

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE
ICSID ARBITRATION (ADDITIONAL FACILITY) RULES

- - - - -x

In the Matter of Arbitration :
Between: :
MOBIL INVESTMENTS CANADA, INC., :
and MURPHY OIL CORPORATION, :
Claimants, :
and : ICSID Case No.
GOVERNMENT OF CANADA, : ARB(AF)/07/4
Respondent. :
- - - - -x Volume 2

HEARING ON THE MERITS

Wednesday, October 20, 2010

The World Bank
1818 H Street, N.W.
Conference Room 4-800
Washington, D.C.

The hearing in the above-entitled matter came
on, pursuant to notice, at 9:05 a.m. before:

- PROF. HANS van HOUTTE, President
- PROF. MERIT E. JANOW, Arbitrator
- PROF. PHILIPPE SANDS, Q.C., Arbitrator

Also Present:

MS. MARTINA POLASEK,
Secretary to the Tribunal

Court Reporter:

MR. DAVID A. KASDAN, RDR-CRR
B&B Reporters
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903

APPEARANCES: (Continued)**Counsel:**

MR. NATHAN BAINES, Law Department, ExxonMobil
Canada Ltd.

MR. RENE MOULEDOUX,
Coordinator, International Disputes Group,
Law Department, Exxon Mobil Corporation

APPEARANCES:**On behalf of the Claimants:**

MR. DAVID W. RIVKIN
MS. JILL van BERG
MS. SAMANTHA ROWE
Debevoise & Plimpton, LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

MS. SOPHIE LAMB
Debevoise & Plimpton, LLP
Tower 42
International Financial Centre
25 Old Broad Street
London
EC2N 1HQ
United Kingdom
+44 20 7588 4180

MR. BART LEGUM
Salans
5 Boulevard Malesherbes
7508 Paris
France
+33 (0)1 42 68 48 70

Counsel:

MS. TONI HENNIKE,
Senior Counsel, International Disputes Group
Law Department, Exxon Mobil Corporation

MS. ANNA TAYLOR KNULL,
Attorney, International Disputes Group
Law Department, Exxon Mobil Corporation

MR. WALTER COMPTON,
Vice President, Law Secretary, Murphy Oil
Corporation

APPEARANCES: (Continued)**On behalf of the Respondent:**

MR. NICK GALLUS
MR. MARK LUZ
MR. ADAM DOUGLAS
MR. PIERRE-OLIVIER SAVOIE
MR. HUGH CHEETHAM
Director and General Counsel
Department of Foreign Affairs
and International Trade, Canada
Trade Law Bureau (JLT)
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada
(613) 944-0027

MR. GORDON VOOGD,
Senior Policy Advisor, Natural
Resources Canada

MR. MATTHEW TONE,
Senior Policy Trade Analyst, Foreign
Affairs and International Trade Canada

MS. MARGARET GILLIES,
Solicitor, Department of Justice,
Government of Newfoundland and Labrador

MR. PAUL SCOTT,
Government Representative, Government of
Newfoundland and Labrador

ALSO PRESENT:

On behalf of the United States:

MR. MARK E. FELDMAN
Chief, NAFTA/CAFTA-DR Arbitration
Division, Office of International Claims
and Investment Disputes
Office of the Legal Adviser
U.S. Department of State
Suite 203, South Building
2430 E Street, N.W.
Washington, D.C. 20037-2800
(202) 776-8443

On behalf of the United Mexican States:

SR. SALVADOR BEHAR,
Legal Counsel for International Trade
Embassy of Mexico
Secretaria de Economia
Trade and NAFTA Office
1911 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 728-1707

PROCEEDINGS

1 PRESIDENT van HOUTTE: Good morning, ladies
2 and gentlemen. If I'm not mistaken, now we will start
3 with the witness examinations, and the first witness
4 is Mr. Paul Phelan.
5 PAUL PHELAN, CLAIMANTS WITNESS, CALLED
6 PRESIDENT van HOUTTE: I guess you are
7 Mr. Paul Phelan.
8 THE WITNESS: Yes, I am.
9 THE SECRETARY: Excuse me. Should we open
10 the session at this time?
11 PRESIDENT van HOUTTE: Yes.
12 THE SECRETARY: Please open the session.
13 PRESIDENT van HOUTTE: Mr. Paul Phelan, can
14 you just repeat: I hereby declare upon my honor and
15 conscience and honor.
16 THE WITNESS: I declare upon my conscience
17 and honor.
18 PRESIDENT van HOUTTE: That I will tell the
19 truth and nothing but the truth.
20 THE WITNESS: That I will tell the truth and
21 nothing but the truth.
22

C O N T E N T S

Table with 2 columns: Description and PAGE. Includes sections for WITNESSES: PAUL PHELAN, ANDREW RINGVEE, JOHN FITZGERALD, FRANK SMYTH, SARAH EMERSON.

09:06:36 1 PRESIDENT van HOUTTE: Thank you very much.
2 Will the Claimants start to examine or
3 present Mr. Phelan?
4 MR. RIVKIN: Yes, we will do a direct
5 examination under the agreed procedures and then turn
6 him over for cross-examination.
7 PRESIDENT van HOUTTE: Thank you.
8 Mr. Rivkin, you have the floor.
9 MR. RIVKIN: Thank you very much, Mr. van
10 Houtte.
11 DIRECT EXAMINATION
12 MR. RIVKIN:
13 Q. Mr. Phelan, you submitted three Witness
14 Statements in this case; is that right?
15 A. That is correct.
16 Q. And do you reaffirm the contents of those
17 Witness Statements?
18 A. I do.
19 Q. And I think they're on the table behind you,
20 actually, if you want to have them near you.
21 Let me ask you--in your--you may not need to
22 refer to this--in your third and most recent Witness

09:07:21 1 Statement, you said that HMDC was still awaiting the
2 Board's decision on the eligibility of Hibernia's
3 reported R&D and E&T expenditures for 2009. Does that
4 continue to be true?
5 A. It does.
6 Q. Did review a draft of Mr. Rosen's updated
7 damages calculation in this arbitration submitted by
8 Claimants?
9 A. I did.
10 Q. And are you familiar with the basis on which
11 he predicted the likely treatment of those 2009
12 submitted expenses?
13 A. Yes, I am.
14 Q. He predicted that the percentage of 2009
15 expenditures at the Board were deemed eligible under
16 the Guidelines based on the percentage of expenditures
17 that the Board deemed eligible for the period 2004 to
18 2008; is that correct?
19 A. That is correct.
20 Q. And do you agree with that approach?
21 A. I do.
22 Q. Can you explain why?

09:09:19 1 the R&D for five of the six years. We took the 2006
2 period as a statistical outlier. So, for average
3 purpose, that would have actually distorted our
4 normalized average, and we've applied that in terms of
5 the 2010 average.
6 Q. Okay. And do you agree with that approach?
7 A. I do.
8 Q. Okay. Yesterday, Arbitrator Janow asked when
9 one can expect the Board to decide which R&D and E&T
10 expenses it will accept as eligible under the
11 Guidelines. Can you describe what the usual calendar
12 is?
13 A. Yeah. I think it's been an iterative process
14 for HMDC in submitting its expenditure. It's only in
15 2000--2009 was the first year that we got into
16 reporting the R&D expenditures in the format that the
17 Guidelines require.
18 In essence, we've submitted for 2009 back in
19 the first half of this year. Typically we would
20 submit by March 31st. We were somewhat delayed in
21 getting the information to the Board, given that we
22 had to go through all of our books for 2009 to

09:08:07 1 A. The approach that we had taken in terms of
2 preparing for the claim, looking at the ordinary
3 course of business relative to R&D, was to look at
4 what the Board has approved for the period 2004
5 through to 2009--or 2008. We had taken those numbers,
6 basically looked at what we had submitted to the Board
7 as R&D in the first instance; then, basically what the
8 Board has accepted. We've applied that percentage for
9 2009, based on the fact that we submitted [REDACTED]
10 to the Board earlier this year relative to the 2009
11 expenditures.
12 Q. And for 2010, are you familiar with the
13 approach Mr. Rosen has taken?
14 A. Yes, I am.
15 Q. And what is that approach?
16 A. We, basically for 2010, again took the period
17 2004 through 2009, so, in other words, we incorporated
18 2009 into our average. In essence we were dealing
19 with a six-year period. We took the E&T component for
20 the full six years and took an average of that E&T,
21 and that became the E&T relative to 2010.
22 Relative to the R&D component, we had taken

09:10:25 1 determine what we would consider as submitted to the
2 Board.
3 In essence, the Board did come back, and
4 rightfully so, and asked for further supporting
5 documentation applicable to those 2009 expenditures.
6 We were able to supply [REDACTED]. We
7 were still waiting for [REDACTED]
8 [REDACTED]
9 So, in essence, the Board are going through
10 their due diligence.
11 Under normal circumstances, we probably see
12 the Board respond back to us mid-year. That would be
13 our--certainly our hope and desire.
14 Q. Thank you.
15 Now, Mr. Phelan, turning to the Board's
16 approval of Work Plans, at the time of your Third
17 Witness Statement, the Board had approved some but not
18 all of projects identified in the Work Plans.
19 Had it done so without any qualifications or
20 reservations?
21 A. Up to the time of my last Witness Statement,
22 there was a reservation associated with [REDACTED]

09:11:22 1 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 7 MR. RIVKIN: And just for the panel's
 8 reference, that document is Claimants' Exhibit 232.
 9 We don't need to take time to look at it now.
 10 BY MR. RIVKIN:
 11 Q. Have any other Work Plan projects been
 12 approved since your Third Witness Statement?
 13 A. We have--in actual fact, even as recent as
 14 last week, we received approval on one other project.
 15 So at this point in time, based on what had been
 16 submitted to the Board by HMDC, the only one that
 17 we're awaiting response back on at this point in time
 18 is [REDACTED]
 19 Q. Okay. For the projects that have been so far
 20 approved by the Board, do you have the Board's
 21 assurance that all of the expenditures incurred in
 22 connection with those projects will, in fact, be

09:13:32 1 Q. Okay.
 2 A. And you're referring to [REDACTED]
 [REDACTED] I
 4 guess it's reference 3469.
 5 Q. And what is the--what is the overall cost of
 6 the [REDACTED] as shown in that work plan?
 [REDACTED]
 [REDACTED]
 9 Q. Great. Thank you. We will come back to
 10 those Work Plans in a little bit.
 11 Mr. Phelan, you said that at Paragraph 25 of
 12 your First Witness Statement that the Hibernia and
 13 Terra Nova Projects are well into their production
 14 phases and there is little need at this point for R&D
 15 in the usual course of business. Do you still agree
 16 with that statement?
 17 A. I do.
 18 Q. And can you explain why?
 19 A. Primarily, the two Operators, the two
 20 projects we were dealing with, Hibernia and Terra
 21 Nova, are not oil companies. They are Operators of
 22 specific assets. Typically, during the life of an

09:12:23 1 eligible or accepted for Guidelines credit?
 2 A. No. The process of pre-approval is provided
 3 to the Operator by the Board to say that the project
 4 from the Board's perspective would meet the intent of
 5 the Guidelines. The actual eligible expenditures are
 6 subject to the Board's review, so we are required
 7 under the Guidelines to actually, at the end of the
 8 project, each project, submit to the Board here are
 9 the actual final costs for that project. At that time
 10 the Board would assess those costs to determine if
 11 they still meet the eligibility requirements.
 12 Q. Okay. And what is the expected costs of the
 13 [REDACTED] that you referred to a minute
 14 ago?
 15 A. Maybe if we could refer to the Work Plan?
 16 Q. Yes. It's exhibit 212, which should be in
 17 the binder on your right there.
 18 MR. RIVKIN: What the witness has in front of
 19 him is the core exhibit binder that we provided to the
 20 panel.
 21 THE WITNESS: I have 212.
 22 BY MR. RIVKIN:

09:14:41 1 asset, during the construction and design phase is
 2 when the best opportunity presents itself relative to
 3 doing research and development.
 4 The Hibernia Project has been in production
 5 now since late 1997. Certainly we're investing, and
 6 continue to invest, about [REDACTED] a year in
 7 research and development, but those costs have been
 8 directly applicable to the technological challenges
 9 that we encounter with the platform. We will likely
 10 see a continuation of that type of spend, but
 11 generally we wouldn't have anticipated to see a type
 12 of R&D that is currently within our new Work Plan.
 13 Q. You described, a little earlier, a process
 14 Mr. Rosen used for determining 2010 R&D expenditures.
 15 Was that same process used for the expenditures after
 16 2010?
 17 A. Yes.
 18 Q. For determining what the ordinary course
 19 would have been?
 20 A. It has been. Again, in looking at the
 21 averages, as I mentioned earlier, 2004 through 2009
 22 and then applying it to 2010, we've continued that

09:15:46 1 process through the life of the field. We had taken
2 into account in the later years some assumptions
3 relative to what would be normal decline in both
4 production as well as costs, but the assumption going
5 forward is based on the average that we had for the
6 period 2004 to 2009.

7 Q. And you said the 2008 was removed as an
8 outlier--2006, sorry--was removed as an outlier. Can
9 you explain the basis for that?

10 A. Right. 2006, again, when we look at the fact
11 that we're using--for a statistical average, we're
12 using a limited number of years. We felt that 2006 in
13 terms of the amount of spend on R&D would have
14 actually been on the high side.

15 Typically, within ExxonMobil, within HMDC,
16 when we're doing our planning, certainly if we're
17 coming up with an average, we looked at highs and
18 lows, and certainly looked for normalization. So, in
19 essence, from a statistical perspective, we just
20 eliminated the outlier.

21 Q. So, is that approach one you typically use in
22 your industry when making any source of future plans

09:17:24 1 CONFIDENTIAL SESSION

2 BY MR. RIVKIN:

3 Q. Okay. Let me show you now, if you can turn
4 in your binder to Claimants' Exhibit 144.

5 A. I have it in front of me.

6 Q. Can you identify what this document is?

7 A. This particular document was prepared by our
8 tax advisor within HMDC. It represents the Scientific
9 Research and Experimental Development, the SR&ED
10 claims from the period 1990 through to 2008 that HMDC
11 submitted basically as claims to CRA.

12 It also indicates those claims that have been
13 accepted, or the amount of the claims, in each of the
14 years that has been accepted by CRA. So, in essence,
15 we have, of the [REDACTED] that was submitted for
16 the period up to end of 2008, we see CRA in actual
17 fact approved [REDACTED] of that.

18 Q. And now does that document also reflect your
19 education and training expenditures in these years?

20 A. No. This is--education and training
21 expenditures are not eligible under the SR&ED program.

22 Q. Okay. And on average, what have they been?

09:16:52 1 or budgets?

2 A. It is. And it is not exclusive to costs.
3 We'll also look at it from a volume's perspective. If
4 we feel there is a particular issue that's going to
5 give us an outlier, then we certainly normalize that.

6 MR. RIVKIN: At this point, Mr. President, I
7 would like to ask that we turn off the feed and go
8 confidential for a few minutes.

9 PRESIDENT van HOUTTE: Okay. Yes. It will
10 be done. And this time verified.

11 THE SECRETARY: Please close the session.
12 (End of open session. Confidential business
13 information redacted.)

14
15
16
17
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19
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09:19:14 1 A. On average, educational and training costs
2 would basically be about [REDACTED] and it
3 really depends on the period that we're looking at.
4 Certainly in the, say, the '94 to '96 period, we were
5 in the heyday of the construction activities at Bull
6 Arm with Hibernia. During that period of time we saw
7 certainly an increase in, for example, co-op students,
8 which would ultimately bring that average up.

9 Q. Production began in November 1997 at
10 Hibernia; is that right?

11 A. That is correct.

12 Q. Now--and is the R&D spend in that year
13 typical of production phase R&D?

14 A. No. 1997, we had started several R&D
15 projects associated with the construction work, so
16 there were follow-on projects coming out of '95 and
17 '96 into 1997.

18 So, two facts. Number one is in 1997, some
19 of those projects are related--most of the projects
20 are related to construction-type design questions;
21 and, secondly, we basically didn't start production
22 until November of that year.

09:20:30 1 Q. Okay. And does this chart reflect what you
2 said earlier about how R&D is usually higher during
3 the design and construction phase than during the
4 development and production phase?
5 A. It does. If you look at the period 1990
6 through 1998, you will notice that there are some
7 significant projects that were submitted by HMDC. The
8 years particularly, when you look at '91 through '95,
9 you notice there's a high incidence of activity
10 relative to SR&ED claims. Certainly from an approval
11 perspective, we weren't as successful as we would have
12 hoped to be. However, again, on the CRA acceptance
13 side, we certainly had more accepted during that
14 period than we have seen since then in the production
15 period.
16 Q. Okay. Now, the expenditures in 2005 and 2006
17 are substantially higher. Can you explain why that
18 was so?
19 A. [REDACTED]
20 [REDACTED]
21 We submitted that as a claim to CRA. So, in essence,
22 if you were to talk about outliers, 2005 and 2006, if

09:22:59 1 submit the [REDACTED] to Stats Canada as part of the
2 normal survey. Annually we are requested to provide a
3 survey or provide a response in terms of the R&D.
4 So, in essence, we did submit--the owners did
5 submit the [REDACTED] as part of the research and
6 development. We have had dialogue with Stats Canada
7 to try to confirm what amounts are there. What we can
8 say is that we did report it to Statistics Canada. We
9 do believe that it is in Statistics Canada's
10 benchmark.
11 Q. Okay. Did the Board accept the [REDACTED]
12 expenditures as eligible for Guidelines credit?
13 A. The Board had not accepted the [REDACTED]
14 Q. You say in Paragraph 10 of your Third Witness
15 Statement that no additional expenditures on R&D are
16 foreseen that will relate specifically to the AA Block
17 or HSE, except in relation to a [REDACTED]
18 contribution to one or more education and
19 research-oriented legacy projects, which is required
20 under the HSE benefits agreement.
21 Do you still agree with that statement?
22 A. Yes I do.

09:21:44 1 CRA had accepted those particular amounts, they
2 certainly would be an outlier in any statistical
3 average that we would have computed for going forward
4 beyond those years.
5 Q. And did CRA accept the amounts for the [REDACTED]
6 [REDACTED]
7 A. No. CRA did not accept the amounts for the
8 [REDACTED] We have--some of our owners have received
9 assessments from CRA. Those that have are in the
10 process of appealing that particular claim.
11 Q. Did HMDC believe that the [REDACTED] was, in
12 fact, research and development?
13 A. Yes. HMDC had reported it as R&D. We
14 believe very strongly that it fits into the category.
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 Q. By the way, do you know if this [REDACTED] has
20 been taken into account for purposes of the Stats Can
21 factor?
22 A. The--what I can indicate is that HMDC did

09:24:05 1 Q. Can you explain why you don't anticipate more
2 R&D in connection with the AA Block?
3 A. Well, the AA Block was a block--when I say
4 "block," it's a section of the reservoir, so we
5 basically have--use alpha to denote different sections
6 of the reservoir.
7 The AA Block was an area that we started to
8 produce from last year. We had to strike a separate
9 agreement with the Province in order to produce in
10 that particular area.
11 [REDACTED]
12 [REDACTED]
13 [REDACTED] So the actual
14 [REDACTED]
15 construction activity associated or the
16 well-construction activity is actually complete with
17 no R&D associated with it.
18 Q. And how about HSE?
19 A. HSE is actually a separate project. It's a
20 different group of working interest owners. We
21 basically have a different player, being Alcor Energy,
22 which basically has a 10 percent ownership.

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09:25:16 1 So, within our numbers, we have excluded any
 2 HSE volumes relative to the calculation of the claim,
 3 and as well we've excluded any associated costs.
 4 Q. Okay. You were looking earlier at Exhibit
 5 CE-212. That's the Work Plan document submitted to
 6 the Board; is that right?
 7 A. Just one second.
 8 Q. Claimants' Exhibit 212.
 9 A. Yes, it is.
 10 Q. Okay. Just a couple of quick questions on
 11 that. The number of projects are listed there as
 12 possibilities, and you've already described that some
 13 of them have been approved by the Board to move
 14 forward.
 15 Do you know today whether all of these
 16 projects will be successfully completed?
 17 A. No, I do not.
 18 Q. Do you know today whether these projects will
 19 result in any operational benefits?
 20 A. That would be speculation on my part.
 21 Q. Do you know today whether any of these
 22 projects will result in any other benefits to HMDC or

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09:27:24 1 experience with CRA is a good proxy for estimating
 2 whether you will receive SR&ED credit for the projects
 3 in the Work Plan. Do you agree with him?
 4 A. I do not agree.
 5 Q. And why not?
 6 A. Primarily, what we got in terms of history is
 7 projects that have been involved directly with the
 8 challenges associated with the Hibernia Project. The
 9 projects--most of the projects that are within the
 10 Work Plan are types of projects that, in terms of
 11 application to Hibernia, we don't have the same
 12 understanding. These are--in terms of projects, the
 13 process around developing this list has been quite
 14 different from the process we've used in the past.
 15 In the past, we basically looked at our
 16 historical expenditures. We didn't have a
 17 pre-approval process. We looked at our historical
 18 expenditures. We would look at the type of activity
 19 that was undertaken in a given year; and then based on
 20 that activity, we would submit a claim to CRA.
 21 In the case of the Work Plan, we're dealing
 22 with projects, all of which--except for one or two,

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09:26:18 1 to its owners?
 2 A. Again, that would be speculation.
 3 Q. Has HMDC received any clarification from the
 4 Federal Government as to whether any of the projects
 5 outlined in the Work Plan will be eligible for SR&ED
 6 credits?
 7 A. We have not received any confirmation from
 8 CRA at all on any of these projects.
 9 Q. Looking at the expenditures that CRA has
 10 previously approved for SR&ED credits, were those R&D
 11 expenditures necessary for the project?
 12 A. Any of the activities we've had right up
 13 through to 2009 that we've submitted to the Board have
 14 been associated with the Hibernia Project. So they've
 15 actually been to help facilitate commercial and
 16 technological challenges that we've had on the
 17 platform. So, historically, all of the R&D has been
 18 applicable to the Hibernia Project.
 19 Q. And going forward, is the research in the
 20 Work Plans actually necessary to the projects?
 21 A. No, it is not.
 22 Q. So, Mr. Walck has suggested that your past

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09:28:32 1 all of which are basically in the preliminary phase.
 2 At this stage, CRA would likely qualify--in other
 3 words, we would not get a pre-approval. We would
 4 likely be in a situation where we'd have to wait until
 5 much more definition on these projects has been
 6 realized.
 7 Q. Has the Province indicated to you that you
 8 will received royalty benefits for completing any of
 9 the projects outlined in the work plan?
 10 A. No, the Province has not.
 11 Q. Do you know if the Board's pre-approval of
 12 projects in the Work Plan will have any relevance to
 13 the obtaining of royalty benefits?
 14 A. No.
 15 The--what we're faced with from a Hibernia
 16 and Terra Nova perspective is we basically have three
 17 different--and I will call them agreements that we
 18 have to adhere to. The Royalty Agreement has its own
 19 set of definitions. And so what would be considered
 20 eligible under the Royalty Agreement is a separate and
 21 distinct process. Due diligence is exercised by the
 22 Province of Newfoundland relative to royalty

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17 Q. Given all the uncertainties in whether or not

18 you will be able to successfully complete this study

19 and whether this research will result in anything

20 usable, at which you have testified to, in the

21 ordinary course of events, would you expect to receive

22 management approval to spend [REDACTED] to get a

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09:36:25 1 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7 Q. Turning to a different subject, you indicated

8 in your Third Witness Statement that oil production in

9 2009 was higher than expected originally. Can you

10 explain to the Panel why that was so.

11 A. Sorry, can you repeat the question.

12 Q. Sure.

13 You indicated that oil production in 2009 was

14 higher than you originally anticipated; is that

15 correct?

16 A. Yes, it was.

17 Q. Can you explain to the Tribunal why that was

18 so.

19 A. Well, first and foremost, we go forward with

20 a Business Plan each year with the most likely case.

21 In the case of Hibernia's production for 2009, we had

22 anticipated to see production of approximately just

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09:35:14 1 potential [REDACTED] savings in return if everything

2 goes correctly?

3 A. As an Operator, we certainly wouldn't have

4 expected, and we wouldn't expect, any owner to endorse

5 a [REDACTED] expenditure to save [REDACTED] when

6 there is the degree of uncertainty associated with

7 this.

8 Again, the assumption you have to make is

9 that this study would be successful. In terms of the

10 economics that we would use for Hibernia Southern

11 Extension, we currently, in our economics, have

12 included [REDACTED] as an example.

13 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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09:37:28 1 over [REDACTED]

2 In actual fact, through 2009, we were

3 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

13 Q. And did this acceleration in production have
 14 any material impact on overall recoverable reserves at
 15 Hibernia?

16 A. No. If you actually look at the profiles
 17 that we've submitted in my First Witness Statement and
 18 then my Third Witness Statement, the production
 19 profiles overall life of field has not changed
 20 dramatically.

21 And in essence, if you look at the most
 22 current production profile, which I think is Exhibit

09:41:00

[REDACTED]

[REDACTED]

[REDACTED]

4 In essence, we have seen that the Hibernia
 5 North properties has goodbye up slightly in terms of
 6 total life of field reserves. So, on 238 you will see
 7 that it's [REDACTED] versus in the
 8 previous submission it was [REDACTED]
 9 What you will also note is that the HSE unit
 10 [REDACTED] to the current
 11 estimate of [REDACTED]

12 A point about the production profile is that
 13 it changes--internally it changes each time we get new
 14 data from the reservoir.

15 What we attempted to do in our First Witness
 16 Statement is provide production profiles that
 17 were--that was information, more in the public domain.
 18 So we tried as close as possible to match in the
 19 information that the Board would have. So, we elected
 20 to use the amendment to the Development Plan for 2009.

21 Again, we had better information relative to
 22 2009 and 2010, actual production or expected

09:39:57

1 CE-238--

2 Q. Two thirty-eight, two thirty-eight.

3 A. So, if you look at a comparison between
 4 CE-238 which was the most recent production profile
 5 for Hibernia versus CE-11.

6 Q. CE-11, which was the 2009.

7 A. Okay. Going back and forth between the two.

8 In essence, overall, between these two
 9 profiles, we haven't seen the reserves overall change
 10 dramatically. So there hasn't been a material
 11 difference.

12 I should point out--

13 Q. Just so the Tribunal is clear, the total
 14 reserves changed from [REDACTED]
 15 is that right?

16 A. Yes, yes.

17 And there's a couple of factors that are
 18 associated with that.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

09:42:18

1 production, but we wanted to anchor a claim back to
 2 something that the Government would be more familiar
 3 with.

4 Q. And for 2010, which figures did you present
 5 with your Third Witness Statement?

6 A. So, if one were to look at the 2010 latest
 7 numbers is [REDACTED] and compare it to what we were last
 8 year, and last year's statement I think it was in the
 9 ballpark of [REDACTED] I can't quite see it on the screen.

10 Q. Yeah, I see it. Let me restate my question.
 11 The question was simply: Was the 2010 forecast a
 12 production profile that you submitted as CE-238
 13 conducted in the ordinary course of business?

14 A. Sorry, yes.

15 As far as the production profile, we
 16 basically go through an annual business planning
 17 process. This Hibernia production profile was a
 18 result of taking our latest information and updating
 19 it accordingly.

20 Q. Okay.

21 A. So, we took the amendment to the Development
 22 Plan that had been submitted and in essence updated it

09:48:03 1 THE SECRETARY: I wanted to confirm that we
2 are in closed session.
3 THE WITNESS: Is it okay if I just get some
4 water? Thank you.
5 (Pause.)
6 THE SECRETARY: Please open the session.
7 CROSS-EXAMINATION
8 BY MR. GALLUS:
9 Q. Good morning, Mr. Phelan.
10 A. Good morning.
11 Q. Mr. Phelan, you work for ExxonMobil Canada?
12 A. Yes, I do.
13 Q. And how long have you worked for ExxonMobil
14 Canada?
15 A. I have actually worked for ExxonMobil Canada
16 since 2002.
17 Q. 2002.
18 Before then, where did you work?
19 A. I actually was an employee of Hibernia
20 Management and Development Company from 1990 through
21 to 2002.
22 Q. And before 1990?

09:52:25 1 Q. Andrew Ringvee, was he working for Mobil
2 before 1990?
3 A. I think you would probably need to ask Andrew
4 that specifically.
5 Q. We might do that.
6 A. Okay.
7 Q. Currently you are the operations manager for
8 ExxonMobil Canada?
9 A. That is correct.
10 Q. And you are responsible for accounting
11 services at ExxonMobil Canada in eastern Canada?
12 A. Eastern Canada.
13 Q. And you have some responsibility for
14 accounting services for the Hibernia Project?
15 A. Yes, I do.
16 Q. You're responsible for preparing the
17 statement of joint account costs?
18 A. I'm responsible for overseeing the
19 preparation of the statement of joint account costs
20 for HMDC, yes.
21 Q. And these statements reflect costs incurred
22 on the project?

09:51:35 1 A. There were several different companies I
2 worked for in the two years preceding it as well as I
3 worked with Sinclair's Mercy Hospital for
4 four-and-a-half years after graduation from Memorial
5 University.
6 Q. Were you working for Mobil in 1985?
7 A. No, I was not.
8 Q. Were you working for Mobil before 1990?
9 A. No. I started work with HMDC in
10 December 1990.
11 Q. Do you know if any of the witnesses for the
12 Claimants in this arbitration were working with Mobil
13 in 1985?
14 A. If you could lists witnesses, I will refer
15 specifically if they were or were not.
16 Q. Do you know if Andrew Ringvee was working for
17 Mobil in 1985?
18 A. No.
19 Q. Do you know if Edward Graham was working for
20 Mobil in 1985?
21 A. That, I'm not sure. He was not working in
22 St. John's. I will clarify that point.

09:53:04 1 A. They do.
2 Q. And they reflect outstanding obligations for
3 the project?
4 A. They do.
5 Q. These statements are prepared according to
6 generally accepted accounting principles?
7 A. They are.
8 Q. And does that include International
9 Accounting Standard 37?
10 A. It does.
11 Q. And that standard described a contingent
12 liability?
13 A. It does.
14 Q. And a contingent liability is not recognized?
15 A. We are not recognizing it.
16 Q. What does it mean to not recognize a
17 contingent liability?
18 A. Maybe if you wouldn't mind bringing up the
19 IAS standard for the Parties.
20 Q. Certainly. That is Tab 12 of the binder
21 which is the before you.
22 A. So, which section would you want the Tribunal

09:53:58 1 to point to?
 2 Q. If you could turn to Page 1,884, and you will
 3 see at the top of Page 1,884 there is a heading for a
 4 contingent liability?
 5 A. Yes.
 6 Q. And you will see next to this Paragraph
 7 Number IN19 s the sentence, "an entity should not
 8 recognize a contingent liability"?
 9 A. That's correct.
 10 Q. What does that mean?
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

09:55:56 1 BY MR. GALLUS:
 2 Q. Again, from an accounting perspective what
 3 does it mean to not recognize contingent liability?
 4 MR. RIVKIN: Do you understand the question.
 5 THE WITNESS: If you go back to IN19, an
 6 entity should not recognize a contingent liability.
 7 Not recognize means not book it.
 8 BY MR. RIVKIN:
 9 Q. Okay. Thanks.
 [REDACTED]
 [REDACTED]
 [REDACTED]
 14 Q. You see at the top of Page 1,884 there is a
 15 definition of contingent liability.
 16 A. Yes.
 17 Q. You will see it describes a contingent
 18 liability as two possibilities, a part (a) and a part
 19 (b).
 20 A. Yes.
 21 Q. And part (a) says that "a contingent
 22 liability is a possible obligation that arises from

09:55:17 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 5 Q. Sorry for interrupting you.
 6 A. Okay. Sure.
 7 Q. Just talking generally--
 8 A. Okay.
 9 Q. --just from an accounting perspective for the
 10 benefit of the Tribunal.
 11 A. Sure.
 12 MR. RIVKIN: I'm sorry. He was answering the
 13 question the best way he could. I think he should be
 14 allowed to finish the question, and I think he has to
 15 answer it in the context of this specific project.
 16 MR. GALLUS: We will certainly give him the
 17 opportunity to do that. I just thought it might be
 18 helpful for everyone that, before we go into
 19 specifics, we just understood the accounting terms we
 20 are going to use, so I thought generally from an
 21 accounting specific.
 22 (Comment off microphone.)

09:56:47 1 past events and whose existence will be confirmed only
 2 by the occurrence or nonoccurrence of one or more
 3 uncertain future events not wholly within the control
 4 of the entity."
 5 A. Right.
 6 Q. And part (b) is "a present obligation that
 7 arises from past events but is not recognized because,
 8 (i), it is not probable that an outflow of resources
 9 embodying economic benefits will be required to settle
 10 the obligation, or, (ii) the amount of the obligation
 11 cannot be measured with sufficient reliability."
 12 A. Right.
 13 Q. So, either of those could be a contingent
 14 liability, is that right?
 15 A. That's correct.
 16 Q. Okay.
 17 MR. GALLUS: Perhaps now if we could turn off
 18 the public feed, in case they are back from the fire
 19 drill.
 20 THE SECRETARY: Please close the session.
 21 (End of open session. Confidential business
 22 information redacted.)

10:03:03 1

[REDACTED]

10:05:30 1

[REDACTED]

8 (Pause.)

9 BY MR. GALLUS:

10 Q. Mr. Phelan, let's go back to International
11 Accounting Standard 37.

12 I should say for the record, I said before
13 it's behind Tab 12 in the binder that you have. But
14 for the record I should also mention that that is a
15 document number GFA-23.

16 So, if you could turn back to have a look
17 again.

18 A. Which page?

19 Q. Let's--

20 A. 1884?

21 Q. Let's look at Page 1881. And you will see
22 there that the Standard also addresses the accounting

10:04:19 1

[REDACTED]

10:22:33 1 Standard for provisions?

2 A. Yes, it does.

3 Q. And a provision is a liability of uncertain
4 timing or amount.

5 A. That's correct.

6 Q. But that's some--

7 MR. RIVKIN: Speak up a bit, if you could.

8 THE WITNESS: Sorry, yes.

9 Sorry, what was your question?

10 BY MR. GALLUS:

11 Q. Let me start again. So a provision is a
12 liability of uncertain timing or amount?

13 A. That's what it says here, yes.

14 Q. And--but which is recognized?

15 A. A provision would be recognized in your
16 books, yes.

17 Q. And the Standard identifies the conditions
18 under which the--under which provisions should be
19 recognized?

20 A. That is correct.

21 Q. And there are three conditions there; is that
22 right?

10:23:13 1 A. That is correct.

2 Q. Each has to be satisfied before a provision

3 is recognized?

4 A. That is correct.

5 Q. The first condition is the entity has a

6 present obligation, legal or constructive, as a result

7 of a past event?

8 A. Yes.

9 Q. The second is that it is probable, that is,

10 more likely than not, that an outflow of resources

11 embodying economic benefits will be required to settle

12 the obligation?

13 A. Yes.

14 Q. And the third is that a reliable estimate can

15 be made of the amount of the obligation?

16 A. Yes.

17 Q. And all three conditions must be satisfied

18 before a provision will be recognized?

19 A. Only when, yes.

[REDACTED]

[REDACTED]

[REDACTED]

10:25:09 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

10:27:12

[REDACTED]

[REDACTED]

10:30:43

[REDACTED]

[REDACTED]

11 Q. Okay. Let's move on. And I think we can

12 turn the public feed on again now.

13 THE SECRETARY: Please open the session.

14 BY MR. GALLUS:

15 Q. Let's talk about Terra Nova for a moment.

16 The ownership of Terra Nova is currently being--or

17 it's currently subject to arbitration?

18 A. Maybe if you can just clarify the question.

19 It's not quite arbitration.

20 Q. Or perhaps you could explain for us--

21 A. So, you're referring to my Witness Statement?

22 Q. That's right.

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10:31:42 1 A. Okay. Maybe if we can turn to that.
 2 Q. Yeah, I'm referring to your Third Witness
 3 Statement, specifically Paragraph 15.
 4 So the first sentence: The redetermination
 5 of owner interest in Terra Nova is currently subject
 6 to arbitration.
 7 A. Yes, it is. And that's part of the Terra
 8 Nova Development and Operating Agreement. There's a
 9 one-time redetermination that would be set within the
 10 terms of that agreement.
 11 Q. So ownership is being redetermined?
 12 A. Yes, it is.
 13 Q. And the redetermination of ownership
 14 interests will impact liability for Terra Nova's
 15 Guidelines obligations?
 16 A. On a go-forward basis, the redetermination
 17 will set new working interests going forward.
 18 Q. So, the redetermination of ownership
 19 interests is only prospective?
 20 A. That's correct. The redetermination process,
 21 any sales that any of the owners would have up to the
 22 point of redetermination are sales of that particular

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10:34:33 1 Q. Okay I'm going to read out these couple of
 2 sentences here. It says the company anticipates that
 3 its working interest will be reduced to approximately
 4 10.5 percent." And the company that seems to be
 5 talking about this arbitration to which you're
 6 referring?
 7 A. I would expect that. This is Murphy's
 8 statement. I can't speak for Murphy, but yes, that's
 9 the intent of the statement.
 10 Q. And they say, "The change is subject to the
 11 results of the ongoing arbitration process between the
 12 Operator and certain other owners."
 13 Then it says, "Upon completion of the
 14 arbitration process, the company will be required to
 15 make a settlement payment to Terra Nova partnership
 16 for the value of oil sold since about December 2004
 17 related to the ultimate working interest reduction
 18 below the company's original 12 percent."
 19 A. That's correct.
 20 But the sales--so I sense a puzzlement in
 21 your expression there.
 22 Q. Right.

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10:33:06 1 owner. So, ExxonMobil or Murphy, whatever percentage
 2 we have, that's the sales we have. On a go-forward
 3 basis, the working interests would be changed.
 4 Q. So, any money received from oil sold before
 5 that time doesn't get redetermined?
 6 A. No, no.
 7 Q. Could you turn to Tab 13 in your binder.
 8 This is Exhibit GFA-30.
 9 And specifically could you turn to Page 2.
 10 And you see that's a dense page of writing, but I want
 11 to refer you to the final paragraph, and about halfway
 12 through there is a sentence that begins "the company
 13 anticipates that its working interest."
 14 MR. RIVKIN: And just so the record is clear
 15 here, the company here is Murphy.
 16 MR. GALLUS: Oh, I'm sorry.
 17 BY MR. GALLUS:
 18 Q. If you could explain what this document is?
 19 This is the 10(k), the Annual Report for Murphy Oil.
 20 A. For the record, this is the first time I've
 21 seen this document, but I'm familiar with the types of
 22 statements that owner companies would issue.

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10:35:30 1 A. The sales basically are the sales to each
 2 owner up to that point, which is what my statement
 3 was. So, we are obliged to pay royalties. We are
 4 obliged to do our calculation of net profits interest
 5 to the Federal Government on an owner-by-owner basis
 6 up to that point.
 7 A redetermination is a payment that would be
 8 made based on specific calculations within the
 9 Development and Operating Agreement.
 10 So, on a go-forward basis, our working
 11 interest would be adjusted based on what the
 12 arbitration panel would rule on.
 13 Q. But between 2004--or December 2004 to the
 14 time of the redetermination, which payments have been
 15 redistributed?
 16 A. Well, again, what we have is a scenario is
 17 the costs are defined within that Development and
 18 Operating Agreement. The obligations in terms of
 19 contingent liabilities, we have, as individual owners,
 20 provided the Board with a financial instrument. That
 21 financial instrument stays in place. There is no
 22 change. We have 3.4 million as ExxonMobil Canada as a

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10:36:44 1 financial instrument in place for Terra Nova. We
2 still will have 3.4 million, and we still, as
3 ExxonMobil, have a responsibility for that amount.
4 That doesn't change. We have, as an owner,
5 responsibility on the Terra Nova for that.
6 Q. So--just so we're clear, the settlement
7 payment to the Terra Nova partnership for the value of
8 what we saw since about December 2004, to what does
9 that refer?
10 A. Well, that's a specific clause within the
11 Development and Operating Agreement. So there is time
12 triggers within that agreement to determine what the
13 specific period would be for the redetermination.
14 I should point out as well that the R&D
15 program, as we've seen it relative to the Board, is
16 one that was not contemplated in the Terra Nova
17 Operating Agreement. So there is no provision within
18 the agreement under the arbitration relative to R&D.
19 It was not something that any of the owners would have
20 anticipated or expected to see.
21 So, the fact that we are sitting with a
22 10 million--or I guess it's \$8 million--type Terra Nova

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10:39:11 1 report.
2 Q. Okay. Are you familiar with the report?
3 A. I've seen--I've read the report obviously
4 through this--for this case.
5 Q. Did you read through the report before this
6 case?
7 A. Yes, I did read the report before this case.
8 Q. In what context?
9 A. Sorry, before today's, or before--
10 Q. Before this arbitration.
11 A. No, no.
12 Q. Are you aware of the 1985 Hibernia Benefits
13 Plan?
14 A. Yes, I am.
15 Q. And you're aware of the 1986 Hibernia
16 Supplemental Benefits Plan?
17 A. Yes, I am.
18 Q. Are you familiar with that plan?
19 A. I am.
20 Q. When did you read that plan?
21 A. Actually, I first read that plan back in the
22 early Nineties, in my capacity when I was first hired

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10:37:59 1 liability, that was not in the Plan. So there is no
2 specific clauses within this arbitration for the
3 redetermination to actually cover what we're actually
4 talking about here today.
5 Q. If the result of this arbitration is to
6 change the ownership interests, would that change the
7 obligation of the companies with regard to payments
8 under the Guidelines?
9 A. Going forward. Going forward. I mean,
10 that's quite obvious. If our working interest or
11 Murphy's working interest changes going forward, and
12 this note that you pointed out would say that Murphy
13 anticipates 10.5 versus 12. That's a fact. Now,
14 that's their estimate at this point in time. Until
15 the Arbitration Ruling comes in on the
16 redetermination, we would be speculating what that
17 percentage is.
18 Q. Mr. Phelan, let's move on.
19 Are you aware of the 1985 report of the
20 Hibernia Environmental Assessment Panel?
21 A. I'm aware of the report. I was not with
22 Mobil at the time, and so I was not involved with the

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10:40:08 1 into HMDC. It was involved with budgeting and
2 reporting, and benefits reporting was one component
3 that we would feed to the Benefits Group.
4 Q. So, you were responsible for benefits
5 reporting at Hibernia from 1995 to 1997?
6 A. When I returned from South Korea's
7 assignment, yes, I moved into the budget and reporting
8 lead position, and at that time benefits reporting was
9 one of the aspects within my portfolio.
10 Q. And Ted O'Keefe was responsible for such
11 reporting from October 2002?
12 A. I think that--I rely on his Witness
13 Statement, but the dates sound approximately right.
14 Q. Who was responsible for such reporting
15 between 1998 and 2002?
16 A. Well, in terms of the benefits recording
17 within Hibernia, our Safety and Regulatory Group. So
18 I've been involved with the reporting, particularly on
19 the benefits side. My group provides the benefits
20 expenditure data, and that's been consistent
21 throughout.
22 Q. So, was there one person responsible for the

10:41:27 1 reporting between 1998 and October 2002?
 2 A. I think between that period of time I was
 3 responsible a couple of times, and we probably had
 4 somebody in terms of our HS&E group also responsible.
 5 I don't--you know that's--I'd have to go back through
 6 specific reports, obviously.
 7 Q. Okay.
 8 A. Okay.
 9 Q. But you were responsible at times
 10 between 1998 and October 2002?
 11 A. We certainly were responsible for any of the
 12 benefits reporting that--benefits expenditure
 13 reporting that goes into the Annual Report that we
 14 were submitting, yes.
 15 Q. And there were others who were responsible
 16 also in this period?
 17 A. There were others, yes.
 18 Q. And you can't remember their names now?
 19 A. I could get a list for you, if you so need
 20 it.
 21 I mean bottom line is I think you can go back
 22 through the records and see who signed off on the

10:43:03 1 no reason to read that. We had a Benefits Plan in
 2 place. The Operator was adhering to the Benefits Plan
 3 and reporting under the Benefits Plan.
 4 Q. And you never worked on Terra Nova?
 5 A. I did not work on Terra Nova.
 6 Q. And you were never responsible for reporting
 7 to the board for Terra Nova?
 8 A. No.
 9 Q. Do you know if Claimants in this arbitration
 10 have provided a witness statement from anyone who was
 11 responsible for reporting to the Board on Terra Nova?
 12 A. I'd have to defer to legal counsel on that,
 13 to be quite honest with you.
 14 Q. Do you know if Edward Graham would have been
 15 responsible for reporting on benefits on Terra Nova?
 16 A. No. Most certainly none. I can qualify
 17 that.
 18 Q. All right. Do you know if Ted O'Keefe would
 19 have been responsible for reporting on Terra Nova?
 20 A. Not on Terra Nova. Ted O'Keefe would have
 21 received reports relative to Terra Nova reports,
 22 certainly as part of the consultative process that we

10:42:15 1 specific reports. I signed off on some of those
 2 Annual Reports that went to the Board.
 3 Q. Okay.
 4 A. And I think we can refer back to the specific
 5 documents to know who actually went through it.
 6 Q. Would these other people have been, for
 7 example, Ed Graham?
 8 A. No.
 9 Q. Andrew Ringvee?
 10 A. No.
 11 Just as a point of reference: Ed Graham and
 12 Andrew Ringvee were not with EMDC at that point in
 13 time.
 14 Q. Okay, thanks.
 15 A. Okay.
 16 Q. Are you aware of the Terra Nova Environmental
 17 Assessment Panel report?
 18 A. Again, that's a document I read in
 19 preparation for this case only.
 20 Q. Okay. You didn't read it before this case?
 21 A. No, I did not.
 22 I had--I should point out to the panel, I had

10:44:04 1 have between Hibernia and Terra Nova.
 2 Similarly, in terms of going back to
 3 statements in terms of what's in our books as
 4 ExxonMobil Canada's accounting manager, we--and I
 5 dialogue with the Terra Nova--my counterpart at Terra
 6 Nova to actually obtain information on an annual
 7 basis. I can tell you that again, on an annual basis,
 8 we would confer on what items had been set up as far
 9 as contingencies.
 10 Q. Do you know if Andrew Ringvee would have been
 11 responsible for reporting on Terra Nova?
 12 MR. RIVKIN: Nick, Nick, you know that the
 13 benefits reporting by Terra Nova is not been by the
 14 Operator of Terra Nova, which is Suncor.
 15 PRESIDENT van HOUTTE: You should address the
 16 Tribunal.
 17 MR. RIVKIN: I'm sorry.
 18 The witness has already testified that the
 19 benefits reporting for Terra Nova was done by its
 20 Operator, Petro-Canada now Suncor.
 21 So, running through this list of ExxonMobil
 22 employees and asking whether they were responsible for

10:45:06 1 Terra Nova benefits reporting doesn't make a lot of
 2 sense. I'm not sure what point he's trying to make
 3 but...
 4 PRESIDENT van HOUTTE: It's up to each
 5 counsel to decide what he wants to put as questions.
 6 THE WITNESS: So, repeat the question,
 7 please.
 8 BY MR. GALLUS:
 9 Q. Andrew Ringvee is not responsible for
 10 reporting on Terra Nova?
 11 A. No.
 12 Q. Thanks.
 13 MR. GALLUS: Can I just take one moment to
 14 confer with counsel?
 15 (Pause.)
 16 BY MR. GALLUS:
 17 Q. Mr. Phelan, that ends my questions to you,
 18 but you're not done yet.
 19 A. Okay.
 20 Q. My colleague, Mr. Douglas, just has a couple
 21 of questions that he'd like to ask you.
 22 A. Sure, absolutely.

10:47:00 1 information redacted.)
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10:46:10 1 BY MR. DOUGLAS:
 2 Q. Hi, Mr. Phelan, just a couple of quick
 3 questions.
 4 You mentioned in your examination that
 5 historically the Claimants have made expenditures that
 6 have been accepted by the CRA as SR&ED-eligible?
 7 A. Yes, I have.
 8 Q. Those expenditures that were accepted total
 9 about [REDACTED]
 10 A. I think in the--
 11 MR. RIVKIN: I think this was done during the
 12 confidential session and so--
 13 MR. DOUGLAS: Oh, my apologies. You're
 14 absolutely right.
 15 (Comment off microphone.)
 16 MR. RIVKIN: I apologize. I believe this
 17 falls within the list of confidential topics, and I
 18 would like to ask that the session be closed.
 19 THE SECRETARY: Please close the session.
 20 The session is closed.
 21 MR. RIVKIN: Thank you.
 22 (End of open session. Confidential business

10:47:00 1 CONFIDENTIAL SESSION
 2 BY MR. DOUGLAS:
 3 Q. Those eligible expenditures totaled about
 4 [REDACTED]
 5 A. I believe the reference from 1990 through
 6 2008 was [REDACTED]
 7 Q. And all of those expenditures were necessary
 8 for the projects?
 9 A. For the period 1990 through 2008, I believe
 10 all of those were necessary for the project, yes.
 11 Q. And you mentioned that the Board will
 12 consider what a SR&ED-eligible when determining
 13 eligibility under the Guidelines.
 14 A. Just repeat that question?
 15 Q. Sure. You mentioned that the Board will
 16 consider what is eligible under the SR&ED regime when
 17 determining what is eligible under the Guidelines?
 18 A. The Board have indicated in their Guidelines,
 19 and certainly they have conveyed to HMDC, that if CRA
 20 ruled that something is SR&ED-eligible--in other
 21 words, we're successful with a SR&ED came--then the
 22 Board have indicated that they would appropriately

10:48:01 1 consider that.
2 In fact, if you look at our First Witness--my
3 First Witness Statement and then bring it to the Third
4 Witness Statement, part of the reason for the change
5 relative to our claim has been an acknowledgment by
6 the Board that, in fact, we did have SR&ED-accepted
7 claims.

8 And so, in essence, our claim seemed like it
9 dropped significantly, when in actual fact it was due
10 to acceptance of the SR&ED.

11 And since I'm on that topic also, an aspect
12 of the acceleration of the development phase credit.
13 So, we actually had \$10 million that in our first
14 claim had been spread through life of field was now
15 basically credited against the shortfall. So we went
16 from, I believe, [REDACTED]
17 [REDACTED] by virtue of the recognition of
18 the eligibility under SR&ED as well as the recognition
19 of the development phase credit.

20 Q. Okay. Thank you.

21 Does a project have to be necessary to the
22 projects to be eligible under the SR&ED regime?

10:50:08 1 Q. Okay.

2 A. --was my comment.

3 Q. And the Guideline--the Board has approved
4 that expenditure, pre-approved that expenditure.

5 A. The Board has pre-approved the [REDACTED]
6 and--yes.

7 Q. Okay. You also spoke about the normalized
8 average of ordinary course expenditures going forward?

9 A. Yes, I have.

10 Q. And you said that with respect to Hibernia,
11 2006 is a statistical outlier; is that right?

12 A. That is correct.

13 Q. Did you discuss this outlier in any of your
14 Witness Statements?

15 A. I did not specifically talk about the 2006
16 outlier in any of my Witness Statements; that is
17 correct.

18 Q. Okay. So, when you calculate--if I
19 understand you correctly, when you calculated the
20 average between 2004 and 2009, you left out 2006
21 altogether?

22 A. Maybe if I can clarify. There's two

10:49:08 1 A. No, it does not have to be necessary for the
2 projects to be eligible under the regime.

3 However, I would point out that our Hibernia
4 owners would be very reluctant for HMDC as an
5 Operator, which has a very specific scope under its
6 Operating Agreement, to suddenly be doing activities
7 that are outside of the scope of the project, and that
8 is in essence what has been our past practice.

9 Q. Okay. And does a project have to be--I'm
10 sorry. Does a R&D expenditure have to be necessary to
11 the projects to be eligible under the Guidelines?

12 A. I think that's something you probably could
13 ask the Board specifically. We certainly have
14 been--it's been indicated to us by the Board that it
15 does not have to be specific to the project.

16 Q. Okay. You've also testified about the
17 [REDACTED]

18 A. Yes, I have.

19 Q. And in your view, that is not necessary for
20 the projects.

21 A. That is not necessary for the direct Hibernia
22 owners--

10:51:04 1 components of the R&D that we put forward as eligible,
2 R&D and E&T. The E&T component, we didn't exclude
3 anything. We took the full six years. On the R&D, we
4 excluded the 2006.

5 Now, to--how management got comfortable with
6 that is we also went back to the producing phase, to
7 start back in 1988, and we took all of the SR&ED that
8 had been applicable to the project, so the R&D that
9 was directly applicable to the project, and we did an
10 average of that as well. In actual fact, that average
11 is actually lower than what we had for the period 2004
12 through 2009 when we normalized that.

13 So, if we actually had even included 2006 R&D
14 and took a statistical average with no outliers from
15 1998 through 2008, we would have actually had a lower
16 average in our claim.

17 Q. Okay.

18 A. Which basically meant our claim would
19 actually have gone up, so we feel we've been
20 conservative on that particular assumption.

21 Q. So, when you looked back to 1998, you
22 mentioned that you look at your SR&ED and the average.

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10:52:45 1 It is what you just said, right?
 2 A. Yes. For purposes of the Tribunal, can we
 3 bring up the--that particular exhibit?
 4 Q. Sure. It's Claimants' Exhibit 144.
 5 A. Thank you.
 6 Q. It's the average from 1997 forward, what's
 7 been accepted by the CRA, is that right?
 8 A. What I had stated earlier, and certainly the
 9 record would say, is from 1998 through to 2008.
 10 Q. Okay.
 11 A. And so if you do an average of that and
 12 compare that to the average that we've used in the
 13 claim, materially you're not that different. That's
 14 really the crux of my statement.
 15 Q. If you took an average from 1998 to 2008 of
 16 what HMDC considered to be R&D, ordinary course R&D,
 17 during that time, would the average be higher?
 18 A. So, I have two comments to make on that. The
 19 first is absolutely, and the average would be higher.
 20 And from a HMDC perspective, if the Board had approved
 21 the eligibility of the [REDACTED] then certainly we
 22 basically would, from a statistical average, want to

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10:55:17 1 conservative going forward.
 2 Q. Okay. Are any of those calculations that you
 3 discuss on the record?
 4 A. They're with--if you look at what we've gone
 5 forward from the 2004 through 2009 period, that
 6 calculation is--
 7 Q. But the verification back to 1998.
 8 A. Oh, the verification? I just made the
 9 statement. I personally have done the calculation
 10 myself and verified that.
 11 Q. I appreciate that.
 12 A. As far as the 2004 through 2009, you'll find
 13 that in Mr. Rosen's report specifically outlining the
 14 assumptions that management does support.
 15 Q. Okay. You also addressed the updated oil
 16 production forecast at Hibernia.
 17 A. I did.
 18 Q. This is Claimants' Exhibit 238.
 19 A. Yes.
 20 Q. This profile has not been submitted to the
 21 Board.
 22 A. No. As I mentioned previously, this

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10:54:06 1 be concerned about [REDACTED] an outlier. So,
 2 statistically we would still have used the same
 3 methodology to say the [REDACTED] is a significant
 4 one-off. The Board has not approved that, so we did
 5 not include it in our claim for average going forward,
 6 either.
 7 Q. Coming back to the calculation of the
 8 normalized average for 2004 to 2009, just for the sake
 9 of argument, if we added back in the statistical
 10 outlier from 2006 R&D of Hibernia--
 11 A. Yes.
 12 Q. --the average would be higher; is that
 13 correct?
 14 A. I think that's obvious. If you do a
 15 calculation adding in that particular year, you will
 16 find that the average would go up, but you're also
 17 talking about a low population. So, in other words,
 18 you've only got six years, so a single year can
 19 distort your normalized average.
 20 Again we tested and calibrated that
 21 normalized average against what I pointed out earlier
 22 and felt comfortable that we were actually

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10:56:10 1 particular profile is the amendment to the Development
 2 Plan updated for the latest information. So the Board
 3 happened to have the amendment to the Development
 4 Plan. That would have, for example, in 2010, reported
 5 about [REDACTED] that you see in the 2010
 6 column.
 7 So, we have given both the--yourselves as
 8 well as the Tribunal--the most recent information that
 9 our folks--our reservoir team--have come up with.
 10 MR. DOUGLAS: Okay. Those are my questions.
 11 Thanks very much, Mr. Phelan.
 12 THE WITNESS: Thank you.
 13 PRESIDENT van HOUTTE: Very well.
 14 MR. GALLUS: I think Canada has no more
 15 questions for the witness.
 16 (Comment off microphone.)
 17 MR. RIVKIN: I have a few short questions, if
 18 I may.
 19 PRESIDENT van HOUTTE: Please.
 20 MR. RIVKIN: Thank you.
 21 And if we can keep it in closed session.
 22 Thank you.

10:57:11 1 REDIRECT EXAMINATION
2 BY MR. RIVKIN:

[REDACTED]

20 Q. And you know today you have to spend the
21 shortfall amount in some manner; is that right?
22 A. That's correct.

10:59:32 1 shortfall money you're going to be able to spend on
2 the work fall projects between now and 2015?
3 A. Well, maybe--I think that's probably best
4 articulated within the Work Plan itself. We
5 anticipate, you know, that by the end of 2015--and
6 that was our discussions or our proposal to the Board.
7 We'd anticipate that we would spend the shortfall by
8 2015; [REDACTED]

12 Q. And do you know today if the Board will call
13 on the financial instrument and, if so, for how much?

14 A. [REDACTED] What the Board have indicated
16 to us is that they will take account of our spend
17 against this Work Plan. A reconciliation will be
18 done. [REDACTED]

10:58:21 1 Q. Do you know today how the money will be
2 spent?

3 A. Well, I mean, in terms of how we anticipate
4 spending going forward, we've developed a Work Plan.
5 We are going through a process where we've, first of
6 all, had pre-approval with the Board, so we've gone
7 through a pre-approval process.

8 We've also had to go to the Hibernia owners
9 and seek their approval that we could proceed with the
10 various projects. The Hibernia owners have given us
11 approval on first phase of these projects. So we may
12 find, as we go forward, that some of the Hibernia
13 owners may in actual fact elect to opt out because
14 they may feel that it's not something that is of
15 interest to those specific owners.

16 We'll go through that process before we can
17 actually go and award any of the specific projects.
18 So we're currently in the process, for example, the
19 [REDACTED] just getting into the contracting
20 aspects and the administration of Phase I, which is
21 the infancy.

22 Q. And do you know today how much of the

11:00:48 1 Q. And do you know today how much of that spend
2 you're going to be able to make [REDACTED]

4 A. We don't.

5 We put a plan in place, but as far as how
6 much actually, we won't know until we get into these
7 projects in terms of seeing or (c) and (b) Phase II,
8 Phase II, Phase III, and Phase IV.

[REDACTED]

11:01:45 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17 Q. Okay. And one quick question about the [REDACTED] which Mr. Douglas asked you about. If the CRA

19 and the Board had recognized the [REDACTED] as eligible

20 R&D, would there have been any shortfall for the 2004

21 to 2008 period?

22 A. If the [REDACTED] had been recognized, there

11:04:11 1 questions.

2 PRESIDENT van HOUTTE: Thank you very much.

3 Thank you very much, Mr. Phelan.

4 QUESTIONS FROM THE TRIBUNAL

5 ARBITRATOR JANOW: Sorry, I'd like to just

6 ask one kind of first principles question, if I could.

7 That's reflected in your first statement, I think, in

8 several places like Paragraph 10 and again in

9 Paragraph 15.

10 You make certain characterizations about your

11 understanding of the obligations for R&D, and you said

12 that prior to the Guidelines in 2004, you never had a

13 spending obligation, and later you say the Board never

14 questioned the accuracy or sufficiency of your

15 expenditures and never gave you reason to believe that

16 you had misunderstood the scope and obligations under

17 the Benefits Plan or that you had R&D spending targets

18 to meet.

19 Could you just speak to us a little bit about

20 the basis. I understand that you are a financial

21 person and not as a legal question, but could you

22 describe for us a bit the basis for you coming to

11:02:52 1 would be zero shortfall for that period of time.

2 Q. Okay. And you were asked about whether or

3 not you had shared the 2010 profile with the Board

4 yet. What is the ordinary course for you to provide

5 new production profiles to the Board?

6 A. Normal course is to provide to the Board in

7 terms of our amendment to our Development Plan. So we

8 did provide an amendment to the Development Plan

9 relative to our Hibernia Southern Extension owners.

10 That is a normal course for providing updates.

11 Q. What is the Board's current view of your

12 recoverable reserves?

13 A. In actual--in the latest amendment to the

14 Development Plan, which was actually--and we received

15 the Board's report just within the last two weeks, the

16 Board actually reported that there is a particular

17 part of the Hibernia reservoir that they would

18 anticipate that should be more recoverable.

19 So, in essence, they reported I believe it's

20 1.39 billion as recoverable versus our estimate in

21 this claim, [REDACTED]

22 MR. RIVKIN: Thank you. I have no further

11:05:24 1 these understandings with respect to R&D obligations?

2 THE WITNESS: Okay. So, I will comment first

3 on the statement about the R&D--there being no R&D

4 obligation. That was in reference to at year-end,

5 when we actually would determine if there was any

6 further commitments or obligations that we would need

7 to book--so, in that particular portion of the Witness

8 Statement--we do have R&D spend, and we do meet our

9 commitment. We've always felt we met our commitment

10 under the Benefits Plan. So our Benefits Plan

11 had--that we submitted and that was approved by the

12 Board had clauses that basically said we would promote

13 R&D within the Province, and certainly we've been

14 promoting R&D in terms of meeting the technological

15 challenge.

16 So, I don't want to confuse the panel by

17 saying that there was no R&D obligation. In that

18 statement, that was referring to--there was really no

19 additional R&D obligation over what we normally spend

20 in the course of normal business.

21 Relative to then us moving forward in terms

22 of--on an annual basis since 1990, we have auditors

11:06:45 1 come in, and the auditors will test our accountants,
2 myself included: Are there any other obligations
3 outstanding? Do you have any other commitments that
4 you have not fulfilled?

5 From 1990 through to 2004, there was no
6 indication whatsoever on any of our records within
7 HMDC that there was any additional requirements to be
8 met.

9 We certainly--at the end of each year, when
10 we sit down with PwC, and previously Ernst & Young, we
11 go through a rigorous process of looking at all of the
12 activities of the project and determining could there
13 be other things out there that we're not aware of.

[REDACTED]

11:09:09 1 been the point person through that whole process.

2 We have a regulatory group and we have a
3 regulatory contact. There are regular meetings with
4 the Board.

5 In addition to that, we go through a normal
6 process with the Board, for example, in the operations
7 phase, where we actually have to renew our operations
8 authorization. When we renew those operations
9 authorizations and apply for those, if we're deficient
10 in terms of our Development Plan or Benefits Plan, the
11 Board would certainly indicate to us, formally
12 indicate to us, that deficiency. [REDACTED]

[REDACTED]

16 The most recent was last year's operations
17 authorization, where the Board indicated to us that
18 they felt we were deficient relative to the
19 Guidelines, so there was a condition set in that
20 operations authorization.

21 But in that period 1997, when we got our
22 first operations authorization, I believe 2000, and

[REDACTED]

6 And so, in essence, that's the context of my
7 statement, to say yes, we honor the Benefits Plans.
8 We felt we've always met the conditions and
9 commitments within the Benefits Plan. There was no
10 reason to doubt that as we'd never--it had never been
11 indicated to us that we were off-sides, and then--and
12 so that's the basis of my statement.

13 ARBITRATOR JANOW: Thank you. If I just may
14 ask one: Are you interacting with the Board over the
15 course of this process, or is your analysis of your
16 obligations with respect to the Benefits Plans and
17 interaction with your auditors and other financial
18 Experts, is there a Board process that you are
19 experiencing as well?

20 THE WITNESS: Well, so, I will speak to the
21 process that the organization has because certainly my
22 involvement has been at different times, so I have not

11:10:16 1 then again in 2005, and 2005 was after the Guidelines,
2 and there was certainly dialogue about the
3 applicability of the Guidelines between ourselves and
4 the Board at that time.

5 But up until 2004, our normal interaction
6 with the Board through quarterly meetings, Annual
7 Reports, and requests for authorizations and
8 amendments to Development Plans, we had never had an
9 indication that we were off-sides with any of our
10 Benefits Plans.

11 ARBITRATOR JANOW: Okay. Thank you so much.

12 ARBITRATOR SANDS: Without any consultation,
13 Arbitrator Janow and I are focusing on exactly the
14 same issues, which is helpful. I'm very grateful for
15 your response to her question.

16 I just want to come back to Arbitrator
17 Janow's first question and just ask for an absolutely
18 precise understanding as I'm not--

19 THE WITNESS: Okay.

20 ARBITRATOR SANDS: --quite clear.

21 Can I take you to Paragraph 11 of your First
22 Witness Statement. And towards the end of that

11:11:28 1 paragraph, five lines up from the bottom, there's a
 2 sentence that begins with the word "however."
 3 I will give you a moment. There is no rush.
 4 THE WITNESS: I'm sorry, which paragraph?
 5 ARBITRATOR SANDS: Your First Witness
 6 Statement, Paragraph 11, five lines up from the end.
 7 THE WITNESS: Correct.
 8 ARBITRATOR SANDS: You say there as I quote,
 9 "however, until the enactment of R&D Expenditure
 10 Guidelines in 2004, there was no target expenditure
 11 amount for R&D."
 12 And if I've understood you correctly, that
 13 was what you reiterated to Arbitrator Janow; is that
 14 correct?
 15 THE WITNESS: That's correct.
 16 ARBITRATOR SANDS: But I thought I heard you
 17 say that you understood that there were commitments to
 18 engage in R&D; is that correct?
 19 THE WITNESS: Yes. You know, our Benefits
 20 Plan that was put forward, that was approved by the
 21 Board certainly indicated that we would promote--so
 22 there is a provision in there--that we would promote

11:13:58 [REDACTED]
 2 So, in actual fact, that's the basis of my
 3 statement.
 4 ARBITRATOR SANDS: So, try to be precise. Am
 5 I right in summarizing the situation as it was then
 6 prior to 2004 as follows: There was a
 7 commitment--there was an obligation to make
 8 commitments on R&D. That obligation included an
 9 obligation to make expenditures, but there was no
 10 obligation to make quantified or targeted
 11 expenditures.
 12 THE WITNESS: Yeah, I can only speak to how
 13 we have looked at this relative to our internal
 14 records.
 15 We have stewarded our Benefits Plan, just
 16 like we stewarded our planning and budget each year.
 17 In stewarding our plan, we knew that we have to
 18 promote R&D when we have challenges associated with
 19 the project. And so, from that perspective, our
 20 commitment was that when we're doing work associated
 21 with a project, we would certainly look in full and
 22 fair opportunity to basically look to local companies

11:12:38 1 R&D, and that R&D--and there were examples given, and
 2 those examples that were given were all types of
 3 projects associated with our activities.
 4 And certainly the objective was to have the
 5 Hibernia Project built, and where we were going to be
 6 doing our R&D, associated with that project, we would
 7 certainly be looking to the local community to assist
 8 us with that, where the local community could provide
 9 it. So, obviously it had to be competitive as well.
 10 But in essence, my statement there is, you
 11 know, the whole concept of a target was not seen by
 12 any or expected by any of the not only HMDC, but any
 13 of the Hibernia owners.

[REDACTED]

11:15:15 1 to invest--to assist us with that R&D.
 2 ARBITRATOR SANDS: I'm very grateful for
 3 that. It wasn't quite as I put it, and I'm just
 4 looking for clarification on exactly what the
 5 situation is.
 6 Was there a commitment to engage expenditure
 7 on R&D but it wasn't quantified in amount?
 8 THE WITNESS: There definitely wasn't a
 9 quantified amount. That's a fair statement.
 10 I think--and again, I'm sitting here amongst
 11 a group of lawyers. I think both sides will say let
 12 the interpretation--so I'm being careful relative to
 13 that. Legal interpretation, I think that's something
 14 that's off the record.
 15 ARBITRATOR SANDS: I'm not trying to get you
 16 to say one thing or another. I'm just trying to
 17 understand my situation because we're getting
 18 conflicting argument.
 19 THE WITNESS: Okay. So here's maybe how I
 20 could state it. We have a commitment to meet our
 21 Benefits Plan. And in our Benefits Plan, we indicated
 22 that we would promote R&D in meeting our technological

11:16:22 1 challenge, and that was in the--1986. We have spent
2 monies on R&D, which is evidenced by the chart we had
3 earlier outlining all of the types of claims that we
4 put forward. That's probably as best I can summarize
5 our commitments.

6 ARBITRATOR SANDS: Sorry to push you on this
7 because what I'm hearing you say is there was a
8 commitment to promote R&D, but did that--was that the
9 same thing as a commitment to make expenditures on
10 R&D, or is that a different--

11 THE WITNESS: I would categorize it
12 differently, if that's the question. I would
13 characterize it that we had a commitment to promote.
14 We've never, from an accounting perspective, seen it
15 as we have to make expenditures.

16 And maybe the way I'd add to that is when we
17 prepared our budget for Hibernia each year and we go
18 to our owners, we have never had an R&D line item in
19 our budget, and we look at our line items in much
20 detail. We've have never, ever gone forward and said
21 we need to make an R&D commitment this year. We've
22 always looked at what do we need to do to operate.

11:18:50 1 THE WITNESS: So, as I mentioned before, this
2 statement here of relative to my reporting functions,
3 which is paragraph we're dealing with, and as I
4 pointed out, is relative to when we complete our
5 Annual Reports, there was no further spending
6 obligation that we needed to book relative to being
7 underspent relative to any targeted amount. So,
8 again, it's sitting down from a financial accounting
9 perspective and saying have we actually captured
10 everything that is applicable for the Financial
11 Statements, we certainly have done that.

12 And so there wasn't any additional R&D
13 spending obligation over and above what we already had
14 in our books.

15 ARBITRATOR SANDS: I have just a second
16 question, but it requires us having to go into closed
17 because it's Tab 144.

18 MR. RIVKIN: I believe we're in closed now,
19 aren't we? Martina?

20 ARBITRATOR SANDS: I don't recall if we are
21 or not.

22 THE SECRETARY: Yes, we are.

11:17:32 1 And then second to that, we certainly look
2 for if we have projects that are out there that need
3 research and development activities, we've certainly
4 used full and fair opportunity, which again is a
5 commitment under the Benefits Plan.

6 ARBITRATOR SANDS: So, it will be helpful for
7 my understanding to get a sense of how one would
8 promote R&D without making an expenditure on R&D.

9 THE WITNESS: We do make expenditures, and so
10 our commitment is to find ways to promote R&D through
11 our technological challenges, and certainly from a
12 Hibernia perspective, we have done that extensively.

13 ARBITRATOR SANDS: If I could take you back,
14 then, just to Paragraph 10 of your statement. You say
15 it's clear to me that HMDC never had any R&D spending
16 obligation prior to the R&D Expenditure Guidelines.
17 So, just taking your formulation, I'm just trying to
18 understand what you believe the situation to be. You
19 had an obligation to promote R&D.

20 THE WITNESS: Yes.

21 ARBITRATOR SANDS: But you had no obligation
22 to spend on R&D; is that correct?

11:19:52 1 ARBITRATOR SANDS: Great. Excellent.

2 If I could take you to--I don't know if
3 you've got it in front of you. It's the Claimants'
4 Bundle Number 1 at Tab 144. It's Volume 1 of the
5 Claimants' Core Bundle of exhibits.

6 THE WITNESS: It's CE-144?

7 ARBITRATOR SANDS: CE-144, and at the bottom
8 right-hand corner it's EMM-0002285.

9 THE WITNESS: Yes, I have that.

10 ARBITRATOR SANDS: "Hibernia" at the top.

11 On the left-hand column is the year of
12 expenditure, and we see some significant earlier
13 expenditures, and then it sort of stabilizes '96, '97,
14 and then goes down a little, and then 2000, 2001,
15 2002, it drops a little further.

16 You explained in answer to the question from
17 Arbitrator Janow that you had a--that there was an
18 ongoing process of conversation with the Board. Were
19 you involved directly? I think you said you weren't
20 involved directly with those conversations.

21 THE WITNESS: No, no. The process I was
22 describing was normal quarterly annual meetings that

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11:21:15 1 the operations team would have; and, if there are
2 topics worthy of discussion relative to anything from
3 well, first and foremost, the safety aspects,
4 operational aspects, and then if there are other
5 issues pertaining to Benefits Plan, those would
6 certainly come up if there was a noncompliance or
7 nonperformance.

8 ARBITRATOR SANDS: Did any feedback reach you
9 on reactions of the Board in relation to the
10 expenditures on R&D in that period in which you were
11 involved but not the point person? Did you hear what
12 the reactions were?

13 THE WITNESS: No. Anything that I was
14 involved, there was no indication that--and no
15 correspondence, no indication from the Board. I'm not
16 aware of any.

17 ARBITRATOR SANDS: Did you pick up any
18 information that indicated that in any way the Board
19 had any concerns, say, in 2001 and 2002 about the
20 diminution in the amounts expended on R&D?

21 THE WITNESS: No, I did not.

22 ARBITRATOR SANDS: Were you aware that

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11:23:54 1 Guidelines. I believe that went through Ted O'Keefe,
2 who was our contact at the time. That was the genesis
3 of the discussion.

4 ARBITRATOR SANDS: Okay. Thank you very
5 much.

6 PRESIDENT van HOUTTE: Thank you.

7 Thank you, Mr. Phelan. I think that's the
8 end of your examination, unless the two Parties have
9 to ask urgent questions.

10 MR. RIVKIN: No. I have no further questions
11 of Mr. Phelan. I just want to remind the Tribunal
12 that since Mr. O'Keefe's name has been mentioned a few
13 times, he did submit a witness statement in this
14 arbitration.

15 PRESIDENT van HOUTTE: We know, yes.

16 MR. RIVKIN: And Canada has chosen not to
17 cross-examine him, but he does have evidence in this
18 proceeding.

19 PRESIDENT van HOUTTE: Yes. Thank you.

20 MR. GALLUS: We have nothing further for the
21 witness.

22 PRESIDENT van HOUTTE: Thank you, Mr. Phelan.

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11:22:30 1 simultaneous with that diminution, assuming it to be
2 the case, the Board was considering issuing Guidelines
3 that emerged in 2004? When did you first hear?

4 THE WITNESS: I think actually it's--there's
5 a document that indicates it was sent from Ted O'Keefe
6 to myself and to others, and that was the first
7 instance that I was aware, and I believe that's 2003.
8 I look to the legal folks, but there was an e-mail
9 that was the first indication of the Guidelines, and
10 that's my first time being aware.

11 Now, as the accounting manager, the purpose
12 of me being involved is obviously do we have some
13 costs that we have not properly reflected, do we have
14 some commitments or other obligations out there that
15 we need to correctly reflect, and I believe it's the
16 2003. I can certainly go back through.

17 ARBITRATOR SANDS: Do you recall what your
18 understanding was as to why the desire for Guidelines
19 had emerged?

20 THE WITNESS: Not at that point in time,
21 we--no. So, what I recall was these Guidelines, the
22 Board were looking for feedback associated with those

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11:24:42 1 That's the end of your testimony at the moment. You
2 are now released.

3 I think the idea is that the witnesses remain
4 in the room, and it could be that maybe sooner or
5 later you are called again, but we will see whether
6 that happens. Thank you very much.

7 THE WITNESS: Thank you.

8 (Witness steps down.)

9 PRESIDENT van HOUTTE: Next witness is
10 Mr. Ringvee?

11 MR. RIVKIN: Shall we take short break
12 before?

13 PRESIDENT van HOUTTE: A short break and then
14 let's say until 12:30?

15 No, no, no. A short break and then continue
16 till 12:30.

17 MR. RIVKIN: Or that--or he should be
18 finished around then, from what I understand Mr. Luz
19 said. So, if it's only a question of a few more
20 minutes to finish him up after 12:30, then perhaps we
21 can--

22 PRESIDENT van HOUTTE: Okay, of course.

11:25:33 1 That's not written in stone.
 2 MR. RIVKIN: Yes, exactly. Thank you.
 3 PRESIDENT van HOUTTE: Fine. Let's say only
 4 five minutes or three-minutes break?
 5 Three-minutes break.
 6 (Brief recess.)
 7 PRESIDENT van HOUTTE: Let us resume.
 8 You are Mr. Andrew Ringvee.
 9 THE WITNESS: That's correct.
 10 ANDREW RINGVEE, CLAIMANTS WITNESS, CALLED
 11 PRESIDENT van HOUTTE: And good morning. You
 12 know I'm President van Houtte, Arbitrator Janow and
 13 Arbitrator Sands.
 14 THE WITNESS: Good morning.
 15 PRESIDENT van HOUTTE: Can you please repeat,
 16 I promise upon my conscience and honor.
 17 THE WITNESS: Sorry, could you repeat?
 18 PRESIDENT van HOUTTE: I promise to tell upon
 19 my conscience and honor...
 20 THE WITNESS: I promise to tell upon my
 21 conscience and honor...
 22 PRESIDENT van HOUTTE: ...to tell the truth

11:37:38 1 ExxonMobil International there.
 2 Q. Apart from that, do you reaffirm the contents
 3 of your First and Second Statement?
 4 A. I do.
 5 Q. Since moving to the United Kingdom, what
 6 involvement, if any, have you had with the R&D file?
 7 A. I have had no involvement.
 8 MS. LAMB: Thank you.
 9 Canada, your witness.
 10 MR. LUZ: Thank you.
 11 CROSS-EXAMINATION
 12 BY MR. LUZ:
 13 Q. Mr. Ringvee, good morning, my name is Mark
 14 Luz, I'm counsel for the Government of Canada?
 15 A. Good morning.
 16 Q. Nice to meet you. I'll apologize in advance
 17 for the quality of my voice. I have brought a serious
 18 case of laryngitis back with me from Ottawa, so
 19 hopefully I won't have to mime my cross-examination
 20 questions, so excuse me if I have to take a drink
 21 break every now and then.
 22 (Pause.)

11:36:46 1 and nothing but the truth.
 2 THE WITNESS: ...to tell the truth and
 3 nothing but the truth.
 4 PRESIDENT van HOUTTE: Thank you.
 5 Mr. Rivkin.
 6 Ms. Lamb, you have the floor.
 7 THE SECRETARY: Good morning. I'm sorry, may
 8 we open this session?
 9 MS. LAMB: Yes, you may.
 10 THE SECRETARY: Please open the session.
 11 DIRECT EXAMINATION
 12 BY MS. LAMB:
 13 Q. Mr. Ringvee, good morning.
 14 A. Good morning.
 15 Q. Please could you have open your First Witness
 16 Statement.
 17 A. Yes, I have it.
 18 Q. Paragraph 1 there, you say that you are
 19 residing in St. John's in Newfoundland. Does that
 20 continue to be the case?
 21 A. No. I was reassigned in July. I'm currently
 22 residing in the United Kingdom, and I'm working for

11:38:35 1 Q. Mr. Ringvee, thank you for clarifying, so
 2 you're no longer in St. John's since July this past
 3 year?
 4 A. Since then, end of July, that's correct.
 5 Q. Okay. And since then you have not had any
 6 involvement with the--with HMDC with respect to its
 7 obligations under the Guidelines?
 8 A. Since July, that's correct.
 9 Q. Okay. You started with ExxonMobil in
 10 January 2007? I should say in St. John's.
 11 A. In St. John's, that's correct.
 12 Q. So, that was for ExxonMobil Canada?
 13 A. That's correct.
 14 Q. Okay. And you joined in January 2007 as the
 15 Terra Nova Joint Interest Leader?
 16 A. Yes. I was Terra Nova Asset Team Lead.
 17 Q. And what was your role as the Terra Nova team
 18 lead?
 19 A. I coordinated our interfaces with the Terra
 20 Nova Operator and other owners with respect to Terra
 21 Nova.
 22 Q. And I believe from your Witness Statement you

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11:39:41 1 said that in September 2008 you became responsible for
2 ExxonMobil Canada's R&D file?
3 A. That's correct.
4 Q. And as part of those responsibilities, you
5 participated in the Joint Industry Task Force on
6 Research and Development?
7 A. That's correct.
8 Q. And could you describe a little bit about
9 what that Joint Industry Task Force does and did at
10 the time you were participating in it.
11 A. The Industry Task Force was set up on behalf
12 of the three Operators, and we also had a couple of
13 the other companies participating, to develop--to
14 assess the R&D Guidelines and develop where we could
15 an integrated response.
16 Q. Okay. And just to clarify, by the time you
17 joined ExxonMobil Canada, the Guidelines had already
18 been issued by the Board; is that right?
19 A. That would be correct.
20 Q. Okay. But you mention in your First Witness
21 Statement that there was still--the Guidelines were
22 still involved--there was still litigation going on

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11:42:05 1 Q. And was it under the auspices of PRAC or CAPP
2 that industry started meeting to come up with R&D
3 projects that could be developed on a joint industry
4 basis?
5 A. It was initially under the auspices of CAPP.
6 The R&D task force was established as a subcommittee
7 under CAPP.
8 Q. And when was the R&D task force established?
9 A. That would be, I believe, October 2008.
10 Q. Okay. And which companies were involved in
11 the R&D task force?
12 A. We had Petro-Canada, who was the Operator of
13 Terra Nova; Husky, who was the Operator of White Rose;
14 ExxonMobil, who was the lead for HMDC and Operator of
15 Hebron. And we had two other companies, were Statoil
16 and Chevron.
17 Q. Okay. And what sorts of people from these
18 various companies were meeting on the task force?
19 Were they just regular employees of the companies?
20 Were they Senior Management? Were they scientists?
21 Engineers?
22 A. Initially, we had a combination of engineers

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11:40:49 1 with respect to the Guidelines?
2 A. That's correct.
3 Q. Okay. So, at the time the Joint Industry
4 Working Group on Research and Development started
5 meeting, had the Guidelines become obligatory under
6 Canadian--had the litigation with respect to the
7 Guidelines already been resolved?
8 A. The Guidelines ruling with the Newfoundland
9 Supreme Court had been heard. There was still an
10 appeal underway to the Supreme Court of Canada at the
11 time.
12 Q. Okay. So, in respect of--and what was the
13 umbrella organization that under the auspices of which
14 this Joint Industry Task Force was meeting?
15 A. It was under the auspices of CAPP, which
16 stands for the Canadian Association of Petroleum
17 Producers.
18 Q. And what is PRAC, the relationship with PRAC?
19 A. PRAC stand for Petroleum Research Atlantic
20 Canada. PRAC was an organization that was set up on
21 behalf of industry to coordinate and facilitate
22 industry participation in R&D activities.

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11:43:27 1 and also people who were involved in the Government
2 public relations area.
3 Q. And were there a lot of meetings of this task
4 force?
5 A. Yes, there were many meetings.
6 Q. You'd mentioned in your Witness Statement, I
7 think there were--in your Second Witness Statement,
8 there had been at least 40 or so meetings?
9 A. That's correct.
10 Q. So, there's a lot of meetings with company
11 representatives?
12 A. Many meetings.
13 Q. And you mentioned that at least during some
14 of these meetings there were scientists and engineers
15 that had come in from Norway, Houston, Calgary, St.
16 John's, to participate in these meetings?
17 A. That was with respect to two workshops that
18 we organized. We had two workshops, one to focus on
19 subsurface and one to focus on Arctic. Those occurred
20 in late 2009.
21 Q. So you mentioned subsurface and Arctic. Why
22 these two areas?

11:44:34 1 A. One of the things we tried to do with
2 this--with this group was identify some areas of
3 potential industry R&D joint activity, and we went
4 through a discussion process and identified these two
5 broad areas as areas where we saw potential for
6 further dialogue.
7 MR. RIVKIN: Members of the Tribunal, so far
8 none ever the questions have gotten into specifics,
9 but I just want to remind counsel for Canada that if
10 he starts asking about specific conversations of the
11 industry, then we need to move into closed session.
12 MR. LUZ: Absolutely. In fact, after these
13 background questions, I'll indicate we will move into
14 closed session because the rest of my questions will
15 relate to the documents and so on that we agreed on.
16 So, these are just focused on what he's already said
17 in his Witness Statement.
18 BY MR. LUZ:
19 Q. So, as you said, industry--once the
20 Guidelines were in place, industry decided to get
21 together and think of useful R&D projects that might
22 be done on a joint basis amongst all of the companies

11:46:52 1 lot of hard work and thinking, a lot of brain power by
2 the companies to come up with a priority list of R&D
3 projects for joint industry collaboration.
4 A. That's correct.
5 Q. Okay. And I'd like to talk to you about some
6 of these joint industry projects a little bit later.
7 A. Okay.
8 Q. Before we do, I'll just ask you about some of
9 the other Hibernia-specific projects that you talked
10 about in your Witness Statement. I won't get into
11 details now, but just generally to go through your
12 Witness Statement.
13 Your second statement mentions that there
14 were, in addition to the joint industry projects, some
15 Hibernia-specific projects that ExxonMobil was
16 considering.
17 A. That's correct.
18 Q. Okay. And just to run them off and not to
19 talk into detail, there were [REDACTED]
20 [REDACTED]
21 A. It would be helpful for me if you could
22 reference--

11:45:45 1 operating offshore Newfoundland.
2 A. That was one of the things we talked about,
3 yes.
4 Q. Okay. And you had a lot of meetings to do
5 this?
6 A. Yes.
7 Q. And could you describe generally what the
8 process was? Did each of the companies sort of
9 identify particular R&D projects that they thought
10 would be useful or interesting and then get together
11 and discuss them? Just generally describe what the
12 process was.
13 A. It was similar to that. We initially asked
14 each company to identify a short list of some
15 opportunities that they saw were larger opportunities
16 with potential for industry participation, and then we
17 put this list together and compared them and then we
18 tested for interest, and it became apparent from those
19 discussion that--that there were these two broad areas
20 that I mentioned that had some promise for further
21 industry discussion.
22 Q. Okay. So, just to sum up, there has been a

11:47:47 1 Q. Sure.
2 A. --the section and I'll follow with you.
3 Q. If you could go to your Second Witness
4 Statement, Para 16.
5 A. Okay.
6 Q. All right. It's saying that in October 2009
7 you met with the Board to review plans for meeting the
8 Guidelines requirement at Hibernia. HMDC pre-viewed
9 plans for [REDACTED] Hibernia R&D projects: [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 Those are the [REDACTED]
14 A. That's correct.
15 Q. Okay. I will come back to those and discuss
16 them shortly, but I wanted to confirm that those were
17 the [REDACTED] Hibernia ones.
18 I think at this point we should probably
19 close the public session and go confidential.
20 THE SECRETARY: Please close the session.
21 (End of open session. Confidential business
22 information redacted.)

11:48:53 1 CONFIDENTIAL SESSION.
2 THE SECRETARY: The session is closed.
3 MR. LUZ: Thank you.
4 BY MR. LUZ:
5 Q. So we've talked about the work that you've
6 put into developing some potential joint industry R&D
7 projects, and there were also Hibernia-specific
8 projects, and these were all put together and put into
9 a Work Plan that was presented to the Board; is that
10 right?
11 A. That's correct.
12 Q. Okay. I believe maybe you should just turn
13 to Tab 1 of the binder that's next to you.
14 MS. LAMB: I'm sorry, I don't have it.
15 MR. LUZ: Oh, you don't have it. I'm sorry.
16 For the record, this is Claimants' Exhibit
17 212.
18 THE WITNESS: Okay.
19 BY MR. LUZ:
20 Q. And is that the Hibernia Work Plan that
21 presented to the Board.
22 A. That's correct.

11:50:44 1 to Terra Nova that they put into their Work Plan
2 presented to the Board?
3 A. Yes.
4 Q. Okay. Could you turn to Tab 2 of your
5 binder, just to confirm. This is Claimants'
6 Exhibit 213.
7 And that's the Terra Nova Work Plan that was
8 submitted to the Board; is that right?
9 A. It is.
10 Q. Okay. Did you have any role in drafting this
11 particular Work Plan?
12 A. No, I didn't. I would have--they include
13 some of the joint industry projects that we talked
14 about, and obviously I participated in those
15 discussions, but not in the development of the Terra
16 Nova Work Plan.
17 Q. Okay. Are you generally familiar with what's
18 in the Terra Nova Work Plan?
19 A. At a very high level.
20 Q. Okay.
21 A. Not in the details.
22 Q. Okay. Well, I will--I may ask you some

11:49:47 1 Q. And it was presented in March 2010?
2 A. That's correct.
3 Q. Okay. Did you have a role in drafting--or I
4 should just ask. What role did you have in putting
5 this Work Plan together?
6 A. I was responsible for coordinating the
7 development of our Hibernia Work Plan.
8 Q. Okay. So, did you draft the Work Plan or
9 just participate in the drafting of it?
10 A. There's portions where I would have, there's
11 other portions where I would have coordinated that
12 with others.
13 Q. Okay. And did you participate in presenting
14 the Work Plan to the Board?
15 A. I did.
16 Q. Okay. I understand that Suncor, the Operator
17 for Terra Nova, did something similar?
18 A. That's correct.
19 Q. Suncor, formerly Petro-Canada, participated
20 in the joint industry workshops?
21 A. They did.
22 Q. And they also had some R&D projects specific

11:51:40 1 questions about it, and if you don't know any of the
2 specific details, feel free to tell me.
3 A. Okay.
4 Q. Okay. So, now that we've got some of the
5 background of how the Work Plans came about, you had a
6 meeting with the Board to discuss the Hibernia Work
7 Plan; is that right?
8 A. Correct.
9 Q. And what did those discussions entail with
10 the Board, just at a general level?
11 A. We--I guess the stage set on this is we had
12 had a series of meetings with the Board. We had had
13 discussions with the industry R&D task force initially
14 addressing some questions the Board had given us, and
15 then updating the Board as we progressed our
16 assessment and plans.
17 And then we also had parallel meetings with
18 the Board from the Hibernia point of view and
19 culminating with this Work Plan here.
20 The final review was the presentation of this
21 Work Plan.
22 Q. Okay. So, over the course of a year or so,

11:52:50 1 you've had meetings with industry to come up with some
 2 joint industry projects. Hibernia has thought about
 3 Hibernia-specific projects, had discussions with the
 4 Board, and now you come to the Board with a Work Plan
 5 to discuss what you think is the best value-add for
 6 Hibernia?
 7 A. Yes.
 8 Q. Okay.
 9 And since that time, Hibernia asked the Board
 10 for approval with respect to the specific expenditures
 11 outlined in the Work Plan; that is right?
 12 A. Under the R&D Guidelines process, there is a
 13 requirement for pre-qualification of projects, and we
 14 then submitted these projects to the Board for
 15 pre-qualification.
 16 Q. Okay. So you submit the expenditures to the
 17 Board for pre-qualification, and then you wait for the
 18 Board to write back and say this is qualified?
 19 A. That's the process.
 20 And perhaps just to clarify, we would have
 21 submitted several of the Hibernia-specific projects at
 22 the same time as we had this review with the Board.

11:55:14 1 study, what it's intending--what it is intended to
 2 accomplish?
 3 A. I can.
 4 What I would like to do is, for summary
 5 purposes, perhaps we can refer to the chart in the
 6 appendix of the Hibernia Work Plan.
 7 Q. Sure, sure. That's tab--you have got it Tab
 8 1, Exhibit C-212, the Hibernia Work Plan.
 9 I think you're probably looking at--the page
 10 reference is EMM-3462.
 11 A. Yes.
 12 So, your question was a little bit of
 13 background around this project?
 14 Q. Yeah. Once we get it on the screen because I
 15 think there is a very helpful diagram, and you can
 16 just tell me a little bit about the project.
 17 A. Okay.
 18 Maybe as a little bit of background,

11:53:59 1 Other projects, depending on their stage of
 2 maturation, would have been presented later, and
 3 although I'm not fully aware, I suspect there are some
 4 of these projects that are still being developed for
 5 presentation.
 6 Q. Okay. And is it fair to say that Terra Nova
 7 followed roughly the same process that we discussed
 8 with respect to Hibernia?
 9 A. I believe that's correct.
 10 Q. Okay. Mr. Ringvee, let's talk about some of
 11 the specific projects in the Work Plans and other
 12 ones. If you could turn to Tab 3 of the binder in
 13 front of you, this is GFA Exhibit 65, it's attached to
 14 Mr. Walck's. Do you see--yeah, Tab 3 in your binder.
 15 You can take a moment to flip through it if
 16 you--
 17 A. Okay.
 18 Q. So, this is the Board's approval of
 19 Hibernia's application for an _____ is
 20 that right?
 21 A. That's correct.
 22 Q. Can you tell me a little bit about this, this

11:56:30 1 _____

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[Redacted text]

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12:04:28

[Redacted text]

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12:03:13

[Redacted text]

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12:48:14 1 PRESIDENT van HOUTTE: Thank you, Mr. Luz.
2 Does counsel for Claimant have questions?
3 MS. LAMB: No, we don't.
4 PRESIDENT van HOUTTE: Then we are...
5 QUESTIONS FROM THE TRIBUNAL
6 ARBITRATOR JANOW: I think lunch is on our
7 minds, but let me just quickly ask you one or two
8 questions of a broad-brush nature.
9 So I understood your comments now to indicate
10 that these various projects that we have been
11 discussing, some of which have been undertaken as a
12 result of the expenditure requirements of the R&D
13 Guidelines, do not have any current positive
14 externalities. The benefits are potential but not
15 current with respect to any of the projects we have
16 been discussing; is that correct?
17 THE WITNESS: Current meaning directly
18 applicable today?
19 ARBITRATOR JANOW: Yes.

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12:51:02 1 Guidelines, is that what you are saying or are you
2 saying that that is conceptually a possibility?
3 THE WITNESS: I think the context of the
4 question was if there was an R&D program somewhere
5 else could we shift that program to Newfoundland, and
6 in context, my response was that if there's a--if
7 there is a program in place, then presumably there is
8 infrastructure and capabilities in place to execute
9 that program.
10 We would always look around the world for the
11 best opportunities and the best locations to do that
12 particular R&D project, but for whatever reasons if we
13 had chosen to do it there, then it would seem that
14 there would be costs associated for moving an existing
15 project to Newfoundland. There would be potentially
16 redundancy of infrastructure. There would be
17 potentially you have an agreement or contract, you
18 would need to extricate that.
19 And so, my comment was simply saying that
20 it's a--it's not a--it's not a clear answer to say
21 that one can readily shift R&D program that's existing
22 here and move it to here without incurring additional

12:49:25 █
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6 ARBITRATOR JANOW: My second question goes to
7 a statement in your second Witness Statement
8 Paragraph 22, and I won't read it in its entirety, but
9 you are commenting on the statement in Canada's
10 Counter-Memorial that "to fill the shortfall the
11 Claimants may shift existing projects to NL from other
12 locations." Now it's a long statement, so I just draw
13 it to our collective attention without reading it.
14 I just would like you to comment, if you
15 would, on whether you are saying that, again,
16 redundancy, which is the term used in here, can be
17 necessary or it can be unnecessary. Redundancy, I
18 would think in this context, you know, you could have
19 necessary redundancy.
20 Are you suggesting in this paragraph that, or
21 is it your view that you have to build unnecessary
22 redundant infrastructure in order to meet the

12:52:22 1 costs by doing that.
2 ARBITRATOR JANOW: So, is that something that
3 has occurred, or is this just a conceptual comment?
4 THE WITNESS: We are, as part of our
5 program--and I could give you an example. We have
6 asked our organization to develop this R&D program,
7 and as we've described, this is significantly in
8 excess of the kind of R&D that we would otherwise be
9 doing. I will give you a very--we have obviously
10 talked about the projects that we have identified, but
11 we're working this on various angles.
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12:53:46 [REDACTED]

4 ARBITRATOR JANOW: Thank you very much.
5 Sorry for the additional lunch delay.
6 PRESIDENT van HOUTTE: We have no further
7 questions. Thank you very much, Mr. Ringvee. That's
8 the end of your testimony. You will remain in the
9 room, I guess, and you may be called later on if it is
10 absolutely necessary, but you will be informed about
11 it.
12 THE WITNESS: Okay.
13 (Witness steps down.)
14 PRESIDENT van HOUTTE: Thank you very much.
15 Now we will have a break. Would it be feasible to
16 resume at 2:00, or is that too short? 2:00.
17 (Whereupon, at 12:54 p.m., the hearing was
18 adjourned until 2:00 p.m., the same day.)
19
20
21
22

02:04:23 1 PRESIDENT van HOUTTE: Thank you.
2 Now, it's for Mr. Gallus to present the
3 witness?
4 MR. GALLUS: Thank you.
5 We just have a couple of brief direct
6 questions--
7 THE SECRETARY: Mr. Gallus, do we open the
8 session?
9 MR. GALLUS: Yes, this session is open.
10 THE SECRETARY: Please open the session.
11 MR. GALLUS: We just have a couple of quick
12 direct questions before we handover to the Claimants
13 for cross-examination.
14 DIRECT EXAMINATION
15 BY MR. GALLUS:
16 Q. Mr. Fitzgerald, you said you were in the
17 hearing room earlier this morning. Were you in the
18 hearing room yesterday?
19 A. No, I was not.
20 Q. If you were here yesterday, you would have
21 heard that the Tribunal asked me several questions
22 with regard to the regulatory requirement or the

1 AFTERNOON SESSION
2 PRESIDENT van HOUTTE: Do we call
3 Mr. Fitzgerald now?
4 MR. GALLUS: That's right. Mr. Fitzgerald.
5 PRESIDENT van HOUTTE: Mr. Fitzgerald.
6 JOHN FITZGERALD, RESPONDENT WITNESS, CALLED
7 PRESIDENT van HOUTTE: Good afternoon,
8 Mr. Fitzgerald. I don't know to what extent you have
9 been sitting in this hearing room in the morning or
10 so?
11 THE WITNESS: Yes, sir. I was here this
12 morning.
13 PRESIDENT van HOUTTE: Okay, fine. Thank
14 you.
15 Can you just repeat, I hereby declare upon my
16 conscience and honor...
17 THE WITNESS: I hereby declare upon my
18 conscience and honor...
19 PRESIDENT van HOUTTE: ...that I tell the
20 truth and nothing but the truth.
21 THE WITNESS: ...that I will tell the truth
22 and nothing but the truth.

02:05:00 1 regulation of the Operators under the Atlantic Accord
2 Implementation Act, and I did my best to defer those
3 questions to Board members such as yourself.
4 The Tribunal, however, was unrelenting and
5 eventually did force me to answer a couple of those
6 questions. However, I thought we might take the
7 opportunity now just to get you to clarify a couple of
8 things with regard to that regulatory environment.
9 And first with regard to Section 45(2) of the
10 Atlantic Accord Implementation Act, can we pull up
11 CA-11 and go to Page 23.
12 Can you read the screen, then,
13 Mr. Fitzgerald?
14 So, if we can just scroll down to--yeah, a
15 bit further down and just highlight 45(2) there.
16 Can you see that?
17 A. Yes, I do.
18 Q. So that's Section 45(2) of the Atlantic
19 Accord Implementation Act before you?
20 A. Yes.
21 Q. And Section 45(2) describes the requirement
22 of a Benefits Plan?

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02:06:10 1 A. Yes.
 2 Q. Could you just describe for the Tribunal
 3 generally how this works, how the process of
 4 submitting a Benefits Plan and eventually approving
 5 that Benefits Plan works.
 6 A. It will take a few minutes.
 7 Q. Take your time.
 8 A. What happens is that an interest holder or
 9 group of interest holders finds an oilfield that they
 10 decide is worthwhile developing. They then set about
 11 to prepare a development application, which in the
 12 Newfoundland regime must be in two parts, a
 13 Canada/Newfoundland Benefits Plan and the Canada--and
 14 the Project Development Plan.
 15 Before the Board may approve the Development
 16 Plan it must first consider and approve the benefits
 17 plan, and the dialogue process with the Proponent has
 18 changed over time. There was nothing in place before
 19 the Board was created that I could rely on. And by
 20 the time I had left, the Board had issued some
 21 Guidelines in respect of the preparation of
 22 applications.

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02:08:58 1 In our jurisdictions, the environmental
 2 impact assessments have come to deal with things which
 3 are in the social environment the--as well as the
 4 physical environment. So the panels deal with things
 5 of perceived economic cost and benefit as well as
 6 things that may affect the physical environment as a
 7 result of the implementation of the project.
 8 Having these--all of these considerations
 9 before it, the Board receives input from the two
 10 Governments, if they have anything to say, and then it
 11 reflects upon what's there, and it makes a decision as
 12 to whether or not the Plan as presented complies with
 13 the requirements of the statute.
 14 Q. And on Hibernia and Terra Nova, did the
 15 original plans comply with the requirements of the
 16 statute?
 17 A. In the case of Hibernia, the Plan had been
 18 prepared in the first instance. The first Benefits
 19 Plan had been prepared before the Board came into
 20 existence.
 21 The Board felt that it was not as explicit as
 22 it might be in many, many areas, so it began a

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02:07:35 1 Q. So, after the Operator submits a Benefits
 2 Plan, what happens next?
 3 (Pause.)
 4 Well, perhaps I could be more specific. If
 5 you recall from your time at Hibernia and Terra Nova
 6 after the Benefits Plan was submitted, what happened
 7 after that?
 8 A. It would be circulated pretty widely both
 9 within the Board and in the agencies of both the
 10 Federal and Provincial Governments which had an
 11 interest. And the Board would begin its examination
 12 of it, taking into account, first of all, the
 13 requirements of the statutes itself, which requires
 14 that the plan contain certain elements.
 15 And it would also take into account the
 16 recommendations, if any, regarding these matters which
 17 would have come forward from a public hearings process
 18 for the environmental impact assessment, which
 19 precedes usually the submission of either Benefits
 20 Plan or development application.
 21 The Board would consider--excuse me, if I may
 22 back up for a minute.

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02:10:10 1 dialogue with the--it was Mobil Canada on behalf of
 2 the Hibernia partners initially, regarding what the
 3 Board interpreted the provisions of the legislation to
 4 mean.
 5 As a result of those consultations,
 6 the--Mobil submitted a supplementary Benefits Plan,
 7 which still was not everything the Board might have
 8 hoped for, but it was sufficiently more elaborate to
 9 allow the Board to approve it with conditions, and
 10 this it did in mid 1986.
 11 Q. And would you classify or describe the
 12 Benefits Decision as an agreement for the Operators?
 13 A. Once the Board has dealt with an application
 14 and approved the Plan, the Board--the approval
 15 plus--including the conditions which the Board may
 16 attach in giving its approval, become a requirement,
 17 if the Proponent wishes to proceed with the project.
 18 Q. And would you say that these Benefits Plans
 19 are negotiated?
 20 A. I suppose to the extent that in the case of
 21 Hibernia they responded to the Board's expression of
 22 concern and telling them that there were things which

02:11:53 1 were going to cause difficulty and that they came back
2 with an amendment, I guess you could call that a
3 negotiation.
4 Q. And the Board only approved the Hibernia and
5 Terra Nova Benefits Plans as supplemented because they
6 satisfied the requirements in the Act.
7 A. That's what the Board's consideration was.
8 It could not have approved them if it did not believe
9 that was the case.
10 Q. Let's look quickly at a couple of the
11 requirements of the Act. Let's highlight if we can,
12 first of all, Section 45(3), which is the first part
13 there. That says that a Canada/Newfoundland Benefits
14 Plan shall contain provisions intended to ensure that.
15 Let's just scroll on to the next page, Page
16 24.
17 Then you see the continuation of the
18 requirements before, including the requirements in
19 Subsection C and D.
20 So, what is the requirement in Subsection 45
21 3(c) there?
22 A. This requirement, as the Board interprets it,

02:14:15 1 Q. Okay.
2 MR. GALLUS: Thanks very much.
3 Claimants?
4 (Comment off microphone.)
5 CROSS-EXAMINATION
6 BY MR. RIVKIN:
7 Q. Thank you, Mr. Fitzgerald. Good afternoon.
8 I'm David Rivkin, representing the Claimants in this
9 case.
10 A. Pleased to meet you, sir.
11 Q. Nice to meet you.
12 As you were just discussing with Mr. Gallus,
13 a Benefits Plan sets forth the preferences that the
14 Operator of a petroleum project in Newfoundland will
15 give to local goods, services and workers; isn't that
16 right?
17 A. It should set forth how he intends to give
18 preference to them because there is a statutory
19 obligation that he do.
20 Q. And yet it's authored by the Proponent of the
21 project.
22 A. It's authored by the Proponent.

02:13:00 1 is that each Benefits Plan must contain provisions
2 that will ensure that expenditures are made for
3 research and development and on education and training
4 in the Province.
5 Q. And that's separate to the obligation in
6 Section 45(3) (d) you see just below that?
7 A. Yes.
8 Q. And what is that obligation?
9 A. Well, that refers to services provided from
10 within the Province and goods manufactured in the
11 Province.
12 And the Benefits Plan may, in fact, cover
13 these things as well, how the Proponent intends to go
14 about procuring goods and services for the project.
15 To the extent that some of those services might be R&D
16 services, they would be captured in two places or
17 the--what the Proponent would undertake to do under
18 (d) would fulfill a requirement under (c) as well.
19 But they are two different requirements.
20 Q. So an Operator cannot just comply with
21 Section 45(3) (d) and not 45(3) (c)?
22 A. No.

02:15:05 1 Q. And submitted to the Board.
2 A. And submitted to the Board.
3 Q. And it sets forth how the Proponent proposes
4 to deliver the benefits--
5 A. Yes.
6 Q. --as you state; right?
7 A. Yes.
8 Q. And, in fact, if you look at--I don't want to
9 take the time right now, but if you look at the
10 Hibernia Plan, it would say things like Mobil plans to
11 do this, Mobil benefits objectives is to do this.
12 It's a statement by the Proponent of what it intends
13 to do; isn't that right?
14 A. And hopefully how it intends to do it.
15 Q. Exactly.
16 A. Yes.
17 Q. Exactly.
18 And then, as you said, it's the Board's
19 responsibility to ensure that the Benefits Plan
20 complies with Section 45 of the Accord Acts.
21 A. Yes.
22 Q. And the Accord Acts themselves do not contain

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02:15:50 1 any particular expenditure thresholds for research and
 2 development, do they?
 3 A. That's quite correct, sir.
 4 Q. Yeah. And they don't require the Board to
 5 impose any particular expenditure thresholds on R&D,
 6 either, do they?
 7 A. There is no explicit requirement that the
 8 Board do that.
 9 Q. And in fact the--when the Board considered
 10 the Hibernia Benefits Plan, it considered whether the
 11 Plan met the requirements of the Accord Acts; correct?
 12 A. Yes.
 13 Q. And it undertook careful consultation with
 14 the Federal and Provincial Governments, for example.
 15 A. It--yes, it did.
 16 Q. And it sought outside views as to whether it
 17 met the requirements of the Federal Accord Act?
 18 A. It took into account the expressions of view
 19 from the Environmental Assessment Panel, and the
 20 internal analysis of the Board staff and probably
 21 anybody who wanted to offer a view through any means.
 22 But the principal advisors, if we can call them that,

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02:18:35 1 Hibernia on and that are reflected in the Supplemental
 2 Benefits Plan didn't involve R&D. They involved other
 3 benefits principally; is that right?
 4 A. I believe that's right. That is my
 5 recollection. I don't have a recollection of having
 6 gone specifically on R&D. It's been 25 years ago.
 7 Q. Okay. I appreciate that.
 8 And the Board then approved the Hibernia
 9 Benefits Plan as stated in Decision 86.01; correct?
 10 A. That's correct.
 11 Q. And as you said, that stated additional
 12 conditions...
 13 A. To what had been explicitly stated in the
 14 submissions of Mobil on behalf of the Hibernia
 15 partners.
 16 Q. Okay. And the Hibernia Proponents then
 17 accepted the Board's approval with those additional
 18 conditions; isn't that right?
 19 A. Yes.
 20 Q. So, you said you had an offer, and you had an
 21 acceptance, and that with some variation that was, in
 22 turn, accepted; right?

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02:17:21 1 would have been the departments of the two governments
 2 who had an interest in these areas, the informed
 3 opinion from the Environmental Assessment Panel who
 4 heard from the community at large. The Board had
 5 informal contacts as well with the local universities
 6 and educational institutions.
 7 So, it sort of formed a view of what the
 8 capabilities were and what the Operator was saying he
 9 was going to do, what it knew that the Operator was,
 10 in fact, already doing, and came to a view in respect
 11 to this aspect as well as other aspects of the
 12 Benefits Plans that the Operator's intentions, if
 13 carried through, would bring him into compliance.
 14 Q. And in the particular case of Hibernia, the
 15 Federal and Provincial Governments endorsed the Plan;
 16 isn't that right?
 17 A. Yes.
 18 Q. And the Board then went ahead and granted
 19 approval to the Hibernia Plan after asking for a
 20 Supplemental Benefits Plan.
 21 A. Yes.
 22 Q. And the issues the Board went back to

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02:19:39 1 A. Yes.
 2 Q. And then once approved, the Board could not
 3 amend the Benefits Plan unilaterally, could it?
 4 A. Well, the Board never amends a Benefits Plan
 5 unilaterally anyway; it can't. It can only respond to
 6 an application, monitor whether or not the Proponent
 7 is--continues to be in compliance through his actions,
 8 and come to a view as to whether or not it is in
 9 compliance. If it's not in compliance, the approval
 10 falls to ground; it becomes invalid. If the Proponent
 11 is in violation of his approved Benefits Plan, he has
 12 to come into compliance if he's going to continue.
 13 Q. Is there any provision in the Accord Acts for
 14 revoking a Benefits Plan?
 15 A. There is--I forgot where the approvals are,
 16 but there are approvals for not granting a production
 17 operations authorization until all of the conditions
 18 in the--in the approvals leading to it have been met.
 19 Q. Right.
 20 And similarly, if a POA is granted, the Board
 21 can only do that if it feels that the Proponent is in
 22 compliance with its Benefits Plan's obligations;

02:21:11 1 right?
 2 A. At that point, yes.
 3 Q. Okay. And going forward, once the Benefits
 4 Plan is approved, what the Proponent has to do is
 5 to--its obligation is to meet the requirements as set
 6 forth in the Benefits Plan; isn't that right?
 7 A. Yes.
 8 Q. Okay. And by doing so, it meets the
 9 requirements of the Accord Acts since you have already
 10 found that the Benefits Plan meets the requirements of
 11 the Accord Acts.
 12 A. That would logically follow.
 13 Q. Okay.
 14 And just--and we've talked about the Hibernia
 15 Plan. The Terra Nova Benefits Plan went through the
 16 same kind of process; isn't that right?
 17 A. Yes.
 18 Q. It was proposed by the Proponents.
 19 A. Yes.
 20 Q. And there was some dialogue, some discussion
 21 between the Proponents and the Board.
 22 A. Both before the Plan was submitted in the

02:23:30 1 right?
 2 A. Shape it in the sense of having informed the
 3 Proponent, as it was preparing this thing, that what
 4 it--the Board's current expectations were, and its
 5 interpretation of the Act, and the conditions, of
 6 course, do constrain the--or add additional
 7 obligations onto the Proponent as he goes forward to
 8 implement that.
 9 Q. Now, it was stated yesterday that the Terra
 10 Nova Benefits Plan was rejected. That wasn't really
 11 so. What happened? Isn't that right, what you've
 12 just described is that the Terra Nova Plan was
 13 accepted with certain conditions added?
 14 A. Yes, yes.
 15 Q. Okay. And you talked--you said that the
 16 conditions reflected the Board's current expectations
 17 at the time of approval; is that right?
 18 A. Yes.
 19 Q. And--
 20 A. And if I may interrupt you for a second--and
 21 its experience with the Hibernia Project which was a
 22 different world altogether, if I may suggest it,

02:22:07 1 case of Terra Nova, the Board had then been in
 2 existence for some 10 years. The--it had issued its
 3 guidance, I think, in the late Eighties for the
 4 preparation of such plans.
 5 And in the lead-up to Terra Nova's submission
 6 of its plan, it had come to the Board for discussion
 7 and clarification of what was in the Guidelines. So,
 8 it went through a process there.
 9 And still, you know, when it came in, the
 10 Board found that it was necessary to attach conditions
 11 to its approval of the Terra Nova Benefits Plan in
 12 order that that plan would be in compliance with the
 13 Accord Acts.
 14 Q. Okay. There was never a Supplemental
 15 Benefits Plan submitted by Terra Nova as there had
 16 been by Hibernia; isn't that right?
 17 A. Not in respect of the initial application.
 18 Q. And, as you said, the Board had the
 19 opportunity to shape that Development Plan--the
 20 Benefits Plan, rather, both before Petro-Canada
 21 submitted it and afterwards in the conditions that it
 22 attached to its approval of the Terra Nova Plan;

02:24:50 1 because of the stop-start nature of that project once
 2 it was--after it was first approved. So there's a
 3 period in there when the--perhaps the normal evolution
 4 of a project and a relation with a newly created Board
 5 was sort of put in a kind of hold pattern for three or
 6 four years.
 7 Q. And it was put in that hold pattern basically
 8 as the price of oil declined so significantly that
 9 there was some questions about the projects'
 10 economics; right?
 11 A. Yes. In fact, to get it going again, it took
 12 some assistance from Governments to make the project
 13 economically feasible, and that happened in the late
 14 Eighties and--
 15 Q. I think about 1990; right? I think that--
 16 A. I think the project was finally sanctioned by
 17 the owners in 1990. I'm not sure of the exact date of
 18 the binding agreement with Government or the agreement
 19 in principle which led to it. There was a lot
 20 of--there was an agreement in principle and then there
 21 was a lot of detailed legal work to put the words
 22 around the final agreement.

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02:25:59 1 Q. Right.
 2 And the Hibernia Proponents entered into
 3 fiscal agreements with both the Federal Government and
 4 the Provincial Government that reflected that--the
 5 dialogue you were just describing; correct?
 6 A. Yes, yes.
 7 Q. And the--
 8 A. If I may add, the Board was not part of
 9 that--of those negotiations at any point.
 10 Q. That's true. But they were all part of the
 11 Government; right?
 12 A. Yeah, yeah.
 13 Q. Okay. And both the Federal and Provincial
 14 Governments offered certain benefits to the Proponents
 15 in return for the Proponents offering, indeed, some
 16 additional benefits to the Province and the country;
 17 isn't that right?
 18 A. I can't remember what the specifics were, but
 19 there were some, the largest of which was to proceed
 20 with the project.
 21 Q. And in neither of those fiscal agreements did
 22 the Federal Government or the Provincial Government

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02:28:09 1 followed you.
 2 (Comment off microphone.)
 3 BY MR. RIVKIN:
 4 Q. Well, you stated that the Board's Decision
 5 reflects its expectations at the time; correct?
 6 A. Yes.
 7 Q. And would you agree with me that the best
 8 place to look at the parties' expectations at the time
 9 was in those documents that they exchanged.
 10 A. The Parties being...
 11 Q. The Proponent and the Board.
 12 A. Yes.
 13 Q. And you also--before I get into the next
 14 subject, you also said a minute ago that the Board
 15 could not amend a Benefits Plan; is that right?
 16 A. No--yes, no.
 17 (Laughter.)
 18 Q. Thank you. I think we understand. Whether
 19 that'll be understood in the transcript is another
 20 thing, but I appreciate it.
 21 And the Guidelines, the 2004 Research and
 22 Development Expenditure Guidelines, are those an

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02:26:59 1 ask for any additional benefits with respect to
 2 research and development; isn't that right?
 3 A. I have no knowledge that they did or did not.
 4 Q. Okay. It would be in the agreements if there
 5 were some additional benefits; right?
 6 A. Yes.
 7 Q. Required.
 8 A. Yeah. If it doesn't appear in the
 9 agreements, then they would not have been included
 10 from either side.
 11 Q. Okay. Now, going back to what you said a
 12 minute ago about the Board's Decision reflecting its
 13 expectations, I take it you would agree with me that
 14 the Benefits Plan as proposed by Hibernia and then
 15 later Terra Nova fairly reflected their expectations
 16 for the project and what they would do.
 17 MR. GALLUS: I'm sorry, if I could interject.
 18 I'm not sure Mr. Fitzgerald can speak to the
 19 expectations of someone else. So, I'm not sure it's a
 20 valid question.
 21 PRESIDENT van HOUTTE: Here again I would
 22 like that you address the Tribunal, but anyway we

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02:29:13 1 amendment to the Benefits Plan?
 2 A. I would not want to speak to the 2004
 3 Guidelines. They came some six, eight years--six
 4 years after I left the Board.
 5 Q. And little did you know that six years later
 6 you would end up here in front of this panel because
 7 of that.
 8 A. I was commenting at noontime to one of the
 9 witnesses this morning that this is the last thing I
 10 would have expected on my radar when I left the Board
 11 in 1998.
 12 (Laughter.)
 13 Q. Exactly. Well, it's always nice to relive
 14 some old times, and we appreciate your being here--
 15 A. Well, I think you may be enjoying it more
 16 than I.
 17 (Laughter.)
 18 Q. Well, let me--we were talking before about
 19 the Board's expectations, and in your Witness
 20 Statement you discuss at some considerable length the
 21 policy considerations underlying the Accord Acts, the
 22 history leading up to them; is that right?

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02:30:16 1 A. Yes, I do.
 2 Q. Okay. And would you agree with me that all
 3 of this historical context informed the Board's
 4 expectations with regard to everything that went into
 5 the Benefits Plan, including the R&D and the E&T
 6 requirements?
 7 A. Well, it certainly contributed to the Board's
 8 consideration. Some Board members were more
 9 intimately familiar with all of that history than
 10 others.
 11 Q. Okay. But at the time the Hibernia Benefits
 12 Plan was reviewed, Board members had extensive
 13 knowledge about the background of the Hibernia
 14 development, the expectations of the Federal and
 15 Provincial Governments and the hopes of the local
 16 community as to the benefits that would be received.
 17 A. That's fair.
 18 Q. Okay. By the way, your Witness Statement
 19 also describes a number of internal staff reviews
 20 about the Hibernia Benefits Plan and, later, the Terra
 21 Nova Plan. Those internal staff reviews were never
 22 disclosed to the Proponents, were they?

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02:31:44 1 A. No, nor were their internal discussions
 2 disclosed to us.
 3 Q. So, again, from their point of view, what
 4 they understood the Board's requirements and
 5 expectations would come from the approval of their
 6 Benefits Plan with any conditions attached to them; is
 7 that right?
 8 A. And in the implementation afterwards, there
 9 was an ongoing series of regular meetings between
 10 relevant officials of both organizations. So the
 11 whole process was evolving on both sides. The project
 12 was dealt a disappointment, so the Proponent went into
 13 a sort of hold-and-reorganization phase, and the Board
 14 continued to have dialogue related to the activities
 15 which were considering--continuing, and those were
 16 principally engineering and planning activities.
 17 The Proponent, as part of that, was
 18 continuing to do research in support of its
 19 engineering design efforts. We knew what was going on
 20 there, and our officials would discuss those things
 21 from time to time with officials in the Hibernia
 22 group.

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02:33:19 1 Q. Okay. By the way, earlier you said you
 2 couldn't necessarily be sure exactly what the
 3 Proponents' expectations were, but then I think you
 4 agreed with me that they were likely reflected in the
 5 Plan that was submitted to the Board.
 6 Let me refer you to Claimants' Exhibit 48.
 7 It's in the Common Bundle, which will be handed to you
 8 right now: Claimants' Exhibit 48.
 9 MR. GALLUS: Sorry, before we go on, I think
 10 we might need to correct the record there. I think
 11 you said Mr. Fitzgerald said that the likely place to
 12 look for those expectations was the Benefits Plans.
 13 I'm not sure that's what Mr. Fitzgerald agreed to.
 14 MR. RIVKIN: The transcript will show what it
 15 says, but I can show him a document that reflects that
 16 as well right now.
 17 BY MR. RIVKIN:
 18 Q. Claimants' Exhibit 48, it's in the Common
 19 Bundle--it's not in the Common Bundle? Okay. Then we
 20 will pass out--we will pass it out.
 21 THE SECRETARY: Are we still in open session?
 22 MR. RIVKIN: Yes.

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02:34:43 1 BY MR. RIVKIN:
 2 Q. Mr. Fitzgerald, do you recognize this
 3 document?
 4 A. Yes, I do.
 5 Q. And--
 6 A. It looks like it's printed differently than
 7 the original, but that's probably because it was done
 8 from an electronic file.
 9 Q. Yes. And it's the Board's approval of an
 10 amendment to the Hibernia Development Plan in 1990; is
 11 that right?
 12 A. Yes.
 13 Q. Okay. If you could just take a look at
 14 Section 3.1 a minute, which is on Page 10, and look at
 15 the first paragraph in that section.
 16 A. That Section 3.1?
 17 Q. 3.1.
 18 If you look at the second sentence, it says:
 19 "The Hibernia Benefits Plan, approved by the Board in
 20 Decision 86.01, contained extensive commitments by the
 21 Proponent to provide a full and fair opportunity for
 22 all Canadian businesses and individuals, and first

02:35:56 1 consideration for those in Newfoundland, to
2 participate in the supply of goods and services and in
3 the employment opportunities arising from the Hibernia
4 Project."

5 Do you see that?

6 A. Yes.

7 Q. And you would agree that that's a true
8 statement?

9 A. If this is a copy of the original document,
10 then I would agree with it.

11 Q. Okay. And then the next sentence says that,
12 again: "The Hibernia Benefits Plan provided
13 information on the Proponent's expectations of the
14 industrial and employment benefits to Canada and
15 Newfoundland."

16 And then it goes on to note: "in particular,
17 the technology, transfer, and supplier development."

18 Do you see that?

19 A. Yes.

20 Q. And you were Vice-Chairman of the Board at
21 the time?

22 A. Yes.

02:37:41 1 A. So, to the extent that it's a service that is
2 conducted in the Province, then it could fall within
3 the ambit of 45(3).

4 Q. And the requirement under the Accord Act that
5 expenditures be made in the Province is certainly
6 guided by the first consideration principle; isn't
7 that right? Because the services that have to be
8 provided under 45(3)(c) and the Benefits Plan
9 incorporating that are covered by 45(3)(d), namely
10 that first consideration shall be given.

11 A. I think the whole thing reads together. The
12 whole section reads together. But what you say is I
13 think I would agree with.

14 Q. Okay. You certainly wouldn't think the
15 Accord Acts or Benefits Plans incorporating the
16 requirements of the Accord Acts would require any
17 Proponent to conduct R&D in the Province that was not
18 competitive with R&D that could be conducted
19 elsewhere.

20 A. Well, there is a requirement to conduct R&D
21 in the Province or to make expenditures in the
22 Province for those purposes. The Board would have no

02:36:46 1 Q. So, I take it it's fair to say that at the
2 time the Board believes the Plan was a--that the
3 Benefits Plan provided information on Mobil Canada's
4 expectations of the benefits to be received?

5 A. This section recites what the Board's reading
6 of the day is, and it says what it says.

7 Q. Good. Okay.

8 And those benefits included research and
9 development and education and training; isn't that
10 right?

11 A. Yes.

12 Q. Okay. By the way, you were shown earlier by
13 Mr. Gallus both 45(3)(c) and 45(3)(d).

14 A. Sections of the statute, yes.

15 Q. Right. And you would agree with me, and I
16 think you indeed refer to the fact that R&D services
17 would fall under both; isn't that right?

18 A. Could.

19 Q. Well, R&D it--the conduct of research and
20 development involves services; isn't that right?

21 A. In--it's a service, yes.

22 Q. Yes.

02:38:58 1 knowledge of whether--what the Proponent was proposing
2 to do in the Province was competitive with what its
3 costs might be somewhere else. It never took the
4 position of telling the Proponent what it should do.
5 It just kept reminding him that it had an obligation
6 to make these expenditures, encouraging him to
7 identify the things which were useful to its purpose,
8 acknowledge that the Proponent and its partners were
9 probably best positioned to determine what was
10 required, and it expected them to take into account
11 the local capabilities in placing contracts for those
12 activities.

13 Q. Exactly, to give first consideration to those
14 services.

15 A. Yes.

16 Q. And, indeed, once Hibernia was up and running
17 in 1990, it did conduct tens of millions of dollars of
18 research in the Province; isn't that right?

19 A. Yes. And it conducted some before 1990.

20 Q. Exactly.

21 A. But I can't remember the numbers, but it was,
22 you know, up and down, but it was significant amounts

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02:40:20 1 of money.
 2 Q. And as you said, the Board left it to them to
 3 decide what was best for the project, whether it's to
 4 conduct that research in the Province or to conduct it
 5 outside, so long as research and development was, in
 6 fact, being conducted in the Province.
 7 A. At that point, the Board was--satisfied
 8 itself through its contacts in the community that the
 9 local capacities were being taken up even though those
 10 capacities were growing from time to time.
 11 And as long as the Proponent was utilizing
 12 those and that there were--they were continuing to
 13 encourage the development of those capacities as well,
 14 the Board felt that in respect of that portion of the
 15 Benefits Plan, that they were using their best efforts
 16 and acting in good faith.
 17 Q. And they were in compliance with their
 18 obligations under the Benefits Plan.
 19 A. And therefore in compliance with their
 20 obligations. And this, you know, was an ongoing
 21 monitoring process.
 22 Q. And, indeed, the Board did not impose a

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02:43:25 1 are missing the first page of it, and I apologize for
 2 that.
 3 The questions I'm going to ask don't go to
 4 the first page, but if you want to see the first page,
 5 I'm happy to show it to you.
 6 What I want to ask you about is under the
 7 heading--sorry, this is--okay, all right.
 8 If you look at Page 2, with the page that is
 9 numbered Page 2, it has--no, actually, I do need to
 10 show you that.
 11 (Pause.)
 12 Q. Let me hand you--this is the first page of
 13 the document.
 14 MR. RIVKIN: I note the Tribunal has one
 15 complete set, so perhaps if you could take a look at
 16 the first page since--the first page. We could put it
 17 up on the screen as well.
 18 BY MR. RIVKIN:
 19 Q. Okay. If you could put--just put the first
 20 page up, Sam? Actually no. Put up--no. That's fine.
 21 If you could highlight the bottom paragraph on Page 1
 22 and the two runover sentences--

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02:41:37 1 particular spending threshold on R&D in the Benefits
 2 Plan.
 3 A. No, it did not.
 4 Q. Let's take a look at Claimants' Exhibit 199,
 5 which is a document that Mr. Gallus showed in the
 6 opening yesterday.
 7 Is that in the Core Bundle? Okay. That's
 8 also an additional document.
 9 I think this is copied in a difficult way,
 10 but the first page is headed "CNOBP Presentation
 11 Hibernia Supplier Development Seminar." Do you see
 12 that?
 13 A. I don't have the first page.
 14 Q. Yeah, it's the first--yeah, if you turn over
 15 what was given to you as the first page, it's on the
 16 backside of that.
 17 A. Okay. It's on the backside of the...
 18 Also it's the header.
 19 Q. Yeah.
 20 A. Up on Page 2 is the title of the document.
 21 Q. Right. Okay. Okay. Very good.
 22 All right. I think--yes, you're right. We

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02:45:24 1 PRESIDENT van HOUTTE: We do have it.
 2 MR. RIVKIN: You do have it. Okay. Okay,
 3 good.
 4 (Comment off microphone.)
 5 MR. RIVKIN: Okay. Actually, it would be
 6 in--Canada used it in its opening, so it would also be
 7 there, but I think you can see it now.
 8 BY MR. RIVKIN:
 9 Q. Do you recognize this document, now that you
 10 have the full document, Mr. Fitzgerald?
 11 A. I can't recall ever having seen it before.
 12 Q. Okay. It was presented yesterday by Canada's
 13 counsel as a presentation made by Hibernia's
 14 suppliers--made to Hibernia suppliers by the Board in
 15 1988, and it states at the bottom of the first page
 16 under "Legislation: "In addition to requiring that
 17 all Canadian firms have a full and fair opportunity to
 18 compete, the Acts further provide that first
 19 consideration shall be given to services provided from
 20 within the Province and to goods manufactured in the
 21 Province, where these services and goods are
 22 competitive in terms of fair market price, quality,

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02:46:35 1 and delivery."
 2 Do you see that?
 3 A. Yes, I do.
 4 Q. And that's the provision we were just looking
 5 at, 45(3)(d); is that right?
 6 A. Um-hmm, um-hmm.
 7 Q. Okay. And then the Board went on to tell the
 8 suppliers: "This provision should not be
 9 misunderstood as providing preference for suppliers of
 10 noncompetitive goods or services. In cases where this
 11 provision affects two or more firms competing for the
 12 same contract, the Board's position is that the
 13 quantity of value-added in Newfoundland will be the
 14 determining factor."
 15 Do you see that?
 16 A. Yes.
 17 Q. So, is it consistent with your understanding
 18 at the time that the first consideration principle for
 19 services like R&D required Operators--in that case the
 20 only Operator was Hibernia--to provide first
 21 consideration to local residents, but on a competitive
 22 basis?

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02:48:30 1 A. Yes.
 2 Q. And it--and, Sam, if you could pull out the
 3 page there underneath that.
 4 It describes here to the suppliers what
 5 Mobil, on behalf of the Hibernia partnership, has
 6 committed to do that is of the most significance to
 7 Canadian suppliers; is that right?
 8 A. That's what it says.
 9 Q. Okay. And it lists, then, five different
 10 aspects of the Hibernia Benefits Plan that the Board
 11 considered to be the most significant to Canadian
 12 suppliers in 1998--1988, rather; right?
 13 A. Yes, I would take it that that's what it
 14 means.
 15 Q. And none of those--research and development
 16 is not listed there among those five items, is it?
 17 A. No, it is not.
 18 Q. Okay. Thank you.
 19 Now, if we could take a look at the Benefits
 20 Plan itself, which is CE--Claimants' Exhibit 45. It's
 21 in the big bundle with you.
 22 Okay. And if you take a look at Paragraph 46

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02:47:32 1 A. Yes.
 2 Q. Yes.
 3 A. I don't think there is any question about
 4 that.
 5 Q. And as the sentence immediately after the
 6 quote says, if the local services were not
 7 competitive, the Hibernia was not in any--under any
 8 obligation to use those services. It could use R&D
 9 services located elsewhere.
 10 A. Well, it doesn't start--speak specifically to
 11 R&D services, but I will take your interpretation.
 12 Q. It speaks about services.
 13 A. Yeah.
 14 Q. And there is no reason why R&D services would
 15 be any different.
 16 A. Agreed, but it doesn't say R&D services.
 17 Q. Understood.
 18 And now let's take a look at the second page
 19 of this document. There is a section devoted to
 20 Hibernia; it's Section 2.2, headed "Hibernia Benefits
 21 Plan and Board Decision 86.01."
 22 Do you see that?

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02:50:24 1 of your First Witness Statement--do you not have that?
 2 A. You referred me to--
 3 Q. Yes, I want to keep the Benefits Plan open.
 4 I thought you also had a copy of your Witness
 5 Statement with you from Canada.
 6 A. I didn't bring it up with me.
 7 Q. Okay.
 8 MR. RIVKIN: Do you have a copy for him?
 9 MR. GALLUS: His First Witness Statement?
 10 MR. RIVKIN: His First Witness Statement. Or
 11 we could give him one.
 12 (Document handed to the witness.)
 13 THE WITNESS: Thank you.
 14 BY MR. RIVKIN:
 15 Q. And Paragraph 46, you state that "the
 16 Benefits Plan had been framed in terms of its
 17 commitment to a Statement of Principles."
 18 Do you see that?
 19 A. I'm just getting it opened.
 20 Q. Okay.
 21 A. Bear with me a second.
 22 Yes.

02:51:31 1 Q. And I assume that the principles you're
2 describing there are the principles of full and fair
3 opportunity and first consideration, in Section 45
4 that we were just talking about.
5 A. Yes. I would have to go on and read this
6 thing in its entirety, but I think we can infer that
7 that's what I was referring to.
8 Q. And then taking a look at the Benefits Plan
9 itself, and in particular Section 3.5.4, Page 49.
10 A. Yes.
11 Q. This is where--this is where Mobil Canada
12 stated its intentions with respect to research and
13 development; isn't that right?
14 A. Yes.
15 MR. GALLUS: Sorry to interrupt. Could I
16 just ask a point of clarification? You said this is
17 the Benefits Plan? Is this the Benefits Plan or the
18 Supplementary Benefits Plan?
19 MR. RIVKIN: This is the Benefits Plan.
20 MR. GALLUS: The original Benefits Plan?
21 MR. RIVKIN: Yes, the original Benefits...
22 MR. GALLUS: Thanks.

02:54:23 1 elsewhere. You were aware, of course, that the
2 Hibernia owners each owned their working interests in
3 the Hibernia Project in particular interests; isn't
4 that right?
5 A. Yes.
6 Q. And they were jointly sharing the expenses
7 that related to Hibernia; correct?
8 A. Yes, that was our understanding.
9 Q. Right. So, you would expect that
10 because--and if a project related specifically to the
11 Hibernia Project, then that cost sharing in the same
12 percentages as their ownership interests was a fair
13 one because they would be getting the same benefit
14 back; isn't that right?
15 A. I don't know how they would view the
16 fairness of that partitioning of costs. It probably
17 was regarded as not a large expenditure right in at
18 that time in relation to what they were confronting
19 for the development itself.
20 Q. Right.
21 A. But--and I would think that, to follow on
22 your suggestion, that those with larger Shares and

02:53:06 1 BY MR. RIVKIN:
2 Q. And in this particular provision, this
3 is--Mobil stated that it would support
4 research-and-development activity in areas where
5 commercial applications could be developed; isn't that
6 right?
7 A. It says: "It would promote local research
8 and development by entrepreneurs and institutions who
9 are aware of technical problems and to have an
10 interest and resources to develop commercial
11 applications." And then it goes on it to list a
12 number of things which at that time were--had been
13 identified as potentially areas that they would want
14 to explore, I guess.
15 Q. And the types of problems that they list are
16 all relating to the particular conditions of the
17 Canadian offshore environment; isn't that right?
18 A. They were--yes, yes. They may have some
19 applications elsewhere, but I'm sure that the list, as
20 created at that time, was out of their immediate
21 prospect of working in that environment.
22 Q. Right. And you talked about application

02:55:31 1 interests in other areas as well would be more
2 disposed to some of these things than others. And if
3 there was only one of them who was interested, it
4 might not show up on this list at all.
5 Q. Well, you would agree with me, I would think,
6 that so long as the research and development was being
7 done for the Hibernia Project, the costs and the
8 benefits would be equivalent for each owner.
9 A. Well, it should--that should represent a fair
10 portion, I guess.
11 Q. But to the extent that research is forced to
12 be done with application to other projects, that cost
13 and benefit balance would be out of whack, wouldn't
14 it?
15 A. Where is the forced research? In my time,
16 the Board didn't force Hibernia to do research of any
17 kind anywhere.
18 Q. Are you aware that the research and
19 development Guidelines have caused the Hibernia and
20 Terra Nova Proponents to have to develop Research and
21 Development Projects to meet the shortfall that has
22 been determined by the Board?

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02:56:47 1 PRESIDENT van HOUTTE: Mr. Rivkin, is this a
2 proper question? I doubt it because--
3 MR. RIVKIN: I will leave it. I'm happy to
4 withdraw it, thank you.
5 THE WITNESS: Thank you.
6 BY MR. RIVKIN:
7 Q. During your time, you were happy to leave it
8 to the Hibernia Project to undertake the research and
9 development that was important to them at the time.
10 A. Well, we asked them to identify the things
11 which were most important to them, and up to
12 the--during my tenure, the projects which had been
13 identified and which were being executed seemed to be
14 taking full advantage of the resources, with some
15 annual variation, that existed at that time, and there
16 was a slow augmentation in the capacities of the local
17 institutions.
18 Q. And after the benefits--after the original
19 Benefits Plan was submitted by the Hibernia owners, as
20 you said, there was some dialogue, and then the
21 Hibernia owners submitted a supplemental plan; is that
22 right?

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02:59:21 1 A. I don't recall that there was any specific
2 request in that regard.
3 Q. Okay.
4 A. It may have come up in the dialogue between
5 officials, but I don't have any knowledge of that.
6 Q. Okay. There is a reference on Page 7 of
7 Exhibit 46, the supplemental plan, on which it says
8 that: "Mobil will continue to support local research
9 institutions and promote further research and
10 development in Canada to solve problems unique to the
11 Canadian offshore environment."
12 Do you see that?
13 A. Yes.
14 Q. That's no different from what we were just
15 looking at in the Benefits Plan, isn't it?
16 A. They seem to be substantially the same.
17 Q. Okay. Thank you.
18 And at this time the Board did not impose
19 mandatory expenditure thresholds; right?
20 A. During my time, the Board never imposed
21 mandatory thresholds.
22 Q. And it never imposed prior approval of

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02:58:11 1 A. Yes.
2 Q. And that is Tab 46 in the binder right behind
3 you?
4 A. Yes.
5 Q. And you stated in your Witness Statement,
6 also in Paragraph 46, that the Board felt that the
7 Proponent's language describing its commitment
8 required clarification in a number of areas, and it
9 sought and received sufficient clarification in
10 subsequent correspondence to enable it to approve the
11 Hibernia Benefits conditionally.
12 Do you see that?
13 A. Yes.
14 Q. And by "the subsequent correspondence,"
15 you're referring to the Supplemental Benefits Plan.
16 A. And my recollection is that there was some
17 letters back and forth and some meetings between the
18 benefits people on both sides.
19 Q. Okay. And the--but the clarification that
20 was requested did not involve the research and
21 development commitments that had been made in the
22 original Benefits Plan, did it?

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03:00:19 1 individual R&D expenditures by the Board.
2 A. No. The process was for the Proponent to
3 propose and report and the Board to look at the
4 reports at the end of the year and to inform Mobil of
5 their satisfaction or otherwise or where they thought
6 there could be improvements.
7 Q. When you say "propose," it wasn't
8 that--Hibernia wasn't proposing its research and
9 development to you in advance. It was informing you
10 that--
11 A. Through that, yeah.
12 Q. --through various channels of what it was
13 doing; correct?
14 A. Yes, yeah.
15 Q. And then the Board approved the Benefits Plan
16 in Decision 86.01; that's Tab 47?
17 A. Yes.
18 Q. And it imposed a variety of conditions in
19 that Decision, did it not?
20 A. It did.
21 Q. But it didn't impose any condition with
22 respect to R&D, did it?

03:01:19 1 A. Not explicitly.
 2 Q. You believed at that time, didn't you,
 3 Mr. Fitzgerald, that the amount of R&D to be conducted
 4 by the Hibernia Project would increase--the amount of
 5 R&D in Newfoundland would increase as the capacity to
 6 conduct that R&D would increase? Isn't that right?
 7 A. Yes. And as the Proponent fulfilled its
 8 undertakings to promote the conduct as such R&D in
 9 Newfoundland.
 10 Q. It would be market driven in that sense;
 11 right? There would be greater--as the capacity grew,
 12 as there was more ability to give consideration to
 13 local services, the Proponents would use it more;
 14 right?
 15 A. And at the same time they would be trying to
 16 develop the market.
 17 Q. Right.
 18 Twice during your time with the Board in 1990
 19 and 1997, the Board approved amendments to the
 20 Hibernia Development Plan; isn't that right?
 21 A. Yes.
 22 Q. At neither of those times did the Board ask

03:04:22 1 Basically it was the things which were going
 2 to involve a lot of people and a lot of money, all of
 3 which were projected to happen over a very short time
 4 frame.
 5 Q. The types of items that we looked at when we
 6 looked at the statement by the Board, that the
 7 suppliers of the matters that would be of most
 8 interest and concern to them.
 9 Never mind. You don't have that in front of
 10 you. I will drop that question.
 11 Let me turn you to Paragraph 54 of your
 12 Witness Statement. In this paragraph, you describe
 13 what you say was: "The approach the Board had adopted
 14 in its June 1986 decision on the Hibernia Benefits
 15 Plan to monitor the Proponents' performance in
 16 relation to its commitment, to consider its adequacy,
 17 and to reserve judgment as to whether further action,
 18 including the possibility of setting expenditure
 19 targets, was required until there was evidence to
 20 indicate the need."
 21 Do you see that?
 22 A. Yes.

03:02:52 1 for amendments to the Benefits Plan.
 2 A. Certainly didn't in '90. I--if there's
 3 nothing recorded in respect of '97, then I guess we
 4 didn't then either.
 5 Q. And the Board's Decision 86.01 did provide
 6 for some monitoring of the Proponent's activities; is
 7 that right?
 8 A. Yes. The Board was going to--or said it was
 9 going to monitor all of its activities closely.
 10 Q. But in particular it was going to focus on
 11 key procurement decisions; is that right?
 12 A. Yes, it used those words.
 13 Q. And R&D would not be a key procurement
 14 decision, would it?
 15 A. As the Board understood it at that time, or
 16 the Board meant it, key procurement decisions were
 17 those which had immediate large employment or
 18 potential employment impacts. The placement of orders
 19 for significant pieces of equipment within Canada and
 20 within Newfoundland, the participation of local
 21 companies through joint ventures, all of those kinds
 22 of things.

03:05:44 1 Q. That is no--what you state there as to the
 2 Board's approach is not stated in the Board's Decision
 3 86.01, is it?
 4 A. No. What I'm telling you is, you know, some
 5 of the--illuminating some of the discussion which took
 6 place internally at the time informed the way the
 7 decision report was finally written.
 8 Q. Okay. But at that time, Decision 86.01 did
 9 not inform the Hibernia Proponents of the possibility
 10 of setting expenditure targets, did it?
 11 A. No, it did not talk to that explicitly at
 12 all.
 13 Q. Okay. And the Exploration Benefits Plan
 14 Guidelines that were issued in April 1987, which did
 15 talk about developing some Guidelines regarding
 16 expenditure amounts, those were Guidelines with
 17 respect to exploration activities, not to development
 18 activities.
 19 A. What year was that?
 20 Q. 1987.
 21 A. '87. Those came, I think, before the
 22 Hibernia Decision. Yes, April '87, June '87, was

03:06:55 1 the--
 2 Q. Now, the Hibernia--
 3 A. No, '86.
 4 Q. The Hibernia Decision was in '86.
 5 A. '86.
 6 The exploration Guidelines, I think, were in
 7 April of that year, were they not?
 8 Q. They were in 1987.
 9 A. No, that's not--my recollection was that they
 10 were in April.
 11 Q. Okay. Well, there were--yes, you're right.
 12 There were some in '86 and there was another set in
 13 '87.
 14 A. Okay. The final ones in '87 I don't think
 15 still had the reference to expenditure in them.
 16 Q. Are they--
 17 A. Those were in--
 18 Q. They--
 19 A. I think that was were there in '86 but I
 20 think--
 21 Q. It's actually the other way around. It was
 22 not there in '86. It came in '87, and then it was

03:08:18 1 activities; correct?
 2 A. That's correct.
 3 Q. Okay.
 4 A. But if I may offer a footnote, the same folks
 5 were involved in both activities, so what was
 6 happening in one arena was not unknown to people
 7 operating in the other, and in some cases they were
 8 the same people.
 9 Q. You would agree with me, though, wouldn't you
 10 that a project going through different phases requires
 11 different amounts of research and development at
 12 different times?
 13 A. Oh, I would think that the research and
 14 development is an up-and-down thing, if you're looking
 15 at a specific project.
 16 Q. But in particular you would need research and
 17 development at the beginning to solve any design
 18 construction issues; isn't that right?
 19 A. Sometimes even before you would put in a
 20 Development Plan.
 21 Q. Right.
 22 A. And--

03:07:31 1 gone again in '88.
 2 MR. RIVKIN: I have it backwards? He has it
 3 right?
 4 BY MR. RIVKIN:
 5 Q. Sorry. They're there in '86, and came back.
 6 Thank you. I stand corrected. Thank you very much
 7 for your--
 8 A. That's okay.
 9 Q. Okay.
 10 A. It's hard to remember this stuff.
 11 Q. And you agree with me--yes, and in
 12 April 1987, when the Board reissued those exploration
 13 benefits Guidelines, it was silent on the subject of
 14 expenditure amounts.
 15 A. Yes.
 16 Q. Okay. And the Guidelines in April 1986 were
 17 for exploration activities.
 18 A. Yes, there were--
 19 Q. Not for development activities.
 20 A. That's correct.
 21 Q. And the Benefits Plan that was adopted in
 22 1986 with respect to Hibernia was for development

03:09:13 1 Q. But once you're in operation, then your need
 2 for R&D is going to be less, actually because you've
 3 solved those initial problems.
 4 A. Well, you solve perhaps the engineering
 5 problems associated with building the installation and
 6 getting it started, but there's the ongoing problems
 7 of how you optimize your operations and the changing
 8 things which become aware to you--you become aware of
 9 in the course of your operations which may cause you
 10 to modify your facilities and require further research
 11 in order to support that.
 12 The whole process is a continuing one, in my
 13 view.
 14 Q. We've talked about the Terra Nova Benefits
 15 Plan a little bit. Let's take a look at Claimants'
 16 Exhibit 55, which should be in the bundle in front of
 17 you.
 18 A. Yes.
 19 Q. The--have you seen this document before?
 20 A. I obviously saw it back in--whenever it--in
 21 '95, and it was shown to me by the counsel for Canada
 22 as being parts of the exhibits here.

03:11:19 1 Q. Okay. And do you recall attending a meeting
2 with Petro-Canada before it submitted its Benefits
3 Plan?
4 A. I frankly did not recall this specific
5 meeting before I saw the piece of paper.
6 Q. Okay. But you testified earlier that there
7 were conversations with Petro-Canada before it
8 submitted its Benefits Plan.
9 A. Yes, I do recall the fact--quite a number of
10 conversations of one kind or another.
11 Q. And this would be consistent with this.
12 A. This would be consistent. This would be one
13 of those.
14 Q. Okay. And if you take a look at the second
15 page, the second paragraph on the second page shows
16 that Petro-Canada asked about the Board's expectations
17 with respect to research and development under the
18 Accord Acts?
19 A. Yes.
20 Q. And the Board responded that Petro-Canada
21 should enunciate its policies and procedures that
22 would provide for expenditures on those areas in

03:13:39 1 Q. Okay. And just to make sure the record is
2 clear, at the bottom of Page 2, the next-to-last
3 paragraph says that: "Petro-Canada officials seemed
4 to be well-informed of the requirements of the
5 Atlantic Accord Acts and the Guidelines." Do you see
6 that?
7 A. Yes.
8 Q. Just so that there's no confusion, the
9 Guidelines being referred to there were the 1988
10 Development Application Guidelines; correct?
11 A. Yes.
12 Q. And those Guidelines, like all of the other
13 Guidelines that were issued while you were
14 Vice-Chairman of the Board, all informed Proponents of
15 projects of what they should plan to do--plan to put
16 into their Development Plan or their Benefits Plan;
17 correct?
18 A. Yes.
19 Q. They were all forward-looking in that way.
20 A. They tried to be, yes.
21 Q. Okay?
22 A. As forward-looking as you can be in any plan.

03:12:29 1 Newfoundland, and also the nature and current level of
2 support to right-hand in the Province and future
3 plans? Do you see that?
4 A. Yes.
5 Q. Is that consistent with the kind of message
6 you recall being given to Petro-Canada at the time,
7 either at this meeting or more generally?
8 A. Yes. I think that was the general theme at
9 this time, and it was a general scene which was there
10 even as early as at least 1990, when Hibernia came for
11 the first--First Amendment to the Development Plan.
12 Q. Okay. And again there was no discussion with
13 Petro-Canada at the time about having a mandatory
14 expenditure threshold to meet, was there?
15 A. No. The Board had not reached that level of
16 consideration at that point. It was still expecting
17 the Proponents to propose to live up to their
18 commitments; if the proposals were accepted, then to
19 monitor how that was going on; and in relation to its
20 own--the Board's own ongoing attempts to inform itself
21 of what the capacities were in the local research and
22 development community.

03:14:35 1 Q. But they were all designed to give guidance--
2 A. To give guidance as to what the--to try to
3 let the Proponent come forward with a set of documents
4 which was as complete as possible in meeting what the
5 Board would expect to see in them.
6 Q. Okay. And in its approval of the Terra Nova
7 Benefits Plan, the Board asked Terra Nova--made a
8 condition to Terra Nova that it provide on an annual
9 basis information about its R&D and E&T expenditures;
10 correct?
11 A. That's right. A report on its past year and
12 a projection of its next three.
13 Q. Okay. And--but at the time the Board was
14 still looking to the industry to take the lead in
15 identifying where it wished to direct its
16 expenditures; correct?
17 A. Yes.
18 Q. And again condition seven did not impose
19 mandatory spending requirements.
20 A. No, it did not state a threshold, as you have
21 described it previously.
22 Q. And it did not impose pre-approval of R&D

03:16:00 1 expenditures.
 2 A. No, no.
 3 Q. And it didn't impose that research and
 4 development be undertaken on a basis other than laid
 5 out in 45(3)(c) and (d), namely, first consideration
 6 to local suppliers on a competitive basis.
 7 A. It didn't speak to that at all.
 8 Q. And, of course, you were aware at the time
 9 that the owners of the Hibernia Project are different
 10 from, in terms of interests, as--from owners of the
 11 Terra Nova Project.
 12 A. Oh, yes, and some are there, and some aren't.
 13 Q. Right. Okay. In Paragraph 72 of your
 14 Witness Statement, you state that: "As the Board had
 15 always published reasons for its major decisions was
 16 prepared to state the reasons for any decision it made
 17 and had published extensive guidance for those
 18 required to submit applications to it"--thus the
 19 Guidelines guidance that we were just talking about;
 20 right?
 21 A. Yes.
 22 Q. It accepted--"the Board accepted that if

03:18:25 1 A. No, it had never stated that publicly.
 2 Q. So, to the extent that there is any Board
 3 consideration described here in Paragraph 72, it's all
 4 entirely internal.
 5 A. It's all entirely internal, so yes.
 6 I should say, though, that from time to time
 7 the question--this question came up and--in informal
 8 discussions, and occasionally the Board would say
 9 that, you know, if this ever gets to a situation that
 10 the expenditure levels disappear or it, you know,
 11 really looks unreasonable, we might have to move to
 12 the next step of establishing something to measure
 13 this by.
 14 Q. You never made an estimate like that in your
 15 Witness Statement, did you?
 16 A. No, I didn't. No.
 17 Q. And you--
 18 A. That's a footnote to your question.
 19 Q. I understand.
 20 A. My answer to your question.
 21 Q. I understand.
 22 But you never--that was important. You never

03:17:33 1 experience showed it to be necessary, it might need to
 2 more explicitly describe the quantum and kind of
 3 expenditures it would judge acceptable and how it
 4 would reach its conclusions in the interest of
 5 fairness, clarity, and transparency at some future
 6 date."
 7 Do you so that?
 8 A. Yes.
 9 Q. Now, you would agree with me that when you
 10 retired from the Board at the end of 1988, the Board
 11 had never stated in any of its published
 12 statements--did I say 19--
 13 A. Said '88, but it was '98.
 14 Q. 1998.
 15 A. It seems a long time ago, but not that long.
 16 (Laughter.)
 17 Q. Sorry. When you retired at the end of 1998,
 18 the Board had never published any statement that said
 19 that it might more explicitly describe the quantum and
 20 kind of expenditures it would judge acceptable or that
 21 it would, indeed, require from Operators in terms of
 22 research and development.

03:19:21 1 stated it in your Witness Statement.
 2 A. No.
 3 Q. And there are no contemporaneous documents in
 4 which such a statement was ever made to any Operator.
 5 A. Not of Board origin, unless somebody recorded
 6 it in a diary or something. Otherwise...
 7 MR. RIVKIN: I have no further questions,
 8 Mr. President.
 9 PRESIDENT van HOUTTE: Thank you, Mr. Rivkin.
 10 Would you like to readdress the witness,
 11 Mr. Gallus?
 12 MR. GALLUS: We would. Could we have just
 13 one moment to confer?
 14 PRESIDENT van HOUTTE: Yes, sure.
 15 (Pause.)
 16 REDIRECT EXAMINATION
 17 BY MR. GALLUS:
 18 Q. Thank you, Mr. Fitzgerald. I have a couple
 19 of follow-up questions. The first ones are with
 20 regard to the Hibernia Benefits Plan to which
 21 Mr. Rivkin referred you, and we're just going to pull
 22 up on the screen for you a couple of aspects of that

03:22:26 1 plan.
 2 The first is from a--
 3 MR. RIVKIN: It's Tab 45 of what's in front
 4 of you if you want to look at it.
 5 MR. GALLUS: Oh, I'm sorry. Yeah, let's--
 6 THE WITNESS: The decision report.
 7 MR. GALLUS: Let's go to the decision report.
 8 Let's go to Page 24.
 9 And if we could highlight on the right-hand
 10 side there, the first paragraph.
 11 BY MR. GALLUS:
 12 Q. So, in that paragraph, Mr. Fitzgerald, the
 13 Board is explaining the Proponent's benefits strategy?
 14 A. Yes.
 15 Q. And the Board is stating that this section
 16 quotes the Proponent's overall strategy to achieve
 17 benefits to Newfoundland and the rest of Canada
 18 throughout the Hibernia Project.
 19 A. Yes.
 20 Q. So, is it the Board's understanding that the
 21 Proponent could only--or only needed to provide
 22 benefits in a specific part of the project?

03:24:39 1 on to the next page--next, Thomas, and if we just
 2 highlight that first bullet point, it says: "To
 3 continue to support local research institutions and
 4 promote further research and development in Canada to
 5 solve problems unique to the Canadian offshore
 6 environment."
 7 A. Yes.
 8 Q. So, the commitment that the Operators made to
 9 the Board was to promote research and development to
 10 solve problems unique to the Canadian offshore
 11 environment.
 12 A. Yes.
 13 Q. And did the Board understand that to be
 14 confined to just the needs of their project, or was it
 15 broader than that?
 16 A. The Board read it to be broader than that.
 17 Q. Okay. Mr. Rivkin also referred you to the
 18 comments on reporting in the Benefits Plan. Do you
 19 recall that, generally?
 20 A. Honestly, I can't remember the question or my
 21 answer.
 22 Q. He referred you to the fact that in the

03:23:31 1 A. No. The project, in the Board's
 2 understanding, extended from when the development
 3 started until the facilities were properly abandoned.
 4 Q. Okay. And it says that in the Benefits
 5 Decision.
 6 In the--if we could just go to the same page
 7 and just highlight--this is the middle of that
 8 right-hand column--strategy to achieve
 9 "Canada/Newfoundland Benefits."
 10 A. Yes.
 11 Q. Just that part. So, this is quoting from the
 12 Proponents' own--I think this is from the Supplemental
 13 Benefits Plan that the Board is quoting from here?
 14 A. It's quoting the Proponents. From which
 15 document, I can't recall.
 16 Q. Okay. Either the Benefits Plan or the
 17 Supplemental Benefits Plan; is that right?
 18 A. Yes. Oh, yeah. It's a Proponent's document.
 19 I would presume it's the latest one.
 20 Q. Okay. And it says there the Proponents state
 21 that their strategy to achieve Canada/Newfoundland
 22 benefits is summarized as follows. And then if we go

03:25:47 1 Hibernia Benefits Decision, the Board stated that it
 2 would monitor the benefits that were being provided.
 3 A. Yes.
 4 Q. And he said that in part of the decision, the
 5 Board said it would monitor key procurement decisions?
 6 A. Yes.
 7 Q. Were they the only benefits that the Board
 8 would be monitoring or said it would monitor?
 9 A. Oh, no. It was signaling that these areas,
 10 which had been the subject of intense public interest,
 11 that it was telling the Proponents it was going to pay
 12 particular attention to those, and telling the
 13 community--the interested community, the business
 14 community, the population at large in Newfoundland,
 15 and, indeed, in Atlantic Canada, where there were
 16 others who were interested in how this project was
 17 going to proceed--that it was going to monitor the
 18 Proponent's performance because it affected them as
 19 well. It was first consideration for--in
 20 Newfoundland, but the Board had a duty to Canada more
 21 broadly as well.
 22 Q. And the benefit for the Board with monitor

03:26:50 1 included the research and development and education
2 and training expenditures.
3 A. All of the--all of the commitments would be
4 monitored.
5 Q. Mr. Rivkin also referred you to the Benefits
6 Plan and the Benefits Decision as a source of the
7 Claimants' expectations. Do you recall that question?
8 A. He asked me that question two or three ways,
9 I think.
10 Q. Perhaps I could ask it a fourth way. Would
11 the Benefits plan, the Benefits Decision have been the
12 only source of the Claimants' expectations?
13 (Pause.)
14 Let me put the question a different way.
15 Are there other things that would have been a
16 source of the Claimants' expectations at the time?
17 A. I would have--
18 MR. RIVKIN: I thought--sorry.
19 Mr. President, I thought Mr. Gallus objected to my
20 question about where the Claimants' expectations would
21 come. What I simply did was to show Mr. Fitzgerald a
22 statement in his own document, the Board document,

03:28:52 1 Province?
2 A. Must make expenditures in Newfoundland for
3 those purposes, yes.
4 Q. Do you think the Atlantic Accord would be a
5 likely source of the Claimants' expectations?
6 A. I would think that they would have made
7 themselves aware of it.
8 Q. And in Section 55 of the Atlantic Accord, it
9 states that the Board shall approve expenditures on
10 research and development and education and training?
11 A. Yes.
12 Q. Do you think the report of the Hibernia
13 Environmental Assessment Panel would be a likely
14 source of the Claimants' expectations?
15 A. I would think so. They were prominently
16 present for the hearings and provided information at
17 it. It was their Environmental Impact Statement that
18 the panel was reporting upon.
19 Q. And at the time immediately before the
20 Hibernia Benefits Plan, do you think that the
21 statements in the Province of the importance of using
22 revenue from oil off the coast to expend on research

03:27:56 1 about the Claimants' expectations, but he already
2 objected to exactly the question he's just asking.
3 MR. GALLUS: I think the question you phrased
4 it was: Would the Benefits Decision be a likely
5 source of their expectations?
6 MR. RIVKIN: And then--and then I pointed him
7 to the document which said just that, the Board's
8 statement that said just that.
9 MR. GALLUS: Well, if Mr. Fitzgerald can
10 speak to the likely sources of the Claimants'
11 expectations, I think I can ask him a follow-up
12 question on that.
13 BY MR. GALLUS:
14 Q. Do you think, Mr. Fitzgerald, that the Accord
15 Implementation Act would be a likely source of
16 Claimants' expectations?
17 A. Well, I'm sure that the Proponent informed
18 himself thoroughly about the requirements of the Act
19 in relation to the project he had before him.
20 Q. And as we've discovered, Section 45(3) (c)
21 says the Proponent must expend on research and
22 development and education and training in the

03:29:46 1 and development and education and training, do you
2 think those general statements would have been a
3 likely source of the Claimants' legitimate
4 expectations?
5 A. Certainly the representatives of the
6 Proponent who were residents in the Province at the
7 time would have been very much aware of it.
8 Q. Let's move on to the 1988 document to which
9 Mr. Rivkin referred you. I actually don't recall what
10 was the--I think it's C-199. That's right. That's
11 the one.
12 And I think Mr. Rivkin referred you to
13 Page 2. That's right.
14 If you could just scroll down and just
15 highlight that bottom paragraph you've got there on
16 the screen now.
17 So, in this 1988 document, which is the Board
18 presentation to Hibernia supplies immediately after
19 the Hibernia Benefits Decision, the Board states
20 there, and you see in the first line: "The Acts
21 further require developers to provide for research and
22 development and also for education and training in the

03:30:50 1 Province."
 2 A. Yes.
 3 Q. Let's move on to the 1990--actually, before
 4 we do that, let's ask one more question about this
 5 document.
 6 Mr. Rivkin also referred you to the next
 7 paragraph, and there it's listed: The commitments
 8 most significant to Canadian supplies include...
 9 The second bullet there is: Support for the
 10 principle of technology transfer.
 11 A. Yes.
 12 Q. Does the technology transfer include research
 13 and development and education and training?
 14 A. There is certainly an education component of
 15 it. It could include research and development
 16 depending upon just what the project at hand was.
 17 Q. Let's move on to the 1990 Hibernia Framework
 18 Agreement. This is the agreement to which Mr. Rivkin
 19 referred you, where the Governments reached an
 20 agreement with the Operators with regard to fiscal
 21 benefits.
 22 Did the Board play any role in that

03:33:12 1 after all the Board is an entity of the Provincial and
 2 Federal Governments. Perhaps you could just speak
 3 briefly to the relationship of the Board to the
 4 Federal and the Provincial Government and the
 5 independence that the Board has.
 6 A. The Board was created to be a stand-alone
 7 agency to administer the Act. The employees of the
 8 Board are not members of either the Federal nor the
 9 Provincial Public Service. The members of the Board
 10 itself are appointed three by the Government of
 11 Canada, three by the Government of Newfoundland and
 12 Labrador, and one jointly. The jointly appointed
 13 member is the Chairman.
 14 The Chairman--the Vice-Chairmen are nominated
 15 from those appointed by the two Governments--by each
 16 Government, by the two Government. So the
 17 Vice-Chairmen are appointed by both Governments, and
 18 they hold office for a fixed term. That term is six
 19 years. I know that when term was chosen, it was
 20 chosen so that it would extend beyond the term of the
 21 Government that appointed them.
 22 There was great apprehension that when the

03:31:56 1 agreement?
 2 A. No, it did not.
 3 Q. And did that agreement affect the Operators'
 4 obligation under Section 45 to expend on research and
 5 development and education and training?
 6 A. No. It may have created obligations on the
 7 Board or on the Proponent out of the arrangement that
 8 it entered into with the Government directly, but as
 9 for its obligations under the provisions of the Act
 10 and the approved Benefits Plan, it didn't change
 11 those. If they undertook to do something extra than
 12 they had undertaken to do before in their
 13 representations to the Board, that fell within the
 14 scope of those activities, they would have
 15 been--become acceptable as elements meeting the--their
 16 obligations. But it didn't change the Plan per se.
 17 Q. This might be a helpful opportunity to
 18 clarify the relationship between the Board and the
 19 Federal and the Provincial Governments. Mr. Rivkin
 20 seemed to indicate that, even though the Board was not
 21 a Party to this 1990 agreement, that it would have
 22 been sort of consumed in the whole process because,

03:34:37 1 Board was created in the corridors of industry that it
 2 would not be independent, that it would be just
 3 another instrument of the two Governments. And while
 4 there's a limited scope within the legislation for the
 5 Board to be issued directives by both Governments,
 6 it's also explicitly says that the Board is to act
 7 independently in administering the Act.
 8 So, the Board certainly considers itself to
 9 be an independent agency. It is not indifferent to
 10 the fact that the two Governments which it represents
 11 have interests, so it tries to keep itself informed of
 12 what those interests are so it can take them into
 13 account when it makes its decision.
 14 The only directive which I can recall the
 15 Board receiving in the 13 years that I had tenure
 16 there was in relation to how it would--it should deal
 17 with a requirement under a piece of Federal
 18 legislation that was expiring, and that was the only
 19 directive that the Board ever received from either--or
 20 from the two Governments or any direct expression of
 21 how the Government believed it should do something or
 22 other in any case. We had no interference, if you

03:36:16 1 want to call it that, from either of the two
2 Governments that appointed us, and we acted within the
3 four corners of the Act, which created this.

4 Q. Thank you. I just have one last question,
5 Mr. Fitzgerald, and that's with regard to Paragraph 72
6 of your Witness Statement. There is no need to look
7 at it now.

8 You recall that Mr. Rivkin referred you to
9 your statement that the Board felt that if
10 expenditures were insufficient, that the Board could
11 intervene, and he asked you whether the Board had
12 stated that publicly up to the time that you retired
13 from the Board, and you said that it hadn't, as far as
14 you were aware.

15 You did state that the Board had conveyed
16 such an impression in informal discussions with the
17 Operators. But I just want to focus on this idea that
18 the Board hadn't stated up to that point publicly that
19 it could intervene if expenditures were insufficient.

20 Could you tell us why it is up to the time
21 that you retired from the Board that the Board had not
22 stated publicly that it could intervene if

03:38:14 1 a few questions, and I will start with a document
2 which was drafted the first year after you entered the
3 Board in '86, and I think the first things you do you
4 remember always best.

5 When I look at it, there is on that page, it
6 is the document in the Claimants' folder 32, and there
7 is on Page 6, I will just read it. The document is a
8 letter from the Board containing Guidelines for the
9 approval of the Benefits Plan. And on Page 6 of those
10 Guidelines it is written--

11 MR. GALLUS: Sorry to interrupt. Which
12 exhibit are we looking at?

13 PRESIDENT van HOUTTE: Claimants' Bundle 32.

14 MR. GALLUS: Thank you.

15 PRESIDENT van HOUTTE: It is CO-32.

16 EMM-000330. A letter by which the Board sends to
17 Mobil the Guidelines for the approval of the Benefits
18 Plan.

19 And there on Page 6 it is written: "Research
20 and development. The instructions are the company's
21 required to outline its proposed expenditures and
22 activities on research and development to be carried

03:37:22 1 expenditures were inadequate?

2 A. It just chose not to.

3 Q. And is that because expenditures up to that
4 point were adequate?

5 A. We had some concerns--

6 MR. RIVKIN: That is a fairly leading
7 question, Mr. President.

8 PRESIDENT van HOUTTE: I think the answer is
9 expected, yes, but can you rephrase the question a
10 little more openly?

11 BY MR. GALLUS:

12 Q. Could you tell us why the Board chose not to
13 publicly state that it could intervene?

14 A. Well, basically it had not decided that it
15 wanted to do that, and it was a question of basically
16 keeping its own counsel until it was necessary for it
17 to say something publicly.

18 Q. Thank you.

19 QUESTIONS FROM THE TRIBUNAL

20 PRESIDENT van HOUTTE: Thank you,

21 Mr. Fitzgerald--or thank you, I'm sorry, Mr. Gallus.

22 We have from the Chairman's side we also have

03:39:45 1 out within the Province." But then between brackets:
2 "Guidelines for expenditure amounts, et cetera, will
3 be developed by the Board."

4 What did you think, what were your ideas,
5 what were your ambitions when this was written one
6 year after you entered the Board?

7 THE WITNESS: Actually, sir, it was about
8 three months after we started. This was--this
9 document is in April of 1986, I believe. It was in
10 response to calls from the Operators who were
11 conducting exploration activities as to what the
12 Board's expectations were in respect of Benefits
13 Plans, and it refers specifically to exploration
14 activities.

15 The Board went on in that year to further
16 consider the question of benefits and decided that it
17 was not appropriate for us to try to establish quanta
18 in those areas at that time. So, when this document
19 was reissued in the next year, those references had
20 been removed to reflect the Board's thinking in
21 approving the Hibernia Development Plan.

22 PRESIDENT van HOUTTE: And say these persons

03:41:15 1 who received those Guidelines, what do you think they
2 were thinking in '86? First of all, that the
3 Guidelines are there and then after one year that they
4 are no longer mentioned.
5 ARBITRATOR JANOW: (Off microphone.)
6 PRESIDENT van HOUTTE: Yes, what should they
7 have been thinking? What did you expect that they
8 were thinking?
9 THE WITNESS: Well, I have to tell you that I
10 don't know what they were thinking. If it had been me
11 on the other side, I can give you an opinion of what
12 it might have conveyed to me, if that's of any
13 interest to you.
14 PRESIDENT van HOUTTE: Yes, of course.
15 THE WITNESS: To me, if I had seen that, it
16 would mean that someone over at the Board--these were
17 issued in draft format--someone over at the Board was
18 thinking along these lines, where we're going to
19 require expenditures for these purposes as part of
20 your approval. We haven't decided what the amount is
21 yet, so make a proposal. That's what I'd have
22 received if I was the recipient of that.

03:43:46 1 Actually, following on from that, could I ask
2 a general question: When in relation to that document
3 in '86 you on the Board turned your mind to these
4 issues, were you assisted in any way by a legal
5 advisor?
6 THE WITNESS: At that time, the Board did not
7 have in-house counsel in place.
8 ARBITRATOR SANDS: So, on what basis did the
9 Board determine what it could and could not do by
10 reference to the Implementation Acts and the Accords?
11 THE WITNESS: On the plain reading of the
12 statute, and if there was a doubt, we would put a
13 question to either the Federal--it would have gone to
14 the Federal Department of Justice. We would have
15 sought the counsel of the assigned counsel in the
16 Department of Energy, Mines and Resources.
17 ARBITRATOR SANDS: To the best of your
18 recollection, when the Board inserted reference to the
19 possibility of drafting Guidelines dealing with
20 expenditures in '86, did it do so by reference to what
21 it was able to do lawfully under the Acts and/or the
22 Accords?

03:42:27 1 I honestly cannot recall the discussions
2 which led to these particular documents. This
3 particular aspect of it was not within my direct
4 day-to-day management at that time.
5 PRESIDENT van HOUTTE: And what is the, I
6 would say, the duration of the impact of such a
7 statement when it is not followed up with the result,
8 in your view? Because now you get--you see a phrase,
9 and then nothing happens.
10 Now, what--you as--
11 THE WITNESS: If I--I don't want to be
12 flippant, but if I was a Proponent and I'd had a piece
13 of paper from a regulator that had this clue in it,
14 I'd breathe a sigh of relief when it didn't appear
15 afterwards and say we got off the hook this time, but
16 we'd better, you know, pay attention to what our
17 commitments are because, obviously, somebody over
18 there thinks it might be necessary to be more explicit
19 on these matters.
20 PRESIDENT van HOUTTE: Thank you.
21 My colleagues?
22 ARBITRATOR SANDS: Thank you, Mr. Fitzgerald.

03:45:05 1 THE WITNESS: I would believe that is
2 it--believed that it--that what it was saying it had
3 the statutory authority to do.
4 ARBITRATOR SANDS: Do you have any
5 recollection of any conversations or communications on
6 this issue? I appreciate it's 23 years ago. It's not
7 a point without significance.
8 THE WITNESS: I have no personal
9 recollection.
10 As I said to Mr. Chairman, that particular
11 file or part of the Board's operation was not under my
12 direct purview at the time. It was handled by the
13 Chairman of the day and the manager for industrial
14 benefits. So, these Guidelines would have been
15 prepared in that department of the Board. That
16 department at that time reported directly to the
17 Chairman of the Board.
18 ARBITRATOR SANDS: Do you recall at all how
19 much consideration and how intense was the
20 consideration given to the question of Guidelines on
21 expenditures?
22 THE WITNESS: In April of 1987--or 86, I have

03:46:16 1 no recollection of there being any time of any
2 significance paid to it by the Board in total. The
3 Board was totally preoccupied almost with the Hibernia
4 Development Application at that time. It had come
5 into existence with its staff in place on the 2nd
6 or 3rd of January of 1986. It had all these boxes of
7 documents delivered to it and instructions from
8 Government that it should deal with this according to
9 the provisions of the legislation, which was then in
10 draft but which in these areas did not change at all
11 before it was finally enacted. And the Board turned
12 its attention almost entirely to the consideration of
13 the development application.

14 ARBITRATOR SANDS: You were asked by
15 Mr. Gallus about the extent of knowledge, if any, by
16 the project developers of the Atlantic Accords and of
17 the implementing legislation. Can I ask you to what
18 extent you as a member of the Board had regard both to
19 the implementing domestic legislation and the Accords
20 themselves?

21 THE WITNESS: Well, personally I had been
22 part of the Provincial team of officials that had

03:49:19 1 which will be withdrawn in both places when the Accord
2 Acts are implemented.

3 I had been responsible for the administration
4 of the Province's version for a couple of years before
5 I went to the Board. We had people there as well who
6 had been responsible for the Federal version, so a
7 good part of this, the middle sections of the Act we
8 had been quite familiar with. The staff implementing
9 the Accord provisions, I, of course, was keenly
10 interested in because I had been part of the team, so
11 I was very much aware of what had been included for
12 that purpose.

13 But all of that having been said, that I'm
14 sure the thought is occurring, I am an engineer; I'm
15 not a lawyer. But I spent most the latter part of my
16 career in an administrative capacity in a
17 quasi-judicial organization. I probably read more
18 statutes than most lawyers.

19 ARBITRATOR SANDS: Taking your mind back to
20 the mid-1980s, it certainly would assist me if you
21 could very briefly just tell us how politically
22 sensitive were the negotiations that led to the

03:47:42 1 negotiated the Accords. I was then the head of the
2 Province's Petroleum Directorate. I subsequently was
3 appointed to the Board. Once the Accord
4 legislation--or the Accord was concluded, the drafting
5 of the legislation itself was turned over to the legal
6 officers of the Federal and Provincial Government, and
7 they eventually came back with the statute which was
8 presented in the Provincial House and the Federal
9 House. They're slightly different because of
10 obligations the Federal took on and changes which are
11 unique to the Newfoundland legal regime.

12 But the substantive part, the introduction to
13 the Implementation Acts in both places records exactly
14 the same thing and is basically the intent of creating
15 the Board.

16 The middle part deals with two former Federal
17 statutes, sort of picks them up in their entirety,
18 virtually, and they deal with the oil-and-gas tenure
19 system and the production and regulations. And then
20 there's the last part which deals with some social
21 considerations which are unique to the Accord itself,
22 and some transitional arrangements for the statutes

03:50:35 1 adoption of the Atlantic Accord within the
2 Canadian/Newfoundland context?

3 THE WITNESS: They were extremely acrimonious
4 for a long time. In the early Eighties, there was a
5 change in Government in Ottawa, prior to which the
6 leader of the new Government who had, as leader of the
7 opposition, given an undertaking to the Province, if
8 elected, he would see through an agreement with the
9 Federal Government that would resolve that
10 long-standing dispute. The negotiation of the Accord
11 itself following that, that Government's coming to
12 office was quite harmonious, but the years before had
13 been characterized by quite acrimonious disputes
14 between the Provincial and Federal Government.

15 ARBITRATOR SANDS: I'm very grateful to you
16 for sharing with us your involvement in the drafting
17 of the Accords, and I wasn't going to take you to
18 them, but I now would actually like to spend a moment
19 looking at a couple of provisions. I don't know if
20 you've got it in front of you. The version that I've
21 got is Canada's opening binder at Tab 10, which I
22 think you've not got with you, and I'm wondering

03:51:54 1 whether someone can provide Mr. Fitzgerald just with a
 2 copy of the Atlantic Accords.
 3 And I'm just looking at clause--well, I don't
 4 know whether it's Clause or Section 55. It's at
 5 Page 12 of the version that I've got in front of me.
 6 It's the section entitled "Research and Development in
 7 Education and Training."
 8 THE WITNESS: I'm looking for the documents
 9 here.
 10 ARBITRATOR SANDS: It's Tab 11. Sorry, Tab
 11 11. I'm so sorry. Tab 11. I apologize.
 12 THE WITNESS: And which paragraph, sir?
 13 ARBITRATOR SANDS: Page 12, Paragraph 55.
 14 MR. LUZ: We may just want to note for the
 15 record, this is Exhibit CA-10.
 16 ARBITRATOR SANDS: Thank you.
 17 Do you have that in front of you?
 18 THE WITNESS: Yes, I do, Professor Sands.
 19 ARBITRATOR SANDS: Are you familiar with that
 20 clause and section?
 21 THE WITNESS: Yes, sir. I read it again just
 22 night before I came down here.

03:54:23 1 spinoffs.
 2 So, the ability to have a first class set of
 3 training institutions turned on the ability of
 4 professors in those institutions being able to conduct
 5 frontline research. It was well-known, and anybody in
 6 any university will say the same thing.
 7 So, it was--the objective was a key part of
 8 the Province's industrial strategy, and it was
 9 prominent in the minds of virtually every member of
 10 the Provincial negotiating team.
 11 ARBITRATOR SANDS: All right. And then
 12 moving forward, wearing now your hat as a member of
 13 the Board, do you recall any occasion when there would
 14 have been discussion or conversation or reference back
 15 to this provision in meetings with the project
 16 developer?
 17 THE WITNESS: I don't have any recollection
 18 of that myself. As I said to the Chairman, at that
 19 time, most of the dialogue with the Proponent was
 20 either through the relevant benefits departments or
 21 in-between the Chairman of the Board and the area
 22 manager for Mobil. I would not have been present at

03:53:09 1 ARBITRATOR SANDS: Were you involved in the
 2 drafting of the subject matter that became that
 3 clause?
 4 THE WITNESS: There was a group of us, and I
 5 can't today tell you who put pen to paper for any
 6 particular clause. There was--we had an equal team on
 7 the--representing the Government of Canada, so the
 8 subject would be discussed, and somebody would get the
 9 chart to try to put words around it, and I can't
 10 recall for the life of me who specifically may have
 11 written this.
 12 ARBITRATOR SANDS: All right. Could I ask,
 13 just to the best of your recollection, going back to
 14 that time if that's possible in the negotiation of
 15 this provision, how significant, if at all, was this
 16 provision in the scheme of the Accords as a whole?
 17 THE WITNESS: It was extremely important to
 18 the Provincial representatives, and the Province had
 19 adopted as part of its strategy for development that
 20 it should improve its education and research and
 21 development capabilities because out of that would
 22 come a better opportunity to have industrial benefits

03:55:48 1 those things, and I would have got a second-hand
 2 report later on perhaps and would have heard about it
 3 in the course of the Board meeting.
 4 ARBITRATOR SANDS: All right. I wonder if I
 5 could just take you now back to Tab--this is the
 6 bigger--even bigger file. It's Tab 55 again. The
 7 reference to the meeting with Petro-Canada, and I
 8 think both Mr. Rivkin and Mr. Gallus have taken you to
 9 this. I certainly don't want to detain you too long.
 10 Now, this is a reference to a meeting that
 11 took place between the representatives of the Board
 12 and Petro-Canada; is that correct?
 13 THE WITNESS: Yes.
 14 ARBITRATOR SANDS: And I think, as I recall,
 15 you said this was an accurate reflection of the
 16 content of the meeting.
 17 If you go over to the second page, there is a
 18 curious line there that it says on the second line,
 19 second paragraph, second line: "Petro-Canada queried
 20 the Board's expectations." And I actually will read
 21 the whole line, "With respect to the research and
 22 development and education and training provisions of

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03:57:22 1 the Accord Act, Petro-Canada queried the Board's
2 expectations." That, of course, appears to be a
3 reference to the Clause 55, if I've understood that
4 correctly. Is that what it's a reference to?
5 THE WITNESS: I--that and the Section 45
6 requirements perhaps of the Act.
7 ARBITRATOR SANDS: Right. Because it's a
8 specific reference there to the Accord Acts.
9 THE WITNESS: It would be Section 45 of the
10 Accord Acts.
11 ARBITRATOR SANDS: Right. "Petro-Canada
12 queried the Board's expectations."
13 Do you have--can you help us at all? I know
14 it's a long time ago as to what the nature of the
15 queries were in relation to the Board's expectations.
16 THE WITNESS: I would think that it was
17 something as similar to what do you guys expect us to
18 do. It wouldn't have been anything more elegant than
19 that.
20 ARBITRATOR SANDS: Right.
21 THE WITNESS: This looks like a fairly
22 informal meeting. It's the area manager for

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03:59:50 1 make expenditures in the development phase, in the
2 exploration phase--
3 THE WITNESS: And during the production
4 phase.
5 ARBITRATOR SANDS: What would be a
6 developer's interest in making expenditure during a
7 development phase, particularly as the development
8 phase reached its term?
9 THE WITNESS: I would not know what their
10 interests were, but the Board's interest was to make
11 sure that as long as the project was in existence,
12 that there would be a continuing stream of
13 expenditures on research and development.
14 Indeed, as you come towards the close of a
15 project, you often end up with a requirement for
16 additional investments in research of various kinds in
17 order to optimize the last days of the field and to
18 properly prepare for its abandonment.
19 ARBITRATOR SANDS: So, that's your clear
20 recollection, is it?
21 THE WITNESS: Yes.
22 ARBITRATOR SANDS: But there would have been

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03:58:28 1 Petro-Canada and their benefits guy. I was Acting
2 Chairman of the Boards, and Ted O'Keefe and--who is
3 now with Mobil Exxon, and was our benefits manager,
4 and Frank Smyth, whom you will hear from shortly, was
5 his second. It was a small group, rather informal
6 meeting. They were getting set to have somebody craft
7 their development application documents, and they
8 wanted some guidance regarding the Benefits Plan
9 component.
10 ARBITRATOR SANDS: At that time, to the best
11 of your recollection, what would the Board--what were
12 the Board's expectations with regards to the
13 obligation to make expenditure on R&D over the
14 lifetime of a project?
15 THE WITNESS: The Board, from its inception,
16 took the view that the requirement for Benefits Plan
17 had to do with the full life of the project, that it
18 was--it was not just approving the development that
19 would devolve from the approved Benefits Plan up to
20 the date it started operations. It took in the full
21 life of the field up to abandonment.
22 ARBITRATOR SANDS: So, they would--they would

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04:01:01 1 an expectation throughout the life of the project.
2 THE WITNESS: Oh, yes, sir. There's no doubt
3 in my mind that the Board expected that the benefits
4 stream, including those devolving from research and
5 development, to continue over the life of the project.
6 It recognized there would be--you know, from time to
7 time there'd be variation as projects were taken on
8 and completed and new ones started. So there would be
9 some ripple in the curve, but that there would be a
10 curve over the whole life was clearly an expectation
11 of the Board.
12 ARBITRATOR SANDS: And was that expectation
13 communicated to the developer?
14 THE WITNESS: Yes.
15 ARBITRATOR SANDS: Why do you not mention
16 this in your statement or your second statement?
17 THE WITNESS: I didn't think it was
18 necessary.
19 ARBITRATOR SANDS: Did you in your
20 conversations on this aspect with the developer,
21 assuming it was communicated, address in any way the
22 extent of expenditures over the life of the project?

04:02:09 1 THE WITNESS: No, we didn't.
 2 ARBITRATOR SANDS: In other words, was it
 3 consistent over time, or would it be large expenditure
 4 at the beginning and then it would tail down? Was
 5 there any--
 6 THE WITNESS: We did not talk about the
 7 quantum at all, only that there had to be
 8 expenditures.
 9 ARBITRATOR SANDS: And I know you've been
 10 asked about this already, but can you tell us a little
 11 bit more about why it was. Because it seems almost
 12 counterintuitive, it might be said, from the
 13 perspective of a Board that has a commitment to
 14 oversee the implementation of the Accords, which
 15 you've told us was a--what I would characterize as
 16 highly sensitive politically--to not address the issue
 17 of quantum.
 18 THE WITNESS: At the start, we were very new
 19 to the field. Hibernia was the first project out the
 20 gate. We were the first Board in existence. There
 21 was discussion inside the Board as to how we should
 22 approach this. Obviously, as is evident from the

04:05:13 1 make an issue of it yet, but when we started
 2 considering what guidance we should be given to Terra
 3 Nova, some of the partners in which were also partners
 4 in Hibernia, we said we'd better signal to them that
 5 we are going to be looking for something explicit from
 6 them against which we can measure their performance.
 7 It's awfully hard to go back if you don't even have a
 8 projection from the Proponent as to what he intends to
 9 do.
 10 So, the process was evolving as the Terra
 11 Nova Project came up for consideration. The Board
 12 made its decision. In so doing, it, in its view,
 13 signaled where it was going on requiring a content
 14 requirement in its reporting of benefits from the
 15 Proponent. It was asking still--still asking the
 16 Proponent to make the proposal, and to give an
 17 estimate of what the expenditure levels were going to
 18 be, this time now on a three years' forward basis.
 19 And then looking at the reports on a
 20 progressive basis, the Board would have a better
 21 understanding of how well the Proponent was doing in
 22 accordance with his stated expectations. So, we would

04:03:22 1 Draft Guidelines on Exploration, there were some
 2 voices that were saying that maybe we should be--we'd
 3 have to be forthcoming on quantum, but we--the
 4 undertakings which we got from Hibernia were felt by
 5 the Board as a group to be sufficient at that time,
 6 and that rather than try to establish a particular
 7 level, that we would take the Proponents' stated
 8 commitments as having been given in good faith, and
 9 look at what our experience was, and continue to
 10 re-evaluate what our approach should be.
 11 As time went on, we saw that there was the
 12 initial hiatus, and then Hibernia got going, and as
 13 the counsel for Mobil has said, there was a buildup
 14 of--as the project developed. And then as it
 15 approached the operation stage, there was the
 16 beginning of a fall-off, and I think I've spoken to
 17 that as a general statement in my Witness Statement.
 18 At the same time we were beginning to hear a
 19 little bit in--back from the community that there was
 20 some slack capacity in the research institutions that
 21 had built up, and we were becoming apprehensive about
 22 the declining level of expenditures. Not enough to

04:06:45 1 have a measure; it was introducing the notion of
 2 having some measure.
 3 And this is where things had progressed
 4 during my tenure. The First Reports from Terra Nova
 5 were just coming in when I was leaving, so--or had
 6 just come in before I left, so perhaps it's fully--I
 7 have no knowledge what happened in the days following
 8 December 31st, 1998.
 9 ARBITRATOR SANDS: And of course it wouldn't
 10 be appropriate to ask you any questions on that. I
 11 thank you.
 12 THE WITNESS: I have to decline them anyways.
 13 ARBITRATOR SANDS: I have no more questions.
 14 PRESIDENT van HOUTTE: Okay. Thank you. But
 15 now I would like to give the floor to Arbitrator
 16 Janow.
 17 ARBITRATOR JANOW: Thank you.
 18 I think Arbitrator Sands has covered a lot of
 19 the ground that I was going to cover, but I just want
 20 to ask two questions.
 21 This last communication was very helpful, and
 22 I think what you've just said is that essentially in

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04:07:47 1 evaluating the Benefits Plans, you were looking at
2 that put forward by the Proponents. So my question
3 is--and maybe you've answered this, but therefore in
4 evaluating the Benefits Plans you were looking at both
5 qualitative and quantitative dimensions to those
6 Benefits Plans; is that correct?

7 THE WITNESS: That's correct.

8 ARBITRATOR JANOW: And you were not looking
9 to any external benchmarks--

10 THE WITNESS: Not at that time.

11 ARBITRATOR JANOW: --with respect to
12 evaluation of the contribution of those Benefits
13 Plans.

14 THE WITNESS: We hadn't come to that point.

15 ARBITRATOR JANOW: I'm not talking about a
16 quantum, but even in terms of a methodology of
17 evaluation, you were not looking to external
18 benchmarks.

19 THE WITNESS: No, we were not.

20 ARBITRATOR JANOW: Okay, thank you.

21 The second question is one that I
22 relentlessly asked Canada yesterday, and they

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04:10:32 1 this time, and we basically adopted the position that
2 we would not make a decision on things that we didn't
3 have to do at the time, that if we could defer a
4 definitive decision on something like how much would
5 be appropriate until we had some better handle based
6 on experience, we thought that that was an appropriate
7 approach at the early days.

8 ARBITRATOR JANOW: Okay. Thank you.

9 And if I may, just one more question?

10 PRESIDENT van HOUTTE: Sure, sure.

11 ARBITRATOR JANOW: And this is a bit from
12 memory, so it may be inaccurate because I don't have
13 the scroll-back capability here. But I think when
14 Arbitrator Sands asked you the question about
15 expenditures over the life of a project and you
16 indicated that, indeed, there is an R&D expenditure
17 expectation over the life of a project, I think I
18 heard you say that sometimes R&D expenditures declined
19 towards the end of the life of the project and there
20 is a need to request additional expenditures. Did I
21 understand you to say that?

22 THE WITNESS: I don't think I said that,

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04:08:47 1 steadfastly resisted so--and directed me to you, so I
2 will ask you for the record, and that is, from your
3 submission, I think that in speaking to this issue of
4 quantum and why the Board decided against specifying a
5 quantum of expenditure, you indicated at one point
6 that the Board knew that if it set an explicit
7 expenditure level early on and that later proved to be
8 too low, it would be difficult to increase it later.

9 Could you comment a little bit further on
10 this? Why would it be difficult to increase that
11 requirement in the future if, in your view, you had
12 the authority to do so? Or did you view you had the
13 authority to do so?

14 THE WITNESS: We viewed that we had the
15 authority to make those kinds of--or issue those kinds
16 of guidance. We were reluctant to do so because we
17 wanted to be--all of our decisions to be credible, one
18 after the other, and it would be extremely difficult
19 on a huge project to set a very low threshold and then
20 find that, you know, it really should have been higher
21 because the capacity was there to do more.

22 We--our own knowledge base was emerging at

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04:11:41 1 Professor.

2 ARBITRATOR JANOW: Okay. So, I guess my
3 question is: Therefore, is there a relationship--what
4 is the relationship between the expected R&D
5 expenditures at--towards the end of the life of a
6 project? I guess that's what I'm--

7 THE WITNESS: I'm not sure the Board's
8 thinking on that had fully developed when I was there,
9 and I must admit I haven't spent a whole pile of time
10 thinking about it since.

11 ARBITRATOR JANOW: Okay.

12 THE WITNESS: In the abstract sense, if I
13 may, the fact that the Board is required as part of
14 all of its approvals to approve a Benefits Plan, one
15 component of which is the expenditure on R&D, the
16 Board would have, as the project went along, to look
17 at the Proponents' intentions in that regard before
18 giving its approval.

19 How we might have dealt with an
20 end-of-project situation if we had one would be pure
21 speculation on my part now. Mine would not have been
22 the only voice that the Board would have had, and I

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04:12:55 1 just don't think it's appropriate for me to try to
2 answer your question.

3 ARBITRATOR JANOW: Okay. I'm sorry if that's
4 inappropriate. I apologize. But I guess what I'm
5 trying to get a sense of is how the Board thought
6 about the relationship between R&D expenditure and the
7 actual needs of a project.

8 THE WITNESS: It thought that they would be
9 identified first out of the needs of the immediate
10 project, and then out of the more broadly cast needs
11 of the Proponent for its activities generally.

12 So, in the Board's mind, it was never
13 isolated to research which was uniquely or solely
14 applicable in the Newfoundland offshore area. It had
15 a much broader context than that. The reason for the
16 Government's having put the requirement in place was
17 to develop R&D capability generally, so they wanted to
18 encourage through the development of oil-and-gas
19 resources to building of that capability in the
20 Province.

21 Obviously, the first place you look is to the
22 projects which are being immediately undertaken, but

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04:15:09 1 the Board looked at other regimes in Canada that dealt
2 with--in foreign investments and the benefits that
3 they were to provide?

4 A. I have no recollection of that.

5 Q. You don't recall if there was any--

6 A. No--

7 Q. --thing with--

8 A. --one way or the other.

9 Q. Okay. Thank you.

10 PRESIDENT van HOUTTE: Thank you,
11 Mr. Fitzgerald. That puts us at the end of your
12 witness testimony. You are now a free man again, but
13 I don't know whether you want to stay in the room and
14 also tomorrow here or...

15 THE WITNESS: With your permission, I may
16 come back to listen to my former colleagues.

17 PRESIDENT van HOUTTE: Okay, good. And
18 tomorrow?

19 THE WITNESS: Tomorrow.

20 PRESIDENT van HOUTTE: Okay, good.

21 THE WITNESS: And I may stay for the rest of
22 the afternoon.

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04:14:15 1 as those you--as those projects develop and mature,
2 you expect--the Board expected that the Proponents,
3 through their owners, their owner companies, to
4 identify initiatives, R&D initiatives which could be
5 undertaken in the Province but might have application
6 more generally in the oil and gas industry.

7 ARBITRATOR JANOW: I see. Okay. Thank you
8 very much for your patience.

9 PRESIDENT van HOUTTE: Do you wish to address
10 the witness?

11 MR. GALLUS: We have nothing further for the
12 witness.

13 PRESIDENT van HOUTTE: Thank you.

14 MR. RIVKIN: I have one question, if I may,
15 just following up on Professor Sands's question.

16 PRESIDENT van HOUTTE: It's a follow-up, yes?

17 MR. RIVKIN: Yes, thank you.

18 FURTHER CROSS-EXAMINATION

19 BY MR. RIVKIN:

20 Q. Mr. Fitzgerald, Mr. Sands was asking about
21 various considerations that went into the drafting of
22 the Accord Acts and its provisions. Do you recall if

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04:15:51 1 PRESIDENT van HOUTTE: It could be that you
2 would be called again, but anyway that will be decided
3 later.

4 THE WITNESS: Okay. Thank you.

5 PRESIDENT van HOUTTE: Thank you very much.
(Witness steps down.)

6 PRESIDENT van HOUTTE: I suggest we have a
7 break until 4:30.
8 (Brief recess.)

9 FRANK SMYTH, RESPONDENT'S WITNESS, CALLED

10 PRESIDENT van HOUTTE: Can we resume?

11 MR. GALLUS: We can.
12 I understand this might be quite quick.
13 Canada has no direct questions for Mr. Smyth.

14 PRESIDENT van HOUTTE: First of all, we have
15 to--

16 MR. RIVKIN: And we have no cross-examination
17 questions of Mr. Smyth.

18 PRESIDENT van HOUTTE: Okay. Then we will
19 start.
20 Good afternoon, Mr. Smyth.

21 MR. RIVKIN: It becomes much better in the
22

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04:39:22 1 afternoon.
 2 PRESIDENT van HOUTTE: Please, if you will be
 3 a witness in this case. Please repeat, on my
 4 conscience and honor I confirm that I will tell the
 5 truth ad nothing but the truth.
 6 (Witness microphone off.)
 7 COURT REPORTER: I did not hear the witness.
 8 PRESIDENT van HOUTTE: Okay, but the witness
 9 has confirmed the statement.
 10 Please.
 11 MR. GALLUS: Canada has no questions for the
 12 witness.
 13 MR. RIVKIN: Claimants have no questions for
 14 the witness.
 15 PRESIDENT van HOUTTE: Well, that puts then
 16 an end to this--
 17 (Laughter.)
 18 PRESIDENT van HOUTTE: Or do you have?
 19 ARBITRATOR JANOW: Mr. Smyth came all this
 20 way, so perhaps we might just ask him a question or
 21 two.
 22 THE SECRETARY: We are in open mode, and I

04:42:00 1 Newfoundland's offshore, we are regularly exposed to
 2 the Operator describing means and measures
 3 operationally as it described several points in that
 4 paragraph, how they compare with their installations
 5 around the world with the benchmark, whether their
 6 performance in Newfoundland was equal to or greater
 7 than performance elsewhere. If it was less than, how
 8 would they address that to improve it to be best
 9 performance for their operations in the world.
 10 In business practices, performance of
 11 production offtime, it was commonly used in regular
 12 meetings with the Board, but the concept of
 13 operational excellence in benchmarking is a common
 14 term used by all the Operators we see. So, in that
 15 context I reference the offtime for processing
 16 systems, production systems, very challenging
 17 circumstances for Operators and operational excellence
 18 by separator design and other operational systems is
 19 when they look to other jurisdictions where they have
 20 installations to make sure they're doing things and
 21 benchmarking their performance against what they see
 22 elsewhere in our jurisdiction.

04:40:24 1 assume that's fine.
 2 QUESTIONS FROM THE TRIBUNAL
 3 ARBITRATOR JANOW: Okay. In reading your
 4 Witness Statement, I think you suggest that the use of
 5 the benchmarks in the Guidelines was partly due to the
 6 demands of the Operators for such benchmarks. Could
 7 you elaborate on this a little bit, please.
 8 And I think Paragraph 7 of your Witness
 9 Statement notes, "Operators in the Newfoundland and
 10 Labrador offshore areas cited the need on many
 11 occasions to establish whether their operational
 12 performance was comparable to other installations," et
 13 cetera. So, I guess areas where the benchmarks were
 14 established in order to gauge operational performance
 15 included A, B, and C, but could you just speak a
 16 little bit to this issue of the role of the Operators
 17 in establishing the benchmarks, or the need for
 18 benchmarks.
 19 THE WITNESS: Any industry, is my
 20 understanding, looks to its operational excellence and
 21 it's development excellence. We--in being exposed at
 22 working at the Board with the oil-and-gas industry in

04:43:15 1 ARBITRATOR JANOW: Thank you.
 2 I gather that the Operators had proposed that
 3 R&D spending should occur based on project--upon the
 4 needs and projects requirements and that the Board
 5 felt it would be important to have some revenue
 6 benchmark or some expenditure benchmark as against
 7 looking to project needs and requirements alone.
 8 Could you comment on this, please.
 9 THE WITNESS: That is correct. The Board's
 10 view, the Operators did in the documents in these
 11 records proposed that the R&D as relates to the
 12 project was their focus area. The Board did not
 13 accept that, and doesn't accept that in these guidance
 14 and this administration.
 15 ARBITRATOR JANOW: And why is that?
 16 THE WITNESS: It believes that the obligation
 17 to spend is not focused solely on the particular
 18 project, the needs of the project, and we would be
 19 quite direct in our response to Operators' submissions
 20 in that respect.
 21 PRESIDENT van HOUTTE: As a matter of fact,
 22 Mr. Smyth, I would like to profit from your presence

04:44:44 1 here to understand better the mechanics of the
2 Guidelines which you describe in your Witness
3 Statement. Now that we understand that you used the
4 benchmark, but I'm unclear how that benchmark works in
5 reality or why the formula was chosen as it was
6 chosen.

7 For instance, am I correct that the benchmark
8 is based upon R&D as recorded in the statistics of
9 Canada, but that the possibility of an individual
10 Operator to deduct or to have research and development
11 considered as a deductible item from the general
12 amount that, therefore, much more reliance is given to
13 what the Canadian tax authorities consider research
14 and development? Am I correct in this view? This
15 type of discrepancy between the benchmark which has
16 the statistics of Canada as a source, and then the
17 individual research and development which is much more
18 assessed, according to the CRA approval or
19 modification.

20 THE WITNESS: My understanding is that there
21 is a coordination between Stats Canada and the Revenue
22 Agencies on these statistics. Although we see on the

04:47:42 [REDACTED]

4 That level of detail as departments in the
5 Federal Government deal with the handling of these
6 statistics, we don't participate in that, and we are
7 not given purview to the makeup of those statistical
8 tables which are published.

9 PRESIDENT van HOUTTE: But the individual
10 Operators know which amounts they have given to the
11 statistical authorities to be included in the
12 statistics; and, therefore, wouldn't each Operator not
13 be allowed to indicate that now in the global
14 statistics of Canada is included a certain amount of
15 research which he has spent, so that, let's say,
16 declaration were approved by an individual Operator
17 would be sufficient to get that amount deducted from
18 the global amount on research that he has spent?

19 THE WITNESS: I'm not quite following that
20 line of questioning, but if I could just add, the
21 Board's view of the statistics issued by the
22 Government of Canada is that, on a gross and--a gross

04:46:21 1 tables that are presented annually a collective, we
2 cannot see the detail because of the Tax Act
3 confidentiality requirements. But there is a
4 correlation between, in my understanding, the Canada
5 Revenue Agency, information and Stats Canada
6 information that's in these published tables.

7 PRESIDENT van HOUTTE: But this morning, if I
8 remember correctly, [REDACTED]

[REDACTED]

04:49:01 1 revenue for the industry against a gross spend on R&D,
2 without knowing any of the detail, in order to be
3 business in our country in the oil-and-gas industry
4 off-stream, that that's a reasonable representation of
5 the ratio between gross revenue and the spend in R&D
6 as reported by the industry to the Government of
7 Canada, and that is the view the Board takes that that
8 is a reasonable benchmark to identify and use.

9 PRESIDENT van HOUTTE: Yes, I don't doubt it,
10 but as you said, each company informs the statistic
11 authorities about research which they have--the
12 amounts spent on research they have to include in the
13 statistics.

14 THE WITNESS: They do by survey and other
15 means possibly. I don't know the details of that
16 assembly of that information.

17 PRESIDENT van HOUTTE: And then the question
18 is why should that company not be entitled to deduct
19 that same amount as research expenses in the
20 whole--under the Guidelines?

21 THE WITNESS: If they are accepted by--by
22 revenue Canada as acceptable and the expenditure is in

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04:50:04 1 the Province, which is a big measure, it is accepted
 2 under the Guidelines as acceptable to quantify
 3 compliance with the Guideline.
 4 PRESIDENT van HOUTTE: Another--and the last
 5 question is, I don't understand how, say, the
 6 Guidelines function in the two preliminary phases,
 7 exploration and development. I have the impression
 8 that there are some gaps there, but can you explain a
 9 little how it works. And exploration, I guess you
 10 have 0.6 percent of all the assets of the companies;
 11 is that it?
 12 THE WITNESS: In the exploration phase, it is
 13 5 percent of their bid for land.
 14 PRESIDENT van HOUTTE: Exploration, yeah,
 15 but--
 16 THE WITNESS: The exploration phase.
 17 PRESIDENT van HOUTTE: Yeah, exploration, but
 18 is there an initial phase?
 19 THE WITNESS: The development phase of a
 20 project.
 21 And in the case of exploration, industry came
 22 to the Board and asked for me to allow an amount they

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04:52:10 1 \$10 million for acreage and they choose to spend
 2 5 percent of that on R&D and E&T for whichever
 3 purpose, they are able to, when they claim to our
 4 office, because if an Operator doesn't spend the
 5 committed monies, 25 of it is retained by the Crown,
 6 so they have allowable expenditures process to go
 7 through with the Board to demonstrate in seismic work
 8 or drilling activity or whatever it might be on the
 9 lands to add up to their commitment. Five percent of
 10 that commitment can be R&D and E&T.
 11 If they would spend more than that, and they
 12 have a project which they could apply that additional
 13 amount of expenditure on R&D, they could apply that
 14 surplus expenditure against a project that might
 15 emerge from that, if they were lucky enough to get the
 16 discovery.
 17 PRESIDENT van HOUTTE: Then why didn't you
 18 just apply the benchmark for the whole project at the
 19 end--from the beginning to the end? Why do you have
 20 those separate regimes for the separate stages?
 21 THE WITNESS: Because the Exploration Phase
 22 of our offshore is one where the exploration activity

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04:51:10 1 could spend for R&D in the Exploration Phase and use
 2 it as an allowable expenditure in their claim against
 3 what they bid for the land, and we did grant that.
 4 PRESIDENT van HOUTTE: What if they spent
 5 more than 5 percent?
 6 THE WITNESS: They could claim only up to
 7 5 percent for their--as an element of their allowable
 8 expenditures for the land exploration.
 9 PRESIDENT van HOUTTE: What if they have
 10 spent actually more than 5 percent? It's lost?
 11 THE WITNESS: Well, they have gained
 12 information from R&D, I guess, in the first instance.
 13 And beyond that, if they do proceed to a project
 14 setting in the development or operations phase, they
 15 could claim that money as an allowable expenditure for
 16 R&D and E&T in the course of development.
 17 PRESIDENT van HOUTTE: But let's say the
 18 first--the 5 percent. What happens to the 5 percent?
 19 It's accepted under the exploration--in the
 20 Exploration Phase?
 21 THE WITNESS: Yes.
 22 So, if an Operator acquires offshore bids

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04:53:29 1 is one in five or more wells that you get success.
 2 You don't always lead from an exploration to a
 3 project.
 4 And in order to get--by Operators request,
 5 they ask for an amount that they could--they could
 6 have for R&D and E&T in the Exploration Phase that
 7 enabled them to be able to get some credit if they
 8 chose to do.
 9 There was a debate of the day that activity
 10 under land tenure should be--the funds should be
 11 channeled towards work on the land and not off the
 12 land if exploration or research activity might not be
 13 directly related to. But the Board, in its wisdom,
 14 decided to apply maximum 5 percent of its bid can be
 15 for R&D.
 16 PRESIDENT van HOUTTE: But couldn't that be
 17 unfair for companies which go to a rather heavy
 18 Exploration Phase and then have a very lucrative
 19 exploitation?
 20 THE WITNESS: The expenditure in R&D and the
 21 Exploration Phase are not mandatory, the 5 percent.
 22 PRESIDENT van HOUTTE: Yeah, okay.

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04:54:44 1 Thank you.
 2 Any other questions?
 3 ARBITRATOR SANDS: Just a couple of quick
 4 ones.
 5 May I ask, what was your role personally in
 6 the development of the Guidelines?
 7 THE WITNESS: I was manager of industrial
 8 benefits when the White Rose Decision was taken, and I
 9 was there from its working for the Board asking for it
 10 to be developed until it was issued by the Board.
 11 ARBITRATOR SANDS: So, you have first-hand
 12 experience of the circumstances in which it emerged.
 13 THE WITNESS: Um-hmm.
 14 ARBITRATOR SANDS: Can I take you to
 15 Paragraph 6 of your First Witness Statement. And in
 16 that that paragraph you described generally the
 17 circumstances in which the move to Guidelines came
 18 about, and the first sentence you write, "Department
 19 observed significant decreases and reported
 20 expenditures and planned expenditures by Operators,"
 21 et cetera.
 22 THE WITNESS: Um-hmm.

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04:57:14 1 to make them more consistent with what they were, or
 2 are we going to be required to take other steps?
 3 THE WITNESS: In the course of Guideline
 4 development, we presented that very plainly to
 5 Operators a number of times. The Board is open to
 6 alternatives to the Guidelines, as long as it had, in
 7 the Board's view, the same effect as the benchmark
 8 calculation process.
 9 And the Operators, in fact, undertook to
 10 explore methods of achieving that, and they were
 11 unable to do that as an elective.
 12 ARBITRATOR SANDS: But in relation
 13 specifically to this or these projects that are the
 14 subject of this case, are you telling me that the
 15 Board put it to the Operators in projects that are the
 16 subject of these proceedings that they had other
 17 alternatives, and did those alternatives include a
 18 return to an elevated level of expenditure?
 19 THE WITNESS: In the course of Guideline
 20 development and in the course of these papers, you
 21 will see we had meetings with Exxon specifically on
 22 what they might do themselves to address this

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04:55:41 1 ARBITRATOR SANDS: Faced with that
 2 development, did you engage with Operators on the
 3 cause of the decrease in R&D?
 4 THE WITNESS: The witnessing of the decrease
 5 in R&D for both operating projects and the course of
 6 the White Rose Application and its public review and
 7 subsequent Board Decision were coincident.
 8 In the White Rose Decision, you see the first
 9 declaration by the Board publicly is that there are
 10 Guidelines, and it's plainly laid out in the Decision
 11 and discussion that the Board has--intends to develop
 12 guidance, it talks about benchmarks, it introduces
 13 that idea.
 14 At the same time as the decline in Hibernia
 15 and Terra Nova reported expenditures in R&D, the
 16 thinking of the Board was turned to at the same time
 17 establishing the Guidelines for R&D and E&T.
 18 ARBITRATOR SANDS: I suppose what I'm trying
 19 to get at is, in the face of apparent decreases in
 20 reported and planned expenditures in Hibernia, for
 21 example, did you at any point present the Operators
 22 with an option: You can either up your expenditures

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04:58:21 1 challenge in alternative to the Guideline.
 2 ARBITRATOR SANDS: And you would have remind
 3 me of what their reaction was to that.
 4 THE WITNESS: They were unable to do that.
 5 ARBITRATOR SANDS: And what does that mean
 6 specifically, they were unable? They were unwilling
 7 to consider increasing their expenditures on their own
 8 accord, or something else?
 9 THE WITNESS: They were unable to provide an
 10 alternative that was equivalent to the Guideline.
 11 ARBITRATOR SANDS: So, the Board had--I mean,
 12 it just appears to flow from what you're saying that
 13 the Board had already identified the use of Guidelines
 14 potentially by the time it engaged with the
 15 confrontation with the Operators on their decreased
 16 expenditures; is that what you're telling me?
 17 THE WITNESS: The Board is--the Board clearly
 18 states in its decision on issuance of the Guideline
 19 that what happened before November 4th or the
 20 effective date of April, the Board chose not to go
 21 back and examine that for its excess or its
 22 deficiency. And that we didn't go back in the period

04:59:28 1 of declining reported and predicted expenditures
2 annually to challenge them; we did not do that. We
3 took from a point forward and applied the Guideline to
4 April 1, 2004, go forward. There was no retroactivity
5 to examine back in the period of decline reported to
6 say that at any point that it was inappropriately low
7 or any discussion of that matter.

8 ARBITRATOR SANDS: Now that I understand, but
9 I'm trying to understand the time--what happened in
10 the time gap in your two--identified in your two
11 paragraphs. Paragraph 6 you refer to a decrease in
12 the period leading up to 2001, and then at Paragraph 8
13 you refer to the Guidelines developed over the period
14 from January 2002 to April 2004.

15 So, I suppose what I'm asking is: Between
16 those two dates, between 2001 and 2002 and 2003, did
17 you give the Operators an opportunity to get their act
18 together and increase expenditures?

19 THE WITNESS: In--in that period White Rose
20 happened, and that was genesis of the thinking as,
21 number one, how to interpret 45 and make a plain
22 statement to the public--the Commissioner encouraged

05:02:10 1 ARBITRATOR SANDS: Were you involved in that
2 effort?

3 THE WITNESS: Yes.

4 ARBITRATOR SANDS: So, what did you
5 personally do to ensure consistency, and what
6 colleagues did you engage with to ensure consistency?

7 THE WITNESS: The counsel of my Vice-Chair
8 who I report to and who was a Board member speaks
9 tomorrow. In the counsel of persons that work with me
10 in my department, in understanding that the guidance
11 was reasonably stated and equitably stated, then it
12 could be supported by the requirements of Section 45.

13 ARBITRATOR SANDS: Did you have input from
14 any legal advisors at the Board on that issue?

15 THE WITNESS: To the extent any Guideline
16 goes to Board, our in-house counsel would bring that
17 as the Corporate Secretary of the Board, and that way
18 there would be a window for any opinion the Board may
19 ask of him with me not present as the Board considers
20 things put forward as advice. He may not have given
21 an opinion. I did not seek it directly from him.

22 ARBITRATOR SANDS: You didn't seek it?

05:00:47 1 us to do that and the Board chose to do that. In the
2 course of that work led to this whole discussion of an
3 emergence of R&D Guideline statement by the Board,
4 that was the period in which that was done. At the
5 same period resonant with their knowledge that there
6 was a decline both in reporting and predicted was
7 present in their thinking as well.

8 So, to go out as a Board while developing, I
9 think, into White Rose, the Board chose not to do that
10 or saw it not appropriate to do that.

11 ARBITRATOR SANDS: You mentioned just now
12 checking on--I'm sorry, I don't have the LiveNote in
13 front of me to know exactly what your framework was,
14 but the compatibility with the Accord Act, what steps
15 did you take at the Board to assure yourselves that
16 the Guidelines proposed were consistent with the
17 requirements set forth in Article 465(3)(c)?

18 THE WITNESS: I'm not sure how to answer that
19 in terms of examining the guidance itself that it is
20 consistent with the Act was constantly done as we
21 drafted it and as the Board discussed wording we put
22 forward as guidance.

05:03:13 1 THE WITNESS: No.

2 ARBITRATOR SANDS: Do you know if he or she
3 expressed any view on the compatibility or
4 consistency?

5 THE WITNESS: I don't know. I don't know.

6 ARBITRATOR SANDS: So, you don't have
7 personal knowledge of that issue?

8 THE WITNESS: I don't have personal
9 knowledge.

10 ARBITRATOR SANDS: I'm only asking you about
11 personal knowledge of these matters. I'm not asking
12 for anyone else's view.

13 THE WITNESS: My knowledge, I have no
14 knowledge, to be clear.

15 ARBITRATOR SANDS: But you say that you do
16 have knowledge that steps were taken to address that
17 issue. I'm again trying to understand the gap.

18 THE WITNESS: I want to be clear that the
19 writing of the guidance I was involved with with other
20 support staff and presented to the Board for its
21 consideration. Within the Board and supporting the
22 Board there is legal--we have a Legal Department that

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05:03:58 1 looks at all of these matters as they're proceeding
2 through the Board. I didn't engage to get a legal
3 opinion to present along with my work to the Board as
4 a test; I did not do that. And whether the Board did
5 that with its counsel, I have no knowledge of that. I
6 do not have any knowledge of that.

7 ARBITRATOR SANDS: Just to conclude on just a
8 slightly separate issue, at Paragraph 10 of your first
9 statement, you describe that for R&D expenditures
10 during the development phase of the project, the Board
11 staff analyzed historical expenditures on R&D for
12 White Rose and, so a benchmark of .5 percent of
13 capital cost was established.

14 When you used "development phase" here, what
15 are you referring to?

16 THE WITNESS: It is the expenditures of funds
17 from project sanction to first oil, to build something
18 and make it function.

19 ARBITRATOR SANDS: Right.

20 When you set your benchmark level for that
21 phase, and you did so by reference apparently as you
22 describe in Paragraph 9 to R&D spending in Canada, and

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05:06:37 1 took the view that the sable (ph.) project and White
2 Rose projects are not bad examples to take, and use
3 the figure of .5 percent as representing that. That
4 .5 percent, although spent in the Development Phase,
5 is credited back to the Operator, so it's not
6 double-counted during the Construction Phase, and it's
7 prorated over.

8 And as Mr. Phelan said earlier, I believe the
9 Board, since I left that position, have given the full
10 credit for the Construction Phase spend on R&D and
11 E&T.

12 ARBITRATOR SANDS: Okay. Thank you very
13 much. No more questions.

14 PRESIDENT van HOUTTE: Maybe I have another
15 question, or let's say more a hypothesis.

16 Let's assume that you have a universe of 10
17 different producers, 10 different wells. Each
18 producer has one well. They all explore, they all
19 develop; but of the 10, only one produces.

20 THE WITNESS: Right.

21 PRESIDENT van HOUTTE: And that's the
22 universe. The production only comes from one well,

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05:05:19 1 you refer in Paragraph 8 to R&D spending by industry,
2 were you having regard to R&D expenditures in the
3 development phases of those other projects
4 domestically and internationally?

5 THE WITNESS: If you could just rephrase
6 that.

7 ARBITRATOR SANDS: What I'm trying to
8 understand is, in setting a figure of .5 percent or
9 .6 percent as a benchmark by reference to what other
10 projects do, in what phase of activity were you
11 looking at those other project activities? Was it in
12 the Exploration Phase? Was it in the Development
13 Phase? Was it averaging out exploration, development,
14 pre-exploration? That's what I'm trying to
15 understand.

16 THE WITNESS: The concept of the .6 percent
17 refers to the entire project and relates to the
18 revenue or the value of the oil in the ground. It's
19 the whole project. The Board took the view that in
20 the Construction Phase, in the Development Phase,
21 there should be some portion of that take place in the
22 Development Phase or the Construction Phase, and it

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05:07:45 1 and there are 10 producers.

2 Now, if I applied the Guidelines, Exploration
3 Phase, 5 percent of the expenditure bit for R&D. Each
4 of them has to pay it; yes?

5 THE WITNESS: They could choose to pay it.

6 PRESIDENT van HOUTTE: Sorry?

7 THE WITNESS: They could choose.

8 PRESIDENT van HOUTTE: What can they choose?

9 THE WITNESS: The 5 percent of their bid for
10 Exploration Phase is something they could choose to
11 do.

12 PRESIDENT van HOUTTE: Yes, all right,
13 but--and if they don't choose to do it.

14 THE WITNESS: They can't choose any more than
15 that. We would not allow it as an expenditure in the
16 Exploration Phase because expenditure money bid for
17 land is to be channeled toward exploiting that land.
18 A maximum of 5 percent is permitted.

19 PRESIDENT van HOUTTE: And what if they don't
20 do anything?

21 THE WITNESS: Then they haven't spent money
22 on research and development, then the Exploration

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05:08:38 1 Phase.

2 PRESIDENT van HOUTTE: And what then under

3 the Guidelines?

4 THE WITNESS: The Guidelines provide for any

5 project for the development and, as it explains in the

6 Guidelines, the phases in the Development and

7 Operations Phase how the distribution of money

8 .5 percent in the Development Phase is mandatory, and

9 .6 percent for the whole.

10 PRESIDENT van HOUTTE: But let's now assume

11 they apply 5 percent of the expenditure because they

12 have to do such and they do it because, as we have

13 seen that is the area where a lot of research and

14 development is necessary.

15 THE WITNESS: Sure.

16 PRESIDENT van HOUTTE: Then they go to the

17 production phase, and they pay 0.5 percent of the

18 total project capital costs.

19 And we also have seen development is one of

20 the moments where research and development is very

21 intensive.

22 THE WITNESS: Yes.

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05:11:06 1 THE WITNESS: And I would comment that the

2 approach has strengths and weaknesses. Its strength

3 is its simplicity. Its weakness is some of the

4 argument you make, whether that's an appropriate

5 benchmark. You will recall in reading that--it's a

6 benchmark for R&D in Canada. It does not reflect

7 education and training.

8 The Board believes that the error induced by

9 discussions such as you might raise and I think I

10 understand where you're going is somewhat mitigated by

11 the fact we have not chosen to explore and identify

12 and add on an education-and-training factor as well to

13 the discussion. The Board did consider that matter in

14 that way.

15 PRESIDENT van HOUTTE: Thank you.

16 Thank you. That makes an end of your

17 testimony. Thank you very much, and you are now a

18 free man.

19 Will we hear the next witness?

20 MR. RIVKIN: How long do you think?

21 PRESIDENT van HOUTTE: I would really like

22 to--then we have heard all the witnesses of fact

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05:09:38 1 PRESIDENT van HOUTTE: Let's say nine

2 companies have paid the amounts I have said for

3 exploration and also the amount for development.

4 Then--and then, of course, the 10 also, but

5 the 10-12 is the only one that produces; and, under

6 the rules of the Guidelines, they have then to pay the

7 research and development, but their production is the

8 only production, but all under the statistics, the

9 Canadian Statistics, all the research and development

10 paid by the nine others will be included also in the

11 statistics, and that will be then the key to determine

12 how much research and development the only producer,

13 the 10 producer has to pay.

14 THE WITNESS: Yeah, yeah.

15 PRESIDENT van HOUTTE: That's much more than

16 reality, isn't it? My example is extreme, but to show

17 you that the formula is not a reflection of reality,

18 but now--

19 (Pause.)

20 PRESIDENT van HOUTTE: I see now it's a

21 mathematical formula, but you don't--I see the

22 weaknesses of the formula; let's put it that way.

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05:12:18 1 today, which would be excellent, if possible.

2 MR. RIVKIN: We have one witness of fact

3 tomorrow. Mr. Way can't testify until tomorrow

4 morning. The next witness would be Sarah Emerson.

5 PRESIDENT van HOUTTE: That's true.

6 MR. RIVKIN: There is some question whether

7 we ought to split up the two Pricing Experts. How

8 long do you think your cross-examination would be? I

9 have probably about 10 minutes of direct.

10 MR. LUZ: It would not take more than 20

11 minutes, and very likely less than that, so I think

12 it's entirely reasonable to think that we could do

13 both Pricing Experts today.

14 PRESIDENT van HOUTTE: That's fine.

15 MR. LUZ: Could we have a break before we

16 start?

17 PRESIDENT van HOUTTE: That's fine.

18 MR. RIVKIN: Mr. President, I ask the

19 proceedings to be closed for the rest of the day since

20 all of the Experts' testimony is to be closed.

21 THE SECRETARY: Please close the session.

22 MR. LUZ: I should point out, and perhaps we

05:13:37 1 can discuss this during the break, that most of my
2 cross-examination will not relate to her specific
3 Witness Statements until towards the end. A lot of it
4 will be on public documents, but I'm fine with closing
5 the entire thing if that was the understanding.
6 MR. RIVKIN: It would be very hard for her to
7 answer without referring back to her reports.
8 MR. LUZ: That's fine, then.
9 (Pause.)
10 SARAH EMERSON, CLAIMANTS' WITNESS, CALLED
11 PRESIDENT van HOUTTE: Okay. Will we resume.
12 Ms. Emerson.
13 THE WITNESS: Yes.
14 PRESIDENT van HOUTTE: You are an expert
15 witness.
16 THE WITNESS: Yes, I am.
17 PRESIDENT van HOUTTE: And you will tell
18 whatever you have to say to the best of your
19 knowledge?
20 THE WITNESS: Yes, I will.
21 PRESIDENT van HOUTTE: You agree? Thank you
22 very much.

05:26:27 1 markets.
2 Most of my time at firm I have focused on
3 petroleum markets, and that includes building an
4 empirical source database which covers supply, demand,
5 inventory, refinery operation, fuel specifications,
6 trade flows, crude-oil quality, taxes and subsidies
7 for each petroleum product in as many countries as
8 possible.
9 With this really significant core asset, I
10 have also developed a series of methodologies for
11 analyzing oil markets and understanding what's moving
12 them and where they will go in the future.
13 At the moment I'm President of the firm, and
14 on the petroleum side I lead a team of seven other oil
15 market analysts, seven including me and six others,
16 and we conduct market analysis right now for [REDACTED]
17 [REDACTED] oil producers, refiners or consumers of oil. And
18 the group of us work on all the research included in
19 these reports.
20 Q. Can you describe the database you mentioned a
21 little bit further so the Tribunal understands what's
22 involved in that.

05:25:36 1 Who will present the witness?
2 MR. RIVKIN: We will.
3 Thank you, Mr. President.
4 DIRECT EXAMINATION
5 BY MR. RIVKIN:
6 Q. Ms. Emerson, you have submitted three Expert
7 Reports in this case?
8 A. Yes.
9 Q. Do you reaffirm them?
10 A. Yes, I do.
11 Q. Can you--you're here describe--I'm sorry.
12 You're here testifying today as an Oil Market Expert.
13 Could you describe your background in the oil markets
14 for the Tribunal.
15 A. Yes, I can.
16 I have been an oil market or energy market
17 analyst since 1986.
18 In 1986, with a partner, I started Energy
19 Security Analysis, also known as ESAI. And since,
20 then I have built it up into a fairly large energy
21 research firm that covers oil markets, electricity
22 market, natural gas markets, and now alternative fuel

05:27:43 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
17 Q. Approximately how many countries do you have
18 data on, and do you regularly maintain and update data
19 on?
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

05:28:54

[REDACTED]

7 Q. Okay. And how often have you testified?
 8 A. In arbitration, I have testified two other
 9 times before the ICC.

10 Q. And you've created two price projections for
 11 this arbitration; is that right?

12 A. Yes, I did.

13 Q. And what did you do to create the projections
 14 in this case?

[REDACTED]

05:31:06

[REDACTED]

05:29:54

[REDACTED]

14 Q. And why did you prepare an updated price
 15 projection in June 2010 for this case?

16 A. I was asked to.

17 Q. And did your prediction change between
 18 June 2009 and June 2010?

[REDACTED]

05:32:21

1 Q. Okay. Ms. Emerson, have you read the Expert
 2 Report submitted by Mr. Davies in this arbitration?

3 A. Yes, I have.

4 Q. And can I ask you to pull out his Second
 5 Report, the June 8, 2010, report.

6 A. Um-hmm.

7 Q. I think that might be the second one under
 8 that.

9 A. Yep.

10 Q. And if you could take a look at Paragraph 26
 11 and the first paragraph of 27, he states there that
 12 "ESAI disputes the Davies report assessment that the
 13 price forecast is high. In so doing, ESAI compares
 14 its forecast with scenario planning assumptions by
 15 IEA, U.S. EIA, and the National Energy Board," that's
 16 with Canada; right?

17 A. Yes.

18 Q. "Such a comparison is conceptually unsound
 19 and misleading."

20 Why do you compare the ESAI projection,
 21 yours, to the reference cases of those three
 22 governmental bodies?

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05:33:21 1 A. Well, first and foremost, those Governments
2 publish these public forecasts, so pretty much
3 everyone in the industry looks especially at the EIA
4 and IEA forecasts. In terms of reference forecast, I
5 mean, that's their baseline vision of the future, and
6 we compare with that that view.

7 Q. And how did your forecast compare to theirs?

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 Q. Okay. If I could ask you, please, to turn to
14 Exhibit 40, your Third Report, which was submitted in
15 the updated damages calculation. Do you have these
16 with you?

17 A. This one.

18 Q. It is in the Core Bundle. It's ESAI
19 Exhibit 4, Volume 2 of the Core Bundle. The document
20 is the U.S. Energy Information Administration Annual
21 Energy Outlook 2010.

22 A. Wait a second. I don't have that here.

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05:38:07 1 Most importantly, in this table are the first
2 five cases. The reference case, which provides the
3 baseline world oil price are based on a baseline
4 economic growth, then there are two cases--

5 Q. Sorry, before you leave the reference price,
6 does it include a world oil price?

7 A. Yes, I just said the world oil price.

8 Q. Okay.

9 A. In fact, that is the base world oil price
10 that they start with.

11 Q. Okay.

12 A. And then below economic growth and high
13 economic growth, all that does is that's a sensitivity
14 to that baseline reference price, a reference forecast
15 which has the world oil price in it, and they just
16 vary the assumption on global--or actually on economic
17 growth. In the case of low economic, you will see in
18 the notes it says they reduced the GDP to 1.8 percent;
19 in the case of high economic growth, they raise it to
20 3.0 percent, so it's one sensitivity away from the
21 reference case which has the baseline world oil price
22 forecast projection.

623

05:35:08 1 Number four? I got it.

2 (Pause.)

3 Q. All right. Everyone has that in front of
4 them now.

5 Ms. Emerson, can you describe the document.

6 A. This is the Annual Energy Outlook produced by
7 the Energy Information Administration of the U.S.
8 Department of Energy, and they produce it every year,
9 and it generally provides a projection 25 years out,
10 in this case to 2035.

11 Q. Okay. Which, coincidentally, as far as your
12 projection went out?

13 A. Absolutely, yeah.

14 Q. If you could turn, please, to Page 201 of the
15 Outlook.

16 What is described on this page?

17 A. On this page, it describes a series of cases
18 undertaken by the EIA, and I think this speaks to the
19 issue that was represented in mine and Mr. Davies's
20 reports about the difference between one price
21 projection and a range of outcomes, which he refers to
22 as "scenarios."

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05:39:11 1 Then the next one is the high--excuse me, is
2 the low oil price, and this is where basically the EI
3 creates these two bookends, one they call the "low oil
4 price" and they basically take the same approach they
5 do with the reference case, but they, as it says here,
6 provide much more optimistic assumptions for economic
7 access to non-OPEC resources and for OPEC behavior
8 than in the reference case. In other words, it's
9 easier to find oil to develop both in the non-OPEC
10 countries, but also it's easier to--there is more
11 access, and OPEC is more likely to provide additional
12 oil, and that generates a low oil price, which as you
13 see here in year 2035 in 2008 dollars is \$133.

14 And then in their high oil price, which is
15 really the other bookend, they basically say that they
16 take the same analysis as the reference case, except
17 they're more pessimistic on access to non-OPEC
18 supplies and on OPEC behavior--i.e. willingness to put
19 oil into the market--and that generates a high case of
20 \$210 by 2035 in 2008 dollars.

21 Q. Thank you.

22 And in order to understand their world oil

05:40:31 1 price that forms the basis throughout these and is the
 2 core of the reference case, could you turn, please, to
 3 Page 28 of the same document.
 4 A. Yes, yes. I have seen this.
 5 Q. Can you explain to the Tribunal what is shown
 6 here and how they describe the reference oil price.
 7 A. This is actually a better, frankly better
 8 description than the table.
 9 PRESIDENT van HOUTTE: Page 28?
 10 MR. RIVKIN: Yes.
 11 THE WITNESS: This is actually a better
 12 description than the table on the previous page.
 13 Basically, if you look under reference case
 14 oil prices, the reference case is based on assumption
 15 of current practices and politics and levels of
 16 access. And as you go further on, it shows that it
 17 actually assumes a liquid demand recovery in 2010.
 18 That's sort of more specific to this one.
 19 Then if you go to the next paragraph--this is
 20 really more the key project--satisfying the growing
 21 world demand for liquids in the next decade will
 22 require accessing higher cost supply, particularly

05:42:56 1 Q. If you could look at Table 10 of EIA's
 2 report, what does EIA itself do?
 3 A. Well, it compares its forecast, its reference
 4 case both from this particular publication but also
 5 the previous year's publication against one, two,
 6 three, four, five--seven private forecasts.
 7 Q. Okay. And what is the significance to you of
 8 the fact that that AEI uses its own reference case in
 9 making these comparisons?
 10 A. EIA.
 11 Q. EIA. Too many initials here.
 12 A. The reference cases are baseline view of the
 13 future, and that's--that is the case that most people
 14 in the industry look at, and it is the case that you
 15 would compare with other forecasts.
 16 Q. And as you said, you have compared your price
 17 to the--
 18 A. Yes.
 19 Q. And I would like to--Greg, if you could put
 20 the table in front of Ms. Emerson and give one to the
 21 panel as well.
 22 What we have done here in this version of

05:41:42 1 from non-OPEC producers. And then it describes the
 2 impact of higher cost of non-OPEC supply. And then
 3 what is not covered by the non-OPEC supply would be
 4 covered by OPEC. The reference case assumes OPEC's
 5 limits on production growth will maintain its share of
 6 total world liquid supply at approximately 40 percent.
 7
 8
 9
 10
 11
 12
 13
 14
 15 Q. Okay. If you could turn to Page 86 of this
 16 document now, please.
 17 Mr. Davies criticized you for comparing your
 18 price to the price of EIA; is that right?
 19 A. Um-hmm, yes.
 20 Q. Because he said it was not comparable to
 21 private forecasters?
 22 A. Yes.

05:44:06 1 Table 10 is use the same comparators as EIA uses in
 2 its Table 10, but we have included in it as well the
 3 ESAI projections so you could see the comparison.
 4 Have I described that correctly, Ms. Emerson?
 5 A. Yes.
 6 And the only thing I would add just for the
 7 Tribunal is the price forecast on the table at the end
 8 of my reports is presented in nominal dollars, and in
 9 this case my price forecast is presented in 2008
 10 dollars to make it comparable with the other forecasts
 11 which are also presented in 2008 dollars.
 12 Q. Okay. And what does this table show in terms
 13 of how your forecast compares to the private forecasts
 14 and to the EIA forecast?
 15
 16
 17
 18
 19
 20 Q. Thank you.
 21 If you could take a look at Mr. Davies's
 22 Third Report, Page 4, and in particular the quote at

05:45:46 1 the top of the page.
 2 A. Page 4?
 3 Q. Yes.
 4 He states there--he quotes from an EIA Report
 5 there, saying that the EIA reference case projections
 6 are not directly comparable with private energy
 7 forecasts that include estimates of policy change in
 8 their scenarios.
 9 Now we have just seen, in fact, that the EAI,
 10 in fact, does compare the reference case projections
 11 to various private forecasts; right?
 12 A. Yes, and they do.
 13 Q. And do you believe it's proper to compare
 14 your projection to the EIA reference case?
 15 A. Yes, I do.

[REDACTED]

05:48:23 [REDACTED]
 [REDACTED]
 3 Q. Thank you.
 4 Ms. Emerson, are oil price projections used
 5 widely in the oil industry?
 6 A. Yes. In my experience, yes, they are.
 7 Q. And on what grounds do you base that answer?
 8 A. Based on the experience I've had with my own
 9 clients.
 10 Q. And how do they use projections?
 11 A. Well, I can give some examples, perhaps.

[REDACTED]

05:47:03 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

7 The EIA has a fairly rigid rule about not
 8 projecting policy changes, and you can imagine why.
 9 It would be a political issue if they were to project
 10 a change on, say, climate policy in the United States.
 11 By the same token--and I think this is
 12 covered in various exhibits--they definitely admit and
 13 point out that they look at existing trends and
 14 extrapolate those existing trends into the future,
 15 [REDACTED]
 16 When you look at just U.S. policy, it seems
 17 this is a very rigid policy. If you were to talk
 18 about the projection of trends, say, in China,

[REDACTED]

05:49:44 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 19 Q. And do oil companies also use, in your
 20 experience, oil price projections to make the
 21 decisions about whether or not to invest in the new
 22 project?

05:51:01 1 A. Absolutely. Absolutely.

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 And I will tell you the key thing about this
9 that this has absolutely been an education for me as
10 well, the key thing about a price forecast in the case
11 where you're looking at a high cost asset like a
12 nonconventional oilfield is there is a long lead time
13 between the day you make the decision to do the
14 project and the day you get first oil, and sometimes
15 that can be 10 or 12 or 13 or 14 years.

16 So, you can't make that decision, you can't
17 commit that money, and then you send it to your board,
18 your investors, your stockholders if you haven't
19 thought about the future price of oil.

20 Q. One quick question: You heard the question
21 that was posed yesterday about the Reuters survey
22 that we have submitted as an additional exhibit?

05:53:23 1 Q. Okay. Ms. Emerson, in your experience, are
2 long-term oil price projections ever perfectly
3 accurate?

4 A. I wish they were.

5 No, I don't think--I think perfection is--
6 (Comment off microphone and laughter.)

7 A. Perfection is a difficult measure to reach.

8 Q. Can one nevertheless rely on projections?

9 A. Well, I think it's obvious that these
10 companies do rely on projections. You have to rely on
11 projections.

12 Q. And how would you describe the projection
13 that you have provided in this arbitration?

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

05:52:16 1 A. Yes.

2 Q. Is that survey available?

3 A. I actually after that session called Reuters
4 to be sure because I thought it was. What Reuters
5 does and has done for many years is they do a survey
6 of predominantly investment banks, although they also
7 include the EIA and the EIA's numbers in this, and
8 they publish that survey at the table, and then they
9 write an article with it. And the article you could
10 get off the Internet pretty much if you Google
11 "Reutter's Price Poll."

12 They don't put it in the article; they put it
13 on the Reuters Wire Service. The article summarize s
14 the table, but the table, in theory, you would have to
15 have subscription to the Reuters Wire Service.

16 Having said that, I called them and I said,
17 "Well, is that privileged information?" They told me
18 it was not because it was--it was also--the data was
19 also included in the Press Releases of most of the
20 Respondent. So they said, "If you called and asked
21 for the table, they would be willing to send it to
22 you."

05:54:40 [REDACTED]
2 Q. Do you think that oil prices could be lower
3 than your projection?

4 A. That's an interesting question.

5 I think, generally speaking, anything can
6 happen. I mean, I presented a price view, and there
7 is some variability. I think you have to expect the
8 fact that prices are volatile. There will be years
9 when the price is higher than the price year, there
10 could be years when the prices are lower. But on
11 balance, I would argue that if there is variability,
12 it will be more to the up side, and I base that on
13 three things:

14 One, as you know, and I'm sure you know that
15 oil comes from OPEC producers and non-OPEC producers,
16 and I'm sure you also are aware that the easy oil,
17 conventional oil, around the world is getting harder
18 to find, and many fields are getting older, and
19 they're beginning decline. So, increasingly, oil
20 companies are having to go into somewhat more frontier
21 areas, and that has increased the cost of production
22 in the non-OPEC production.

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05:56:06 1 And I'm sure you've seen in the press
2 discussions of the cost of offshore--deep-water
3 offshore production, especially off Brazil or the Gulf
4 of Mexico or even off Africa.

5 In addition, there is the Canadian oil sands,
6 of course, which is more costly than conventional oil.
7 There is potential one day of developing oil shale in
8 the United States.

9 And, in addition, there are difficult foreign
10 investment environments, like countries that are
11 pursuing resource nationalism and who are making the
12 foreign investment environment difficult for private
13 companies, private foreign companies to come in.
14 That's one item.

15 The second item that I would--and this is an
16 issue that you have probably also noticed where there
17 is a little disagreement between me and Mr. Davies,
18 and that is this issue of spare capacity. As a result
19 of the decline in oil demand and a really heroic
20 production cut by OPEC at the end of 2008, we have
21 actually had a little spike in spare capacity. [REDACTED]

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05:58:40 1 is based on something, and in Saudi Arabia--I mean,
2 the Saudi Arabian economy, despite the fact that they
3 have such high oil revenues, it's an economy in
4 crisis. Some estimates put unemployment as high as
5 40 percent. [REDACTED]

[REDACTED] I travel to Saudi Arabia every year, and
7 every year much of the discussion is how are we going
8 to generate enough income, believe it or not, to
9 reform our economy?

10 So, I think they're very serious about this.
11 They don't want prices to fall. And if that much
12 spare capacity is held by that country and that's
13 arguably neighboring countries that typically make
14 decisions in accord with them, this is not a bearish
15 factor.

16 The third thing I would say, which I think is
17 also some back and forth between Mr. Davies and me on
18 this, is what I call "passive investment" in oil and
19 in commodities. The world has changed. It's changed
20 for a number of reasons. [REDACTED]

[REDACTED] Keep in mind
22 the futures market is just part of the paper markets.

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05:57:27 1

[REDACTED]
[REDACTED]
[REDACTED]

5 One, unlike in the 1980s and early 1990s,
6 when spare capacity in OPEC was divided among many,
7 many countries, at least 60, if not 65 percent of the
8 spare capacity today is in one country: Saudi Arabia.
9 And if you add Kuwait and the UAE who generally make
10 decisions in accord with Saudi Arabia, that number
11 rises to 80 percent, or maybe even 85 percent. And I
12 would argue that that capacity, it's large now because
13 of the production cut we had as a result of the
14 recession, that capacity is in what I call "strong
15 hands." Saudi Arabia and the Oil Minister have said
16 many times in the last few years that they would like
17 to see oil prices stay between \$70 and \$80, that they
18 feel that is a price level at which economic growth
19 can continue worldwide and at which they can invest
20 and other producers can invest.

21 And I would argue that this is not just a
22 public statement--this public statement, I should say,

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05:59:54 1 Over-the-counter market is even bigger.

2 And as you will see, what the open interest
3 data shows--and open interest, I hope you understand,
4 is unliquidated contracts on the exchange at any given
5 time--open interest shows a significant increase in
6 the positions of passive investors through swap
7 dealers and through other managed money entities. [REDACTED]

12 You probably noticed yesterday that they
13 announced that China increased interest rates, and
14 what happened? Not only did the stock market go down,
15 the price of oil went down because the concern was
16 increasing interest rates tightens credit, and it
17 slows down Chinese economic growth.

18 It's no longer a situation where we could
19 live in our little oil market and say it's
20 disconnected from the currency market, the other
21 commodity markets or the other financial markets.

22 So, when you take that into consideration,

06:01:05 1 I'm not saying that's a bullish factor, but it's a
2 nonbearish factor. In other words, as prices fall,
3 they will come to a point at which universities and
4 pension funds and other passive investors will want to
5 buy and hold commodities in much the same way that I'm
6 sure people in this room purchased equities when the
7 Dow-Jones hit 5000.

8 PRESIDENT van HOUTTE: Ms. Emerson--
9 (Discussion off the record.)

10 PRESIDENT van HOUTTE: Mr. Rivkin, do you
11 have any idea how long? Because then there has to be
12 cross-examination also.

13 MR. RIVKIN: I have one more question.
14 That's it.

15 PRESIDENT van HOUTTE: Keep your answers
16 because I maybe invest my money with all the inside
17 knowledge I got, but let's keep it short.

18 THE WITNESS: Sorry.

19 BY MR. RIVKIN:

20 Q. My last question was just that you mentioned
21 at one point the volatility in the market, is your
22 projection in this case an annual average?

06:03:05 1 Q. EIA. You will excuse me if I mix up the
2 acronyms every now and then.
3 --and compare your forecasts to the reference
4 case forecast of the EIA; is that right?

5 A. Yes, um-hmm.

6 Q. You should say yes or nor just for the
7 record.

8 A. Yes.

9 Q. It's okay. The court reporter usually
10 doesn't record nods.

11 And you said that the EIA's reference case is
12 an appropriate comparator to the oil price forecast
13 that you have developed.

14 A. It is for this assignment, yes.

15 Q. And ESIA's reference case--the EIA's
16 reference case represents a similar forecasting
17 methodology and approach as your--as ESAI adopts?

18 A. Yes.

19 Q. Okay. And you also compare your forecasts to
20 that of the IEA, International Energy Agency; is that
21 right?

22 A. Yes.

06:02:14 1 A. It is an annual average.

2 Q. And how does that impact the volatility
3 that's there?

4 A. The volatility we see in the market is daily
5 prices or monthly prices, and there is not as much
6 volatility in the--take 2009 as an example. Excuse
7 me, 2008 as an example, the price was \$145 and \$40,
8 and the average for the year was 99.

9 Q. Thank you.

10 MR. RIVKIN: I have no further questions.

11 PRESIDENT van HOUTTE: Thank you.

12 From this side...

13 CROSS-EXAMINATION

14 BY MR. LUZ:

15 Q. Thank you.

16 Hi, Ms. Emerson.

17 You went through a lot of the information I
18 was going to cover in my cross-examination. I will
19 just bear repeating for the record that you refer
20 several times to the United States Energy Information
21 Administration--

22 A. EIA, yeah.

06:04:11 1 Q. And as well as to the National Energy Board
2 of Canada; is that right?

3 A. Yes.

4 Q. So, you see those as also as appropriate
5 comparators to your forecasting methodology?

6 A. I would say yes about the IEA. I confess I
7 don't know as much about the methodology of the NEB's
8 forecast.

9 Q. Okay. But in comparing yours to theirs, you
10 see enough of a comparable type of forecast as to
11 compare them?

12 A. They present them as forecasts, yes.

13 Q. Okay.

14 You state in your Expert Report that you
15 believe long-term oil price forecasting is reliable.
16 Is that still your opinion?

17 A. Yes, it is.

18 Q. And you stated in your Expert Reports that
19 oil price forecasting is worthy of confidence; is that
20 still your opinion?

21 A. Yes, it is.

22 Q. And you also stated in your Second Expert

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06:05:03 1 Report, and we can go to it if you want, but I could
 2 just quote from it if you like, it's at Paragraph 12
 3 of your Second Report, projecting--sorry, go ahead.
 4 You could look at it. It's at Paragraph 12.
 5 A. Yes.
 6 Q. In the last sentence you say that "projecting
 7 supply and demand over an extended period of time and
 8 identifying or anticipating imbalances is not so
 9 difficult that the resulting price forecasts are
 10 unreliable or worthy of low confidence." Is that
 11 still your opinion?
 12 A. Yes.
 13 Q. Okay. Ms. Emerson, before we go on to talk
 14 about some of the forecasts, what is the average
 15 price--current price of oil right now?
 16 A. It's \$81-82.
 17 Q. \$81.
 18 And we have only got a couple of months left
 19 in 2010. Do you think it likely that's probably where
 20 the yearly average will end up?
 21 A. I think the yearly averages come up a little
 22 shy of 80, maybe 77, 78.

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06:07:19 1 A. Yes, um-hmm.
 2 Q. Okay. Could you turn to Page 34.
 3 A. Um-hmm.
 4 Q. There is a graph there--
 5 A. Um-hmm.
 6 Q. --is Figure 28, world oil prices in three
 7 cases.
 8 A. Um-hmm.
 9 Q. There is a small, little graph in there which
 10 shows the reference case in nominal dollars.
 11 A. Um-hmm?
 12 Q. Okay. If we just go to the paragraph
 13 underneath that graph in the second--the third
 14 sentence, for the reference case--you see where it
 15 starts?--for reference case, prices rise by about
 16 1.4 percent a year, reaching \$21 and constant \$95 in
 17 2015; nominal dollars, the reference case price
 18 reaches \$39 in 2015.
 19 A. Um-hmm.
 20 Q. Do you see that?
 21 A. Yes, I see it. Sorry.
 22 Q. Would you turn to Page 76 and Table 14. It's

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06:06:13 1 Q. \$77-78 you think--
 2 A. I'm thinking, yes.
 3 Q. I won't ask for a forecast for the next two
 4 months?
 5 A. No, that's okay. I haven't done the average
 6 for the year.
 7 Q. That's fine.
 8 You have a couple of binders on your desk,
 9 and I would like to go to the EIA's Annual Energy
 10 Outlook from 1997.
 11 A. Which binder?
 12 Q. This is Volume 1 of the witness bundle.
 13 A. Yeah.
 14 Q. And for the record this is the Exhibit 6 of
 15 Mr. Davies's most recent Third Report.
 16 A. Which tab is it?
 17 Q. Tab 1.
 18 And this is the EIA's Annual Energy Outlook
 19 for 1997--
 20 A. Um-hmm.
 21 Q. --which we discussed earlier. This is where
 22 the United States EIA publishes its annual forecasts?

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06:08:26 1 a similar chart that we looked at earlier, comparative
 2 forecast of the AEO's reference price to other
 3 private--to other forecasts, including the IEA?
 4 A. Yes.
 5 Q. And some other acronym, PEL, PIRA, WEFA, GRI,
 6 do you know what those acronyms stand for?
 7 A. Yes. PEL, PIRA, WEFA are private, and DRI
 8 are private companies.
 9 Q. Okay. So, these are also private companies
 10 that produce oil forecasts?
 11 A. Not the IEA. That's International Energy
 12 Agency.
 13 Q. Right. So, those other acronyms are private
 14 companies?
 15 A. Um-hmm.
 16 Q. Look at the oil price forecast for 2010 for
 17 the AEO reference on the first column.
 18 A. Um-hmm.
 19 Q. In 1995 dollars, the EIA forecast for 2010
 20 was \$20.41; is that right?
 21 A. Yes.
 22 Q. Adjusting for inflation, that's about \$30 a

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06:09:31 1 barrel?
 2 A. Or just a little higher, maybe.
 3 Q. Okay. Is that the price of oil in 2010?
 4 A. No.
 5 Q. It's \$77, is that right?
 6 A. Um-hmm, yes.
 7 Q. So, the EIA's forecast was wrong.
 8 A. It was low, yeah.
 9 Q. Very low.
 10 A. Yes.
 11 MR. RIVKIN: 1995 dollars.
 12 BY MR. LUZ:
 13 Q. Adjusting for inflation, it's about \$30?
 14 A. I would have to do the calculation for
 15 inflation over that time frame, but let's assume it's
 16 in the 30s.
 17 Q. Okay. If you would like, I could refer to
 18 Mr. Davies's first appendix where he does all these
 19 calculations, and I could tell you it's about \$30 a
 20 barrel.
 21 A. Okay, I will take your word for it.
 22 Q. Okay. So, it's off about \$40 per barrel?

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06:11:30 1 Q. Do you agree with the statement of the United
 2 States Energy Information Administration in 1997 that
 3 there is considerable uncertainty about future oil
 4 prices?
 5 A. I understand why they say it. I understand
 6 why every forecaster likes to say that because it's
 7 cover; right? If you say there's uncertainty, then it
 8 gives cover if you're wrong; right?
 9 I think the thing you have to understand with
 10 forecasting is a forecast is based on the information
 11 at hand at the time, and the reliability of a forecast
 12 is not a function of its accuracy. It's a function of
 13 its utility in helping you make decisions, and I think
 14 that's what's important here.
 15 I'm sure you could put up a dozen slides of
 16 forecasts that look as if they're wrong, but what
 17 matters is that you take the information you have at
 18 the time, and it's the best information you have.
 19 We've learned a lot since 1997 about the oil markets,
 20 most notably China has emerged as a net importer of
 21 oil.
 22 So, no, you cannot anticipate every single

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06:10:18 1 A. Yes.
 2 Q. And so if you look down that column in 2010,
 3 all of those forecasts were wrong for 2010; is that
 4 right?
 5 A. Well, they were low.
 6 Q. They were not only low, but they were off by
 7 about \$40 a barrel, some of them \$50 a barrel?
 8 A. Yes.
 9 Q. Okay. If you could turn back to Page 34, and
 10 back to the same paragraph we were looking at--
 11 A. Um-hmm.
 12 Q. --the first sentence there, "Just as the
 13 historical record shows substantial variability in
 14 world oil prices, there is considerable uncertainty
 15 about future prices."
 16 Ms. Emerson, do you agree with the United
 17 States EIA that there is considerable uncertainty
 18 about future prices?
 19 MR. RIVKIN: This is, of course, a statement
 20 by the U.S. Government in 1997, not today, and so the
 21 question ought to reflect that.
 22 BY MR. LUZ:

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06:12:38 1 variable, but I don't think that makes price
 2 forecasting unreliable or worthy of low confidence
 3 because the point of forecasting is to help you make
 4 decisions.
 5 Q. I will ask the question again: Do you agree
 6 with the United States EIA that there is considerable
 7 uncertainty about future prices of oil?
 8 A. I would have to think about the term
 9 "considerable uncertainty."
 10 Q. So, you're not sure if you agree with the
 11 United States EIA that there is considerable
 12 uncertainty about future oil prices?
 13 MR. RIVKIN: Same objection.
 14 PRESIDENT van HOUTTE: In 1997?
 15 BY MR. LUZ:
 16 Q. In 1997.
 17 A. I think there was some uncertainty about 2010
 18 prices back in 1997.
 19 Q. Okay. Let's flip to Tab 2. This is the
 20 Annual Energy Outlook from 1999.
 21 A. Um-hmm.
 22 Q. For the record, this is Exhibit 8 attached to

06:13:38 1 Davies Third Report.
 2 Could you turn to Page 46. Page 46.
 3 You see it?
 4 A. Yes, I do.
 5 Q. And there is a similar graph with the
 6 reference case showing the reference case projection
 7 from '95 to 2020.
 8 And then in the paragraph below there is the
 9 third sentence, "For the reference case, prices rise
 10 by about .9 percent a year, reaching 22.73 and
 11 constant \$97 in 2020. Nominal dollars, the reference
 12 price exceeds \$43 in 2020.
 13 A. Um-hmm.
 14 Q. Now, could we turn to Page 88 for comparison.
 15 A. Um-hmm.
 16 Q. And Table 13, a similar table.
 17 A. Um-hmm.
 18 Q. We have the EIA '99 reference price and again
 19 the EIA's forecasts as well as some of those other
 20 private companies that we have referred to before.
 21 A. Yes.
 22 Q. Okay. And you see in the first row you've

06:16:13 1 A. It's low by \$40 a barrel.
 2 PRESIDENT van HOUTTE: Let's stop this Ping
 3 Pong game.
 4 It's 6:15. How will we proceed?
 5 MR. LUZ: It should be another 10 minutes.
 6 PRESIDENT van HOUTTE: Sure?
 7 MR. LUZ: Yeah.
 8 BY MR. LUZ:
 9 Q. Could you go back to Page 46 where we looked
 10 at before.
 11 1999--I'm looking at the first sentence after
 12 Figure 37. 1999, the United States Energy
 13 Administration said the same thing: There is
 14 considerable uncertainty about future prices. I will
 15 ask whether you have changed your mind from the last
 16 time I asked you this question, do you agree with the
 17 United States Energy Administration in '99 that there
 18 is considerable uncertainty about future prices?
 19 A. I would agree it is uncertainty. I'm
 20 comfortable with the "considerable uncertainty."
 21 Q. Okay. Let's go to Tab 3.
 22 A. And I should also mention as of 1997 there

06:15:10 1 got under the AEO99 reference price for 2010 is
 2 \$21.30.
 3 A. Um-hmm.
 4 Q. Do you see that?
 5 A. Yes, yes.
 6 Q. And so that was basically the same as the
 7 forecast as we saw before, so adjusting for inflation,
 8 that's approximately \$30 a barrel?
 9 A. Somewhere in the 30s, I suspect, yeah.
 10 Q. Okay. I will just say from Mr. Davies's
 11 calculation it's around \$30 again.
 12 So, that forecast was wrong, was it not?
 13 A. It was low, yes.
 14 Q. It was wrong, was it not?
 15 A. I'm not sure I'm comfortable with the word
 16 "wrong" and "right." Low or high.
 17 Q. \$40 a barrel.
 18 A. Yes, I would agree with that.
 19 Q. So, it's not just wrong, but it's off by \$40
 20 a barrel?
 21 A. No. I said it's low by \$40 a barrel.
 22 Q. But it's off by \$40 a barrel?

06:17:14 1 was considerable uncertainty.
 2 I mean, there is an issue here that I don't
 3 know if I should raise it or you're going to, but we
 4 have had a paradigm shift in how the oil energy
 5 markets work, and the EIA obviously did not anticipate
 6 that. It was an extraordinary event, a series of
 7 events, and I think that just because they got it
 8 wrong in '96 and '97 does is not necessarily an
 9 indictment are all forecasts.
 10 Q. Just because they got it wrong before doesn't
 11 mean they won't get it wrong again?
 12 A. Just because they were too low.
 13 Q. Tab 3, the National Energy Board--
 14 A. Yeah.
 15 Q. --of Canada, and this is Exhibit RE-54.
 16 If you could turn to Page 5. The second
 17 paragraph that starts "to address long-term oil price
 18 uncertainty."
 19 A. Page 5.
 20 Q. Right.
 21 A. During the Board consultation, that one.
 22 Q. Right.

06:18:30 1 I should note this is a publication from
 2 1999.
 3 A. Okay.
 4 Q. Actually, that's--I'm sorry, I should look up
 5 to the paragraph right before that. "During the
 6 Board's consultations."
 7 A. Yes.
 8 Q. Right.
 9 "During the Board's consultation, there was a
 10 general consensus that \$18 U.S. was a reasonable
 11 assumption for the long term."
 12 Do you see that?
 13 A. Um-hmm.
 14 Q. And if you go to Figure 2-2 on the same
 15 page--
 16 A. Um-hmm.
 17 Q. --that's reflected in saying "world oil price
 18 comparison"--
 19 A. Yes.
 20 Q. --over the long term?
 21 A. Um-hmm, yes.
 22 Q. So, adjusting for inflation, was that

06:20:19 1 Ms. Emerson, do you agree with Canada's
 2 National Energy Board that price forecasting is
 3 hazardous?
 4 A. No, I don't.
 5 Q. If we could flip to Tab 4--this is the
 6 Exhibit 12 to Mr. Davies's report--you could flip to
 7 page--and again it's the 2003 EIA Annual Energy
 8 Outlook, Page 96, Table 15?
 9 A. Um-hmm.
 10 Q. And again you have got the EIA's reference
 11 price forecast. I'm interested in looking at 2010.
 12 The forecast in 2001 dollars for this year was 23.99.
 13 That was not a reliable forecast, was it?
 14 A. You also have that in nominal.
 15 Q. If you adjust for inflation, I could give you
 16 the number. I think it's about \$30 a barrel.
 17 A. Yeah, it's going to be in the 30s, probably.
 18 Q. In the 30s. So, that was not a reliable
 19 forecast?
 20 A. It was a low forecast.
 21 Q. Okay. I won't go through this again.
 22 You see the IEA there as well, \$21?

06:19:19 1 forecast of \$18 a barrel for 2010, as we could see
 2 where the graph comes, that was not a reliable
 3 forecast, was it?
 4 A. It was low compared to the actual price in
 5 2010, yes.
 6 Q. The actual price is \$77?
 7 A. Yes.
 8 Well, we think so, yes.
 9 Q. And the forecast was, granted it hasn't been
 10 adjusted for inflation, but assuming \$18?
 11 A. It was still lower, yes.
 12 Q. Substantially lower?
 13 A. Well, \$40 lower.
 14 Q. If we flip back to Page 4, under the heading
 15 "World Oil Prices," 2.2, "The factors governing oil
 16 price determination are generally well-known. World
 17 economic growth and oil demand, non-OPEC oil
 18 production, OPEC's ability to manage its low cost
 19 surplus production capacity."
 20 A. Yes.
 21 Q. Next sentence says, "The interplay of these
 22 factors causes price forecasting to be hazardous."

06:21:46 1 A. Yes, I do.
 2 Q. \$21.47?
 3 A. Yes, I do.
 4 Q. Okay. And none of these forecasts for 2010
 5 were reliable, were they?
 6 A. They were all low.
 7 Q. If you turn to Page 52.
 8 A. 52?
 9 Q. Again, the United States Energy
 10 Administration says in the paragraph right under
 11 Figure 32 on Page 52, "The historical record shows
 12 substantial variability in world oil prices, and there
 13 is similar uncertainty about future prices."
 14 I will ask again: Do you agree with the
 15 United States EIA that there is uncertainty about
 16 future oil prices?
 17 A. I think there is uncertainty about all the
 18 variables that go into developing the price outlook.
 19 Q. Okay. So, you don't agree with the EIA when
 20 they say this?
 21 A. I feel like we are parsing words here. I
 22 mean, I think the issue is not so much is there

06:22:46 1 uncertainty about future prices--yes, there is
 2 uncertainty, I would agree with that, but I'm not--I
 3 don't necessarily agree with "substantial."
 4 Q. Okay. Switch the volumes of your binders
 5 here, and I do have only have another five minutes,
 6 that will be it.
 7 If we could go to Tab 7, please. This is the
 8 EIA's oil price forecast for--from 2006, that's only
 9 four years ago.
 10 A. Um-hmm.
 11 Q. If you could turn to Page 108, and again
 12 there's the chart that we have become familiar with--
 13 A. Um-hmm.
 14 Q. --with the EIA's reference price for 2006--
 15 A. Um-hmm.
 16 Q. --and that's, sorry, Table 20?
 17 A. Um-hmm.
 18 Yes, I see it.
 19 Q. And you will see for 2010 the reference price
 20 forecast for 2010 was \$47.29.
 21 Do you see that?
 22 A. In 2004 dollars.

06:25:29 1 A. Um-hmm.
 2 Q. So, in 2006, the United States Energy
 3 Administration says, "The historical record shows
 4 substantial variability in world oil prices, and there
 5 is arguably even more uncertainty about future oil
 6 prices in the long term."
 7 Are you more comfortable with that language?
 8 A. You know, "more uncertainty," "substantial
 9 uncertainty," all of these words, and they're a little
 10 bit different each time, I mean, I think it's safe to
 11 say that, as Mr. Rivkin said, it's impossible to have
 12 a perfect forecast; that's right.
 13 Q. Okay. So, you wouldn't be--you would not
 14 agree that projections of energy markets are highly
 15 uncertain and subject to many random events that can't
 16 be foreseen?
 17 A. Not when you consider they're based on
 18 information you have at the time of the forecast.
 19 Q. Okay. Can I get you to look at your Third
 20 Report, Page 19--sorry, Paragraph 19 in your Third
 21 Report. Paragraph 19, right in the middle--
 22 A. Oh, sorry, still don't have it.

06:24:35 1 Q. In 2004 dollars.
 2 So, adjusting for inflation, do you have an
 3 idea of how much that is?
 4 A. I suspect you do.
 5 Q. It's about--it's not much more than that.
 6 It's about \$50 a barrel.
 7 A. I would be surprised.
 8 Q. I can confirm that, but again the question
 9 is: That was not a correct forecast, was it?
 10 A. I struggle with this term "right" and "wrong"
 11 and "correct" and "incorrect." I really do.
 12 Q. Was it a reliable forecast?
 13 A. It was reliable forecast based on information
 14 they had at the time.
 15 Q. Okay. Did it turn out to be a reliable
 16 forecast?
 17 A. Based on the information we had at the time,
 18 yes.
 19 You still have to make decisions.
 20 Q. Flip back to Page 64, and I'm looking at the
 21 second paragraph under Figure 29, so the second
 22 paragraph on the left column.

06:26:56 1 Q. Sure.
 2 A. No, that's the first one.
 3 Here it is.
 4 Sorry.
 5 Q. That's okay.
 6 A. Yeah, I've got it.
 7 Q. Paragraph 19 of your report quotes the former
 8 EIA Administrator, Mr. Caruso.
 9 A. Yes.
 10 Q. And says, after the first sentence, right in
 11 the middle, it says "EIA recognizes that projection of
 12 energy markets are highly uncertain and subject to
 13 many random events that cannot be foreseen."
 14 A. Yes.
 15 Q. That was the question I just posed to you and
 16 you weren't willing to agree to it, yet you quote it
 17 in your Expert Report?
 18 A. Yes, because I think the point I was making
 19 had to do with the first half of his sentence.
 20 Q. So, you don't agree with the second half of
 21 his sentence, that projections of energy markets are
 22 highly uncertain?

06:27:59 1 A. Again, I struggle with these adjectives,
2 "highly," "substantial," "significant," whatever the
3 other one was. I agree there is some uncertainty in
4 the future.
5 Q. Ms. Emerson, I just have a few final
6 questions: What evidence has been submitted in this
7 arbitration that evidences ESAI's past oil price
8 forecasts?
9 A. I don't believe any has been.
10 Q. So, we have no way of knowing if your oil
11 price forecasts have been more or less reliable than
12 the unreliable forecasts that we have been looking at
13 previously?
14 A. Except to the degree that I have clients who
15 pay me for them and use them.
16 Q. Okay. So, you don't issue publications that
17 have oil price forecasts?
18 A. I don't issue public publications.
19 Q. I think there is actually one--there is some
20 evidence of your past oil price forecasts. If you
21 turn to Tab 10 of your binder.
22 A. Volume--this volume?

06:29:56 1 Q. Can you give me, say, in 2008, how high did
2 it go?
3 A. Well, in 2008, you're cherry-picking that
4 one, that's a really high one, \$99.
5 If you look at 2000--
6 Q. I'm sorry, that was \$99 the average?
7 A. Average for the year.
8 Q. And what was the highest price it hit in
9 2008?
10 A. \$145.
11 Q. So, the average in 2008 was--
12 A. \$99.
13 Q. \$99.
14 A. But can I also add?
15 Q. Please do.
16 A. The average in 2006 was in the 60s, the
17 average in 2007 was in the 70s, and the average in
18 2009 after the financial crisis and this sort of odd
19 2008-2009, it was back in the 60s.
20 So, I actually don't think this was so bad,
21 but maybe I should explain that.
22 Q. So, you're wrong, but not just that wrong?

06:28:54 1 Q. Of the second, the second volume.
2 A. Yep.
3 I remember this.
4 Q. And for the record, this is Davies Second
5 Report Exhibit R-1. This is an article from
6 November 23rd, 2004, Oil and Gas Journal On-line.
7 You're quoted in this article?
8 A. Yes, I am.
9 Q. And if you could flip to the second page, the
10 top, in that paragraph that says, "Basquis and
11 Simmonds both refused to make price forecasts." Right
12 above that.
13 A. Um-hmm, yes.
14 Q. This is November 2004, Ms. Emerson, "she,"
15 referring to you, "does not expect oil prices to climb
16 much above \$50 a barrel during the next five of
17 years." Is that right?
18 A. Yes, that's what it says here.
19 Q. And did the price of oil climb much above \$50
20 a barrel over the next five years?
21 A. In nominal terms, it did come up, yes. It
22 was higher.

06:30:51 1 QUESTIONS FROM THE TRIBUNAL
2 PRESIDENT van HOUTTE: I have a question, and
3 in all events we have to stop at quarter to 7:00.
4 Now, my question to Ms. Emerson is the
5 following, and I'm not going into the discussion
6 whether what's wrong and what's low and high and so
7 on, but I understand that your clients need some
8 forecasts because it's better to have a forecast than
9 to have no forecast, and two people know more than one
10 person and so on. But can you say that your forecasts
11 are reasonably certain? I'm not speaking about wrong
12 and right. I'm speaking about certainty, the
13 different shades of certainty, and are your forecasts
14 reasonably certain?
15 THE WITNESS: In my opinion, they are. I'm
16 very comfortable. I have very high confidence in my
17 forecasts, again especially in the period covered by
18 the damages.
19 PRESIDENT van HOUTTE: And I think that we
20 understood your point, we start to understand it, I
21 would say, maybe--
22 MR. LUZ: You intervened at the time I was

06:32:07 1 stopping my cross-examination anyway, so it was
2 perfect timing.
3 PRESIDENT van HOUTTE: Okay, good.
4 Are there other issues you would like to
5 cover?
6 MR. LUZ: None at this time, thank you.
7 ARBITRATOR JANOW: May I have one question?
8 PRESIDENT van HOUTTE: Yes.
9 ARBITRATOR JANOW: I think you have gotten to
10 this, but could you just make one concluding remark on
11 how you think an oil price forecaster establishes
12 their credibility.
13 THE WITNESS: I think the price forecaster
14 establishes their credibility in the degree to which
15 their forecast is used. You could always come up with
16 price forecasts that are not 100 percent accurate.
17 And I wouldn't be in business if I hadn't developed an
18 approach to price forecasting that people pay me for.
19 ARBITRATOR JANOW: Thank you.
20 PRESIDENT van HOUTTE: Mr. Rivkin?
21 MR. RIVKIN: I just wanted to add that if the
22 Tribunal would like--I don't want the hour to prevent

06:34:35 1 semantics. When you say that in your view the
2 forecasts are reasonably certain, may I ask you what
3 do you, yourself, consider reasonably certain? Can
4 you define what you consider "reasonably certain."
5 It's a hard question, but as you had no hesitation to
6 say that it was reasonably certain, I think I would
7 like to know what you see is "reasonably certain."
8 THE WITNESS: "Reasonably certain" to me
9 means, first and foremost, not certain. And,
10 secondly, I think it means--I think the term
11 "reasonable" to me means based upon careful
12 consideration of the facts and information at hand.
13 So, if I combine the two, it's a view that is based on
14 the facts at hand, but it's not certain.
15 PRESIDENT van HOUTTE: Then they would say
16 "uncertain."
17 THE WITNESS: No, you said "reasonable."
18 "Reasonably uncertain."
19 PRESIDENT van HOUTTE: If we are speaking
20 mathematics, when 100 is the target, when are you
21 reasonably near to the target?
22 THE WITNESS: You mean am I near at 80, 90,

06:33:20 1 the Tribunal from asking Ms. Emerson any questions
2 that it has. If they would prefer for her to come
3 back tomorrow, fine. If you've asked the questions
4 you wish, that's fine. I would have just one question
5 for her, which is a follow-up on the President's
6 question about your clients needing to have a number
7 to plug in.
8 FURTHER DIRECT EXAMINATION
9 BY MR. RIVKIN:
10 Q. I think you testified that your clients rely
11 on your figures to make important investment
12 decisions. Is that your understanding?
13 A. My understanding is they purchase the
14 forecast and thus use it internally in some way, and
15 it's been my experience with them that they all sort
16 of use it a slightly different way. Some actually
17 measured it against their own internal forecasts.
18 Others actually adopt it. And then in other cases I
19 think they purchase other private forecasts as well
20 and do a comparison across several.
21 QUESTIONS FROM THE TRIBUNAL
22 PRESIDENT van HOUTTE: I have a question of

06:35:59 1 or--
2 PRESIDENT van HOUTTE: Yeah, yeah.
3 What is in your view reasonable?
4 THE WITNESS: I think it depends on the use
5 of the forecast.
6 If you can make a decision with a forecast
7 that is, you know, within 50 percent of the target,
8 then that's reasonable. If you need something closer,
9 then that defines what reasonable is.
10 I think the thing that strikes me about that
11 phrase is it doesn't mean certainty. It means
12 something less than certainty. And when I think about
13 the word "reasonable," I think about doing something
14 carefully. So, for me, "reasonably certain" means not
15 quite certain, but carefully and thoughtfully done.
16 And I really believe that--I have been doing
17 this a long time, and I really believe that the
18 forecasts that I have included in this proceedings, I
19 have a very high confidence in it, especially given
20 the fact we are really only talking about the period
21 '20 to '23.
22 PRESIDENT van HOUTTE: Okay. Thank you.

06:37:15 1 Professor Sands.
 2 ARBITRATOR SANDS: Just to follow up quickly,
 3 you were taken by Mr. Luz to a number of forecasts by
 4 the EIA. A reasonable observer might conclude that,
 5 on the basis of the definition you have just given,
 6 you would say that the EIA forecasts to which you were
 7 taken were reasonably certain. Would you, in fact,
 8 say that the forecasts that you were taken to by the
 9 EIA in the past, '97-'99, were reasonably certain?
 10 THE WITNESS: Well, I think first and
 11 foremost, I wasn't working at the EIA at the time, so
 12 it's very hard for me to make a judgment as to exactly
 13 how carefully they did the work. I'm assuming as a
 14 Government agency they try to do it carefully.
 15 I think the best way to think about this is
 16 they did what they could, they did a reasonably
 17 certain job based on what they knew.
 18 And you have to understand the oil markets
 19 changed a lot, and there are things that you cannot
 20 anticipate, but one of the things, for example, is the
 21 concern over the stability of oil flows, which
 22 happened to be changed a lot by 9/11, the Madrid

06:39:39 1 price was for--
 2 THE WITNESS: \$47.
 3 MR. LUZ: That's right. And this is from the
 4 EIA's 2006 reference case forecast. Just for the
 5 record, it's in Mr. Davies's appendix to his First
 6 Report. It was \$54.70.
 7 THE WITNESS: Okay.
 8 MR. LUZ: So, I didn't want to leave that
 9 hanging, but I may have said it was \$50, but 54.70.
 10 THE WITNESS: Thanks.
 11 MR. RIVKIN: Before we go off the record,
 12 could I ask Mark one question.
 13 Are you planning any direct examination of
 14 Mr. Davies?
 15 MR. LUZ: In light of the frontloading of the
 16 direct that you did with Ms. Emerson, what I had
 17 anticipated doing in redirect may be more appropriate
 18 to do in direct, so it might be a couple of--it might
 19 be 10, 15 minutes of direct, but I would keep it very
 20 short.
 21 MR. RIVKIN: Thank you.
 22 THE SECRETARY: Two things for the record:

06:38:39 1 bombings, U.K. bombings, the bombings in Riyadh. I
 2 mean, how do we take that on board? Based on what
 3 they knew, they tried to be reasonably certain. It
 4 turns out they were inaccurate.
 5 ARBITRATOR SANDS: So, yes or no: Were they
 6 reasonably certain, by your standard?
 7 THE WITNESS: I'm not sure I know how to
 8 answer that. They were reasonably certain at the
 9 time. Do you see what I'm saying? Again, the utility
 10 of the forecast is not whether you hit the target
 11 smack in the middle. The utility is does it help me
 12 make decisions, and I suspect decisions were made
 13 based on that forecast.
 14 ARBITRATOR SANDS: So, reasonably certain at
 15 the time they were made?
 16 THE WITNESS: Yes.
 17 PRESIDENT van HOUTTE: I suggest on this
 18 philosophical note we end today and see each other at
 19 9:00 tomorrow.
 20 MR. LUZ: Sorry, may I clarify something just
 21 for the record. It's not a question or anything.
 22 It's Ms. Emerson asked me to confirm what the nominal

06:40:38 1 First, the timing. I just wanted to update you on
 2 that. The Claimants have used two hours and 31
 3 minutes today, and a total of four hours and 21
 4 minutes; and the Respondent has used two hours and 51
 5 minutes today, with a total of four hours and 34
 6 minutes.
 7 And the second thing is that the other NAFTA
 8 Parties have requested a copy of the transcript, and
 9 pursuant to the NAFTA and our practice, we are going
 10 to transmit an electronic copy of the transcript to
 11 them.
 12 MR. RIVKIN: Can we have over night to
 13 consider the legal issues involved in that? Because
 14 there are--then there become Freedom of Information
 15 Act issues and so forth, and we have an arrangement
 16 with Canada that any transcript that's going to be
 17 public is redacted to remove confidential information,
 18 and, once you have unredacted transcripts in the hands
 19 of other Governments, then they may be subject to
 20 certain considerations.
 21 So, before you do that, we would like to
 22 understand the provision that you have described and

06:41:55 1 if you could send that to us perhaps, Martina, and we
2 could think about it before tomorrow.

3 MR. LUZ: Canada will let the Claimants think
4 about it.

5 MR. RIVKIN: Thank you.

6 (Whereupon, at 6:41 p.m., the hearing was
7 adjourned until 9:00 a.m. the following day.)

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CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter,
do hereby certify that the foregoing proceedings were
stenographically recorded by me and thereafter reduced
to typewritten form by computer-assisted transcription
under my direction and supervision; and that the
foregoing transcript is a true and accurate record of
the proceedings.

I further certify that I am neither counsel
for, related to, nor employed by any of the parties to
this action in this proceeding, nor financially or
otherwise interested in the outcome of this
litigation.

DAVID A. KASDAN