Fisheries Act, Beaches Act that sort of thing, if we had had an honest process, I'm absolutely, absolutely sure that we would have got all the necessary permits.

Let me just add this. I'm in this business. I do environmental assessments for a living. And in the last five years, I have got permits and approvals, and I'm guessing a little bit here, for about 240 projects. I've never had one denied.

The field offices of the Department of the Environment, Province of Nova Scotia, are filled with very fine people, very dedicated people, very good people. And amongst those approvals, there were 82 mink farms. If you think a quarry might be bad, you want to go on a mink farm with 350,000 animals. All those EISs were done and approved and all those mink farms were licensed.

So I'm aware of the process, I'm aware of the standards, and I have absolutely no doubt whatsoever. And, in fact under section 35, we virtually had a promise from the Department of Fisheries and Oceans that they would give us the permit for Section 35 for habitat destruction. And there was no Section 32, so we would be looking at

an industrial approval and then applications under the Beaches Act, et cetera, et cetera, and I have no doubt whatsoever that we would have gotten industrial approvals. I get industrial approvals all the time for mink oil plants, for highway—rail crossings, all kinds of things. And they are very good, very good people at the Department of Environment and the regional offices, they are dedicated, sincere, very good people, and they are there to protect the environment and they do their job, and I have no doubt that we would have got permits.

Q. Could you turn, please, to tab 6 of the large white binder, the first page. Ms. Kam referred you to that as well.

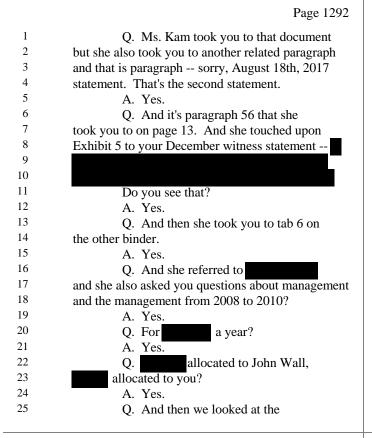
A. Yes.

Q. At the same time, could you turn in your second -- let's get to tab 6 first in the big white binder.

A. I'm in tab 6. Give me a page number.

Q. Tab 6 should be the first -- the first page should be "personnel cost", if we're in the same binder.

A. Tab 6.

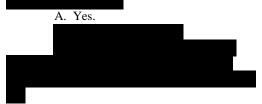


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personnel cost. Could you look down on the personnel cost in tab 6 to the -- near the bottom line of the first table, under "management"?

A. Yes.

Q. Was that the management amount allocated for the operation of the project for



MR. NASH: Thank you, Mr. Buxton, those are my questions.

PRESIDING ARBITRATOR: Thank you, Mr. Nash. Let me ask respondents, no further questions?

That takes us to the Tribunal, and Arbitrator Schwartz has a number of questions to you.

PROFESSOR SCHWARTZ: I think we're in confidential session right now because I'm going to ask you about some stuff in tab 6 of the binder.

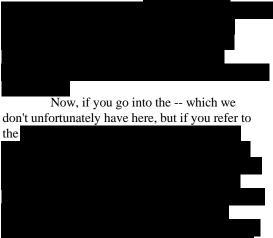
THE WITNESS: Okay, got it, yes.

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QUESTIONS BY THE ARBITRAL TRIBUNAL
PROFESSOR SCHWARTZ: First of all, on
the obverse page it says,

THE WITNESS: Yes.
PROFESSOR SCHWARTZ: Would you -again, trying to keep this crisp and succinct, what
does that mean?
THE WITNESS:

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For example, we committed, and if you look in the commitment table, to elements like we would bring in an expert to make sure that the glaucous rattlesnake root, which was said to be extirpated but which we found hundreds of copies on the site were being well-protected, that we were doing exactly what the plan called for to protect them. So that would be bringing somebody in from the outside to do that.

In the first year, we would do much more of that than in subsequent years. So if you take a look at the schedule, you will see in the first year, we're at to bring in these experts and also to sort of -- to do the base parameters to check before we start producing, the status of the plants, et cetera, et cetera. So that's what that's for.

Then as you go on, that drops off

because for some of the environmental

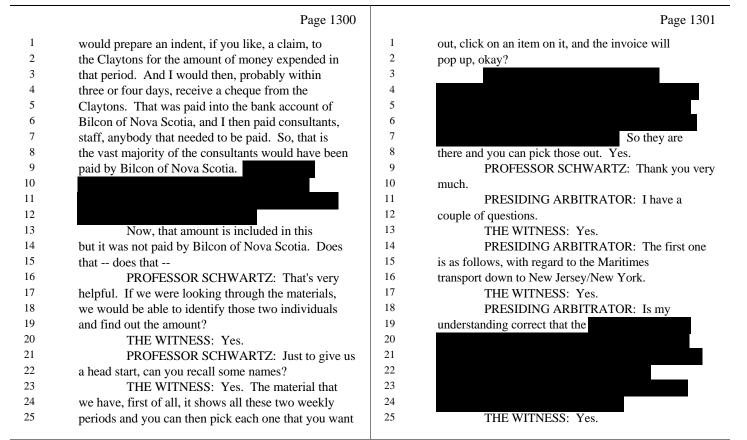
Page 1296 Page 1297 1 1 many forms, is that whatever it took, we would spend reporting, we said that we would report, let's say 2 2 every three years, bring an expert in every five to meet the commitments that we'd made. So -- and 3 3 years, et cetera, so, that those three elements make it's hard to -- you know, we think our mitigation is 4 up the environmental costs of the project. 4 pretty thorough, and very expert and very thorough, 5 5 PROFESSOR SCHWARTZ: So, as I but if that happened, you're right, that could go, 6 6 understand it, one of the ways you deal with in one year, 7 7 uncertainty is monitoring and then potential 8 mitigation efforts if the monitoring reveals a 8 9 problem. 9 10 10 THE WITNESS: Yes, yes. 11 11 PROFESSOR SCHWARTZ: Does the figure 12 12 you have here which drops off, does that include a 13 13 contingent element to pay for further mitigation PROFESSOR SCHWARTZ: Thank you. Now, 14 14 measures that become necessary after monitoring? just looking at the chart generally, it says 15 THE WITNESS: No, it didn't, although 15 and then it says 2011. 16 THE WITNESS: Yes. 16 we describe in the -- generally in our EIS, the 17 entire concept of adaptive management, which 17 PROFESSOR SCHWARTZ: Whose personnel 18 18 costs are those? Are those Bilcon of Nova Scotia? unfortunately got misunderstood. Adaptive 19 19 Are they the Bilcon of Delaware? To be determined? management is an acceptable approach, just as you've 20 described it. So we describe mitigation, we monitor 20 How do we understand who is absorbing those costs? 21 21 THE WITNESS: These costs are the it and we find that, wow, we don't quite meet the cost of operating the quarry which would be operated 22 22 standard. So what do we do? We need to do more 23 23 by Bilcon of Nova Scotia. So these people would be mitigation. We need to change this process. We 24 24 need to change that process. employees of Bilcon of Nova Scotia and they would 25 25 What we did, and we committed to in pay provincial taxes and federal taxes, and so on Page 1298 Page 1299 1 and so on, and also the quarry would pay the 1 December 13th, 2016. 2 assessment, taxes, the municipal taxes, and of 2 THE WITNESS: Oh, sorry. 3 course we'd pay for everything we bought, the HST. 3 PROFESSOR SCHWARTZ: I've got it as 4 4 tab K in this large binder. So those costs or those benefits to the province and 5 the municipality and federal government would be 5 THE WITNESS: Yes, I'm with you. 6 paid by Bilcon of Nova Scotia. 6 PROFESSOR SCHWARTZ: I will just read 7 7 PROFESSOR SCHWARTZ: Okay, maybe this it out: 8 8 is something we should have remembered from the "The amounts the investors 9 9 earlier proceedings but could you just refresh our expended on the Whites Point 10 memory here. You mentioned very recently you were 10 Quarry up to and including 11 an independent consultant. 11 December 18th, 2007, total 12 THE WITNESS: Yes. 12 13 13 THE WITNESS: Yes. Could you give me PROFESSOR SCHWARTZ: An independent 14 the paragraph? I'm sorry. 14 consultant to whom, to Bilcon of Nova Scotia, to 15 PROFESSOR SCHWARTZ: Paragraph 33, 15 Bilcon of Delaware, to the Claytons? 16 THE WITNESS: To Bilcon of Nova 16 I'm sorry. 17 17 THE WITNESS: Yes. Scotia. I receive monies from Bilcon of Nova Scotia 18 PROFESSOR SCHWARTZ: Paragraph 33 on 18 for my services. 19 19 PROFESSOR SCHWARTZ: I'm looking at page 8. So how should the panel understand that in 20 20 terms of those are amounts expended by Bilcon of your witness statement. 21 21 Nova Scotia, by Bilcon of Delaware, by some THE WITNESS: Yes. 22 22 combination of the Clayton family. PROFESSOR SCHWARTZ: Paragraph 33. 23 THE WITNESS: Okay, the vast majority 23 THE WITNESS: The second witness 24 of those are expenditures by Bilcon of Nova Scotia 24 statement? August?

PROFESSOR SCHWARTZ: The one dated

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and the procedure is and was that every two weeks I



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PRESIDING ARBITRATOR: THE WITNESS: Yes. THE WITNESS: Yes, yes. PRESIDING ARBITRATOR: That gets me to that -- that gets me to this opinion on the --let's say environmental risks on plankton, et cetera, et cetera, et cetera. THE WITNESS: Yes. PRESIDING ARBITRATOR: So there couldn't be a difference with regard to, let's say

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dangerous stuff in the water between the East River navy yard and the area in New Jersey with regard to invasive species.

THE WITNESS: Oh, invasive species. I can't tell you that. It would certainly bear out everything that comes down the Hudson, and my guess is that it would also represent a lot of the material, whatever it is that is coming down the East River. The line between New York and New Jersey is a very fragile line. If you are flying on one side of the Hudson, you are in New Jersey. If you fly on the other side, you are in New York.

And there was talk at one point -there was a channel, I believe it's called the
Elizabeth Reach, which goes from sort of the foot,
almost, of -- or lower down than Manhattan, through
-- and I think Staten Island is on the other side
and then it comes out again and in that area it
would have been possible,

And so, yes, Raritan Bay is a big area in there and I think it would be generally

Page 1304 Page 1305 1 1 representative. It would be difficult to know where that could mean --2 2 THE WITNESS: Could be reused, could to take a sample from, and our consultants took one 3 3 from Raritan Bay. It is just a -- you could call be reused. 4 4 the whole bay area the Raritan Bay, but it is shown PRESIDING ARBITRATOR: While 80 to 5 separately on most mapping as sort of coming down 5 90 per cent --6 6 almost -- almost into the Brooklyn side. So I think THE WITNESS: Would have to be 7 7 it would be fairly representative. re-done. 8 8 PRESIDING ARBITRATOR: Okav. mv PRESIDING ARBITRATOR: Re-done. 9 second question is as follows: In one of your 9 Okay. 10 10 reports there was a paragraph which was shown, I THE WITNESS: Yes. 11 11 think, which said: PRESIDING ARBITRATOR: So revised? 12 12 "In case a new EIS would have THE WITNESS: Well, you are talking 13 been produced only 10 to 13 about -- let me give you a good example, which is 14 20 per cent of the materials 14 very current and it concerns one of our, obviously, 15 would still have been of use." 15 major VECs and that is marine endangered species, 16 THE WITNESS: Yes. 16 the North Atlantic Right Whale. So we put mapping 17 PRESIDING ARBITRATOR: I think 17 in the EIS which showed the occurrence of the Right 18 "useful." 18 Whale in the Bay of Fundy, which is where this 19 THE WITNESS: Yes. 19 quarry would have been. While it is well away from 20 PRESIDING ARBITRATOR: And then 20 the... 21 you -- this was a question that you discussed with 21 PRESIDING ARBITRATOR: May I say -- I 22 Ms. Kam, and there I had a problem because there 22 don't want to be impolite but I think what you 23 what you said was 10 to 20 per cent of the material 23 wanted to say was --24 could be repeated. I think you used the word 24 THE WITNESS: Things change. They 25 "repeated" or "repeatedly submitted", and I mean 25 changed dramatically in a very short period of time. Page 1306 Page 1307 1 So --Q. And are those costed in the 2 PRESIDING ARBITRATOR: That's fine. 2 budget that we were reviewing earlier? 3 THE WITNESS: -- there was a lot of 3 A. Absolutely. 4 whales then. Some years there are no North Atlantic 4 5 Right Whales or five, let's say now. 5 6 So, you are talking about a whole 6 7 7 different set of circumstances now, and this would 8 8 have occurred with every biological feature. Any 9 9 panel would have said, "Well, the Harlequin duck 10 10 weren't a problem in 2006 when you submitted but 11 11

maybe they're a problem now." And I've got to sit 12 somebody out there for six months all winter, to see 13 whether there are any Harlequin duck wintering in 14 Whites Cove. It's got to be done again. Okay? PRESIDING ARBITRATOR: Right, thank 15 16 you. Mr. Nash has a question. 17 FURTHER RE-EXAMINATION BY MR. NASH: 18 MR. NASH: Mr. Buxton, Professor 19 Schwartz asked some questions about mitigation and 20 costing and how those issues folded together into 21 the budget. 22 As I understand it, in the EIS, there 23

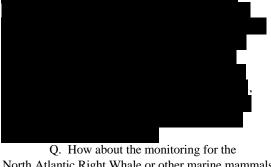
are commitments made which incorporate mitigation and monitoring measures; is that right?

A. Yes.

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North Atlantic Right Whale or other marine mammals? A. Yes, that's taken into account,

Q. Going back to paragraph 33 which Professor Schwartz put to you in your --

A. Yes.

Q. -- witness statement. I think you still have it in front of you.

A. Yes.

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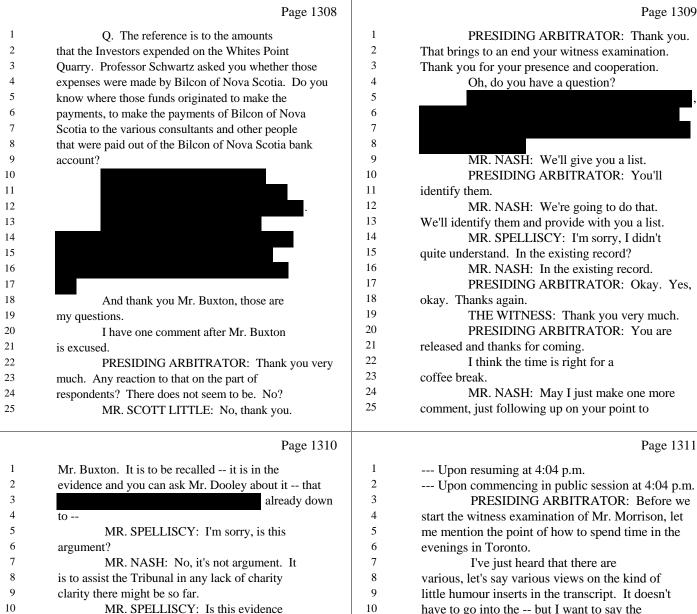
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Page 1311



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then? There is no witness on the stand. PRESIDING ARBITRATOR: What do you

intend to --MR. NASH: You were asking the

question of Mr. Buxton about the

PRESIDING ARBITRATOR: I think I was fine with the answer.

MR. NASH: Oh, you were.

PRESIDING ARBITRATOR: Okay, now we have the coffee break and we start again at

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--- Recess taken at 3:46 p.m.

PRESIDING ARBITRATOR: Before we start the witness examination of Mr. Morrison, let

me mention the point of how to spend time in the

various, let's say various views on the kind of little humour inserts in the transcript. It doesn't have to go into the -- but I want to say the Tribunal is ready to sit until 7:00 o'clock every night, meaning tonight. Friday.

In principle, we would also be ready to spend some time on Monday here and I think the outfit would be available for that, but my guess is from some -- looking at some of the faces, that you would really prefer to sit longer into the evenings and have Monday for the preparation of your concluding statements.

MR. NASH: The parties are in agreement on that.

PRESIDING ARBITRATOR: Finally, we have found a point. That can go into the record because it is so rare.

We are ready to sit here until 7:00

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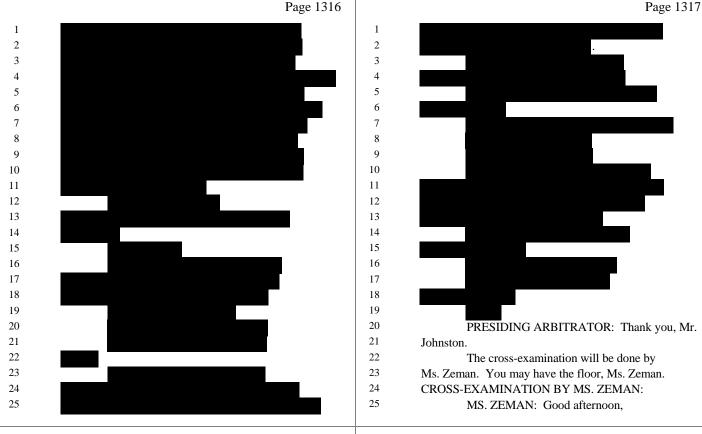
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	Page 1312		Page 1313
1	and maybe not even look nervously at our watches at	1	A. Yes, I did.
2	7:00 so that we can, let's say, get to an end by	2	Q. And your first expert report is
3	Saturday night. All right. Saturday will be a full	3	dated December 9th, 2016 and your second report is
4	day and the 7:00 o'clock, I think, also applies to	4	dated August 18th, 2017?
5	Saturday. Okay, is that all right? Thank you.	5	A. That's correct.
6	Now, we turn to the examination of	6	Q. And you hold a Bachelor's of
7	Mr. Morrison.	7	Business Administration and Master's of Business
8	Mr. Morrison, will you please read	8	Administration?
9	out the statement that	9	A. Correct.
10	THE WITNESS: Declaration for expert.	10	Q. And you are the president and
11	I solemnly declare honour and	11	owner of Tamarack Coal and Resources?
12	conscience that I will speak the truth, the whole	12	A. That's correct.
13	truth and nothing but the truth and that my	13	Q. And Tamarack Coal and Resources
14	statement will be in accordance with my sincere	14	brokers, arranges and manages shipping for cargo
15	belief.	15	internationally, including bulk cargoes such as coal
16	AFFIRMED: MR. WAYNE MORRISON:	16	and aggregates?
17	PRESIDING ARBITRATOR: Thank you and	17	A. That is correct.
18	I give the floor to Mr. Johnston for the direct.	18	Q. And through Tamarack you have
19	MR. JOHNSTON: Thank you, Judge	19	arranged and managed shipping for cargo
20	Simma.	20	internationally since 2007?
21	EXAMINATION-IN-CHIEF BY MR. JOHNSTON:	21	A. That is correct.
22	Q. You are Wayne Morrison?	22	Q. And you continue to do so today?
23	A. Yes, I am.	23	A. Continue today.
24	Q. You signed two expert reports in	24	Q. And previously, for approximately
25	this arbitration?	25	20 years, Mr. Morrison, you were the director,
	uns arotration:		20 years, Mil Morrison, you were the uncertor,
	Page 1314		Page 1315
1	marketing and customer service director, pardon	1	Q. And as a member of the executive
2	me, of marketing and customer service for Canada	2	council of the Shipping Federation of Canada?
3	Steamship Lines?	3	A. That is correct.
4	A. That's correct, yes, I was.	4	Q. And as the vice-chair of the
5	Q. And what is Canada Steamship	5	Halifax Shipping Association?
6	Lines?	6	A. Yes.
7	A. Canada Steamship Lines is one of	7	Q. And as a member of the
8	the largest shipping companies in Canada. They own	8	Newfoundland Offshore Industry Association?
9	bulkers and self-discharging vessels on the Great	9	A. Yes.
10	Lakes. They also own subsidiaries in North American	10	Q. And, sir, have you had a chance
11	down in Boston. They have CSL Americas, they have	11	
	down in Boston. They have CSL Americas, they have		to review your statements before today?
12	CSL Australia, they have CSL Europe.	12	A. Yes.
12 13	CSL Australia, they have CSL Europe. The ships that operate in CSL	12 13	
12 13 14	CSL Australia, they have CSL Europe. The ships that operate in CSL Americas are members of a pool operation which they	12 13 14	A. Yes. Q. Do you have any corrections that you would like to make to your statements?
12 13 14 15	CSL Australia, they have CSL Europe. The ships that operate in CSL Americas are members of a pool operation which they share the ships that are put into that pool	12 13 14 15	A. Yes. Q. Do you have any corrections that you would like to make to your statements? A. Yes, I have one correction that
12 13 14 15 16	CSL Australia, they have CSL Europe. The ships that operate in CSL Americas are members of a pool operation which they share the ships that are put into that pool belong to Henning Oldendorff, Oldendorff carriers	12 13 14 15 16	A. Yes. Q. Do you have any corrections that you would like to make to your statements?
12 13 14 15 16 17	CSL Australia, they have CSL Europe. The ships that operate in CSL Americas are members of a pool operation which they share the ships that are put into that pool belong to Henning Oldendorff, Oldendorff carriers out of Lübeck, CSL, Canada Steamship Lines, out of	12 13 14 15 16 17	A. Yes. Q. Do you have any corrections that you would like to make to your statements? A. Yes, I have one correction that
12 13 14 15 16 17	CSL Australia, they have CSL Europe. The ships that operate in CSL Americas are members of a pool operation which they share the ships that are put into that pool belong to Henning Oldendorff, Oldendorff carriers out of Lübeck, CSL, Canada Steamship Lines, out of Montreal, and Algoma Steamship Lines out of St.	12 13 14 15 16 17 18	A. Yes. Q. Do you have any corrections that you would like to make to your statements? A. Yes, I have one correction that
12 13 14 15 16 17 18	CSL Australia, they have CSL Europe. The ships that operate in CSL Americas are members of a pool operation which they share the ships that are put into that pool belong to Henning Oldendorff, Oldendorff carriers out of Lübeck, CSL, Canada Steamship Lines, out of Montreal, and Algoma Steamship Lines out of St. Catharines, Ontario?	12 13 14 15 16 17 18 19	A. Yes. Q. Do you have any corrections that you would like to make to your statements? A. Yes, I have one correction that
12 13 14 15 16 17 18 19 20	CSL Australia, they have CSL Europe. The ships that operate in CSL Americas are members of a pool operation which they share the ships that are put into that pool belong to Henning Oldendorff, Oldendorff carriers out of Lübeck, CSL, Canada Steamship Lines, out of Montreal, and Algoma Steamship Lines out of St. Catharines, Ontario? A. Right, sorry.	12 13 14 15 16 17 18 19 20	A. Yes. Q. Do you have any corrections that you would like to make to your statements? A. Yes, I have one correction that
12 13 14 15 16 17 18 19 20 21	CSL Australia, they have CSL Europe. The ships that operate in CSL Americas are members of a pool operation which they share the ships that are put into that pool belong to Henning Oldendorff, Oldendorff carriers out of Lübeck, CSL, Canada Steamship Lines, out of Montreal, and Algoma Steamship Lines out of St. Catharines, Ontario? A. Right, sorry. Q. And you've also, Mr. Morrison,	12 13 14 15 16 17 18 19 20 21	A. Yes. Q. Do you have any corrections that you would like to make to your statements? A. Yes, I have one correction that
12 13 14 15 16 17 18 19 20 21 22	CSL Australia, they have CSL Europe. The ships that operate in CSL Americas are members of a pool operation which they share the ships that are put into that pool belong to Henning Oldendorff, Oldendorff carriers out of Lübeck, CSL, Canada Steamship Lines, out of Montreal, and Algoma Steamship Lines out of St. Catharines, Ontario? A. Right, sorry. Q. And you've also, Mr. Morrison, held numerous executive positions with industry and	12 13 14 15 16 17 18 19 20 21 22	A. Yes. Q. Do you have any corrections that you would like to make to your statements? A. Yes, I have one correction that
12 13 14 15 16 17 18 19 20 21 22 23	CSL Australia, they have CSL Europe. The ships that operate in CSL Americas are members of a pool operation which they share the ships that are put into that pool belong to Henning Oldendorff, Oldendorff carriers out of Lübeck, CSL, Canada Steamship Lines, out of Montreal, and Algoma Steamship Lines out of St. Catharines, Ontario? A. Right, sorry. Q. And you've also, Mr. Morrison, held numerous executive positions with industry and professional associations, including as the director	12 13 14 15 16 17 18 19 20 21 22 23	A. Yes. Q. Do you have any corrections that you would like to make to your statements? A. Yes, I have one correction that
12 13 14 15 16 17 18 19 20 21 22	CSL Australia, they have CSL Europe. The ships that operate in CSL Americas are members of a pool operation which they share the ships that are put into that pool belong to Henning Oldendorff, Oldendorff carriers out of Lübeck, CSL, Canada Steamship Lines, out of Montreal, and Algoma Steamship Lines out of St. Catharines, Ontario? A. Right, sorry. Q. And you've also, Mr. Morrison, held numerous executive positions with industry and	12 13 14 15 16 17 18 19 20 21 22	A. Yes. Q. Do you have any corrections that you would like to make to your statements? A. Yes, I have one correction that



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Mr. Morrison.

(613) 564-2727

A. Good afternoon.

Q. My name is Krista Zeman and I am counsel for Canada in this arbitration.

PRESIDING ARBITRATOR: Just maybe give us a chance to get a hold of all the binders.

MS. ZEMAN: Sure, I was just introducing myself but, yes, I can wait.

PRESIDING ARBITRATOR: Okay, we are fine.

MS. ZEMAN: So as I was saying, my name is Krista Zeman. I'm counsel for Canada. I think you've been sitting here for a little while so you know the drill, you've got the binder in front of you, we'll pull the documents up on the screen and if you don't -- and if you don't understand the question I'm asking let me know and I'll do my best to reframe.

Equally we don't have a lot of time together so I'd appreciate a "yes" or "no" to the extent that's possible. And I'll do my best to allow you to provide any necessary context that you feel is necessary.

Does that sound like an agreeable way forward?

A. It would be good.

Q. So, before I start my questions, I'd like to go into confidential session. Just a note for the record.

--- Upon commencing confidential session under separate cover at 4:13 p.m.

BY MS. ZEMAN:

Q. So, as Mr. Johnston introduced to you in his direct, so you worked for Canada Steamship Lines or CSL as we'll refer to them, until 2007; correct?

A. That's correct.

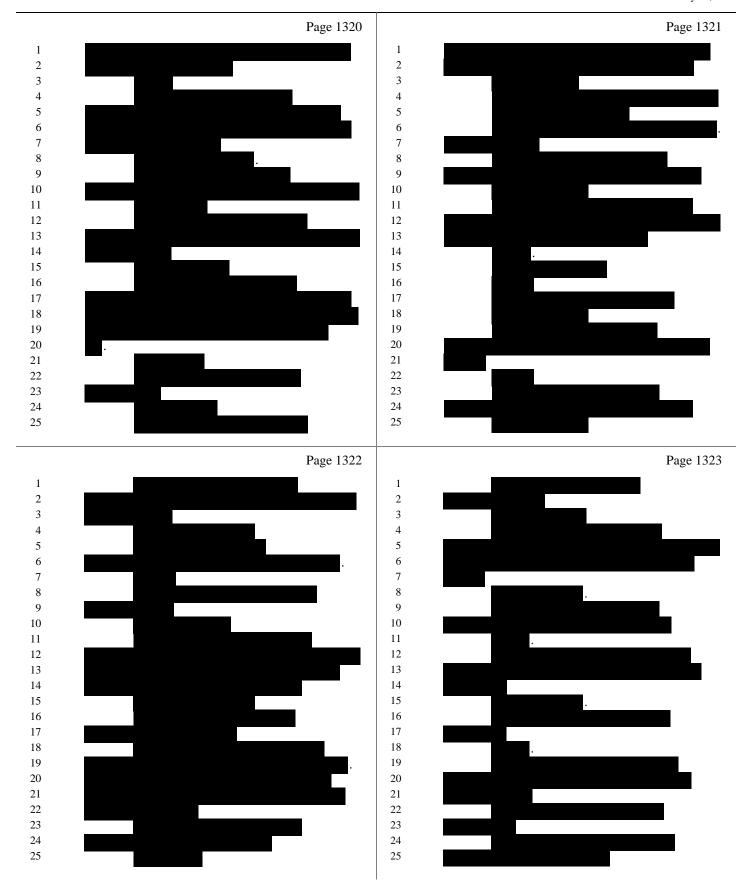
Q. And your most recent role as director of marketing and customer relations?

A. Customer service.

Q. And in that capacity you were directly involved in the negotiation of contracts of affreightment is another one, another short form, COAs; is that right?

A. Yes. Contracts of affreightment.

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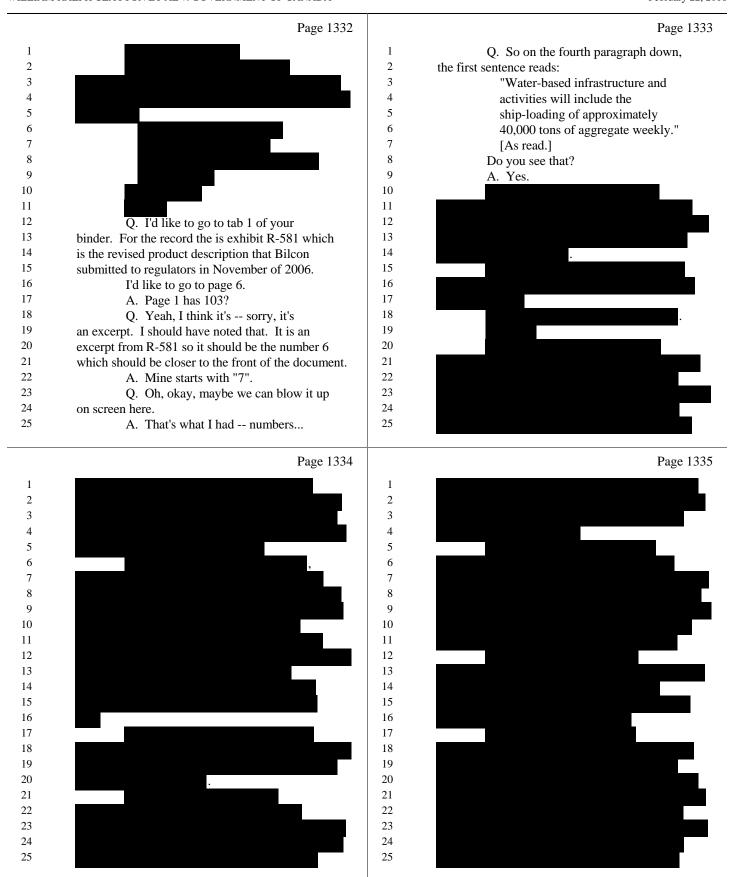


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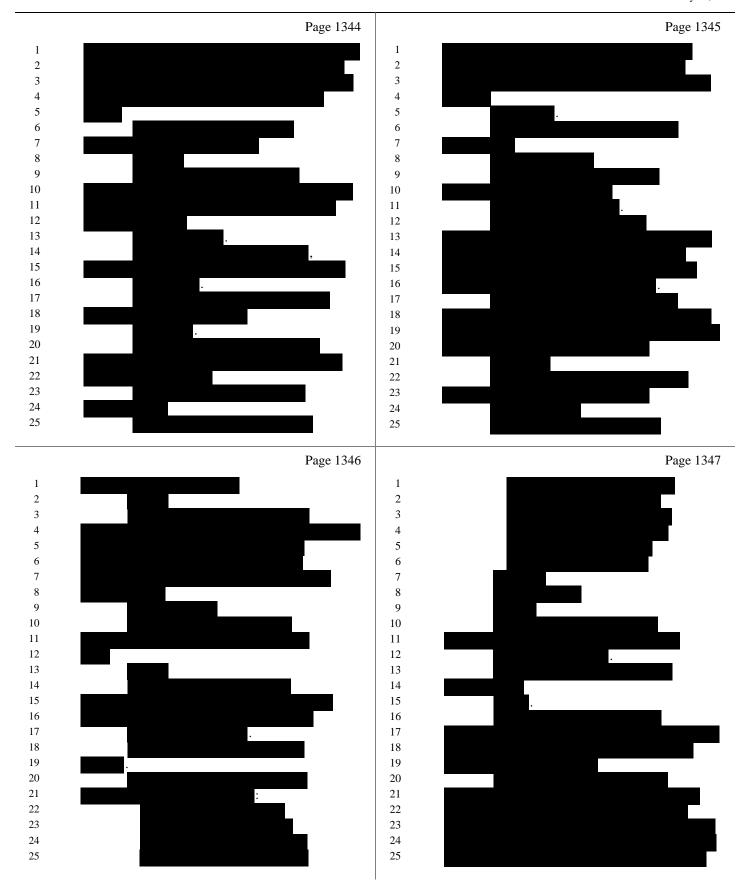








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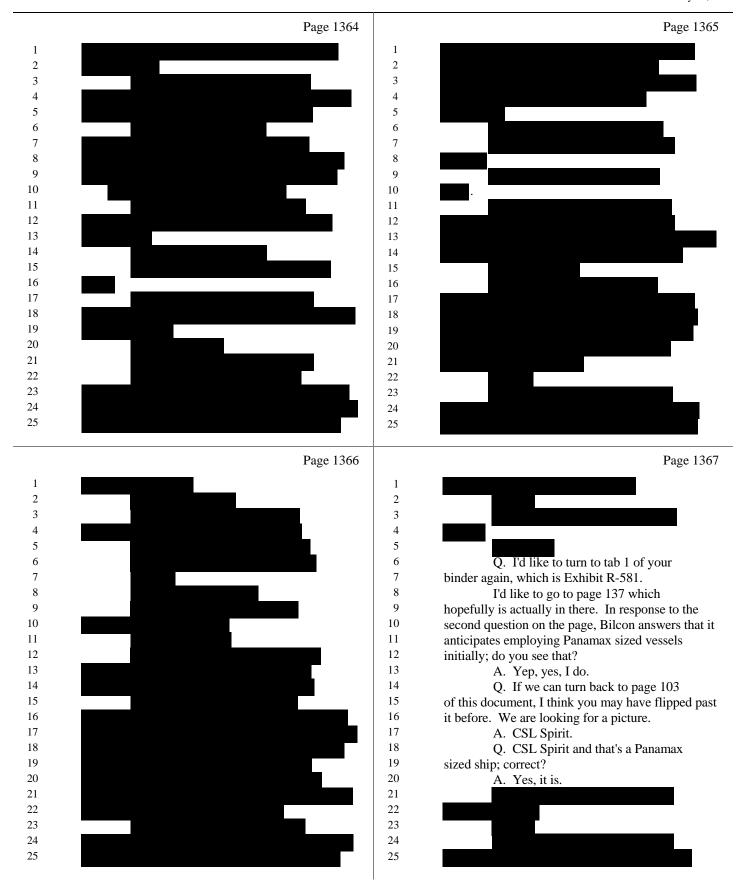


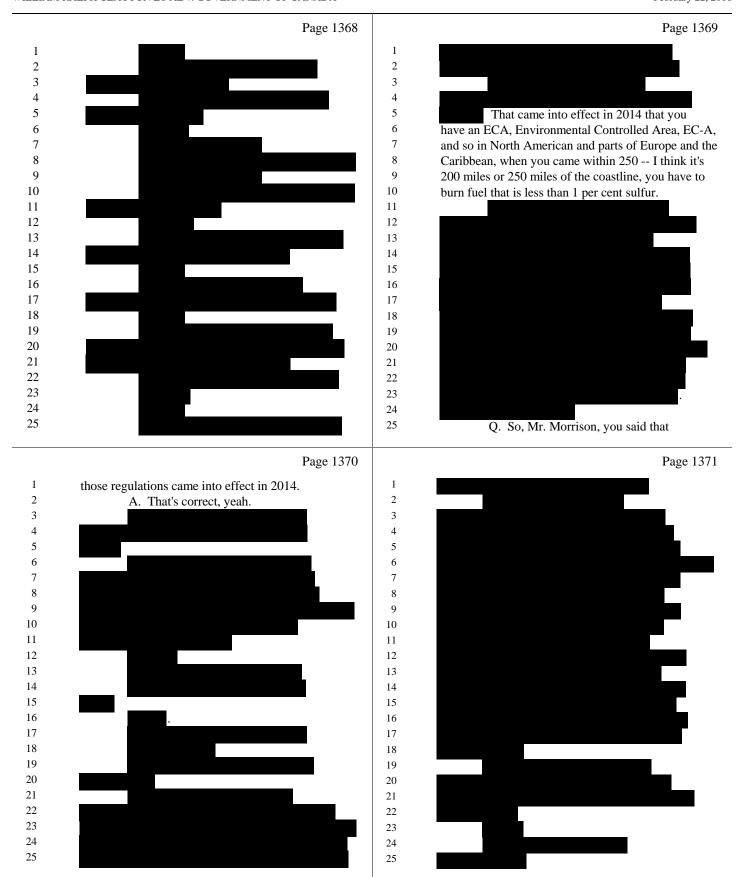






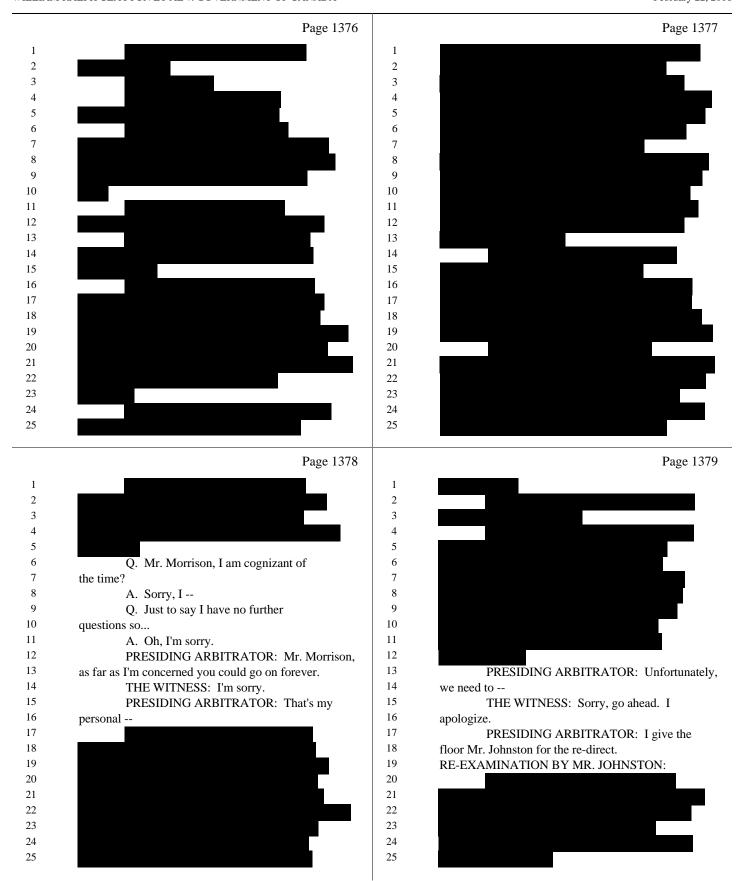


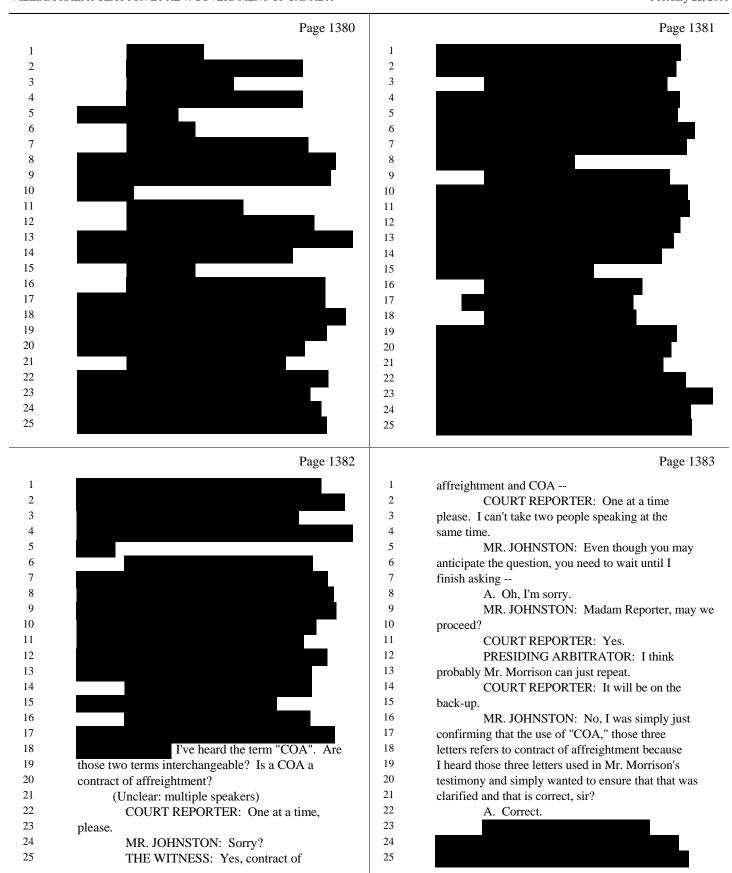


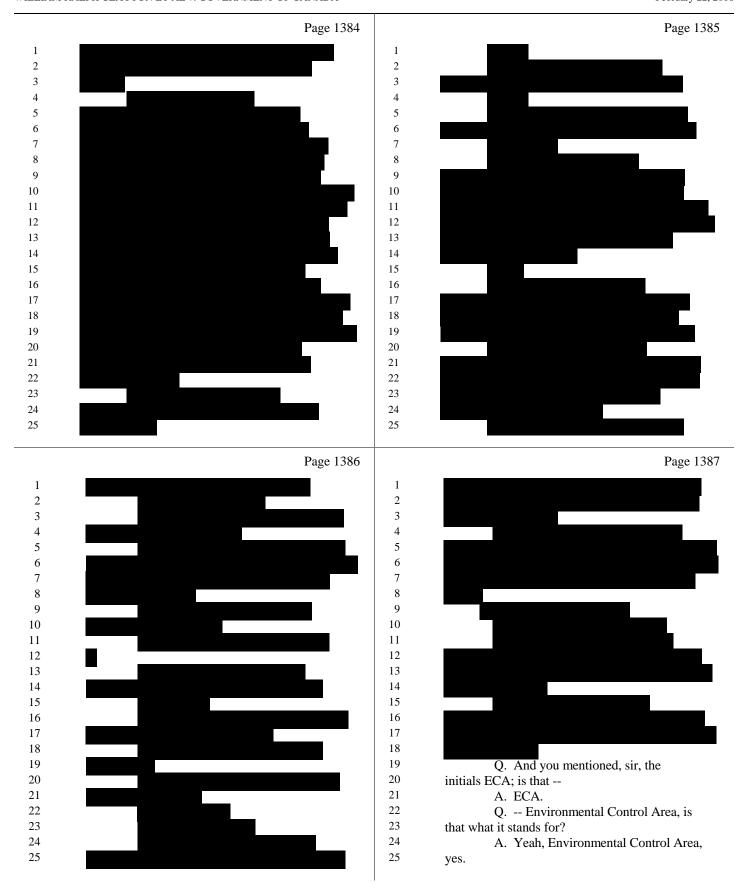


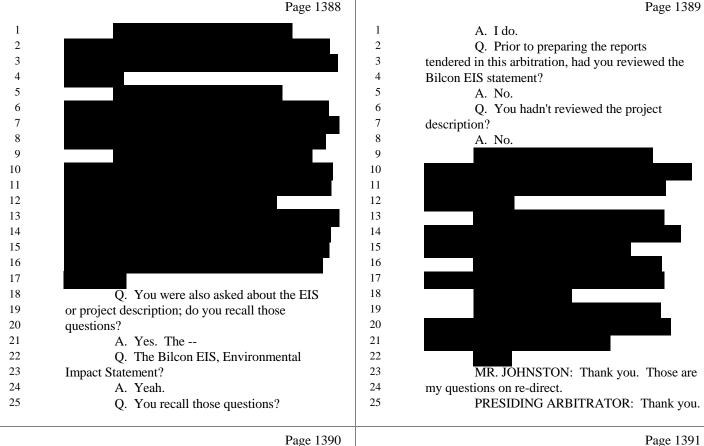
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1 Any further questions from the respondent? 2 Questions from the tribunal? 3 THE WITNESS: I'm free. 4 PRESIDING ARBITRATOR: I wouldn't 5 have any. That would concludes the witness 6 examination. Thank you very much for your presence 7 and for your input and you are free to go. 8 THE WITNESS: Thank you very much, 9 Judge Simma. I appreciate, it gentlemen. Thank 10 you. 11 PRESIDING ARBITRATOR: I think we 12 probably need a break. How many -- maybe. 13 MR. SPELLISCY: I'm in your hands. I 14 could certainly use --15 PRESIDING ARBITRATOR: If we go on until 7:00 which might be the case if we can handle 16 17 hand Mr. Dooley to the end, right? So give us 10 18 minutes. 19 MR. SPELLISCY: Sure. Both Mr. Nash and I had hoped, perhaps, optimistically we might 20 21 get through Mr. Dooley and Mr. Fougere but --22 PRESIDING ARBITRATOR: Tonight? 23 MR. SPELLISCY: Perhaps we are on the 24 sunny side of life. We will have to see. Certainly 25 we can get through Mr. Dooley.

(613) 564-2727

1 MR. NASH: We had agreement. 2 PRESIDING ARBITRATOR: Great, 3 wonderful. So we'll start again at 5:45. 4 --- Recess taken at 5:35 p.m. 5 --- Upon resuming at 5:45 p.m. 6 --- Upon commencing public session at 5:46 p.m. 7 PRESIDING ARBITRATOR: Now we can go 8 on the record. Just before we start the 9 cross-examination of Mr. Dooley, let me indicate 10 that the tribunal has decided that it would be 11 ready -- in addition to starting at 8:30 and going 12 to 7:00 to also cut the lunch break to 45 minutes 13 and sandwiches to do everything possible to get you 14 off that Monday for your own preparation.

> Do you agree? MR. NASH: Agree.

PRESIDING ARBITRATOR: Wonderful. So

we start tomorrow with that new deal, right. Okay, okay. So, welcome Mr. Dooley.

MR. DOOLEY: Thank you.

PRESIDING ARBITRATOR: Would you

please read the statement you have in front of you?

THE WITNESS: I solemnly declare upon my honour and conscience that I will speak the

truth, the whole truth and nothing but the truth.

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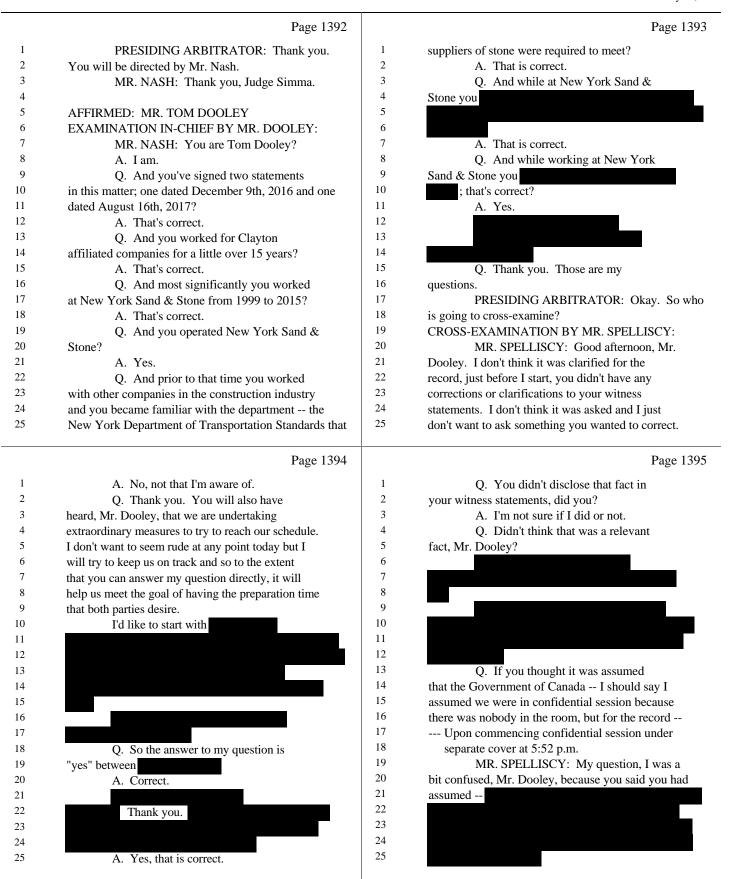
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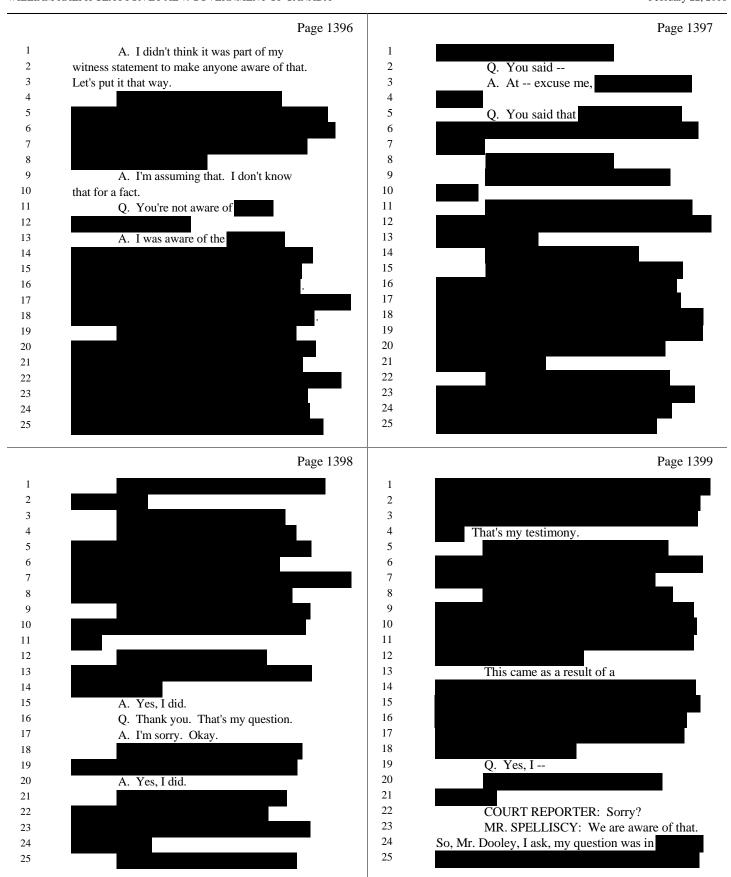
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Page 1400 Page 1401 1 1 MR. NASH: But you said "I'll get to 2 2 that." A. Okay. 3 3 Q. -- but it's going to be much MR. SPELLISCY: I will get to that. 4 easier and much smoother and much more pleasant for 4 MR. NASH: So you're trying to save 5 the court reporter if you answer my questions so 5 time by having him give very short answers which may not be fully explanatory and so he doesn't know 6 6 that we can get going faster. 7 7 A. Yeah, I mean, my goal here today where you're going. So if you tell him where you're 8 8 is to give the information as I know and in the best going, then he'll be able to answer your questions 9 9 way that I can. more quickly. 10 10 Q. And the best way to do that is by MR. SPELLISCY: I'm assuming if he 11 11 can answer a "yes" or "no", then he can do that. answering my questions, Mr. Dooley. 12 12 A. I think I'm doing that. Let's go to paragraph 91 of your 13 13 MR. NASH: In fairness, Mr. Dooley is first witness statement, Mr. Dooley. It's on the 14 14 not a clairvoyant, I don't think. So he doesn't table in front of you. 15 know where Mr. Spelliscy is going so in order to 15 A. Okay. 16 give an answer he may give some detail in order to 16 Q. I think your counsel gave it to 17 give context and that's perfectly fair. 17 you. 18 MR. SPELLISCY: Mr. Nash, with 18 A. In here, right? 19 19 respect, he doesn't need to be clairvoyant to answer O. No, it's not in that book. I'll 20 my questions. And my question is 20 refer to that as our binder. I think counsel give 21 21 you your witness statements? All I need is a "yes" or 22 "no", much the same way that you asked for from our 22 A. December 9th, 2016. 23 23 witnesses. And so I am simply asking for the same Q. I think that's your first one, is 24 respect from Mr. Dooley so we can proceed with this. 24 that right? 25 Now let's continue. 25 A. Now, bear with me here on reading Page 1402 Page 1403 1 this stuff because I've got a cataract condition in 1 Whites Point Quarry were issued in 2007; correct? 2 my right eye and things are not reading as well as I 2 A. I know that now, but I didn't 3 should be. 3 know it at that particular time. I was not privy to 4 4 Q. If it helps, I'm not sure with all of the information that was going on with the 5 5 your condition --Whites Point Quarry. 6 6 A. It doesn't. That's like a blur Again, my focus was on operating New 7 7 to me right now unfortunately. So give me your page York Sand & Stone. 8 8 number, I'm sorry? What was transpiring at the Whites 9 9 Q. It's at paragraph 91. Point Quarry was a separate entity and was not 10 10 A. Okay. really part of my spectrum of information, if I can 11 Q. And in the second sentence here, 11 explain it that way. 12 12 Q. But you knew it when you wrote you say: 13 13 this statement; right? 14 14 A. I knew it when I wrote this 15 15 statement, that's correct. 16 16 Q. So then you are aware that by 17 17 March of 2010, the Claytons had already been 18 18 unsuccessful in obtaining their approvals for the 19 19 [As read.] Whites Point Quarry Project?

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A. That's correct, yes.

on the screen but also turn you to it.

Q. Now you haven't had the

opportunity to hear the testimony this week so far

so I am going to take you to it. I would put it up

It is the last tab in your binder.

And for now I wanted to make sure

Q. You are aware, Mr. Dooley, that

A. Yes, just give me the context

the decisions on the environmental approval for the

that you're with me and you read that sentence.

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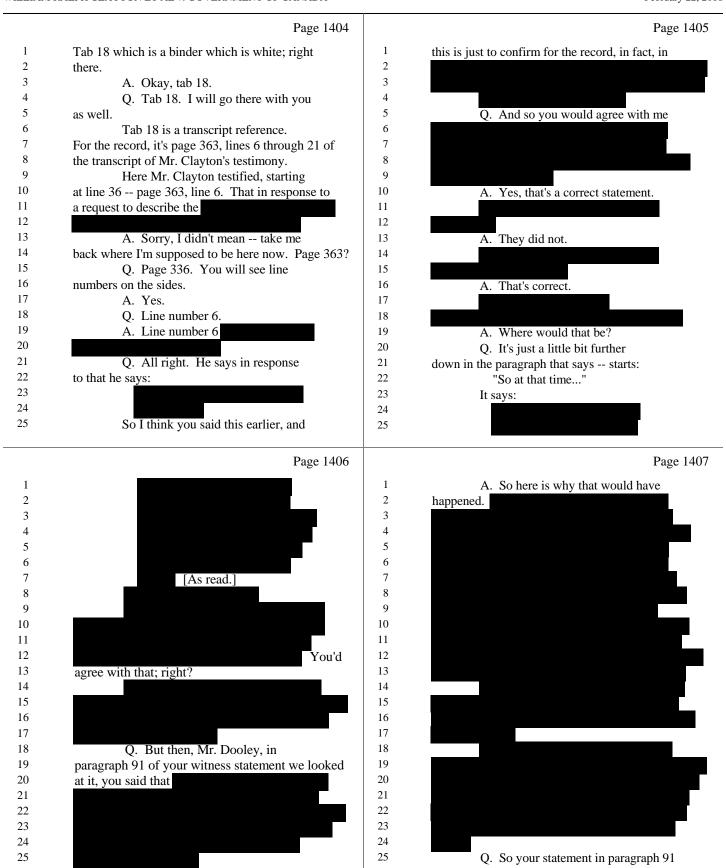
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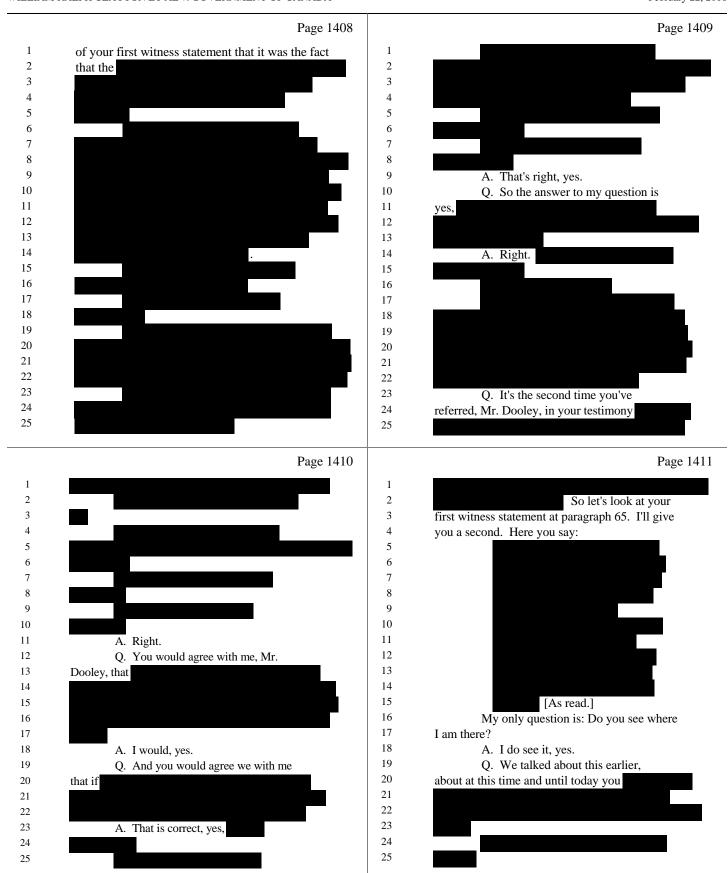
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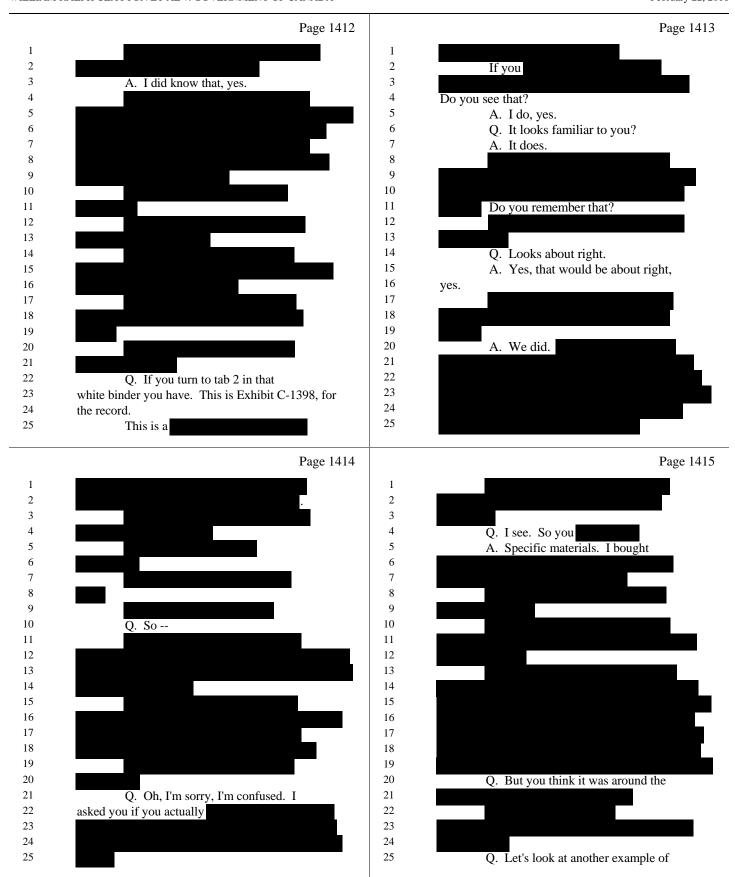
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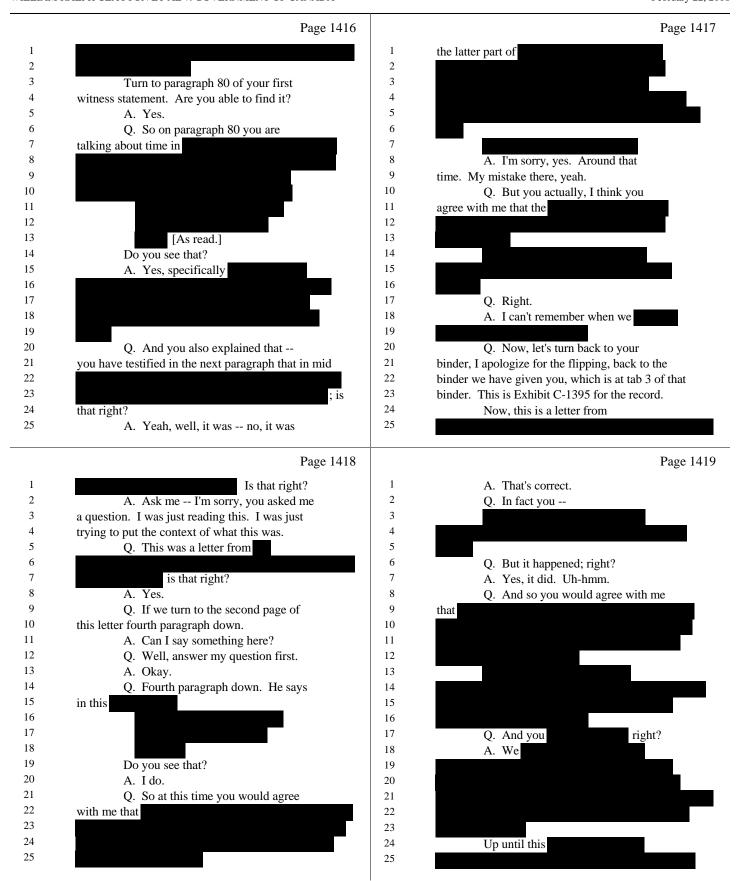
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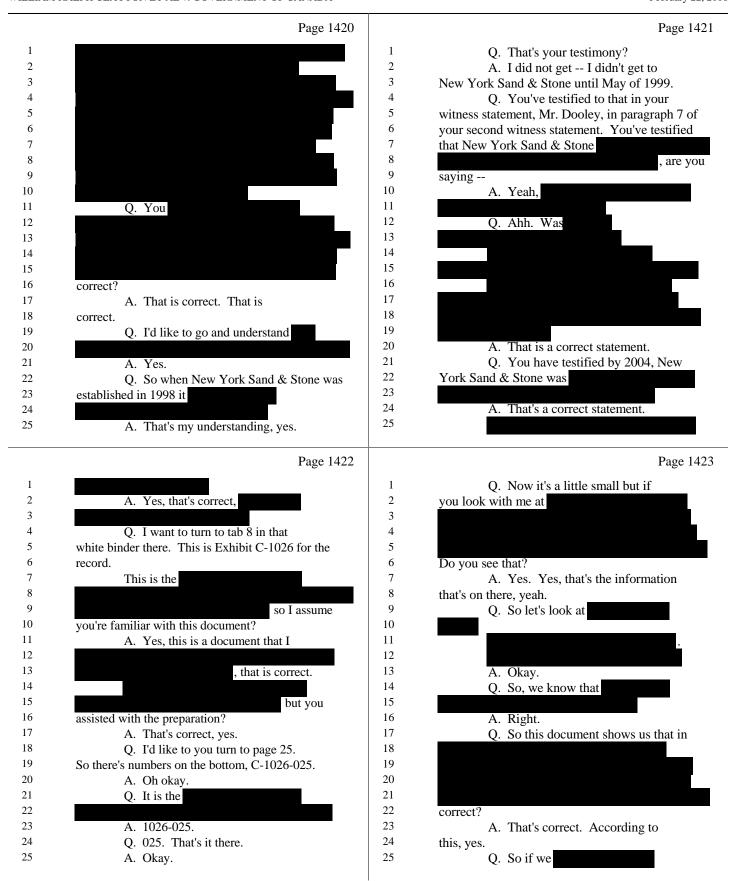
here. Okay.

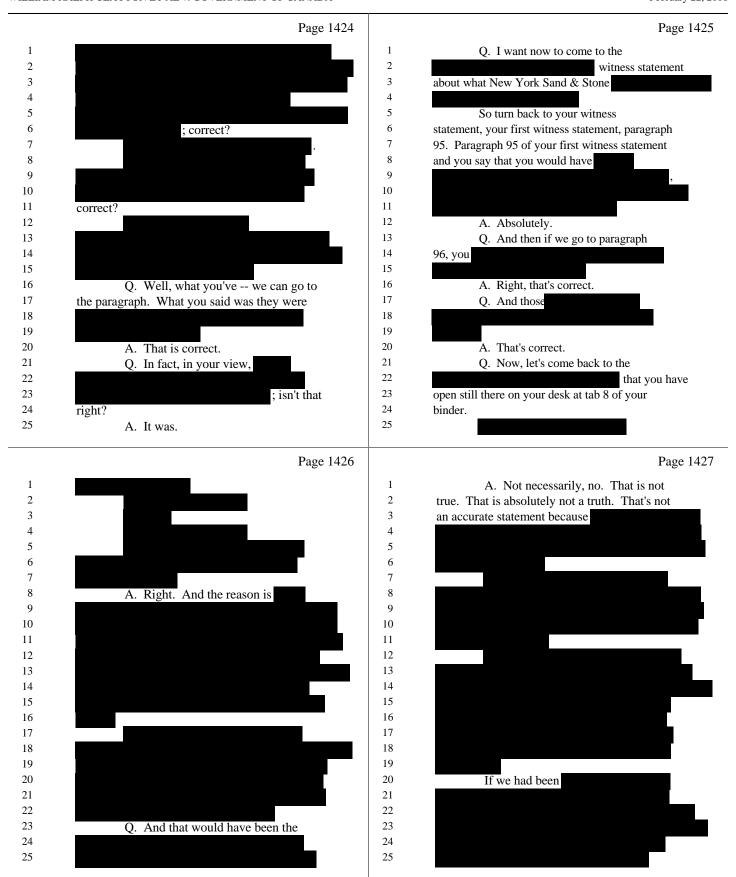


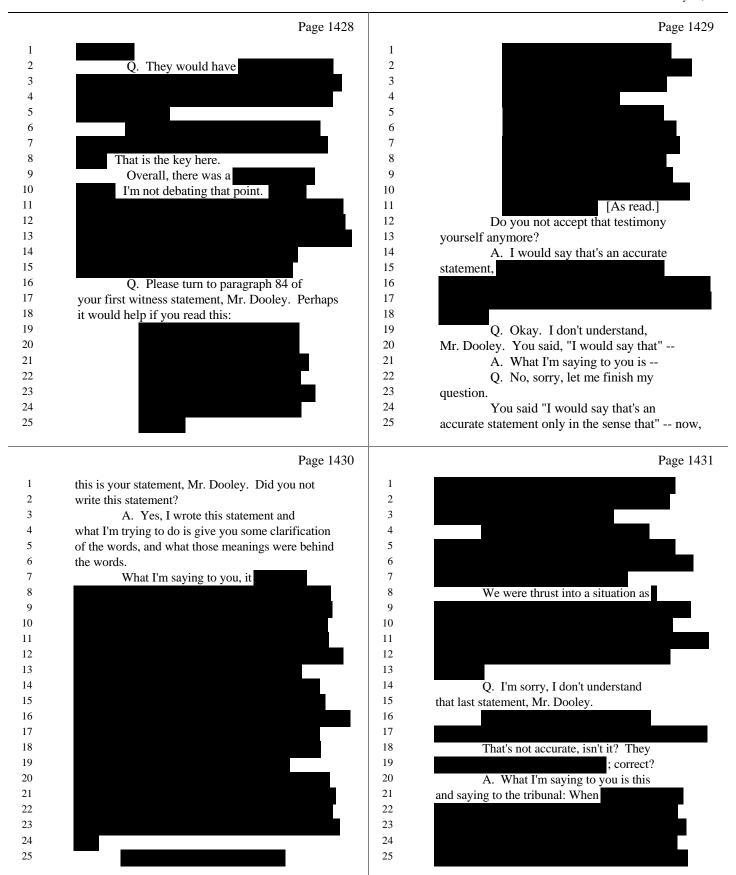


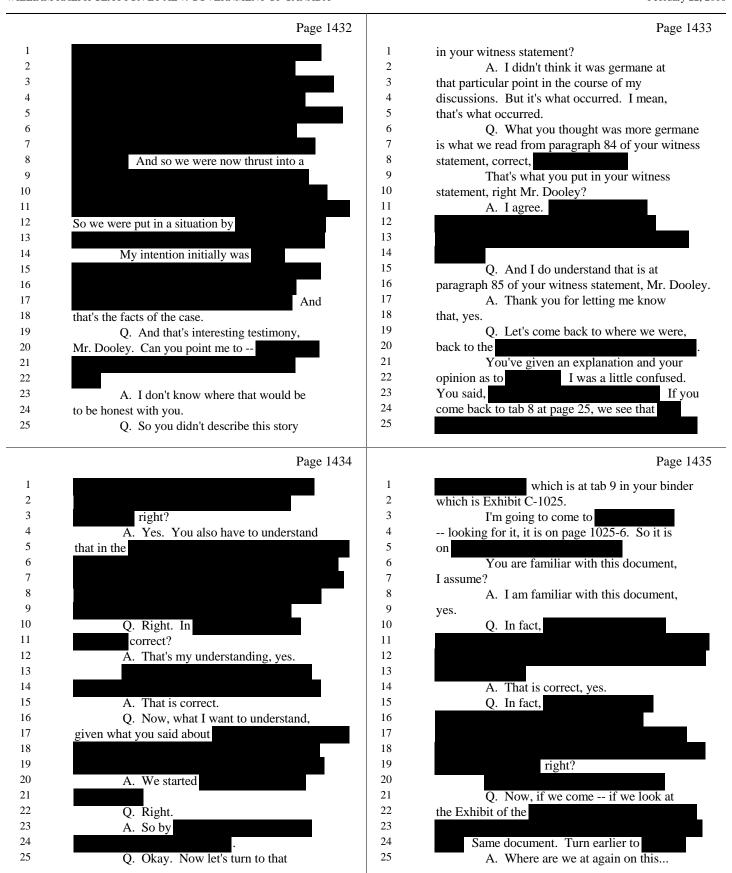


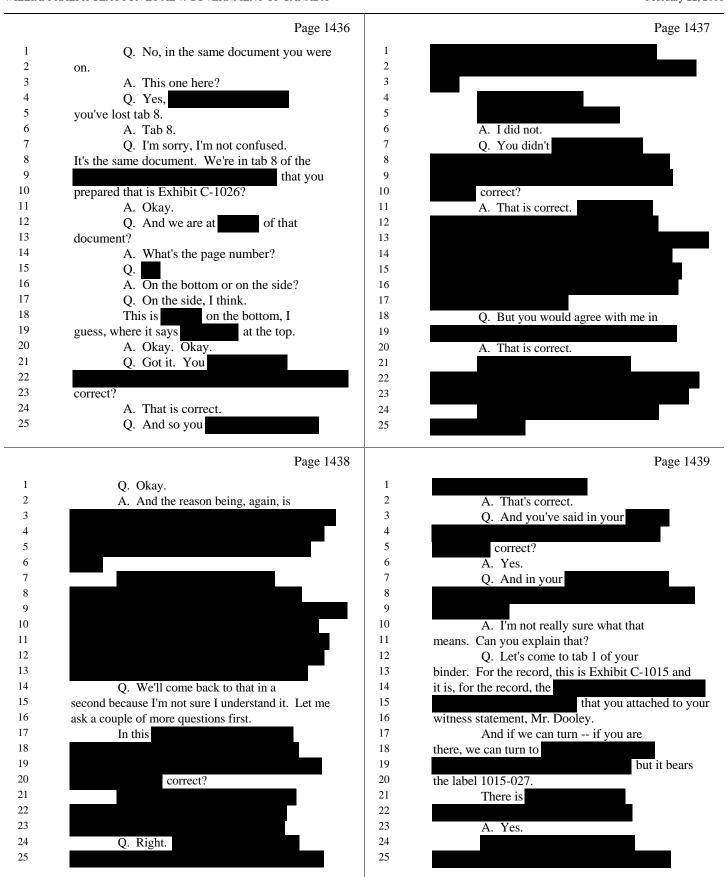


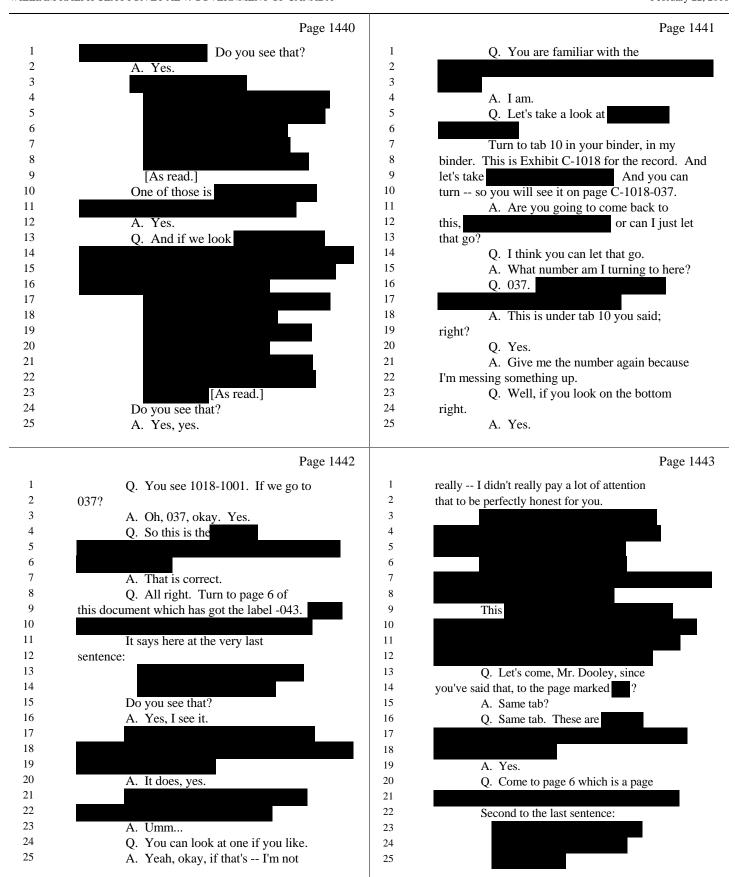


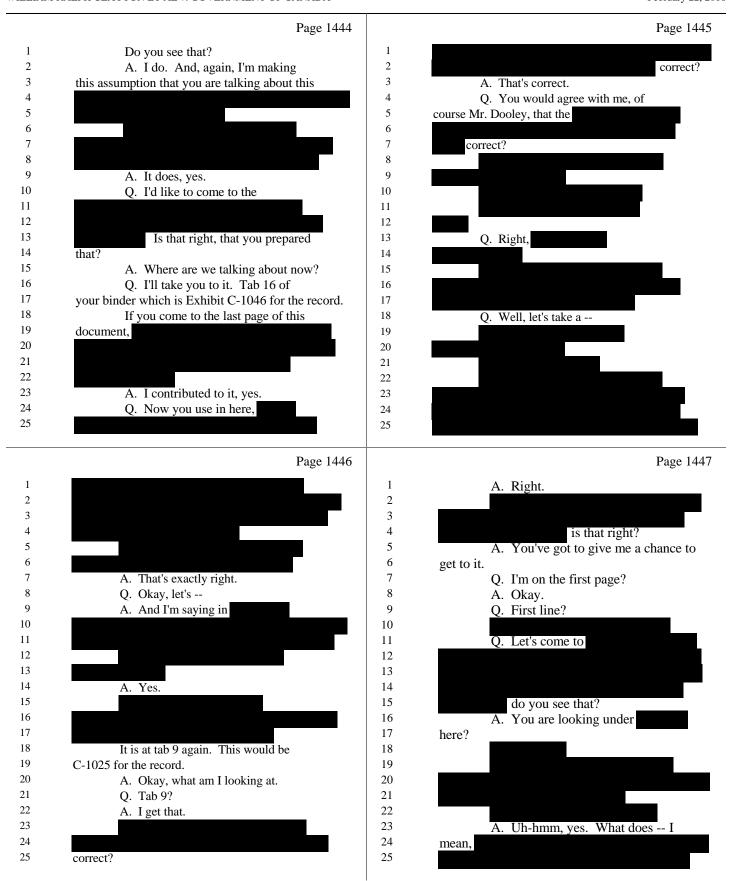


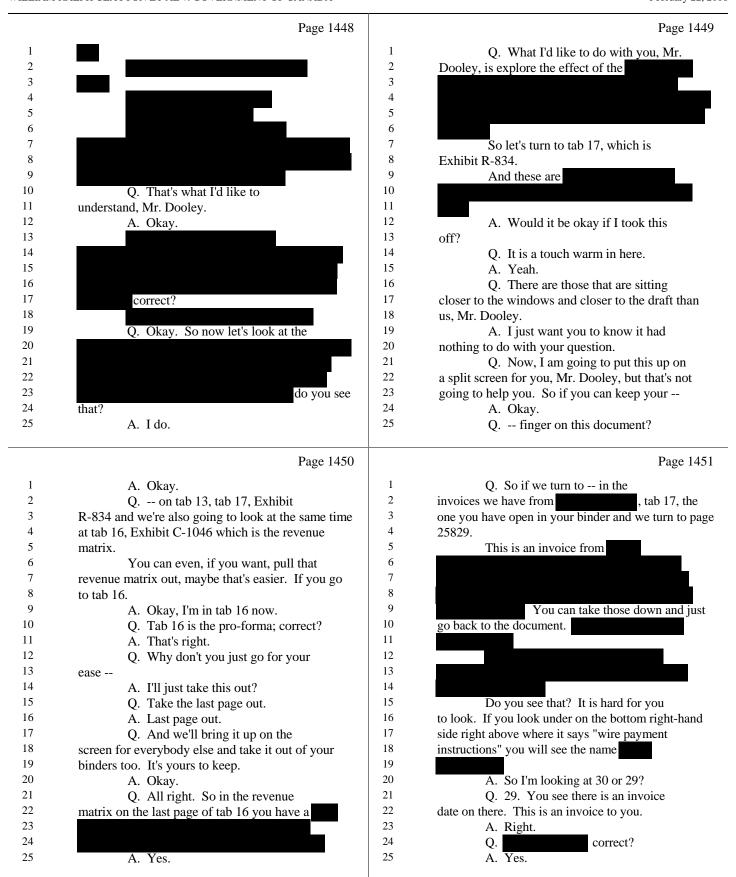


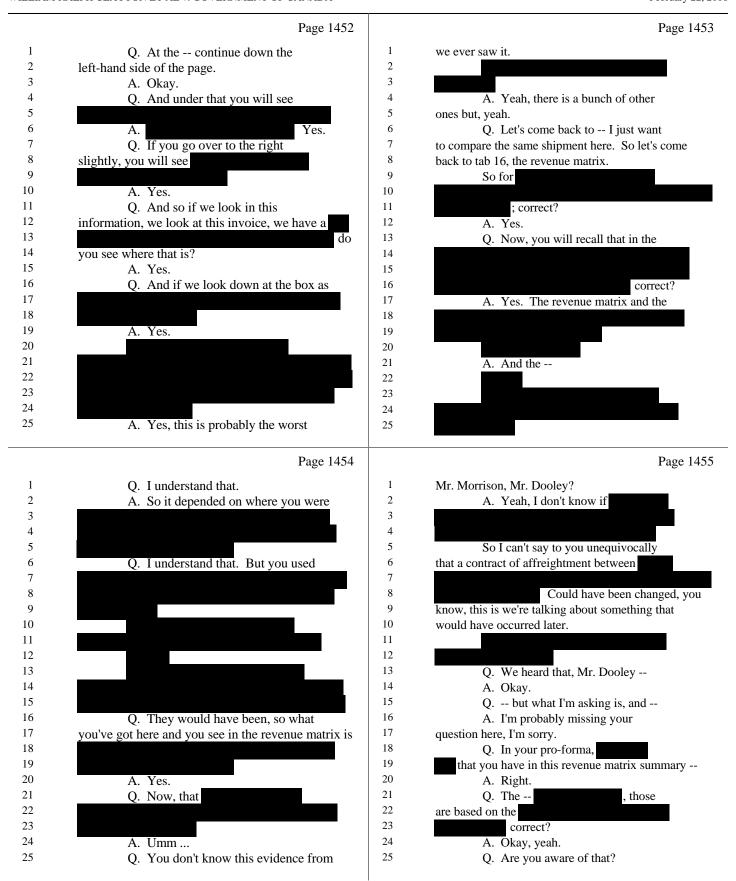


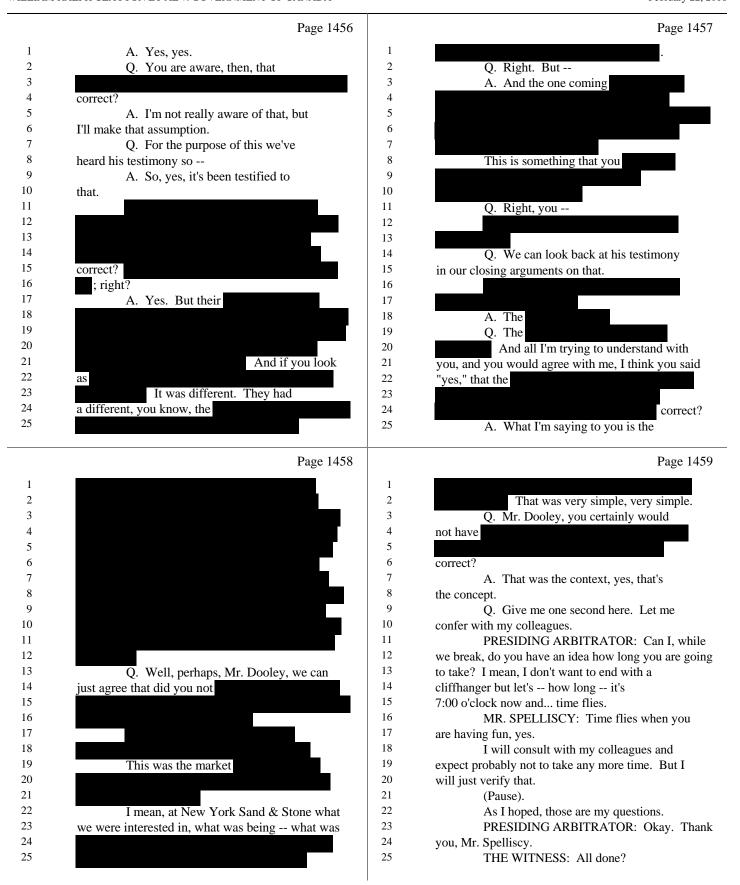












	Page 1460		Page 1461
1	PRESIDING ARBITRATOR: Sorry. Not	1	movies.
2	quite.	2	PRESIDING ARBITRATOR: But you
3	What are the prospects for the	3	understand that you are
4	re-direct? How long do you need it or	4	THE WITNESS: I understand.
5	MR. NASH: It's five past 7:00 now.	5	Absolutely.
6	It is going to be some time in	6	PRESIDING ARBITRATOR: So we break
7	re-direct. It will be shortened, I believe, if	7	for tonight and tomorrow at 8:30 we complete the
8	I have overnight just to go back.	8	thank you.
9	Mr. Spelliscy has maintained an	9	Whereupon proceedings adjourned at 7:04 p.m. to
10	admirable clip, but he has hit upon a number of	10	be resumed Friday February 23, 2018, at 8:30 a.m.
11	issues, an number of pieces, paragraphs and	11	
12	documents. So if I can gather the thoughts	12	
13	overnight, I think I can shrink it.	13	
14	I think I would be at least 45	14	
15	minutes to an hour now. But I think I can shrink	15	
16	that, I hope I can, by looking at this overnight,	16	
17	taking a look at those documents that Mr. Dooley has	17	
18	been referred to, see what questions arise with	18	
19	respect to them.	19	
20	I can do it in a much more systematic	20	
21	way tomorrow morning starting at 8:30.	21	
22	PRESIDING ARBITRATOR: Mr. Dooley, do	22	
23	you know what that means for you?	23	
24	THE WITNESS: Another night of	24	
25	restless sleep and another night watching the late	25	

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