
PCA CASE No. 2021-26

PERMANENT COURT OF ARBITRATION

BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

- vs -

THE GOVERNMENT OF CANADA

Respondent

TRANSCRIPT OF ARBITRATION PROCEEDINGS
Held at the offices of Arbitration Place
333 Bay Street, Suite 900, Toronto, Ontario
on Tuesday, February 6, 2024, at 9:00 a.m.

VOLUME 2
FURTHER REVISED TRANSCRIPT
CONDENSED TRANSCRIPT WITH INDEX

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1 Toronto, Ontario
 2 --- Upon resuming on Tuesday, February 6, 2024
 3 at 9:00 a.m.
 4 PRESIDING ARBITRATOR MILES:
 5 Before we begin, Ms. Shelley or Mr. Terry, any
 6 housekeeping from the Claimants?
 7 MR. TERRY: I don't think
 8 anything we need to deal with right now.
 9 I think we might want to
 10 revisit our conversation about closing that we had
 11 yesterday, later on, as we get closer to the end
 12 of the week. Just because I think probably
 13 Canada's feeling the same way in we talked about
 14 two and a half hours with Tribunal questions and --
 15 PRESIDING ARBITRATOR MILES:
 16 You didn't expect four hours --
 17 MR. TERRY: I think we may all
 18 collectively just want to think about what makes
 19 most sense for Friday as we get closer, if that's
 20 fine to leave open for now.
 21 PRESIDING ARBITRATOR MILES:
 22 That's fine.
 23 MR. TERRY: Thanks.
 24 PRESIDING ARBITRATOR MILES: I
 25 hope you're not thinking about Saturday.

1 Ms. Dosman, any housekeeping?
 2 MS. DOSMAN: Nothing from us.
 3 PRESIDING ARBITRATOR MILES:
 4 Okay. Excellent.
 5 So then that leaves us with
 6 Ms. Baines, I think.
 7 So, Ms. Shelley, are you
 8 calling Ms. Baines?
 9 MS. SHELLEY: I am.
 10 Ms. Baines, can you please
 11 come forward to the witness table.
 12 PRESIDING ARBITRATOR MILES:
 13 Ms. Baines, welcome. Please don't hold it against
 14 us excluding you yesterday. That's sort of the
 15 rules of engagement. It was nothing personal.
 16 So it's nice to have you with
 17 us today.
 18 There is an oath or an
 19 affirmation on the table in front of you. Could
 20 you please make that affirmation for the Tribunal.
 21 MS. BAINES: I solemnly
 22 declare upon my honour and conscience that I will
 23 speak the truth, the whole truth and nothing but
 24 the truth.
 25 AFFIRMED: NANCY BAINES

1 PRESIDING ARBITRATOR MILES:
 2 Thank you very much. Much appreciated.
 3 Now Ms. Shelley is going to
 4 start with some introductory questions and then
 5 Ms. Dosman is going to ask you some additional
 6 questions.
 7 EXAMINATION IN-CHIEF BY MS. SHELLEY:
 8 Q. Good morning, Ms. Baines.
 9 A. Good morning.
 10 Q. I understand this is your
 11 first experience as a witness?
 12 A. Yes, it is.
 13 Q. Just a reminder that it
 14 works best if we take turns speaking so that Lisa,
 15 our stenographer, can record the evidence.
 16 I understand you are currently
 17 the Director, Administration, of Windstream Energy
 18 Inc.?
 19 A. That's correct.
 20 Q. When did you start in
 21 that role?
 22 A. I started in that role in
 23 2008.
 24 Q. And could you please
 25 describe what the role of director of

1 administration entails?
 2 A. The director of
 3 administration does a lot of organizational work,
 4 administrative work. I do all the financial
 5 transactions for Windstream Energy Inc.
 6 I have also been very involved
 7 in project management as well as public relations,
 8 government affairs.
 9 Q. And would you also
 10 explain for the Tribunal what your role and
 11 responsibilities are in connection with the Wolfe
 12 Island Shoals offshore wind project?
 13 A. Sure.
 14 The Windstream Energy Inc. is
 15 the operating company for Windstream Wolfe Island
 16 Shoals. So the roles are very similar. I am just
 17 acting on behalf of the project.
 18 Q. And how does your role
 19 overlap or differ from Mr. Baines' role?
 20 A. There are three of us
 21 working together, Mr. Baines, Mr. Mars and myself.
 22 We all have different core strengths.
 23 Mine is in the meticulous
 24 area.
 25 And I would say Mr. Baines

1 does a lot of the strategy, certainly the
 2 technical work. He is a consulting engineer.
 3 Mr. Mars is the financial,
 4 financing of the project.
 5 And we all work together on
 6 the strategy.
 7 Q. And, prior to joining
 8 Windstream in 2008, what was your professional
 9 background?
 10 A. I graduated from Queen's
 11 University in 1976 in honours biochemistry, spent
 12 ten years with Procter & Gamble in product
 13 development where I did formulation process
 14 development, as well as a lot of market research
 15 and marketing with the marketing group in Toronto.
 16 After that, I went to a multi
 17 -- to a large restaurant group because I wanted to
 18 get more experience beyond the technical area.
 19 And I was director of marketing in that two years.
 20 After that, though, I spent
 21 the bulk of my career in pharmaceuticals and I
 22 joined Boehringer Ingelheim, a multinational
 23 German pharmaceutical company, as the manager of
 24 new business development and then became director
 25 of new business development and public relations,

1 public affairs.
 2 But, in that role, I did a lot
 3 of work looking at opportunities for purchasing
 4 products, purchasing companies, had to evaluate
 5 everything from the technical to the regulatory
 6 situation, marketing and sales, and financial
 7 return on these opportunities.
 8 And, in so doing, we bought a
 9 company and I eventually wound up running the
 10 company -- running the consumer health division of
 11 Boehringer Ingelheim. I was the general manager
 12 of this consumer health division and I did that
 13 until 2002, at which point, the company divested
 14 of that division.
 15 So I went with the new company
 16 for a year and I was vice president of corporate
 17 development at this company for the year.
 18 And then I joined Patheon,
 19 which was a Canadian company that was private and
 20 eventually became public. But it had almost 6,000
 21 employees and 11 plants, and I was the vice
 22 president of business development for the North
 23 American business.
 24 So my responsibility was for
 25 the seven plants that were in -- three in Puerto

1 Rico, one in Cincinnati and the rest in Canada and
 2 I did all of the interaction with the customers, I
 3 had P&L responsibility for those products and did
 4 a little bit of everything really.
 5 And that took me to 2008.
 6 And they moved to Raleigh in
 7 the States and I didn't want to do that and there
 8 was an opportunity to help David and Ian in
 9 Windstream and I thought that my skills were quite
 10 transferable to helping them in some of the areas
 11 they needed help in.
 12 Q. And which skills, in
 13 particular, did you bring to bear?
 14 A. Even though my background
 15 isn't in financial work, I love doing it. So I
 16 did a lot of the meticulous work setting up all of
 17 the financials for the company and the Canadian --
 18 like Windstream Energy Inc.
 19 But, as I said, I did all the
 20 financial transactions and I did a lot of project
 21 management.
 22 And because my background has
 23 been in strategic planning for all these other
 24 entities, I also worked with Ian and David in --
 25 all along the way from 2008 on in trying to get

1 this wind farm operational.
 2 MS. SHELLEY: Thank you,
 3 Ms. Baines. Ms. Dosman will have some questions
 4 for you now.
 5 MS. DOSMAN: Thank you. I am
 6 going to pass you this binder.
 7 THE WITNESS: Sure. Thank
 8 you.
 9 CROSS-EXAMINATION BY MS. DOSMAN:
 10 Q. So, Ms. Baines, it's a
 11 pleasure to meet you. I am Alex Dosman and I am
 12 counsel for Canada in this arbitration.
 13 Before we get started, just a
 14 couple of housekeeping type matters. So you will
 15 see the binder in front of you?
 16 MS. SHELLEY: Sorry. Just
 17 wondering if there a binder available or if we are
 18 to use the electronic version?
 19 MS. DOSMAN: Electronic. That
 20 was my understanding of our agreement.
 21 The Tribunal also,
 22 unfortunately, does not have paper copies. That
 23 was my understanding.
 24 PRESIDING ARBITRATOR MILES:
 25 But you will give us the bundle reference numbers

1 so we can pull it up.
 2 MS. DOSMAN: Absolutely. And
 3 we have the electronic copies as well.
 4 BY MS. DOSMAN:
 5 Q. Okay. So we may refer to
 6 these documents during our time together today and
 7 we will also be pulling them up on the screen in
 8 front of you and all these screens so that you can
 9 look at them in either format.
 10 It's important that we
 11 understand each other so, if I am speaking too
 12 quickly or you don't understand or I skipped a
 13 word, please let me know and I will repeat or
 14 reframe.
 15 And then, as Ms. Shelley
 16 mentioned, the transcript doesn't capture
 17 gestures. So if you could answer orally, please,
 18 starting with yes or no, if possible. That would
 19 facilitate our time together.
 20 Is that acceptable?
 21 A. Yes, it is.
 22 Q. Okay. Excellent.
 23 So you're here today as a
 24 witness for Windstream, and I would like to start
 25 by getting the various Windstream entities

1 straight.
 2 A. Sure.
 3 Q. So if we go to Tab 3 in
 4 your binder.
 5 Tabs 1 and 2 are your
 6 statements, so we will go straight to Tab 3.
 7 This is the Claimant's
 8 memorial dated February 18th, 2022.
 9 A. Um-hmm.
 10 Q. And then, on the flip
 11 side, we have reproduced page 25 of the memorial.
 12 And, for the record, this is
 13 page 30 of the electronic PDF copy.
 14 So we see here an
 15 organizational chart. Perhaps we could zoom in on
 16 the electronic copy.
 17 It's not a very good copy so
 18 we will have to do our best to decipher it,
 19 perhaps with further zooming.
 20 So, at the top, we have
 21 Windstream Energy LLC and that's the Claimant in
 22 this arbitration; right?
 23 A. Correct.
 24 Q. Okay.
 25 And that's a US entity, as we

1 see marked there?
 2 A. Correct.
 3 Q. And then, to the right,
 4 we see one of its subsidiaries is Windstream
 5 Energy Inc.; is that right?
 6 A. That's right.
 7 Q. And that's an Ontario
 8 entity?
 9 A. Yes.
 10 Q. Okay.
 11 And then separately, on the
 12 left, we see that Windstream Energy LLC owns
 13 Windstream Wolfe Island Shoals Inc., and it's the
 14 third little box from the left -- I know, we have
 15 to squint.
 16 A. Yes, I see that.
 17 Q. Okay.
 18 And it looks as though that
 19 ownership is 85 percent directly, that's the
 20 little line in the middle. And 15 percent
 21 indirectly via an entity called OCP Option Inc.?
 22 A. Yes.
 23 Q. And I believe you
 24 clarified, that WWIS is an Ontario company; is
 25 that right?

1 A. That's correct.
 2 Q. And WWIS was the party
 3 that was the entity that was a party to the FIT
 4 Contract?
 5 A. That's correct.
 6 Q. Okay. Great.
 7 So you just confirmed that you
 8 joined Windstream Energy Inc. in 2008.
 9 I just want to make sure I
 10 understand one thing.
 11 If we go to Tab 4, this is
 12 Exhibit C-1877.
 13 A. Um-hmm.
 14 Q. It's an independent
 15 contract for services dated October 1st, 2009.
 16 And we can see there on the
 17 front page that this is an agreement between you,
 18 Windstream Energy Inc., and Controltech
 19 Engineering Inc.
 20 And then, in the first whereas
 21 clause, we see that you are a principal of
 22 Controltech; is that correct?
 23 A. Yes.
 24 Q. And your husband, Ian
 25 Baines, is also a principal of Controltech?

1 A. Yes.
 2 Q. And was this the
 3 agreement under which you provided services to
 4 Windstream Energy Inc.?
 5 A. Yes, it was.
 6 Q. Okay.
 7 So when you say you joined
 8 Windstream Energy Inc., it was via this -- or your
 9 provision of services was via this agreement?
 10 A. You'll note that this is
 11 2009.
 12 Q. Yes.
 13 A. But I started working
 14 with the group in 2008.
 15 Q. Yes.
 16 A. And this is, this is one
 17 of the things that I put together.
 18 Q. That you put together?
 19 A. Yes, that's right.
 20 Q. Excellent. Okay.
 21 A. With the lawyers.
 22 Q. Right. So but you
 23 weren't an employee or hadn't been an employee?
 24 A. No, I have never been an
 25 employee of -- in fact, neither has Mr. Baines.

1 Q. Okay. Excellent.
 2 I would like to just go
 3 quickly, then, to Schedule A1, which is on page 11
 4 of the printed copy, and I believe also page 11 of
 5 the PDF.
 6 A. Scope of services?
 7 Q. Correct, yes.
 8 A. Yes.
 9 Q. So I just want to confirm
 10 this -- you did a bit of an introduction of your
 11 services in direct but I want to confirm that this
 12 remains accurate as a scope of your services
 13 provided.
 14 There's legal documentation,
 15 financial. On the flip side, purchasing, project
 16 management, and promotion.
 17 Is that accurate still?
 18 A. I'd just like to read it
 19 because it's been a long time since I wrote this.
 20 Q. Of course. Take your
 21 time.
 22 A. Yes, that's correct.
 23 Q. Good.
 24 And am I right that
 25 Controltech changed its name to 905850 Ontario

1 Inc.?
 2 A. That's correct.
 3 Q. Okay. In about 2013?
 4 A. I am sorry?
 5 Q. In about 2013?
 6 A. I can't remember the
 7 exact date but it did change its name to that,
 8 yes.
 9 Q. Okay. Great.
 10 But the scope of your duties
 11 remained the same?
 12 A. Yes.
 13 Q. Okay. So let's move on
 14 from that.
 15 You've testified that the FIT
 16 Contract remained in force as of the date of the
 17 award, as the Tribunal itself noted.
 18 Do you also recall that, as of
 19 the date of the award, the Contract was in force
 20 majeure status?
 21 A. Yes.
 22 Q. Okay. Let's look at
 23 Tab 5, which is Exhibit C-0408.
 24 This is WWIS' notice of force
 25 majeure under the FIT Contract?

1 A. Correct.
 2 Q. Do you recognize this
 3 document?
 4 A. Yes, I do.
 5 Q. Okay. Very good.
 6 And do you recall that the
 7 force majeure event related to the lack of a site
 8 release process by MNR?
 9 A. Yes.
 10 Q. Ministry of Natural
 11 Resources, sorry --
 12 A. That's fine I know who
 13 MNR is.
 14 Q. Okay. Great.
 15 So I would just like to get
 16 clear on the meaning of "site release". It's
 17 something I struggled with.
 18 So let's pull up the award
 19 itself which is RL109. It's at Tab 6 of the
 20 binder.
 21 And if you -- I just want to
 22 orient you in the award because it's very long and
 23 we have only included an excerpt.
 24 A. Right. That's fine.
 25 Q. So, on page 16 of the

1 award, which we should have had it flagged for
 2 you, it's page 25 of the PDF.
 3 Just to orient you, we are in
 4 the section --
 5 A. "Factual background."
 6 Q. -- entitled "factual
 7 background".
 8 A. Okay.
 9 Q. So let's flip forward a
 10 couple pages to page 22 of the award,
 11 paragraph 107.
 12 You can see there that, in the
 13 second sentence, the Tribunal notes that the
 14 process for applying to build -- for permission to
 15 test or build on Crown land was called the site
 16 release process, and a project proponent obtaining
 17 site release was referred to as an applicant of
 18 record or AOR; do you see that?
 19 A. That's correct.
 20 Q. Okay.
 21 And WWIS had applied for
 22 applicant of record status; is that correct?
 23 A. For a number of blocks
 24 out in Lake Ontario, yes.
 25 Q. Okay.

1 But it never received AOR
 2 status?
 3 A. No, it did not receive
 4 AOR status.
 5 Q. Okay.
 6 And with respect to -- you
 7 mentioned the blocks or grid cells?
 8 A. Grid cells.
 9 Q. Am I right that, when
 10 WWIS applied for AOR status, it identified certain
 11 grid cells and later wanted to change those grid
 12 cells?
 13 A. I wouldn't agree that we
 14 wanted to change the grid cells. It had to do
 15 with discussions about a 5 kilometre setback that,
 16 in fact, was never put in place. But we could
 17 accommodate the movement of our grid cells. If I
 18 may just add some context to this?
 19 Q. Please.
 20 A. Basically, we applied for
 21 a lot of grid cells close to land because we
 22 didn't want others to get it and we actually
 23 didn't want to build close to the land because of
 24 noise or anything else.
 25 So we actually applied for a

1 massive amount of land that we didn't need for the
 2 project.
 3 Q. Okay.
 4 A. So our plan was to, when
 5 we heard about this 5 kilometre possible setback,
 6 we basically were re-engineering so that we could
 7 build on the cells that were outside of the 5
 8 kilometre zone.
 9 Q. Okay.
 10 That had not been identified
 11 in the applicant of record status application?
 12 A. No, no, many of them had,
 13 actually.
 14 Q. Okay.
 15 A. And, in fact, we asked --
 16 in fact, when we talked to the Ministry of Natural
 17 Resources, they indicated that they were open to
 18 discussing a swap of the grid cells we had close
 19 to land for other cells outside of the ones that
 20 we applied for.
 21 As it turned out, we didn't
 22 need those cells. And, in fact, you know, the
 23 project is really on about 150 acres and, outside
 24 of the 5 kilometre setback, there was something
 25 like 4500 acres.

1 Q. So -- it might help us
 2 and, you know --
 3 A. Sure. Too much, sorry.
 4 Q. All the map issues but
 5 Tab 7 of your binder, which is C-033 -- sorry,
 6 0330.
 7 A. Um-hmm.
 8 Q. This is an email from
 9 Mr. Baines to MNR copying you and a few others.
 10 A. Um-hmm.
 11 Q. Called Crown land
 12 requirements.
 13 A. Yes.
 14 Q. For a 300 megawatt
 15 project.
 16 And Mr. Baines is setting out
 17 the total number of blocks required and some of
 18 the existing blocks. And he is noting
 19 Windstream's proposing to renounce the
 20 applications that are outside the area as -- I
 21 believe this is what you were getting to.
 22 There is some overlap but the
 23 project didn't need new cells in order to proceed
 24 if there was a 5 kilometre setback?
 25 A. I will note that this was

1 back in 2010.
 2 Q. Yes.
 3 A. A lot has changed since
 4 then.
 5 I would also like to note this
 6 is Ian's email, not mine, so --
 7 Q. Right. I know. I am
 8 just putting it to you because you were copied on
 9 it.
 10 A. Hard for me to know what
 11 he was thinking there --
 12 Q. I believe I misspoke
 13 there.
 14 The project did need new grid
 15 cells in order to proceed if there was a 5
 16 kilometre setback?
 17 A. Could you say that again,
 18 please.
 19 Q. Sorry. Yes.
 20 If a 5 kilometre setback was
 21 put in place, the project would need to swap cells
 22 or obtain new cells. It couldn't use the original
 23 cells that had been set out in the applicant of
 24 record status application?
 25 A. All I remember from this

1 point of time, because, again, this was not in my
 2 area of responsibility, although I was copied on
 3 this, is that the -- we received comfort letter
 4 from the Ministry of Natural Resources saying that
 5 they would, they would be open to doing that.
 6 So that's, that gave us
 7 comfort.
 8 Q. I understand.
 9 And I think that's all
 10 detailed in the notice of force majeure itself?
 11 A. Yeah, yeah.
 12 Q. Just to confirm, though,
 13 that the Ministry of Natural Resources did not
 14 ever agree to this, to changing the grid cells?
 15 A. We never came to a
 16 conclusion what would happen, although they gave
 17 us comfort that they would, they would be open to
 18 doing this.
 19 Q. Right.
 20 So you did not agree?
 21 A. We did not receive
 22 confirmation.
 23 Q. So you did not agree?
 24 A. We did not receive
 25 confirmation. That's all I can say.

1 Q. Okay. Maybe we can go
 2 back to the notice of force majeure itself.
 3 A. Sure.
 4 Q. That's at Tab 4.
 5 A. Tab 4. Tab 4 is the
 6 contract. Am I looking at --
 7 Q. Oh, sorry. Tab 5.
 8 A. Tab 5. Okay.
 9 Q. And let's go to page 3,
 10 which I believe is page 5 of the PDF. And we can
 11 go to paragraph 16. There is a Section 2 called
 12 "effects of force majeure" at the bottom of the
 13 page.
 14 Are you with me?
 15 A. Yes, I am.
 16 Q. Okay.
 17 And it's noted here that the
 18 effects -- this is effects on project. I am
 19 quoting:
 20 "Absent the introduction
 21 and implementation of the
 22 regulatory processes (MNR
 23 site release and related
 24 applicant of record
 25 status) and conditions

1 required (MOE exclusion
 2 zone) for the WIS project
 3 to proceed, it is not
 4 possible for the project
 5 to advance any further
 6 towards the milestone
 7 dates described in the
 8 FIT Contract. More
 9 specifically, wind
 10 testing and the further
 11 defining of the project
 12 to allow engineering and
 13 REA related studies
 14 cannot be concluded in
 15 the current
 16 circumstances."[as read]
 17 Do you agree there?
 18 A. Yes, I see that. It's
 19 stated there.
 20 Q. And you didn't receive
 21 confirmation from MNR that your change of grid
 22 cells would be accepted?
 23 A. No, no.
 24 Q. I'd like to just -- so --
 25 and this notice of force majeure remained in

1 effect from the date here in 2010, all the way
 2 through to termination of the FIT Contract; is
 3 that right?
 4 A. That's correct.
 5 Q. Okay.
 6 I'd like to move forward now
 7 to statements about the attempt to move the
 8 project forward after the Windstream I award.
 9 And you address this in your
 10 second witness statement, which we have at Tab 2,
 11 and I believe you also have before you on your
 12 table.
 13 I'd like to go to the section
 14 that starts at paragraph 17 entitled "Windstream's
 15 updated REA submission".
 16 A. Yes.
 17 Q. Okay. So you state that:
 18 "On February 15th, 2017,
 19 WWIS submitted an updated
 20 REA submission to the
 21 Ministry of the
 22 Environment and Climate
 23 Change."[as read]
 24 Do you see that?
 25 A. That's correct.

1 Q. Great.
 2 An REA means renewable energy
 3 approval; is that right?
 4 A. Yes, it is.
 5 Q. Let's go to Tab 8, which
 6 is Exhibit 0322.
 7 This is a document of the
 8 Ontario Ministry of the Environment entitled
 9 "checklist for requirements under Ontario
 10 regulation 359/09"?
 11 A. I see that.
 12 Q. You can see that this
 13 document lists a number of sections and reports
 14 and documentation that's required for an
 15 application for an REA, and it's quite a long
 16 document.
 17 Let's go through it together.
 18 We start with the requirement,
 19 construction plan report, a consultation report.
 20 Flipping to page 2, a
 21 decommissioning plan report. Design and operation
 22 report. That one is very long.
 23 And then we get to page 5, the
 24 top of page 5 notes a project description report.
 25 A. Yes.

1 Q. Okay.
 2 The checklist of requirements
 3 continues, though.
 4 There's then a section B on
 5 consultation, including notices of project and
 6 meetings. Consultation with public. Consultation
 7 with Aboriginal communities. Consultation with
 8 municipalities, local authorities.
 9 A. Um-hmm.
 10 Q. There's a section on
 11 page 8 called "protected properties,
 12 archaeological and heritage resources" with a
 13 number of subsections there that I won't belabour.
 14 There's a subsection D on
 15 natural heritage.
 16 Can we agree that WWIS never
 17 made an REA application?
 18 A. I can't agree with that.
 19 Q. Did WWIS prepare a
 20 construction plan report?
 21 A. You're asking me
 22 something that is outside of my area of expertise.
 23 That would be Mr. Baines. And, also, our
 24 consultants who -- Ortech, which provided that.
 25 So I really can't get into the

1 specifics on that.
 2 Q. So, in your second
 3 witness statement, you exhibit what you say is an
 4 updated REA submission.
 5 A. Yes.
 6 Q. So I am going to take it
 7 that you are competent to testify on the REA
 8 submission and what it is and what it is not.
 9 A. I relied on our experts,
 10 our consultants, to put together the REA
 11 submission which was the project description, as
 12 well as all the work that we had done, both in
 13 engineering and environmental to support that.
 14 And I relied on Mr. Baines as
 15 well, because he has done many REAs but Ortech had
 16 done dozens of them.
 17 So all I can say is we
 18 submitted a very extensive submission to the
 19 Ministry of the Environment as an REA submission.
 20 Q. You submitted a project
 21 description report?
 22 A. It was beyond the project
 23 description report because we also had a lot of
 24 the studies.
 25 Q. Okay.

1 Maybe I can help you out with
 2 -- because you said you're very meticulous so
 3 let's go to Tab 9.
 4 A. Um-hmm.
 5 Q. This is C-0166. It's
 6 another Ontario Ministry of the Environment
 7 document.
 8 A. Um-hmm.
 9 Q. It's called "application
 10 for approval of a renewable energy project".
 11 A. Correct.
 12 Q. Did WWIS fill out this
 13 form and apply for an REA?
 14 A. I cannot confirm that
 15 because I didn't do it.
 16 Q. So you have testified --
 17 A. Um-hmm.
 18 Q. -- that you submitted an
 19 updated REA submission --
 20 A. Yes.
 21 Q. -- what I am trying to do
 22 is understand the difference between submission
 23 and application.
 24 I have put to you the form
 25 that would be required to be filed with the

1 Ministry of the Environment for an application for
 2 REA.
 3 A. Right. Right.
 4 Q. In your role as director
 5 of administration --
 6 A. Um-hmm.
 7 Q. -- paying close attention
 8 to project management, did WWIS submit an
 9 application for an REA?
 10 A. My understanding is that
 11 we did. I did not have direct control over this.
 12 I am only one of a team.
 13 And we, as I said, we had
 14 consultants, in particular, Ortech, that had done
 15 this many, many times and we asked them to submit
 16 that as an REA submission.
 17 So that's my knowledge of it
 18 and I really can't go into did I -- you are not
 19 asking me if I filled this out.
 20 Q. I am asking you if WWIS,
 21 which you have testified you have extensive
 22 responsibilities with respect to project
 23 management --
 24 A. I didn't say extensive --
 25 Q. You said key. You said

1 key.
 2 A. I said I am involved in
 3 project management.
 4 Q. You did say key. It's in
 5 your witness statement.
 6 I am asking you, separate and
 7 apart from the submission, which we will come
 8 to --
 9 A. Um-hmm, um-hmm.
 10 Q. -- whether you can point
 11 me to anywhere on the record where WWIS applied,
 12 submitted an application for REA approval?
 13 A. My understanding is that
 14 we did.
 15 Q. So you cannot?
 16 A. I will just leave it at
 17 that. My understanding is that we did.
 18 Q. I will put it to you
 19 then.
 20 There is nothing on the record
 21 indicating that WWIS applied for REA status?
 22 A. What record are you
 23 referring to?
 24 Q. The record of the
 25 arbitration.

1 A. I would have expected
 2 that -- in fact, I'd have to say that the Ministry
 3 of the Environment responded to us six months
 4 later in August.
 5 And what was very interesting
 6 is that they didn't refer to any of the
 7 environmental work, of which there were about 47
 8 studies that we had done, and we were hoping to
 9 share with them so that they could inform their
 10 decision on what to do with the moratorium.
 11 But they did respond to us
 12 with regard to Aboriginal consultation, which
 13 suggested to me they accepted that application
 14 and, in fact, told us who we should be consulting
 15 with, so --
 16 Q. We will come to that --
 17 A. -- so I find that very
 18 interesting.
 19 Q. We will come to the
 20 letter.
 21 I just note you said you were
 22 hoping to submit the 47 studies. So those were
 23 not attached to the submission?
 24 A. No, they were attached to
 25 the submission.

1 Q. Okay.
 2 And let's go to -- oh, you say
 3 they were attached to the submission?
 4 A. I believed that they were
 5 a part of the submission along with the project
 6 description. Again, I --
 7 Q. Let's go to it because
 8 you exhibit it. You do exhibit it. So I think
 9 it's fair to ask you about this document and the
 10 details of it.
 11 It's at Tab 10 of your binder.
 12 A. Um-hmm.
 13 Q. This is a letter from
 14 Windstream Energy Inc. to the Ministry of the
 15 Environment and Climate Change. It's dated
 16 February 15th, 2017.
 17 A. Yes.
 18 Q. And this is the document
 19 you cite to in your witness statement as the
 20 updated REA submission.
 21 A. Yes. I will note that I
 22 didn't write this document -- this is Mr. Baines.
 23 Q. I understand but you did
 24 put it in evidence.
 25 A. Um-hmm.

1 Q. So if you flip to the
 2 next page, we can see what was attached to this
 3 letter at the bottom.
 4 This submission includes, 1,
 5 the updated project description report for the
 6 Wolfe Island Shoals offshore wind farm. And it
 7 has an Ortech reference.
 8 And, 2, a summary of
 9 engineering and environmental studies in support
 10 of the Wolfe Island Shoals offshore wind farm,
 11 also bearing an Ortech reference number.
 12 Do you see that there?
 13 A. Yes, I do.
 14 Q. Those were the two
 15 attachments to this letter?
 16 A. Right.
 17 Q. So we have those
 18 attachments here at tabs 11 and 12. And, for the
 19 record, those are C-2074 and C-2075.
 20 Let's look, first, at C-2074.
 21 A. Which tab is that,
 22 please?
 23 Q. Sorry, Tab 11.
 24 A. All right, um-hmm.
 25 Q. So this is the Ortech

1 report called "project description".
 2 A. Correct.
 3 Q. And it's dated
 4 February 15th, 2017.
 5 A. That's right.
 6 Q. Okay.
 7 And let's just flip the page
 8 to the sort of -- well, the first page after the
 9 cover page.
 10 A. Um-hmm.
 11 Q. And you'll see there a
 12 little box called "revision history".
 13 And you'll see that this is
 14 the third iteration of this project description
 15 report with two prior drafts.
 16 A. Correct.
 17 Q. Dated 2010 and 2012.
 18 A. Correct.
 19 Q. Okay.
 20 And then, if we go to the
 21 table of contents and flip over to the second page
 22 in the table of contents, we will see there that
 23 there is a reference to Table 2, which is noted to
 24 be the studies completed in support of removal of
 25 the moratorium.

1 I may have lost you, sorry?
 2 A. I see it. I see it.
 3 Okay.
 4 Q. There you are.
 5 A. Yes. Thank you.
 6 Q. And it tells us to flip
 7 to page 28. So let's do that to get to Table 2.
 8 A. Um-hmm.
 9 Q. Okay.
 10 And I believe these might have
 11 been the studies you were referencing earlier?
 12 A. Yes.
 13 Q. Okay.
 14 So, on the third column of
 15 this table, and it goes on for three pages.
 16 A. Um-hmm.
 17 Q. The dates of all of these
 18 documents are listed. I will give you just a
 19 moment to flip through.
 20 But I would like you to
 21 confirm that all of these predate the Windstream I
 22 award, which was rendered at the end of
 23 September 2016.
 24 A. That's correct.
 25 Q. So let's look at the

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1 second attachment to the February 15th letter.
 2 A. Okay.
 3 Q. Which is at Tab 12?
 4 A. Tab 12, um-hmm.
 5 Q. It's Exhibit C-2075.
 6 A. Okay.
 7 Q. It's entitled "summary of
 8 engineering and environmental studies". We saw
 9 the full title earlier, also dated February 15th,
 10 2017.
 11 A. Correct.
 12 Q. Okay. And let's go to
 13 page 10.
 14 It's here listed Table 1.
 15 List of main studies and other analysis.
 16 A. Correct.
 17 Q. Here, we have four
 18 columns.
 19 In the second -- in the third
 20 column along, or second to last, we have a column
 21 entitled "study author and date"?
 22 And I will give you a moment
 23 to look through the table which now goes on for
 24 five pages to look at the dates.
 25 A. Correct.

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1 report, a draft summary of studies report, and a
 2 draft cover letter to the Ministry of the
 3 Environment.
 4 A. Correct. That's what I
 5 am reading.
 6 Q. And you'll see there, in
 7 the last bullet, Ortech refers to initiating the
 8 first steps of the REA process?
 9 A. This was in January.
 10 Q. 2017.
 11 A. That's correct.
 12 Q. So you note at
 13 paragraph 18 of your second witness statement
 14 that, in the fall of 2016, Ortech had been in
 15 touch and provided an estimate for services?
 16 A. Correct.
 17 Q. And the estimate was
 18 approximately \$15,000 in fees?
 19 A. That's right.
 20 Q. Am I right that that
 21 \$15,000 was to cover the work listed in these
 22 three bullet points?
 23 A. To pull it all together.
 24 Q. Okay --
 25 A. So that it could be

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1 Q. And these dates, again,
 2 they all predate the Windstream I award; is that
 3 correct?
 4 A. Yes, they do.
 5 Q. And then are you aware
 6 that the studies listed in Table 2 of the project
 7 description report duplicate those that are listed
 8 here?
 9 A. I would assume, yes.
 10 Q. Okay.
 11 And, as far as you're aware,
 12 there were no other attachments? I mean no other
 13 attachments are listed to this updated REA
 14 submission, as you call it?
 15 A. Not that I am aware of.
 16 Q. So let's go to exhibit --
 17 sorry, Tab 16. Which is Exhibit C-2668.
 18 This is an email from Ortech
 19 to you. Sorry, to Mr. Baines and you?
 20 A. Right.
 21 Q. And it's dated
 22 January 1st, 2017. January 20th, 2017, pardon me.
 23 A. January 20th, yes, yeah.
 24 Q. And, here, Ortech
 25 transmits a project -- a draft project description

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1 submitted.
 2 Q. So the project
 3 description report and the summary of studies?
 4 A. Yes.
 5 Q. Okay.
 6 So just one other thing about
 7 these. And I want to clarify, for the record,
 8 it's sort of unclear in the pleadings.
 9 In your second witness
 10 statement, at paragraph 21, you say that this was
 11 Windstream's third REA submission to Ontario.
 12 A. I did say that in the
 13 second witness statement.
 14 Q. Yeah.
 15 And then you clarify, though,
 16 in the next paragraph, that the first two
 17 submissions were not made to the Minister of the
 18 Environment but, rather, to the Ministry of
 19 Natural Resources?
 20 A. Yes.
 21 Q. Okay.
 22 So should we understand, then,
 23 that this letter, in your view, comprising an REA
 24 submission was the first to be submitted to the
 25 Ministry of Energy -- of the Environment?

1 A. Of the Environment, yes.
 2 And I'd say it was kind of a
 3 misstatement to say. We did submit it to the MNR
 4 in 2010 and in 2012. And, in fact, it should go
 5 to the Ministry of the Environment.
 6 Q. It should --
 7 A. So we recognized that.
 8 Q. Okay. Thank you.
 9 Let's finish up on the letter.
 10 You mentioned you received a
 11 response. The response is at Tab 17.
 12 A. Um-hmm.
 13 Q. It's C-2474. This is one
 14 of those exhibits that's absolutely massive so we
 15 have just excerpted part of it --
 16 A. Yes.
 17 Q. -- and, for the record,
 18 when people are looking in the electronic copy,
 19 it's pages 87 to 90 of the PDF copy.
 20 A. Um-hmm.
 21 Q. This same letter appears
 22 as R-0795. But, either way, Tab 17, for our
 23 purposes.
 24 A. Okay.
 25 Q. So this is a letter dated

1 August 25th, 2017, and the Ministry of the
 2 Environment is responding to WWIS' correspondence
 3 of February.
 4 And then if you flip to
 5 page 2.
 6 A. Yes.
 7 Q. The Ministry notes, and
 8 this is the first full paragraph, that:
 9 "In your letter, you also
 10 describe the studies that
 11 you have carried out to
 12 date. The Ministry has
 13 not published any final
 14 guidelines or policies
 15 specific to offshore
 16 wind. As a result, the
 17 Ministry does not endorse
 18 any of the studies that
 19 you have conducted in the
 20 absence of any provincial
 21 policy framework on
 22 offshore wind. Any
 23 studies you carry out are
 24 entirely at your own
 25 risk. The studies may

1 not meet the standards
 2 set out in the provincial
 3 guidelines and policies,
 4 should these be
 5 developed."[as read]
 6 And then I'd just like to
 7 point to the next paragraph, which clarifies, as I
 8 believe we have just done, that the documents
 9 submitted with the letter of February 15th, are
 10 not those required -- those that are required for
 11 an REA application.
 12 The Ministry writes:
 13 "I would also point out
 14 that a number of
 15 documents that you
 16 describe as studies in
 17 the draft PDR."[as read]
 18 That's the project description
 19 report:
 20 "Are not the reports that
 21 are required to be
 22 prepared under Ontario
 23 regulation 359/09 as part
 24 of an application for
 25 REA."[as read]

1 Do you note that?
 2 A. I read that there.
 3 Q. Okay. Great.
 4 So, so far, we have seen an
 5 updated Ortech project description report, and the
 6 Ortech summary of studies.
 7 At paragraph 27 of your second
 8 witness statement, you also reference an updated
 9 wind resource assessment by Ortech.
 10 Let's go to Tab 18, which is
 11 C-2704.
 12 This is an email chain. So,
 13 in order to get more towards the beginning, we
 14 have to go to the end of the document.
 15 So I'd like to direct you to a
 16 document numbered on the very bottom WIND00011 --
 17 sorry, 1107_0009. I am going to call this page 9
 18 for simplicity.
 19 Are you there with me?
 20 A. I believe I am, yes.
 21 Q. Okay.
 22 And what I am looking at here
 23 is a February 20th, 2017, email from Mr. Baines to
 24 Ortech -- sorry, to Ortech and it copies you.
 25 Do you see that?

1 A. Yes.
 2 Q. Okay.
 3 And so, a little farther down,
 4 we see Ortech -- that's his response?
 5 So then we see Ortech's
 6 writing to the same group just before.
 7 A. Where are you looking --
 8 I see it, yes.
 9 Q. Page 9.
 10 There is a paragraph, this is
 11 Ortech writing:
 12 "As communicated
 13 previously."[as read]
 14 Do you see that where we are?
 15 A. Yes.
 16 Q. :
 17 "As communicated
 18 previously, we provided a
 19 budget estimate of
 20 \$12,000 to provide an
 21 updated WRA."[as read]
 22 Wind resource assessment.
 23 A. Um-hmm.
 24 Q. :
 25 "Based on one turbine

1 model/layout and hub
 2 height combination."[as
 3 read]
 4 And then it specifies the
 5 Siemens 3.6-130 times 83 turbines at hub height of
 6 90 metres.
 7 And then the last sentence:
 8 "You expanded this budget
 9 to provide \$15,000 to
 10 provide some leeway."[as
 11 read]
 12 Do you see that there, at the
 13 end of that paragraph?
 14 A. Right, um-hmm. Um-hmm.
 15 I see that.
 16 Q. Okay.
 17 A. A letter from -- an email
 18 from Hank to Ian.
 19 Q. Yes. On which you are
 20 copied, I presume, because of the estimate?
 21 A. It's just because I put
 22 out the POs.
 23 Q. Right. You are in charge
 24 of the finances --
 25 A. I relied on the technical

1 people to be talking together, yes.
 2 Q. Right.
 3 So let's go forward in the
 4 chain which means back in the document to the
 5 page 7, so it's only one.
 6 And, looking at the top of the
 7 page, we have here an email, again, from
 8 Mr. Baines to Ortech, copying you. It's called
 9 "budget for additional wind resource analysis".
 10 And I am not asking you about the content.
 11 But, at the very bottom of
 12 this email, there is a mark for litigation
 13 privilege. And I would just like to understand
 14 which litigation this might have referred to.
 15 So the Windstream I had
 16 concluded?
 17 A. Right.
 18 Q. And this one had not yet
 19 begun.
 20 Do you know what that
 21 litigation --
 22 A. I honestly have no idea.
 23 Q. No, that's totally fair.
 24 Let's just look briefly at the
 25 wind resource assessment itself, that's at the

1 next tab, Tab 19.
 2 And we will just go to the
 3 executive summary, which is on page 3.
 4 And I will just draw your
 5 attention to the fact that the wind resource
 6 assessment, Ortech says, was updated to consider a
 7 larger capacity turbine with greater rotor
 8 diameter using the available measurement data.
 9 And that data being
 10 December 2011 to March 2015; do you see that?
 11 A. Yes, I would just like to
 12 read it for a second, please.
 13 Q. Of course, sorry.
 14 A. There are so many pages
 15 here.
 16 Yes, I see that.
 17 Q. Great.
 18 And then let's go, finally,
 19 to, on this topic, to Tab 20, which is Exhibit
 20 C-2143.
 21 A. Um-hmm.
 22 Q. This is a document
 23 entitled "a 2017 geological assessment" by CSR
 24 GeoSurveys; is that right?
 25 A. That's correct.

1 Q. And I would just like to
 2 note the date of this document, the final document
 3 is on the very bottom of the cover page. The date
 4 of the document is February 27th, 2018.
 5 A. That's correct.
 6 We were continually updating
 7 the engineering and studies, despite submitting to
 8 the REA. But this continued on right through to
 9 the end.
 10 Q. Maybe we could then just
 11 take a look at the abstract which is on the other
 12 flip side of that page.
 13 A. Um-hmm.
 14 Q. And the second paragraph:
 15 "CSR notes that it
 16 conducted a regional
 17 bathymetry and marine
 18 geophysical program in
 19 2010."[as read]
 20 A. Right.
 21 Q. And then, in the final
 22 paragraph:
 23 "In 2017, CSR was
 24 contracted to compile a
 25 geological assessment of

1 the wind farm site,
 2 including the updated
 3 2017 turbine locations.
 4 And that this report
 5 documents the results of
 6 the geological assessment
 7 based on the
 8 interpretation of
 9 reprocessed 2010
 10 data."[as read]
 11 A. Correct.
 12 Q. Okay.
 13 Let's go to Tab 21. This is
 14 C-2720.
 15 A. Um-hmm.
 16 Q. And C-2720A. So it's the
 17 document and its attachment.
 18 A. Right.
 19 Q. Let's look at the email
 20 first.
 21 This is on March 1st, 2018.
 22 CSR writes to you and to
 23 Mr. Baines with a subject line "re proposal for
 24 further study of the bottom using existing data".
 25 And then if we flip to the

1 next page, the invoice. This is an invoice for
 2 services with a total billed amount of just over
 3 50,000 Canadian dollars; is that right?
 4 A. Yes, that's right.
 5 Q. I'd like to shift gears
 6 and turn to Tab 22. This is another one of those
 7 giant PDFs.
 8 So, for the record, it is
 9 Exhibit C-2477. The relevant pages of the PDF are
 10 127 to 128. It's part of an affidavit of Michael
 11 Lyle in the domestic application --
 12 A. Yes.
 13 Q. -- this letter appears as
 14 Exhibit N to that affidavit.
 15 A. Um-hmm.
 16 Q. So as not to kill all the
 17 trees, we have only printed the relevant part of
 18 the letter.
 19 A. That's a good thing.
 20 Q. Okay.
 21 This is a letter dated
 22 February 20th, 2018. And it's from the IESO to
 23 you; do you see that?
 24 A. Yes, I do.
 25 Q. Okay.

1 And then, on the second page
 2 of the letter, the second to last paragraph, the
 3 IESO writes that:
 4 "In light of all of the
 5 information available to
 6 it, the IESO has
 7 determined to exercise
 8 its right of termination
 9 and this letter,
 10 therefore, constitutes
 11 notice of termination of
 12 the FIT Contract pursuant
 13 to Section 10.1(g)
 14 thereof."[as read]
 15 Do you recall that?
 16 A. Yes, I do.
 17 Q. Okay.
 18 I'd like to move now to some
 19 financial records. So let's go to Tab 23.
 20 Exhibit C-2082.
 21 A. Um-hmm.
 22 Q. This is a two-page chart
 23 entitled "accounting". Do you know what this
 24 chart is?
 25 A. Yes, I do. It's a record

1 from David Mars.
 2 Q. Okay.
 3 A. Because the LLC paid
 4 certain invoices and most of -- these,
 5 basically -- David was involved with the letting
 6 of the contract. He would often pay for some of
 7 the invoices.
 8 So this is a tabulation of the
 9 invoices he has paid. It's separate from the
 10 Windstream Energy or Windstream Wolfe Island
 11 Shoals books.
 12 Q. So this is Windstream
 13 Energy LLC?
 14 A. Yes.
 15 Q. Would you have done any
 16 of these transactions, those involving Canadian
 17 dollars?
 18 A. No, I didn't.
 19 Q. Okay. I still am going
 20 to ask you about them because there are a couple
 21 of things that are relevant to you on this chart?
 22 A. I will try to answer them
 23 but, as I said, it's Mr. Mars' spreadsheet.
 24 Q. Sure.
 25 And, actually, maybe before I

1 get into this very small type, I would like to
 2 understand how expenses were dealt with as between
 3 the three entities?
 4 A. Sure.
 5 Q. So we have Windstream
 6 Energy LLC, we have Windstream Energy Inc. and we
 7 have WWIS.
 8 A. Yes.
 9 Q. Am I correct that WWIS
 10 would incur an expense and then it would get
 11 reimbursed? Or perhaps you just --
 12 A. No.
 13 Q. -- tell us about how
 14 those financial relationships worked.
 15 A. I will do my best.
 16 Again, I am not an accountant,
 17 although I love, I love the financial area. But I
 18 am not trained in accounting, so I will do my best
 19 to explain.
 20 Q. Just in your capacity
 21 as -- yeah.
 22 A. I worked with PwC all
 23 through this process, right from when we set up
 24 the books in the Canadian companies.
 25 So, basically, Windstream

1 Energy Inc. would contract all the work and so
 2 those -- every single transaction is done on
 3 QuickBooks and --
 4 Q. Of Windstream Energy
 5 Inc.?
 6 A. Of Windstream Energy Inc.
 7 Q. Okay.
 8 A. And then PwC has
 9 allocated the expenses that Windstream Energy Inc.
 10 incurred for Windstream Wolfe Island Shoals.
 11 And we have circled those
 12 expenses at the end of the year -- PwC has done
 13 this, through Windstream Wolfe Island Shoals.
 14 So, in other words, on an
 15 operating basis, everything came through
 16 Windstream Energy Inc., and then PwC handled the
 17 allocation to the Wolfe Island Shoals project.
 18 Q. Okay. So Wolfe -- the
 19 WWIS does not have its own books?
 20 A. It does have its own
 21 books, yes. And there are financial statements
 22 produced by PwC for Wolfe Island.
 23 And so when I put -- when I
 24 put everything into QuickBooks, it is allocated by
 25 project.

1 So, yes, you know, everything
 2 would be put in as Windstream Wolfe Island Shoals,
 3 through the Windstream Energy books.
 4 Q. Right.
 5 But, in terms of incurring an
 6 expense, like, would that have been paid by WWIS
 7 and then it would have been allocated --
 8 A. No. It would have been
 9 paid --
 10 Q. Or everything went
 11 through Inc.?
 12 A. Everything went through
 13 Windstream Energy Inc.
 14 Q. Okay. Except for the
 15 things we have here that would have gone through
 16 LLC?
 17 A. That's correct. That's
 18 correct.
 19 Q. Thank you. That's very
 20 helpful.
 21 So let's just go back to
 22 C-2082, the accounting chart. It definitely
 23 requires glasses.
 24 A. Yeah, it does.
 25 Q. So this appears to be --

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1 it's a series of transaction records and the date
2 range is April 21st, 2017. That's the first
3 entry.
4 And then, on the flip side,
5 the last entry is December 31st, 2020?
6 A. Yes.
7 Q. If we can go back to the
8 first page, we have the opening balance and that's
9 payment from the Tribunal. So that's the
10 Windstream I award.
11 A. Correct.
12 Q. And there's a series of
13 payments, legal fees, principal, interest, et
14 cetera.
15 And then, a quarter of the way
16 down, there are two payments to 905085 Ontario?
17 A. That's correct.
18 Q. And that's your company?
19 A. Yes.
20 Q. And the notation there is
21 "accrued management fees"?
22 A. That's right.
23 Q. And then the two payments
24 total \$2 million?
25 A. That's correct.

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1 money that David has shown as an accrual --
2 because I did keep records of what we would
3 normally have invoiced Windstream for our time.
4 As it turns out, what we were
5 paid was basically about the same amount as we
6 would have invoiced during that time.
7 Q. Okay.
8 A. So that's what took us to
9 basically we were -- when we got the money,
10 finally, was 2017.
11 Q. Yeah. I note there it
12 was paid, I believe this is the American style, so
13 May 8th, 2017.
14 A. Well, there we go.
15 Q. So of those costs,
16 then --
17 A. Um-hmm, um-hmm.
18 Q. -- how many -- how much
19 of that accrual, how much of those services
20 related to the time, up to and including the
21 Windstream I award, and how much related to work
22 after the Windstream I award?
23 A. Nothing after the
24 Windstream I award.
25 Q. Okay.

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1 Would you like me to explain
2 those?
3 Q. I would like you to
4 explain the accrued part of that.
5 So when would these services
6 have been performed?
7 A. Okay.
8 So we continued to invoice, as
9 contractors, Ian and I, Windstream right up until
10 June 2012.
11 And, at that point, we
12 realized that we were heading into a litigation.
13 And, I have to say, our
14 investors have been incredibly supportive and we
15 so appreciated it.
16 And, at that point, Ian and I
17 said, look it, if they are going to fund going
18 forward and trying to get this project off the
19 ground and go into NAFTA 1, we have to have skin
20 in the game.
21 And so we decided not to be
22 paid since June 2012.
23 And so we worked for free,
24 basically, until 2016 when the award was made.
25 And, as it turns out, the

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1 A. It took us just to the
2 Windstream I award.
3 Q. Okay.
4 A. We have since done the
5 same thing, and we have been working since 2016
6 for free because -- not for free. We have kept an
7 accrual.
8 But, basically, Ian, David and
9 I -- I will speak for Ian and I. I can't speak
10 for David. But I am sure it's similar -- have not
11 been paid for basically eight years. And that's
12 our skin in the game.
13 Q. Right. Although you did
14 receive the \$2 million --
15 A. Sorry, not eight years.
16 We did in 2017. But it took us to 2016, the award
17 in 2016.
18 Q. Okay. Great.
19 A. Not when it was paid.
20 Q. No, I understand.
21 Let's flip the page. I just
22 want to ask about one more entry.
23 It's about the eighth row from
24 the bottom. And this appears to be a payment to
25 Windstream Energy Inc., so the entity for which

1 you were responsible.
 2 And the notation is "legal
 3 settlement".
 4 A. I am sorry --
 5 Q. Oh, yeah. I know it's so
 6 small.
 7 So, if you go up from the
 8 bottom --
 9 A. Oh, yeah. Yeah.
 10 Q. Yeah.
 11 A. Just a moment. I am
 12 still looking for it down here. I am sorry.
 13 Q. I see Secretariat, Tors
 14 and then Windstream.
 15 A. Oh, I am sorry. I am on
 16 the wrong page. That helps; doesn't it.
 17 Yes, I see it.
 18 Q. Okay.
 19 And this is a payment of
 20 \$750,000?
 21 A. Yes.
 22 Q. Do you remember what
 23 that's for?
 24 A. That was paid to the --
 25 to the IESO as a result of direction from the

1 judge in the Ontario application. We paid that
 2 amount.
 3 Q. We have, on the record,
 4 C-2304 which is a letter between lawyers. They
 5 are discussing the costs to be allocated.
 6 A. Yes, yes.
 7 Q. And the IESO was willing
 8 to settle its costs of the domestic application
 9 for just under \$750,000 -- sorry, I should have
 10 taken you there.
 11 It's Tab 24, in case you
 12 wanted a refresher.
 13 A. Okay.
 14 Again, this is not something
 15 that I was directly involved with.
 16 Q. But you would have been
 17 involved in the payments, obviously, in receiving
 18 the payment --
 19 A. No, I didn't. That was
 20 Mr. Mars.
 21 Are you referring to the
 22 \$750,000 or what --
 23 Q. Yes. The \$750,000 on
 24 that accounting document --
 25 A. Right.

1 Q. -- it shows it as going
 2 to Windstream Energy Inc.?
 3 A. Oh, sorry. I had
 4 forgotten that.
 5 Okay.
 6 Q. Okay.
 7 A. You know what, it's been
 8 so long ago.
 9 Q. Yes.
 10 A. I can't remember
 11 whether -- this is kind of jarring -- I have got a
 12 little bit of a memory that money came wired in to
 13 me and then I --
 14 Q. Wired it on?
 15 A. -- paid it, probably,
 16 yeah.
 17 It's been a long time so I
 18 can't remember each transaction.
 19 Q. That's why we have
 20 documents --
 21 A. I do remember the judge's
 22 handwritten notes with regard to this.
 23 Q. I just wanted you to
 24 confirm that what we have on the record, C-2304,
 25 is about that \$750,000 --

1 A. Okay.
 2 Q. -- and I wanted to
 3 confirm that that was the same \$750,000 we have
 4 here recorded.
 5 A. Okay. Sure. Sure.
 6 Thank you.
 7 Q. Okay.
 8 And you'll remember, just a
 9 couple minutes ago, we looked at the IESO's notice
 10 of termination that went to you?
 11 A. Yes.
 12 Q. And that that was dated
 13 February 20th, 2018?
 14 A. Yes.
 15 Q. Okay.
 16 And so we can agree, then,
 17 that, all of the entries, if you look on this
 18 chart, all of the entries after -- there is an
 19 entry sort of three quarters of the way down,
 20 WRZ -- I believe that's Mr. Ziegler -- 2017
 21 expenses. That was paid at the end of
 22 January 2018.
 23 So we can agree that all the
 24 entries after that post date that notice of
 25 termination of the FIT Contract?

1 A. I see that on this sheet.
 2 Q. Um-hmm.
 3 A. I am not sure what you're
 4 trying to get at.
 5 Q. That's okay. I just
 6 wanted to confirm that.
 7 Let me confer with my
 8 colleagues before I hand you back to Ms. Shelley.
 9 So if you'll bear with me, we
 10 have just a couple more questions about the
 11 payments to 9058 -- sorry, 905085 Ontario Inc.
 12 A. Right.
 13 Q. So I am going to ask the
 14 technician to bring up -- oh, okay. Sorry.
 15 As you can see, we are having
 16 a little trouble deciphering some of the financial
 17 records but I think we will leave it there for
 18 today.
 19 So thank you for being here.
 20 I will give you back to Ms. Shelley or perhaps the
 21 Tribunal.
 22 MS. SHELLEY: I am wondering
 23 if we might be able to take a small break before
 24 we gather to do a short re-examination.
 25 PRESIDING ARBITRATOR MILES:

1 Do you think you'll need a re-examination?
 2 MS. SHELLEY: I do.
 3 PRESIDING ARBITRATOR MILES:
 4 All right, five minutes. We will be back at
 5 quarter past.
 6 MS. SHELLEY: Thank you.
 7 --- Upon recess at 10:10 a.m.
 8 --- Upon resuming at 10:17 a.m.
 9 PRESIDING ARBITRATOR MILES:
 10 Please go ahead, Ms. Shelley.
 11 RE-EXAMINATION BY MS. SHELLEY:
 12 Q. Thank you.
 13 Ms. Baines, I just have a
 14 couple of questions in re-examination.
 15 During Ms. Dosman's
 16 examination, you made reference to a comfort
 17 letter from the MNR?
 18 A. Correct.
 19 Q. And I would like to just
 20 pull up, if we could, the Tribunal's award from
 21 NAFTA 1. This is the C-2040, the version we are
 22 using. And I am at paragraph 135.
 23 We see there:
 24 "On the 5th of August,
 25 2010, WWIS sent a

1 proposed layout and
 2 description of the grid
 3 cells required for the
 4 project to be built
 5 outside of the 5
 6 kilometre exclusion zone
 7 to the MNR."[as read]
 8 And that's the 5 kilometre
 9 setback -- sorry, I should ask that.
 10 That was the 5 kilometre
 11 setback you discussed?
 12 A. That was the 5 kilometre
 13 setback and this is what I was referring to, yes.
 14 Q. So you'll see, on the 9th
 15 of August 2010, with the approval of the MEI and
 16 the Premier's office, the MNR sent Windstream a
 17 letter confirming its willingness to discuss a
 18 reconfiguration of the project site after the
 19 conclusion of the 5 kilometre setback policy?
 20 A. That was the comfort
 21 letter I was referring to.
 22 Q. And the letter was
 23 promising to move as quickly as possible through
 24 the remainder of the application review process in
 25 order that WWIS may obtain applicant of record

1 status in a timely manner?
 2 A. That's right.
 3 Q. And that's consistent
 4 with your recollection?
 5 A. That's consistent with my
 6 recollection.
 7 Q. And, for the Tribunal,
 8 the record that's being referred to here is C-0334
 9 but I don't think we need to go to the record
 10 itself.
 11 And if we could just then move
 12 forward a couple paragraphs in the award to
 13 paragraph 139. Still in Exhibit C-2040.
 14 And we are going to be at the
 15 very bottom of the page, beginning on the 7
 16 October 2010:
 17 "On the 7th of
 18 October 2010, Windstream
 19 formally applied to the
 20 MNR for the swap of Crown
 21 land grid cells, also
 22 reiterating its request
 23 to obtain AOR status."[as
 24 read]
 25 A. Yes, I see that.

1 Q. Ms. Baines, is that
 2 consistent with your recollection --
 3 A. Yes, it is.
 4 Q. -- how it proceeded?
 5 Those are my questions -- oh,
 6 sorry, apologies. Sorry, I jumped the gun.
 7 I am going to move topics
 8 slightly now, Ms. Baines. I have one final
 9 question.
 10 You discussed, during your
 11 examination with Ms. Dosman, the PDR, the project
 12 description report; you recall that?
 13 A. Yes.
 14 Q. And if we could now pull
 15 up C-2075. And it's Exhibit 1.
 16 There was a discussion between
 17 you and Ms. Dosman about whether the 45, 47
 18 studies were or were not attached.
 19 On the screen, maybe we could
 20 orient Ms. Baines as to what this document is?
 21 A. Thank you.
 22 Q. So this is the -- if you
 23 go right -- there we go.
 24 This is the Ortech document.
 25 It's the report, the summary of engineering and

1 environmental studies of the Wolfe Island Shoals
 2 offshore wind farm?
 3 A. Correct.
 4 Q. And it's dated
 5 February 15th, 2017.
 6 And now we could advance
 7 forward to the table of contents.
 8 And you see listed there the
 9 list of appendices?
 10 A. Yes, I do.
 11 Q. And what does that list
 12 of appendices tell us, Ms. Baines?
 13 A. It says there is an
 14 electronic copy of all the studies that were
 15 referenced in the report on a DVD.
 16 Q. Thank you, Ms. Baines.
 17 Those are my questions.
 18 MS. DOSMAN: Can I just have
 19 one point with the witness?
 20 No, I won't. I do have a
 21 point of clarification for the Tribunal, though,
 22 on the issue of the binders.
 23 PRESIDING ARBITRATOR MILES:
 24 How about we release Ms. Baines.
 25 Ms. Baines, thank you very

1 much very, very much for answering the questions
 2 and that's it for you.
 3 THE WITNESS: Thank you.
 4 PRESIDING ARBITRATOR MILES:
 5 So you may now stay for as much of the hearing as
 6 you want.
 7 THE WITNESS: Thank you.
 8 PRESIDING ARBITRATOR MILES:
 9 Ms. Dosman.
 10 MS. DOSMAN: I just wanted to
 11 clarify the issue of the binders.
 12 In PO5 --
 13 PRESIDING ARBITRATOR MILES:
 14 Yes, we have got PO5.
 15 Can I just jump ahead.
 16 This process wasn't
 17 particularly helpful for me. Not having the
 18 documents and not being able easily to access from
 19 your index.
 20 So I understand -- I checked
 21 too. I understand exactly what PO5 said. You did
 22 it by the book. It just wasn't helpful to me as
 23 the Tribunal member. I haven't spoken to --
 24 CO-ARBITRATOR MCLACHLIN: No,
 25 it wasn't helpful.

1 PRESIDING ARBITRATOR MILES:
 2 We can't follow.
 3 So how big is your bundle for
 4 Mr. Killeavy?
 5 MR. TIAN: Not very big. We
 6 could, in the break, get three copies for the
 7 Tribunal.
 8 PRESIDING ARBITRATOR MILES:
 9 Excellent.
 10 MR. TIAN: And one copy for
 11 the Claimant, of course.
 12 PRESIDING ARBITRATOR MILES:
 13 And for the Claimant's; that's right. Don't give
 14 us anything you don't give them.
 15 Who is crossing the --
 16 MS. SHERKEY: I am defending
 17 Mr. Killeavy.
 18 PRESIDING ARBITRATOR MILES:
 19 That wasn't my question.
 20 MS. SHERKEY: Oh, sorry.
 21 PRESIDING ARBITRATOR MILES:
 22 Who is crossing the Respondent's witnesses this
 23 afternoon?
 24 MS. SHERKEY: I am and I have
 25 physical copies of all briefs.

1 PRESIDING ARBITRATOR MILES:
 2 You have physical copies. Excellent. All right.
 3 Well, we will proceed on that
 4 basis. Are you -- I don't think there is any
 5 prejudice to the Claimants, in particular, of the
 6 Tribunal and you not having a bundle here.
 7 But are you prepared to
 8 confirm that for Ms. Baines?
 9 MS. SHERKEY: That was fine.
 10 PRESIDING ARBITRATOR MILES:
 11 Okay. Excellent.
 12 So we will proceed on the
 13 basis that we didn't have the bundles there. It
 14 will mean that we will need to go back and relook
 15 at those documents.
 16 And we will take the 10:30
 17 break now. And Mr. Tian will get us copies of his
 18 bundles, three for the Tribunal and one for the
 19 Claimant.
 20 MR. TIAN: For exhibits that
 21 are very large, is the Tribunal satisfied with the
 22 excerpt that I will be referring to.
 23 PRESIDING ARBITRATOR MILES:
 24 Just to photocopy whatever you have in the witness
 25 bundle.

1 So I am assuming, based on
 2 practice with Ms. Baines, that you are not
 3 reproducing whole exhibits in the bundle.
 4 MR. TIAN: That's correct.
 5 PRESIDING ARBITRATOR MILES:
 6 Yes. So just what you have is helpful. Thank
 7 you.
 8 We will take the full break
 9 now, so twenty to 11. So we will take the
 10 15-minute proper coffee break now.
 11 You will all be twitchy by the
 12 time you come back from your coffee. Maybe it's
 13 just me.
 14 So 20 to 11, please, sharp.
 15 MS. DOSMAN: I am sensing
 16 murmuring.
 17 In the event that's not enough
 18 time to complete the reproduction of the binders,
 19 should we just let everyone know?
 20 I am noting some concern that
 21 15 minutes may not be enough time to reproduce the
 22 four copies. So, if that's the case, we will let
 23 everyone know.
 24 PRESIDING ARBITRATOR MILES:
 25 Hustle, hustle. Okay.

1 --- Upon recess at 10:26 a.m.
 2 --- Upon resuming at 11:06 a.m.
 3 PRESIDING ARBITRATOR MILES:
 4 Ms. Sherkey, is this your witness?
 5 MS. SHERKEY: Yes.
 6 PRESIDING ARBITRATOR MILES:
 7 Mr. Killeavy, hello.
 8 My name is Wendy Miles. Your
 9 Tribunal, Professor Gotanda, Justice McLachlin.
 10 You have an affirmation in
 11 front of you. Could you please take that for the
 12 Tribunal?
 13 THE WITNESS: I solemnly
 14 declare upon my honour and conscience that I will
 15 speak the truth, the whole truth and nothing but
 16 the truth.
 17 AFFIRMED: MICHAEL KILLEAVY
 18 PRESIDING ARBITRATOR MILES:
 19 Thank you very much, Mr. Killeavy.
 20 Ms. Sherkey is going to ask
 21 you some questions briefly and then you will be
 22 cross-examined, I believe, by Mr. Tian.
 23 THE WITNESS: Okay.
 24 EXAMINATION IN-CHIEF BY MS. SHERKEY:
 25 Q. Good morning.

1 You were director of contract
 2 management at the OPA, then the IESO, from fall
 3 2009 --
 4 --- Off-record discussion re microphones
 5 BY MS. SHERKEY:
 6 Q. You were director of
 7 contract management at the OPA then the IESO from
 8 fall 2009 to February 2018; is that correct?
 9 A. Correct.
 10 Q. Describe your
 11 responsibilities in that role?
 12 A. So I led the contract
 13 management function at the OPA and the IESO. I
 14 was responsible for, I think when I left, around
 15 30,000 odd contracts. This would include sort of
 16 the day-to-day administration of all the power
 17 generation and storage contracts that the OPA and
 18 IESO had.
 19 Q. What was the hierarchy of
 20 the contract management group? Who did you report
 21 to and who reported to you?
 22 A. I reported to JoAnne
 23 Butler who was the vice president of what was
 24 called electricity resources. She reported to the
 25 CEO.

1 And I had, over the eight or
 2 so years that I was there, I had anywhere between
 3 half a dozen and 12 direct reports who were
 4 managers.
 5 Q. And who were underneath
 6 the managers?
 7 A. Underneath the managers
 8 would have been what we call contract analysts.
 9 Q. And did you report to
 10 Ms. Butler to the end of your tenure?
 11 A. Yes. Oh, no, sorry.
 12 Pardon me.
 13 She left in October of 2017,
 14 and then I reported to Michael Lyle for a few
 15 months. Sorry.
 16 Q. Who was in charge of the
 17 Windstream contract?
 18 A. The manager for the
 19 Windstream contract was a fellow named Perry
 20 Cecchini.
 21 Q. And then he reported to
 22 you?
 23 A. And then he reported to
 24 me; correct.
 25 Q. You left your role at the

1 IESO in February 2018?
 2 A. Correct.
 3 Q. Why?
 4 A. Correct. I was
 5 terminated without cause.
 6 Q. Do you have any further
 7 information as to why?
 8 A. I don't.
 9 Q. Where did you go?
 10 A. I went to work for Power
 11 Advisory in around May of 2018.
 12 Q. What is Power Advisory?
 13 A. Power Advisory is an
 14 energy sector consultancy. We provide sort of
 15 management consulting advice to mostly power
 16 generators, sometimes utilities, even the IESO, in
 17 fact.
 18 Q. What's your role at Power
 19 Advisory?
 20 A. I am what's called a
 21 commercial director. So I look after all matters
 22 that would be commercial, such as negotiating
 23 contracts, appraising investments, providing that
 24 sort of advice in general.
 25 Q. How did you know Jason

1 Chee-Aloy, the managing principle of Power
 2 Advisory?
 3 A. So, before I joined the
 4 Ontario Power Authority in 2009, I owned a
 5 consulting firm and we did work with the Ontario
 6 Power Authority.
 7 I probably met him around
 8 almost 20 years ago, circa 2004, 2005.
 9 Q. How would you describe
 10 your relationship with him?
 11 A. He was a professional
 12 colleague. I mean, when I joined the OPA in 2009,
 13 he was director of procurement. I was director of
 14 contract management. So we worked side by side
 15 for about, I think about a year or so until he
 16 left.
 17 Q. Okay. Great.
 18 Those are all my questions.
 19 A. Thank you.
 20 CROSS-EXAMINATION BY MR. TIAN:
 21 Q. Good morning,
 22 Mr. Killeavy.
 23 A. Good morning.
 24 Q. Thank you very much for
 25 your time this morning.

1 A. No problem.
 2 Q. My name is Yu Cai Tian.
 3 I am counsel for Canada in this arbitration.
 4 I am going to ask you a few
 5 questions so that I can better understand the
 6 witness testimony that you have submitted on
 7 behalf of the Claimant in this arbitration.
 8 A. Okay.
 9 Q. If you don't understand a
 10 question, please let me know and I will repeat it
 11 or I will rephrase it.
 12 A. All right.
 13 Q. It's quite important, of
 14 course, that we understand each other.
 15 A. Of course.
 16 Q. And it's also important
 17 that you answer my questions.
 18 So, in that sense, if my
 19 question is yes or no, I would appreciate if you
 20 could start your answer in that way so that we
 21 have a clear record.
 22 I will then do my best to
 23 allow you time to add the context you think is
 24 necessary. But we do have a limited amount of
 25 time so I would appreciate very much if we could

1 remain focused on the point of our discussions
 2 today.
 3 And I will also be referring
 4 to a number of documents. Some of them have been
 5 designated as confidential by the parties.
 6 So, when I am referring to one
 7 of those, we will take a brief pause so that the
 8 public feed can be cut out.
 9 All the documents are included
 10 in the bundle in front of you and they will also
 11 come up on the screen in front of you.
 12 If you have trouble seeing a
 13 document at any time or if you want to take your
 14 time to read the document through, please let me
 15 know, and of course I will do my best to allow
 16 that.
 17 Do you have any questions?
 18 A. No.
 19 Q. Great.
 20 So I want to start today by
 21 situating us in the time of relevant events.
 22 You just said that you started
 23 working for the OPA and its predecessor -- the
 24 IESO and the OPA, its predecessor, in 2009;
 25 correct?

1 A. Correct.
 2 Q. And are you aware that,
 3 in January 2013, the Claimant filed the Windstream
 4 I arbitration?
 5 A. I believe that's correct.
 6 Q. Are you aware that Power
 7 Advisory was engaged as an expert by the Claimant
 8 in that arbitration?
 9 A. I didn't know that.
 10 Q. Let's take a look at
 11 Tab 4.
 12 For the record, this is the
 13 expert report filed by Power Advisory in the
 14 Windstream I arbitration.
 15 A. Okay.
 16 Q. So turning to page Roman
 17 numeral 3. That is page 4 of the PDF.
 18 A. Yes.
 19 Q. Do you see the first
 20 sentence under the executive summary?
 21 A. The first sentence that
 22 says "Windstream Energy Inc."?
 23 Q. Yes.
 24 A. Yes.
 25 Q. It says:

1 "Windstream Energy Inc.
 2 (Windstream) engaged
 3 Power Advisory LLC (Power
 4 Advisory) to provide an
 5 independent assessment of
 6 the economic benefits to
 7 the Province of Ontario
 8 from the cancellation of
 9 the Wolfe Island Shoals
 10 Inc. (Wolfe Island
 11 Shoals) offshore wind
 12 project power purchase
 13 agreement (PPA)."[as
 14 read]
 15 Do you see that?
 16 A. I do.
 17 Q. Do you take issue with
 18 that statement?
 19 A. I wasn't involved so I
 20 don't know what they did. I don't know what Power
 21 Advisory did then.
 22 Q. But you don't disagree
 23 with it?
 24 A. Disagree with it? They
 25 are saying that they were hired to do an

1 independent assessment. I would take it on face
 2 value, I guess.
 3 Q. Great.
 4 Are you aware that the award,
 5 so the final decision in the Windstream I
 6 arbitration was issued in September 2016?
 7 A. I can't remember the
 8 exact date but I will take your word that that was
 9 the date.
 10 Q. So, for the entirety of
 11 the Windstream I arbitration, that is between 2013
 12 and 2016, you were working at the OPA; correct?
 13 A. Sorry, can you give me
 14 those dates again?
 15 Q. 2013 to 2016.
 16 A. So 2013 to 2015, I worked
 17 for the Ontario Power Authority.
 18 2015 to 2016, I would have
 19 worked for the Independent Electricity System
 20 Operator. They merged on January 1st of 2015.
 21 Q. Right.
 22 And, for the whole entirety,
 23 you worked at either the OPA or the IESO; correct?
 24 A. Correct. Correct.
 25 Q. And, soon after, are you

1 aware that Windstream, through its enterprise,
2 WWIS, brought a domestic application against the
3 IESO in March 2017?

4 A. I believe that's correct.

5 Q. At that time, March 2017,
6 you were still at the OPA; correct -- the IESO,
7 sorry?

8 A. March of 2017, I was
9 still working for the Independent Electricity
10 System Operator.

11 Q. And, in October 2017, so
12 a few months after that, you were examined as an
13 IESO representative in that domestic application;
14 correct?

15 A. I believe so.

16 Q. Then, in February 2018,
17 you presented a memo to Mr. Michael Lyle
18 recommending the termination of Windstream's FIT
19 Contract with the IESO; correct?

20 A. Correct.

21 Q. And it was also in the
22 same month that you left the IESO; correct --

23 A. Correct.

24 Q. -- February 2018?

25 A. Correct.

1 Q. And three months later,
2 in May 2018, you started working for Power
3 Advisory; correct?

4 A. Correct.

5 Q. In October 2018, you then
6 gave an affidavit in the domestic application,
7 this time as witness for Windstream; correct?

8 A. Correct.

9 Q. Do you still work for
10 Power Advisory to this day?

11 A. I do.

12 Q. And you said earlier that
13 you report to Mr. Jason Chee-Aloy --

14 A. I don't think I said
15 that; did I? I work with Jason Chee-Aloy at Power
16 Advisory.

17 Q. Do you report to him?

18 A. I guess I do, yes. I
19 suppose that would be correct, yes.

20 Q. So just to recapture, for
21 the sake of clarity, you were at the IESO from
22 2009; at the OPA/IESO from 2009 up to
23 February 2018; correct?

24 A. Correct.

25 Q. And you have been working

1 at Power Advisory from May 2018 up to today?

2 A. Correct.

3 Q. I would like to briefly
4 turn to your professional qualifications.

5 A. Yes.

6 Q. I understand that you are
7 a member of the Professional Engineers of Ontario?

8 A. Correct.

9 Q. And you also have a law
10 degree?

11 A. I do. I don't practice
12 law though.

13 Q. Right.

14 I would like to turn to your
15 experience in the wind energy sector in Ontario.

16 You stated earlier that you
17 worked as a director of contract management at the
18 OPA and then at the IESO; correct?

19 A. Correct.

20 Q. For the entirety of your
21 tenure?

22 A. Yes.

23 Q. That is between 2009 and
24 2018?

25 A. Correct.

1 Q. In October 2018 -- 2017,
2 sorry, you mentioned that Mr. Michael Lyle -- you
3 reported to Mr. Michael Lyle?

4 A. At the end of the month,
5 yes.

6 Q. That was when he became
7 the head of contract management at the IESO?

8 A. He became the vice
9 president that was responsible for the contract
10 management function. He was still the general
11 counsel. He had a number of duties.

12 Q. And in the chain of
13 command you would report to him?

14 A. Yes.

15 Q. And you would also take
16 instructions from him?

17 A. Yes.

18 Q. Let's turn to the
19 Windstream I arbitration. No documents yet. Just
20 turning to that topic.

21 Recalling, for the benefit of
22 the Tribunal, that was between 2013 and 2016;
23 correct?

24 A. I believe so, yes.

25 Q. And a part of that case

1 involved Canada addressing facts related to the
2 IESO's actions or the OPA's actions; correct?
3 A. I think so, yes.
4 Q. In that respect, Canada's
5 counsels worked with the OPA and then the IESO to
6 prepare its defence in Windstream I; correct?
7 A. Correct.
8 Q. And, in doing so, Canada
9 shared information subject to confidential --
10 information subject to solicitor-client privilege
11 with the OPA; correct?
12 A. I don't know.
13 Q. Were you present at
14 meetings with Canada's counsels back then?
15 A. One or two maybe.
16 Q. Do you recall being
17 copied on emails from Canada's counsels?
18 A. I don't.
19 Q. Do you recall providing
20 input to Canada's expert report?
21 A. I believe I did review
22 and comment on the construction aspect of it.
23 I am a civil engineer. I have
24 done marine construction so they asked me to look
25 at it and comment, yes.

1 Q. Could you provide more
2 detail on your input, or your involvement?
3 A. Not really, no. It was a
4 while ago.
5 Q. You said earlier that
6 Mr. Perry Cecchini reported to you back then;
7 correct?
8 A. That's correct, yes.
9 Q. Are you aware that
10 Mr. Cecchini testified for Canada in Windstream I?
11 A. I believe that's correct.
12 Q. Did you discuss his
13 witness statement with him at the time of filing?
14 A. I don't believe I did.
15 Q. Did you discuss it with
16 anybody else at the IESO or the OPA?
17 A. I really didn't get that
18 involved in the NAFTA hearing unless people asked
19 me specific things to respond to.
20 Q. You were present at
21 meetings with Canada's counsels when they prepared
22 Mr. Cecchini prior to the Windstream I hearing?
23 A. I can't recall if I was
24 or not. I don't know.
25 Q. So, other than the expert

1 report, did you otherwise provide input to Canada
2 for its defence in Windstream I?
3 A. I don't recall that I
4 did.
5 Q. I'd like to turn to the
6 domestic application.
7 Again, recalling, for the
8 benefit of the Tribunal, the Claimant via WWIS
9 started this domestic application in March 2017;
10 correct?
11 A. I believe that's correct.
12 Q. And, back then, you were
13 still director of contract management at the IESO;
14 correct?
15 A. Correct.
16 Q. And, in that application,
17 the whole purpose was that Windstream, through
18 WWIS, sought to restrain the IESO from exercising
19 its termination right under the FIT Contract?
20 A. I think that's correct,
21 yes.
22 Q. Let's turn to Tab 6 of
23 your binder.
24 For the record, this is
25 C-2480. A transcript of Mr. Killeavy's

1 examination in the domestic application as an IESO
2 representative.
3 Do you recognize this
4 document?
5 A. I have seen it before,
6 yes.
7 Q. On the first page, the
8 middle, it says:
9 "Rule 39 examination of
10 Michael Killeavy."[as
11 read]
12 Could you tell the Tribunal
13 what is a Rule 39 examination.
14 A. I don't know.
15 Q. If I tell you that it is
16 when a party examines for discovery an adverse
17 party or a representative of that adverse party;
18 do you take issue with that statement?
19 A. I don't know. I will
20 take your word for it.
21 Q. So, if I understand the
22 document correctly, you were examined or
23 questioned in the context of the domestic
24 application; correct?
25 A. I believe so, yes.

1 Q. And that was in
 2 October 2017?
 3 A. Yes.
 4 What is the date on it? It
 5 says "revised December 2017".
 6 Q. Right --
 7 A. Oh, yes. It says
 8 October 4th, yes. Excuse me. I see it now, yes.
 9 Q. And you were an IESO
 10 representative?
 11 A. Yes.
 12 Q. The opposing or the
 13 adverse side was Windstream or WWIS; correct?
 14 A. Yes, yes.
 15 Q. Represented by its
 16 counsel, Mr. John Terry?
 17 A. Yes.
 18 Q. The same Mr. Terry that
 19 is with us today?
 20 A. He looks to be the same
 21 person, yes.
 22 Q. And, as WWIS' counsel,
 23 Mr. Terry asked you questions in that examination?
 24 A. Yes, he did.
 25 Q. Still on the first page.

1 After appearances, do you see
 2 Alan Mark and Melanie Ouanounou?
 3 A. I do.
 4 Q. They were IESO's external
 5 counsels; correct?
 6 A. That's correct.
 7 Q. Have you ever
 8 participated in a meeting with any of them?
 9 A. Probably -- I probably
 10 did participate in meetings with them, with Alan,
 11 Mark and Melanie Ouanounou. I probably did, yes.
 12 Q. Were any of these
 13 meetings to prepare for your examination?
 14 A. Yes.
 15 Q. Were any of those to
 16 prepare for the IESO's defence in the domestic
 17 application?
 18 A. It was to prepare me for
 19 my cross-examination, I believe. Yes.
 20 Q. And these meetings were
 21 understandably subject to solicitor-client
 22 privilege; correct?
 23 A. I believe so, yes.
 24 Q. Let's take a look at
 25 Tab 2 of your binder.

1 For the record, this is
 2 C-2475, the affidavit Mr. Killeavy gave in the
 3 domestic application as Windstream's witness.
 4 A part of this document is
 5 confidential and we will go to confidential mode
 6 when we get to questions related to that material.
 7 A. Okay.
 8 Q. Do you recognize this
 9 document?
 10 A. I do.
 11 Q. That's the affidavit you
 12 gave in the domestic application as Windstream's
 13 witness; correct?
 14 A. I believe so, yes.
 15 Q. And we are talking about
 16 the same domestic application for which you had
 17 been examined as an IESO representative; correct?
 18 A. Yes.
 19 Q. Were you paid to testify
 20 for Windstream?
 21 A. Yes.
 22 Q. Was Power Advisory paid
 23 for your testimony?
 24 A. On October --
 25 October 2018, I believe so, yes.

1 Q. Did Power Advisory
 2 instruct you to testify?
 3 A. No. I was asked by
 4 counsel to testify.
 5 Q. Let's turn to paragraph 8
 6 of that affidavit. So that's page 3.
 7 You indicated, at paragraph 8,
 8 that, again, as you stated, that counsel for
 9 Windstream asked you to review a report prepared
 10 by Power Advisory; correct?
 11 A. That's what it says, yes.
 12 Q. And, on that basis, you
 13 changed your mind on the termination
 14 recommendation; correct?
 15 A. Correct, correct.
 16 Q. Was the report the only
 17 element that made you change your mind?
 18 A. Yes.
 19 Q. And that report in
 20 question is signed by Mr. Jason Chee-Aloy, the
 21 person you report to?
 22 A. Can you show me the
 23 document? Is that the --
 24 Q. Yes, it's in Exhibit A.
 25 Unfortunately, there is no page number. But it's

1 in the same tab.
 2 A. I am not sure. Where did
 3 he sign it.
 4 Q. At Tab 2, so turning
 5 page 3, turning another page.
 6 Do you see the cover page?
 7 A. Romanette 3 or page 3?
 8 Q. Before that, before that,
 9 sorry. Yeah, yeah. Just before that.
 10 A. Before this?
 11 Q. No. The page you were
 12 on, just one page before. Yeah. This one. This
 13 one.
 14 A. All right.
 15 Q. Do you see that the
 16 report -- that's the report you referred to;
 17 right?
 18 A. That's right.
 19 Q. And that's signed by
 20 Mr. Jason Chee-Aloy?
 21 A. It's not signed. It says
 22 he authored it. Or it has got his name in
 23 brackets. Presumably, he authored it.
 24 Q. He authored it?
 25 A. Yeah.

1 Q. And that's the person you
 2 report to in your day job?
 3 A. Yes.
 4 Q. When did the counsel for
 5 Windstream ask you to review this report?
 6 A. I can't recall.
 7 Q. Did you review an
 8 advanced copy before it being released?
 9 A. I can't recall.
 10 Q. Did you discuss it with
 11 Mr. Jason Chee-Aloy before it being released?
 12 A. No, we had not talked
 13 about this report at all.
 14 Q. I would like to go to
 15 confidential session, please.
 16 --- CONFIDENTIAL TRANSCRIPT COMMENCES AT 11:29
 17 a.m.
 18 PRESIDING ARBITRATOR MILES:
 19 Alonso, are you with us?
 20 MR. HAUSER: I am, Madam
 21 President. One second, please.
 22 We are now in confidential,
 23 Madam President.
 24 PRESIDING ARBITRATOR MILES:
 25 Thank you. Amazing.

1 Off you go, Mr. Tian.
 2 BY MR. TIAN:
 3 Q. So turning the page to
 4 page 1 of the report?
 5 A. Romanette 1 or page 1.
 6 Q. Arabic number.
 7 A. Arabic number 1; okay.
 8 Q. Where it says "executive
 9 summary"; do you see that?
 10 A. Yes.
 11 Q. That first paragraph, the
 12 first two lines, it says:
 13 "Power Advisory LLC
 14 (Power Advisory) has been
 15 retained by Torys LLP on
 16 behalf of Windstream
 17 Wolfe Island Shoals Inc.
 18 (Windstream) in the
 19 dispute between
 20 Windstream and the
 21 Independent Electricity
 22 System Operator (IESO)
 23 concerning the
 24 termination of the
 25 Windstream Wolfe Island

1 Shoals Inc. (Windstream)
 2 Feed-in Tariff (FIT)
 3 Contract."[as read]
 4 Do you see that?
 5 A. I do.
 6 Q. Do you take issue with
 7 that statement?
 8 A. No.
 9 MR. TIAN: We can exit the
 10 confidential session.
 11 --- CONFIDENTIAL TRANSCRIPT ENDS AT 11:30 a.m.
 12 MR. HAUSER: We are back,
 13 Madam President. Thank you.
 14 PRESIDING ARBITRATOR MILES:
 15 Thank you very much.
 16 Go ahead.
 17 BY MR. TIAN:
 18 Q. So turning back to the
 19 cover page of the report.
 20 A. Yes.
 21 Q. So it says that report
 22 was released on October 17th, 2018; correct?
 23 A. Correct.
 24 Q. And let's go back two
 25 pages, way back. Just turning one, where we see

1 your signature for the affidavit.
 2 A. Correct, yes.
 3 Q. And you signed this
 4 affidavit on October 17th or 18th of 2018?
 5 A. It says 18.
 6 Q. 18.
 7 So it was released, the report
 8 was released on October 17th.
 9 A. Yes.
 10 Q. And the affidavit is
 11 dated on October 18th?
 12 A. Correct.
 13 Q. And you had previously
 14 indicated that you don't remember having reviewed
 15 an advance copy of that report?
 16 A. Correct.
 17 Q. So, if I understand you
 18 correctly, you had the time to review a 40-page
 19 report --
 20 A. Yes.
 21 Q. -- change your mind and
 22 prepare an affidavit in less than a day?
 23 A. Yes.
 24 Q. Again, let's stay on the
 25 domestic application.

1 I'd like to turn to Tab 10 of
 2 your binder.
 3 A. Ten. Yes.
 4 Q. For the record, this is
 5 the Claimant's memorial.
 6 Turning the page, do you see
 7 paragraph 271?
 8 A. Yes.
 9 Q. It states, and I am
 10 quoting:
 11 "On or about
 12 November 1st, 2017, the
 13 IESO and WWIS agreed to
 14 adjourn the Ontario
 15 application while the
 16 IESO undertook that
 17 process to decide whether
 18 to terminate the FIT
 19 Contract pursuant to
 20 Section 10.1(g), the
 21 adjournment
 22 agreement." [as read]
 23 Do you see that?
 24 A. Yes.
 25 Q. Do you take issue with

1 that statement?
 2 A. No.
 3 Q. So, just to be clear, the
 4 domestic application in question was initiated in
 5 March 2017 and then adjourned on or about
 6 November 1st, 2017?
 7 A. Is that a question or?
 8 Q. Correct?
 9 A. I believe so.
 10 Q. And the purpose of that
 11 adjournment was to allow the IESO to make a
 12 decision on whether or not to terminate the FIT
 13 Contract; correct?
 14 A. Correct.
 15 Q. Let's turn to Tab 11.
 16 For the record, this is a
 17 letter sent by the IESO to Windstream on
 18 November 10th, 2017.
 19 A. Correct.
 20 Q. Do you recognize this
 21 document?
 22 A. I do.
 23 Q. You signed this letter;
 24 correct?
 25 A. I did, yes.

1 Q. And that was ten days
 2 after the adjournment agreement, on November 10th,
 3 2017; correct?
 4 A. Yes.
 5 Q. The purpose of the letter
 6 was to request a number of documents from
 7 Windstream; correct?
 8 A. Yes.
 9 Q. And that is to enable the
 10 IESO -- and I am looking at paragraph 3 -- "to
 11 making a determination with respect to whether or
 12 not to exercise its termination right under
 13 Section 10.1(g)"; correct?
 14 A. Correct.
 15 Q. Let's go through the list
 16 of documents that was requested.
 17 A. Okay.
 18 Q. So I see that the first
 19 point is the documents on the status of the
 20 moratorium; correct?
 21 A. Bear with me for a moment
 22 while I read it.
 23 Q. Of course. Take your
 24 time.
 25 A. Yes.

1 Q. The second point was on
 2 the status of the site release; correct?
 3 A. Let me have a look at it.
 4 Correct.
 5 Q. Do you remember why did
 6 you or the IESO ask for that?
 7 A. My recollection is they
 8 did not have -- they were going to be putting the
 9 facility on Crown land and they didn't have the
 10 site release from the Ontario government yet.
 11 Q. And that was also the
 12 reason for the force majeure event in the first
 13 place?
 14 A. Yes.
 15 Q. And, then turning the
 16 page, at point 3, you -- or the IESO requested
 17 information on the status of the force majeure
 18 event itself; correct?
 19 A. Yes.
 20 Q. Point 4, we then
 21 requested -- or the IESO, rather, information on
 22 the anticipated hourly energy production profile;
 23 correct?
 24 A. Correct.
 25 Q. And we will come to that

1 point later.
 2 Turning to point 5, you
 3 requested project schedule; correct?
 4 A. Bear with me.
 5 Yes.
 6 Q. Did you receive one?
 7 A. I can't recall.
 8 Q. Point 6. You then
 9 requested the turbine supply agreement; correct?
 10 A. Yes.
 11 Q. Why did the IESO ask for
 12 that?
 13 A. We wanted to see if they
 14 had the sort of primary components purchased
 15 already. And that would be the wind turbines.
 16 Q. Point 7, you requested
 17 financing plans; correct?
 18 A. Correct.
 19 Q. And point 8 was about
 20 risk management; correct?
 21 A. Yes.
 22 Q. And point 9 was all
 23 outstanding approvals and permits; correct?
 24 A. Just bear with me.
 25 Yes, municipal, provincial and

1 federal approvals, yes.
 2 Q. Do you remember how many
 3 were outstanding?
 4 A. I don't recall.
 5 Q. If I tell you there were
 6 over 40, do you take issue with that?
 7 A. I don't know.
 8 Q. Did Windstream indicate
 9 that they have received any permits that were
 10 granted?
 11 A. I can't recall.
 12 Q. Point 10 was the list of
 13 any impact assessments; correct?
 14 A. Yes.
 15 Q. And point 11 was the
 16 discussion regarding connection of the project to
 17 the grid; correct?
 18 A. Correct.
 19 Q. Or any discussion?
 20 A. Yes.
 21 Q. And 12 was an outline of
 22 the currently anticipated delays; correct?
 23 A. Currently anticipated
 24 delays or impediments to advancing the project,
 25 yes.

1 Q. And point 13 was other
 2 informations; correct?
 3 A. Any other information
 4 that the supplier considers relevant to the IESO's
 5 decision, yes.
 6 Q. Let's turn to Tab 12.
 7 For the record, this is R-803,
 8 a letter sent by the IESO to Windstream on
 9 December 15th, 2017.
 10 A. Yes.
 11 Q. Do you recognize this
 12 document?
 13 A. I signed it, so I -- yes.
 14 Q. And, in that letter, you
 15 requested further information from Windstream;
 16 correct?
 17 A. Let me read it.
 18 Yes.
 19 Q. And the further
 20 information includes the anticipated hourly energy
 21 production profile based on data for at least one
 22 year; correct?
 23 A. Yes.
 24 Q. And, that, I am referring
 25 to point 1 of the information requested?

1 A. Correct.
2 Q. Right?
3 A. Correct.
4 Q. Because Windstream only
5 provided data for a 24-hour period; correct?
6 A. Yes.
7 Q. And then, at point 2,
8 turning the page, you also requested copies of
9 some correspondence between Windstream and the
10 Ministry of Environment; correct?
11 A. Yes.
12 Q. Let's turn to Tab 13.
13 For the record, this is R-804,
14 a letter sent by the IESO to Windstream on
15 January 8th, 2018.
16 Do you recognize this
17 document?
18 A. Yes.
19 Q. You signed this letter as
20 well; correct?
21 A. Yes, I did.
22 Q. It was in January 2018;
23 correct?
24 A. That's the date on the
25 letter, yes.

1 Q. And, again, the letter
2 communicated to Windstream that the IESO did not
3 receive anticipated hourly energy production
4 profile it requested; right?
5 A. Let me read the letter.
6 It's been a while.
7 Q. Of course. Take your
8 time.
9 A. Yes.
10 Q. So I will just repeat my
11 question for the sake of clarity.
12 The letter was to communicate
13 to Windstream that the IESO did not receive
14 anticipated hourly energy production profile it
15 requested; correct?
16 A. Correct.
17 Q. Because it requested for
18 a period of one year at least; right?
19 A. Yes, yes.
20 Q. And you then indicated,
21 in the absence of the documents requested, the
22 IESO would have to use proxy data if it were to do
23 any modelling; correct?
24 A. Yes.
25 Q. Great. Let's start a

1 confidential session, please.
2 --- CONFIDENTIAL TRANSCRIPT COMMENCES AT 11:43
3 a.m.
4 MR. HAUSER: We are
5 confidential now, Madam President.
6 PRESIDING ARBITRATOR MILES:
7 Thank you very much.
8 BY MR. TIAN:
9 [Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12 PRESIDING ARBITRATOR MILES:
13 Thank you for that. That's very helpful.
14 Sorry for that, Mr. Tian.
15 Carry on.
16 Mr. Tian, did you want to ask
17 any follow-up questions to that and, if not, we
18 will come out of confidential.
19 MR. TIAN: No. No follow-ups.
20 PRESIDING ARBITRATOR MILES:
21 Excellent. Thank you, Justice McLachlin.
22 Alonso, we can come out of
23 confidential now, please.
24 MR. HAUSER: Thank you, Madam
25 President. We are out of confidential. Thank

1 you.
2 --- CONFIDENTIAL TRANSCRIPT ENDS AT 12:01 p.m.
3 PRESIDING ARBITRATOR MILES:
4 Thank you.
5 CROSS-EXAMINATION BY MR. TIAN (Cont'd):
6 Q. So let's go back to
7 Tab 2.
8 A. Tab 2 of the binder?
9 Q. Yes.
10 A. Okay, yes.
11 Q. For the record, this is
12 the affidavit Mr. Killeavy gave in the domestic
13 application as Windstream's witness.
14 Could you please turn to
15 paragraph 9.
16 A. Yes.
17 Q. I understand, from that
18 paragraph, that you now think the PSPG analysis is
19 based on flawed assumptions; correct?
20 A. Yes, yes.
21 Q. And, as we've discussed
22 earlier, the PSPG analysis refers to the planning
23 evaluation; correct?
24 A. Correct, correct.
25 Q. And it does not refer to

1 maturity evaluation?
2 A. It did not refer to
3 maturity evaluation, no.
4 Q. And it does not refer
5 either to the procurement policies evaluation?
6 A. Correct.
7 Q. So we are talking about,
8 by PSPG analysis, one element or one subsection
9 out of the three sections of the termination
10 analysis?
11 A. Yes, but it was valid
12 that all three sections were considered in
13 determination. Yes.
14 Q. But the PSPG only refers
15 to one section?
16 A. Correct.
17 Q. And this new view of
18 yours, based on the Power Advisory report --
19 A. Yes.
20 Q. -- it doesn't change the
21 fact that Windstream still had not obtained over
22 40 approvals or permits; correct?
23 A. Correct.
24 Q. It does not either change
25 the fact that there is still no timeline regarding

1 if and when the force majeure event would be
 2 resolved after seven years from the contract
 3 award; correct?
 4 A. Correct, correct.
 5 Q. It doesn't change the
 6 fact that Windstream still had no access to Crown
 7 land; correct?
 8 A. Correct.
 9 Q. Nor does it change the
 10 fact that Windstream has been awarded damages from
 11 the Windstream I arbitration; correct?
 12 A. Correct.
 13 MR. TIAN: Thank you,
 14 Mr. Killeavy. Those are all my questions.
 15 THE WITNESS: Okay.
 16 PRESIDING ARBITRATOR MILES:
 17 Thank you very much.
 18 Ms. Sherkey.
 19 MS. SHERKEY: I have a few
 20 reply questions. Can I just have a couple minutes
 21 to -- I don't need a break -- just to confer with
 22 Mr. Terry.
 23 PRESIDING ARBITRATOR MILES:
 24 Yes.
 25 --- Upon recess at 12:04 p.m.

1 --- Upon resuming at 12:09 p.m.
 2 PRESIDING ARBITRATOR MILES:
 3 Ms. Sherkey, just before you start, just for the
 4 record, I spoke to Mr. Killeavy during the break
 5 and he did not discuss his evidence with anybody
 6 during the break.
 7 Please proceed.
 8 RE-EXAMINATION BY MS. SHERKEY:
 9 Q. Good afternoon now,
 10 Mr. Killeavy.
 11 A. Yeah, good afternoon.
 12 Q. Canada's counsel asked
 13 you about meetings you attended with IESO and
 14 Canada's counsel where solicitor privilege
 15 discussions occurred; do you recall that?
 16 A. He did ask that, yes.
 17 Q. Have you ever disclosed
 18 any information subject to privilege?
 19 A. No, I have not.
 20 Q. Canada's counsel also
 21 asked you if you were paid for your testimony on
 22 behalf of Windstream and you said yes; do you
 23 recall that?
 24 A. Yes.
 25 Q. What were you paid?

1 A. My rate is \$500 an hour.
 2 Q. And you say your rate.
 3 What does that mean?
 4 A. It's an hourly rate. I
 5 get paid -- there's no success fee or anything
 6 like that involved in it.
 7 Q. You were also asked if
 8 Power Advisory asked you to provide your testimony
 9 in the Ontario application and you said no; do you
 10 recall that?
 11 A. Yes.
 12 Q. What discussions, if any,
 13 did you have with Mr. Chee-Aloy about your
 14 testimony?
 15 A. I did not discuss the
 16 report or my testimony with him at all.
 17 Q. You were also taken
 18 through -- let's go into confidentiality mode.
 19 PRESIDING ARBITRATOR MILES:
 20 Alonso, the drapes down, please.
 21 --- CONFIDENTIAL TRANSCRIPT COMMENCES AT 12:11
 22 p.m.
 23 MR. HAUSER: We are
 24 confidential now, Madam President.
 25 PRESIDING ARBITRATOR MILES:

1 Thank you very much.
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12 BY MS. SHERKEY:
 13 Q. And my final question.
 14 We can take the document off the screen and we can
 15 come out of confidentiality mode.
 16 PRESIDING ARBITRATOR MILES:
 17 Okay, Alonso, we are coming back.
 18 --- CONFIDENTIAL TRANSCRIPT ENDS AT 12:21 p.m.
 19 MR. HAUSER: We are back now,
 20 Madam President.
 21 PRESIDING ARBITRATOR MILES:
 22 Thank you.
 23 BY MS. SHERKEY:
 24 Q. My friend asked you about
 25 the timeline of you leaving the IESO, starting at

1 Power Advisory and then providing your testimony
 2 in the Ontario application; do you recall that?
 3 A. Yes, yes.
 4 Q. If what Canada's counsel
 5 is suggesting is that your testimony, in the
 6 Ontario application, was influenced by virtue of
 7 your role at Power Advisory; what is your reaction
 8 to that?
 9 A. No. It was influenced by
 10 the report that I read only.
 11 MS. SHERKEY: Those are all my
 12 questions.
 13 PRESIDING ARBITRATOR MILES:
 14 Could I just ask one more question.
 15 Mr. Killeavy, if I read your
 16 witness statement properly, it didn't mention the
 17 content of your affidavit in the earlier
 18 proceedings; is that right? Or did I miss it?
 19 THE WITNESS: I am not sure.
 20 Are you talking about the October 2018 affidavit?
 21 PRESIDING ARBITRATOR MILES:
 22 So you've given a witness statement in these
 23 proceedings and you gave an affidavit in the Court
 24 proceedings.
 25 And your affidavit in the

1 Court proceedings related to this memo that we
 2 have just been talking about, the Power Advisory
 3 memo.
 4 And I did not see a discussion
 5 about that in your witness statement in these
 6 proceedings. Did I just miss it or did you not
 7 address that?
 8 THE WITNESS: Are you talking
 9 about my affidavit from October of 2018?
 10 PRESIDING ARBITRATOR MILES:
 11 Yes.
 12 THE WITNESS: And did it refer
 13 to the application, the Court application; is that
 14 what you're asking?
 15 PRESIDING ARBITRATOR MILES: I
 16 have -- sorry, in your witness statement in these
 17 proceedings, which is dated 16th of February 2022.
 18 I may have missed it, but I
 19 didn't think that witness statement discussed the
 20 content of your affidavit dated 18 October 2018
 21 and, in particular, the changing your mind in
 22 response to the Power Advisory memo.
 23 And, Counsel, if you can help
 24 by referring me to a paragraph, please do so.
 25 MS. SHERKEY: Yes. If it

1 helps, I believe Mr. Killeavy is looking for his
 2 NAFTA witness statement. There should be a spare
 3 copy, I put up a spare copy --
 4 PRESIDING ARBITRATOR MILES:
 5 If there is a paragraph number, just tell me.
 6 MS. SHERKEY: Paragraph 9.
 7 PRESIDING ARBITRATOR MILES:
 8 Sorry, you did. I read straight past it. I do
 9 apologize, Mr. Killeavy.
 10 THE WITNESS: No problem.
 11 PRESIDING ARBITRATOR MILES: I
 12 am pleased I found it because my next question was
 13 going to be why not. But you did.
 14 So that's very helpful. Thank
 15 you very much.
 16 THE WITNESS: Okay.
 17 PRESIDING ARBITRATOR MILES:
 18 Mr. Tian, I asked a question during the
 19 re-examination and I just asked one further
 20 question then.
 21 If you have a question arising
 22 out of my questions, you are free to ask.
 23 MR. TIAN: Yes, please. Can
 24 we go back to confidential mode?
 25 PRESIDING ARBITRATOR MILES:

1 Yes, please.
 2 Alonzo, please we will go back
 3 into confidential.
 4 --- CONFIDENTIAL TRANSCRIPT COMMENCES AT 12:24
 5 p.m.
 6 MR. HAUSER: We are in
 7 confidential now, Madam President.
 8 PRESIDING ARBITRATOR MILES:
 9 Thank you very much.
 10 RE-CROSS-EXAMINATION BY MR. TIAN:
 11 Q. So you mentioned earlier
 12 that there are two elements in the Power Advisory
 13 report that played into your consideration?
 14 A. Yes.
 15 Q. And one, the first
 16 element being page 6 of that report.
 17 A. Yes.
 18 Q. The IESO's presentation
 19 from technical planning conference stakeholder
 20 meetings; is that right?
 21 A. I think that's on page 7.
 22 Q. Yeah, it's --
 23 PRESIDING ARBITRATOR MILES:
 24 Be careful, Mr. Tian, that you're asking questions
 25 arising out of my questions and not out of

1 Ms. Sherkey's questions. So just be careful about
 2 that.
 3 MR. TIAN: I will stop there.
 4 PRESIDING ARBITRATOR MILES:
 5 My question was did these two items fall within
 6 the planning --
 7 MR. TIAN: It's related to the
 8 two items, if I may.
 9 PRESIDING ARBITRATOR MILES:
 10 Well, I didn't talk about the content of the two
 11 items, just which box did they fall in, in the
 12 IESO memo.
 13 You ask your question and we
 14 will see if Ms. Sherkey objects but you don't get
 15 to re-examine, the re-examine.
 16 MR. TIAN: Sure. Just to make
 17 sure we are still in confidential.
 18 PRESIDING ARBITRATOR MILES:
 19 We are.
 20 BY MR. TIAN:
 21 Q. So that particular
 22 technical planning conference that you refer to,
 23 if we look at footnote 5 on page 7, that was held
 24 on September 13th, 2018; correct?
 25 MS. SHERKEY: Objection.

1 PRESIDING ARBITRATOR MILES: I
 2 think you are well out of the scope of certainly
 3 my questions and the process. So I think we will
 4 leave it there.
 5 But if it's a document you
 6 want our attention on, you have closing for that.
 7 So you may make your submissions at the
 8 appropriate time.
 9 Did you have any other
 10 questions?
 11 CO-ARBITRATOR MCLACHLIN: No.
 12 PRESIDING ARBITRATOR MILES:
 13 Mr. Killeavy, thank you so much for coming and for
 14 answering counsel's and our questions. It was
 15 incredibly helpful and we really appreciate it.
 16 THE WITNESS: Thank you.
 17 Thank you.
 18 PRESIDING ARBITRATOR MILES:
 19 You are released. You can speak to whoever you
 20 want about whatever you want.
 21 THE WITNESS: Thank you.
 22 PRESIDING ARBITRATOR MILES:
 23 So that was quite nice timing. We were due to
 24 finish at quarter after 12.
 25 I am going to suggest that we

1 still come back at 1:15 as planned in the
 2 schedule.
 3 So we will just have a
 4 15-minute shorter lunch break and then we stay on
 5 schedule for this afternoon.
 6 MS. SHERKEY: Yes. And I told
 7 my friends last night as well that my
 8 cross-examination of Mr. Teliszewsky is not going
 9 to be long. I think the schedule has an hour.
 10 But we can, we will see what
 11 happens and if the Tribunal has questions. But I
 12 told them I don't plan to be long so I don't
 13 expect a long run over, if that impacts just
 14 timing for Mr. Lyle to come and for the afternoon.
 15 PRESIDING ARBITRATOR MILES:
 16 Perfect. So you will have Mr. Lyle ready to go
 17 after lunch as well.
 18 MR. NEUFELD: Yes. So two
 19 points to make on that, if I -- two points to
 20 make.
 21 First, with respect to
 22 Mr. Lyle, so we have notified the Claimant that
 23 there may be a conflict for him this afternoon,
 24 which they are fully aware of there is still no
 25 conflict. He is still ready to go, he will be

1 here and that is the plan.
 2 The second point, not to
 3 relieve what just happened but just for clarifying
 4 what takes place during cross-examinations.
 5 And I am referring to
 6 Procedural Order Number 1, 11.10(d).
 7 So this is the paragraph that
 8 deals with examination -- cross-examination and
 9 re-cross-examination.
 10 So, again, we don't want to
 11 reopen this and Mr. Tian isn't necessarily asking
 12 questions.
 13 But does the other side not
 14 have a right to request re-cross-examination based
 15 on Ms. -- in our case, based on Ms. Sherkey's
 16 questions as well?
 17 That was the question there.
 18 PRESIDING ARBITRATOR MILES:
 19 We will take a look at that in the break but -- we
 20 will take a look at that in the break. That would
 21 be unusual. I mean, where would we end?
 22 MR. NEUFELD: We all want an
 23 end. We all want an end.
 24 PRESIDING ARBITRATOR MILES:
 25 So we will take a look at the break but unless,

1 just for preparation for this afternoon, unless
 2 advised otherwise -- José Luis might have
 3 something to say -- we just proceed on the norm
 4 that cross-exam, and then re-exam and no
 5 re-re-exam, except arising out of Tribunal
 6 questions.
 7 MR. NEUFELD: Thank you so
 8 much.
 9 PRESIDING ARBITRATOR MILES:
 10 So we are back at quarter past 1, please.
 11 --- CONFIDENTIAL TRANSCRIPT ENDS at 12:30 p.m.
 12 --- Upon luncheon recess at 12:30 p.m.
 13 --- Upon resuming at 1:18 p.m.
 14 PRESIDING ARBITRATOR MILES:
 15 Mr. Teliszewsky, welcome.
 16 My name is Wendy Miles. To my
 17 right is Justice McLachlin. To my left, Professor
 18 Gotanda. And we are the Tribunal here in these
 19 proceedings.
 20 You should have in front of
 21 you an affirmation. Could you please make that
 22 affirmation now for the Tribunal.
 23 THE WITNESS: I solemnly
 24 declare upon my honour and conscience that I will
 25 speak the truth, the whole truth and nothing but

1 the truth.
 2 AFFIRMED: ANDREW TELISZEWSKY
 3 PRESIDING ARBITRATOR MILES:
 4 Thank you very much for that.
 5 Now I think Ms. Dosman is
 6 going to start by asking you some brief questions
 7 and then I think Ms. Sherkey is going to ask you
 8 some probably more extensive questions.
 9 EXAMINATION IN-CHIEF MS. DOSMAN:
 10 Q. I will be very brief.
 11 Mr. Teliszewsky, you have in
 12 front of you a witness statement dated
 13 October 23rd, 2023; yes?
 14 A. Correct.
 15 Q. And that serves as your
 16 direct testimony in this arbitration?
 17 A. It does.
 18 Q. And do you have any
 19 corrections to make?
 20 A. I do not.
 21 Q. Okay. With that, I will
 22 hand you over to Ms. Sherkey.
 23 CROSS-EXAMINATION BY MS. SHERKEY:
 24 Q. Good afternoon. I am
 25 Ms. Sherkey. I am counsel for Windstream, the

1 Claimant, in this matter.
 2 And you said your name is
 3 pronounced Teliszewsky?
 4 A. Teliszewsky, yes.
 5 Q. And correct me, please,
 6 if I misstate that but I will --
 7 A. Andrew is fine.
 8 Q. If we can turn to
 9 paragraph 2 of your witness statement.
 10 You were chief of staff to the
 11 Minister of Energy from February 2013 to
 12 January 2018; is that right?
 13 A. Correct.
 14 Q. Why did you leave that
 15 role?
 16 A. I left for a role in the
 17 private sector.
 18 Q. And so you were not
 19 employed or with the Government of Ontario when
 20 Windstream was informed of the termination
 21 decision in February 2018?
 22 A. I left government in
 23 January.
 24 Q. Perfect.
 25 At paragraph 4, you summarize

1 what's in your witness statement and you set out
 2 three topics:
 3 "The FIT program and the
 4 nature of the Ministry's
 5 interactions with the
 6 Ontario Power Authority,
 7 later the Independent
 8 Electricity System
 9 Operator, with respect to
 10 the FIT program, the
 11 context of renewable
 12 energy procurement in
 13 2016 and my limited
 14 interaction with
 15 Windstream
 16 representatives in the
 17 period following the
 18 Ministry's receipt of the
 19 Windstream award."[as
 20 read]
 21 Do you see that?
 22 A. I do.
 23 Q. And, in addressing these
 24 three topics, you provided your full recollection
 25 on the matters; is that right?

1 A. Yes.
 2 Q. You would have included
 3 all details you felt were relevant and important
 4 to address these issues?
 5 A. All details that I could
 6 recall.
 7 Q. And, if we move over to
 8 paragraph 22, we are going to focus today on your
 9 interactions with Windstream's representatives
 10 after the Windstream I award.
 11 And, at paragraph 22, you
 12 write that you would have received a confidential
 13 copy of the award in late September 2016.
 14 You would have read it on or
 15 pretty close to having received that award; is
 16 that right?
 17 A. Yes.
 18 Q. And, looking at
 19 paragraph 25, you are responding in these
 20 subsequent paragraphs to Windstream's position in
 21 this arbitration regarding Ontario's refusal to
 22 meet with Windstream following the award; is that
 23 right?
 24 A. Yes.
 25 Q. And you state that during

1 your time at the Ministry of Energy, you had
 2 regular meetings with Mr. Benedetti who
 3 represented many proponents in the energy sector,
 4 including Windstream?
 5 A. Yes. I frequently met
 6 with Chris Benedetti.
 7 Q. And then, at
 8 paragraph 26, you set out that, during a meeting
 9 with Mr. Benedetti in and around October,
 10 November 2016 -- and I take it you don't remember
 11 the specific date but it's around that time frame?
 12 A. Yes.
 13 Q. Is that right?
 14 A. He raised the issue of
 15 Windstream with me.
 16 Q. So you discussed, when you
 17 say "he raised the issue of Windstream with me",
 18 do you mean that Mr. Benedetti asked you to have a
 19 meeting with Windstream?
 20 A. I don't believe I recall
 21 exactly whether he made a formal meeting request,
 22 but he would have raised the topic of the case and
 23 Ontario government's reaction.
 24 Q. And you advised him that,
 25 no, the Minister's office is not going to meet

1 with Windstream; is that right?
 2 A. I would have been very
 3 clear with Mr. Benedetti that the appropriate
 4 course of action was for Windstream to meet with
 5 their contractual counterparty which was the IESO.
 6 Q. And when you say, at the
 7 end of paragraph 27, you would have been quite
 8 blunt in communicating that message, it's that
 9 message that you just conveyed that you would have
 10 been blunt?
 11 A. Yes.
 12 So, as you may be aware,
 13 Mr. Benedetti represents multiple interests in the
 14 energy and electricity sectors in Ontario and is
 15 frequently before government, provincially,
 16 advocating on their behalf.
 17 We had a practice of regularly
 18 meeting to discuss his clients' interests and we
 19 would bluntly speak to each other about the
 20 prospects of each of his clients' interests.
 21 Q. And the reasons that you
 22 were informing him the Ministry wouldn't meet with
 23 Windstream and you were referring him to the IESO,
 24 the reasons for that decision is what's set out
 25 at paragraph 27 of your witness statement?

1 A. As the contractual
 2 counterparty, I frequently would redirect
 3 proponents to the IESO.
 4 Q. And if we go to
 5 paragraph 24, just back over the page.
 6 You note that, in the emails
 7 the Claimant relies on in this arbitration, you
 8 refer to a potential huddle in the next couple of
 9 weeks:
 10 "But I do not recall this
 11 huddle, this event ever
 12 happening. Instead, I
 13 recall more general
 14 briefings within the
 15 Ministry of Energy at the
 16 time the award was being
 17 discussed as part of a
 18 long list of other items
 19 relevant to the energy
 20 sector. I also recall
 21 the award being discussed
 22 as an information or
 23 awareness piece, not as
 24 an item requiring
 25 particular ministerial

1 decision."[as read]
 2 Do you see that?
 3 A. I do.
 4 Q. So when you say the award
 5 was discussed as an information or awareness
 6 piece, you mean it was discussed to other
 7 officials to say "here you are. You should be
 8 aware of this award"?
 9 A. Well, this was a
 10 significant development; right. The initial
 11 arbitration lasted several years. We would have
 12 been tracking it and we would have known,
 13 generally speaking, that a decision was going to
 14 be released.
 15 And so then, upon its release,
 16 it was appropriate for us to brief up to the
 17 Premier's office and other related officials so
 18 that they would also be aware, from a whole of
 19 government issues management perspective.
 20 Q. And that was the full
 21 extent of the meetings and briefings you had
 22 regarding the award?
 23 A. Yes.
 24 Q. And you draw a contrast
 25 between this award and other experiences. You

1 highlight the 2013 WTO Appellate Body decision
 2 that required Ontario to take certain actions.
 3 And, at the end of this
 4 paragraph, you conclude:
 5 "In contrast, when the
 6 Windstream I award was
 7 issued, there was nothing
 8 further required of the
 9 Ministry of Energy."[as
 10 read]
 11 And that was the conclusion
 12 reached by the Ministry; is that right? That
 13 there was nothing in the award that required your
 14 further attention?
 15 A. Based on the advice of
 16 our legal counsel at the time, that's my
 17 recollection, yes.
 18 Q. So when the Ministry
 19 decided, going forward, it was not going to meet
 20 with Windstream and it communicated that message
 21 to Windstream, the Ministry had not had further
 22 internal meetings or huddles to discuss should
 23 such a meeting happen?
 24 A. We would have had
 25 briefings about the initial ruling and what the

1 obligations were, if any, on government. And, as
 2 I indicated, there were no outstanding decision
 3 points for the Ontario government to take.
 4 And we also respected the role
 5 that contract management staff at the IESO had to
 6 be able to properly do their jobs.
 7 Q. And so you didn't have
 8 any meetings to discuss the reactivation of the
 9 FIT Contract and what that would look like?
 10 A. I apologize. I am
 11 unclear about what you mean by "reactivation"?
 12 Q. The Ministry didn't meet
 13 to discuss the possibility, after the Windstream I
 14 award, of renegotiating, reactivating Windstream's
 15 FIT Contract and if that was something the
 16 Ministry was interested in?
 17 A. I am sorry. I also still
 18 don't understand your question.
 19 It wasn't the role of the
 20 Ministry of Energy to negotiate with the
 21 proponent, so we wouldn't have debated how to do
 22 such a thing.
 23 Q. It was the Ministry of
 24 Energy that promised Windstream, in 2011, to keep
 25 the project on hold or frozen; are you aware of

1 that?
 2 A. I wasn't at the Ministry
 3 of Energy in 2011.
 4 Q. But, in the subsequent
 5 years and through the arbitration, did you become
 6 aware of that commitment?
 7 A. I don't recall that
 8 commitment. I wasn't privy to any such
 9 conversation.
 10 Q. So you never had any
 11 discussions at the Ministry following this award
 12 about that commitment?
 13 A. Not being aware of this
 14 commitment, I wouldn't have had conversations at
 15 the Ministry subsequent to the release of the
 16 award about any commitment I wasn't a part of or
 17 privy to.
 18 Q. And you didn't have any
 19 meetings to discuss the possibility of whether the
 20 circumstances of this case warranted a direction
 21 to the IESO?
 22 A. It's possible that during
 23 the course of conversations and briefings within
 24 the Ministry that topics like that were raised.
 25 But, ultimately, my

1 recollection is that no, like, decision point was
 2 required on the part of the Ontario government.
 3 MS. SHERKEY: Just one moment.
 4 BY MS. SHERKEY:
 5 Q. And on Tab 3 of the brief
 6 in front of you.
 7 A. Sorry, the brief here?
 8 Q. Yes.
 9 A. The correspondence?
 10 Q. Yes. I am just looking
 11 at the top two emails where you get an email from
 12 Mr. -- how do you say his last name?
 13 A. Nekolaichuk.
 14 Q. I may, for the sake of
 15 respecting his last name, not attempt it.
 16 A. Colin.
 17 Q. He was the press secretary
 18 at the Ministry of Energy; is that right?
 19 A. Indeed.
 20 Q. And he wrote to you about
 21 an inquiry that he received from a reporter; is
 22 that right?
 23 A. It appears so, yes.
 24 Q. In response, you said:
 25 "This is a very sensitive

1 legal issue. Ontario is
 2 not a counterparty to the
 3 contracts. The OPA/IESO
 4 is. We will not today,
 5 not ever be sitting down
 6 with them."[as read]
 7 In that last sentence, when
 8 you say "them", you are referring to Windstream;
 9 right?
 10 A. Yes.
 11 Q. And that was the position
 12 of the Ministry at the time?
 13 A. Indeed.
 14 Q. And, as far as you're
 15 aware, that remained the position of the Ministry?
 16 A. During my tenure it was.
 17 MS. SHERKEY: Those are all my
 18 questions.
 19 MS. DOSMAN: Nothing from me.
 20 PRESIDING ARBITRATOR MILES:
 21 Okay. You are all completed. Thank you,
 22 Mr. Teliszewsky.
 23 THE WITNESS: Very good.
 24 Thank you.
 25 PRESIDING ARBITRATOR MILES:

1 Thank you very much for coming and for answering
 2 our questions. It's not normally that brief or
 3 easy so well done, you. And thank you very much.
 4 And insofar as you were
 5 sequestered from discussing this during the
 6 hearing during the other witnesses, that's all now
 7 lifted for you. We don't want you to talk to
 8 Mr. Lyle just yet but I don't think you will have
 9 a chance because we will call him right now. You
 10 are welcome to stay.
 11 THE WITNESS: I might excuse
 12 myself.
 13 PRESIDING ARBITRATOR MILES:
 14 We won't be offended. Thank you very much.
 15 Mr. Lyle? Are we able to
 16 proceed with Ms. Dosman gone?
 17 MR. NEUFELD: We are.
 18 Somebody is getting Mr. Lyle?
 19 We are.
 20 PRESIDING ARBITRATOR MILES:
 21 Okay.
 22 Good afternoon, Mr. Lyle.
 23 Welcome.
 24 THE WITNESS: Thank you. Good
 25 afternoon.

1 PRESIDING ARBITRATOR MILES:
2 Don't be lulled into a false sense of security
3 that we were so quick with Mr. Teliszewsky. No
4 promises for you.
5 My name is Wendy Miles. I am
6 the chair of the Tribunal. Professor Gotanda to
7 my left and Justice McLachlin to my right.
8 You should have, in front of
9 you, an affirmation and we ask if you can please
10 make the affirmation for the Tribunal to please
11 proceed.
12 THE WITNESS: I solemnly
13 declare upon my honour and conscience that I will
14 speak the truth, the whole truth and nothing but
15 the truth.
16 AFFIRMED: MICHAEL LYLE
17 PRESIDING ARBITRATOR MILES:
18 Thank you very much, Mr. Lyle.
19 Now I think Mr. Neufeld is
20 going to start with some questions and then
21 Ms. Sherkey will ask you some more extensive
22 questions and we may have some too. Thank you.
23 EXAMINATION IN-CHIEF MR. NEUFELD:
24 Q. I have two questions for
25 you.

1 One is you submitted a witness
2 statement in this arbitration that's before you.
3 Do you have any corrections to make to that
4 witness statement?
5 A. No, I do not.
6 Q. And, second, if you could
7 just briefly describe who you are, your
8 background, professional background. I know it's
9 in the witness statement but just take a moment to
10 introduce yourself.
11 A. Sure.
12 So I came to the Ontario Power
13 Authority in 2005. Before that, when it was just
14 created, as general counsel and I have been with
15 the Ontario Power Authority and then with the
16 Independent Electricity System Operator when the
17 two organizations merged at the beginning of 2015.
18 So I have served in the
19 capacity of being responsible for the legal team
20 over that time period, as well as other teams at
21 different time frames, including the contract
22 management team from the fall of 2017 to the
23 present date.
24 CROSS-EXAMINATION BY MS. SHERKEY:
25 Q. Good afternoon.

1 A. Hello.
2 Q. My name is Ms. Sherkey.
3 I am counsel for the Claimant in this arbitration
4 and I will be asking you some questions this
5 afternoon.
6 You have in front of you a
7 brief of documents we will be going through.
8 A. Okay.
9 Q. As well as your witness
10 statement, if we refer to it. But I am going to
11 be focused on the brief.
12 I'd like to begin our
13 discussion with the relationship between the
14 Ministry of Energy and the IESO and, more
15 specifically, I am going to start with the
16 Ministry's formal directive powers.
17 A. Um-hmm.
18 Q. If you turn to Tab 1,
19 this is some excerpts from the Electricity Act.
20 I take it you are familiar
21 with this piece of legislation?
22 A. Yes, I am.
23 Q. And you are aware there
24 are a number of provisions in the Act that gives
25 the Minister of Energy -- I will probably just

1 refer to him as "the Minister" through my
2 submissions -- or my questions.
3 It gives him the power to
4 issue directives to the IESO; is that right?
5 A. Yes, it does.
6 Q. And one of those powers
7 is the power to issue directives requiring the
8 IESO to undertake or initiate activity related to
9 electricity supply capacity or storage; is that
10 right?
11 A. Yes.
12 Q. And that, if we turn to
13 look at the provision, that's 25.32, subsections 2
14 and 5; is that right?
15 A. Yes.
16 Q. And the IESO must comply
17 with these directives?
18 A. Yes. Those are legally
19 binding directives.
20 Q. In terms of formal
21 directives related to these energy procurement
22 matters, they can relate to general policy or
23 broader planning issues; right?
24 A. They can be quite
25 specific in terms of procurement or particular

1 contract, or they can be fairly general in nature.
 2 Q. And in -- they can refer
 3 to a specific contract or they can also refer to a
 4 category of contracts; is that fair?
 5 A. That is -- that is
 6 correct, yes.
 7 Q. And so one example of a
 8 formal directive relating to a category of
 9 contracts was the July 13th, 2018, directive to
 10 wind down FIT 2, 3, 4, 5 contracts; is that right?
 11 A. Yes.
 12 Q. And, as a result of that
 13 directive, 758 procurement contracts were
 14 terminated by the IESO?
 15 A. It was actually 751, but.
 16 Q. All right.
 17 A. I know there is a number
 18 out there of 758 as well, but 751 is the accurate
 19 number.
 20 Q. That's the accurate
 21 number?
 22 A. Yes.
 23 Q. And, in terms of
 24 directives that can be specific to a contract, I
 25 want to look at a few examples with you.

1 If we turn to Tab 2.
 2 This is the December 13th,
 3 2012, directive relating to TransCanada. Have you
 4 seen this before?
 5 A. Yes.
 6 Q. And we are going to talk
 7 about TransCanada in some more detail.
 8 But, if you turn to page 2,
 9 the directive here was for the OPA to assume
 10 responsibility for the Crown, including the
 11 Ministry of Energy, for this initiative and enter
 12 in negotiations for a definitive clean energy
 13 supply contract with TCE.
 14 TCE is TransCanada; right?
 15 A. Yes.
 16 Q. At the Lennox generating
 17 site.
 18 So this was a directive to
 19 enter into specific negotiations with one
 20 proponent; is that right?
 21 A. That is correct.
 22 Q. If we turn to Tab 3.
 23 This is a May 1st, 2014,
 24 directive regarding Ontario Power Generation; have
 25 you seen this one before?

1 A. Yes.
 2 Q. And the directive we have
 3 highlighted here, there was a prior directive to
 4 negotiate and enter a contract with OPG; do you
 5 see that?
 6 A. Yes.
 7 Q. And, in the next
 8 paragraph, the direction further provided for
 9 certain terms the contract should have; is that
 10 right?
 11 A. That is correct, yes.
 12 Q. And then, in this
 13 direction here, at the bottom, this was a further
 14 direction about some of the specificities of those
 15 terms; would you agree with that?
 16 A. Yes.
 17 Q. And, if you turn to Tab 5
 18 of the brief. This is a June 12th, 2013,
 19 directive that deals with a multitude of issues.
 20 We are not going to go through all of them, but do
 21 you recognize this document?
 22 A. I just have to take a
 23 quick look. I think there's been well over 100
 24 directives in the last several years.
 25 Yes, I recognize this.

1 Q. Do you recognize the
 2 document?
 3 A. I do, yes.
 4 Q. And, at page 6, there is
 5 a directive relating to Aboriginal projects on
 6 reserve land; do you see that?
 7 A. I do.
 8 Q. And, if you look at the
 9 highlighted part, we have noted:
 10 "In acknowledgement of
 11 the unique and
 12 significant land control
 13 challenges facing
 14 Aboriginal FIT projects
 15 on reserve lands, the OPA
 16 shall offer a four-year
 17 extension to the
 18 milestone date for
 19 commercial operation in
 20 existing large FIT (as
 21 that term is used in this
 22 direction) contracts for
 23 Aboriginal participation
 24 projects where the
 25 generating facilities are

1 located entirely on
 2 reserve lands."[as read]
 3 Do you recall this direction?
 4 A. Yes.
 5 Q. And this direction
 6 applied to an entire class of projects; right?
 7 All of the FIT Contracts on existing -- entirely
 8 on reserve lands?
 9 A. That would be correct.
 10 Q. But only one project fell
 11 into that class; is that right?
 12 A. I don't recollect exactly
 13 how many but I will accept your statement.
 14 Q. Who is Perry Cecchini?
 15 A. Who is Perry Cecchini?
 16 Perry was a senior manager in the contract
 17 management team for several years.
 18 Q. And, if he previously
 19 testified that only one project fell into that
 20 class, would you disagree with that?
 21 A. I would have no reason to
 22 disagree with that.
 23 Q. And, like Windstream,
 24 Windstream is also only the one project that falls
 25 into a class; right? Offshore wind projects with

1 a FIT Contract?
 2 A. It is the only offshore
 3 wind FIT Contract; that is correct. Or was.
 4 Q. And, because a project is
 5 on First Nation land, it's under federal
 6 jurisdiction; is that right?
 7 A. In terms of land use,
 8 yes, that's my understanding.
 9 Q. And so the proponent had
 10 to go through a federal process to get agreement
 11 to go on to federal land; is that what you refer
 12 to as the site process?
 13 A. That is my understanding.
 14 Q. And so the proponent, in
 15 this case, was having challenges getting that
 16 approval; are you aware of that?
 17 A. I am not familiar with
 18 the specifics of this particular circumstance.
 19 Q. So you're not aware if
 20 the Ministry decided to issue this directive to
 21 address that specific difficulty this proponent
 22 was facing?
 23 A. No, I am not aware of the
 24 specifics of that particular instance.
 25 Q. But, if Mr. Cecchini had

1 provided that statement, you would trust it was
 2 accurate?
 3 A. I would trust that it was
 4 accurate, yes.
 5 Q. And you said a few
 6 minutes ago that there have been more than 100
 7 directives. What time frame are you referring to?
 8 A. So it would have run from
 9 the time frame of the creation of the Ontario
 10 Power Authority, so roughly 2005 to present day.
 11 Q. Would many relate to
 12 electricity procurement?
 13 A. The majority of them
 14 would relate to electricity procurement, yes.
 15 MR. NEUFELD: Sorry, can I
 16 interject for a moment, Madam President.
 17 Just a very quick point.
 18 We discussed with -- or I
 19 discussed with Mr. Terry, specifically, about the
 20 entire testimony of Mr. Lyle being in the
 21 confidential session.
 22 The IESO agrees with that
 23 concern. Their information is what is at issue
 24 here and, rather than dancing in and out of
 25 confidential and public, that they would prefer

1 just to have sort of a blanket approach.
 2 And, you know, I have no
 3 problem with what's being discussed so far is
 4 public. But just on the -- in the spirit of what
 5 we agreed to, can we.
 6 MS. SHERKEY: No, I appreciate
 7 the reminder. We should go into confidential
 8 mode.
 9 PRESIDING ARBITRATOR MILES:
 10 Okay, Alonso, could we please go into confidential
 11 mode and we will stay in it until we are finished
 12 the fact evidence today.
 13 Thank you. So just until we
 14 finish with Mr. Lyle.
 15 --- CONFIDENTIAL TRANSCRIPT COMMENCES AT 1:46 p.m.
 16 MR. HAUSER: Thank you, Madam
 17 President. We are in confidential mode now.
 18 PRESIDING ARBITRATOR MILES:
 19 Thank you very much.
 20 BY MS. SHERKEY:
 21 Q. I want to go back to the
 22 Electricity Act. If we go back to Tab 1.
 23 A. Um-hmm.
 24 Q. Section 10 sets out the
 25 composure of the IESO's board of directors; is

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1 that right?

2 A. That is correct.

3 Q. And, at subparagraph 2,

4 the board of directors shall be composed of the

5 chief executive officer at the IESO and at least

6 eight and not more than ten additional individuals

7 appointed by the Minister.

8 So the Minister of Energy

9 appoints the majority of the board?

10 A. Yes, that is correct.

11 Q. And if we turn to Tab 6,

12 this is an excerpt from the IESO's 2020 annual

13 report; is that right?

14 A. It appears to be, yes.

15 Q. And you're familiar with

16 this document?

17 A. I would have been back in

18 2020.

19 Q. And are you involved in

20 the process of publishing these reports annually?

21 A. I likely will have a

22 brief read of it but I would not have been

23 directly involved in its preparation.

24 Q. And but the IESO, you

25 would agree, would be honest and transparent in

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1 the IESO without a formal directive.

2 Are you aware that these

3 informal demands have included requests to

4 terminate or renegotiate contracts?

5 A. I am aware of some, yes.

6 PRESIDING ARBITRATOR MILES:

7 Can I just ask a process question. Maybe

8 Mr. Neufeld knows.

9 The witness statement from

10 this morning that discussed this formal and

11 informal process, that was all redacted. Was

12 Mr. Lyle able to see that?

13 MS. SHERKEY: I don't -- we

14 can ask if he has read it. I am not sure what he

15 has been shown by --

16 PRESIDING ARBITRATOR MILES:

17 That wasn't my question.

18 Was he allowed to see it?

19 Because, in the list of participants, he is an "N"

20 in not being able to attend confidential.

21 MR. NEUFELD: I think the N

22 was for restricted access as opposed

23 to confidential --

24 PRESIDING ARBITRATOR MILES:

25 So N means yes?

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1 what it states in its annual report?

2 A. Yes.

3 Q. And, over on the next

4 page, the annual report states:

5 "The Province of Ontario

6 controls the IESO by

7 virtue of its ability to

8 appoint the IESO's board

9 of directors."[as read]

10 Do you see that?

11 A. I do.

12 Q. And the IESO is setting

13 this out in its annual report to note that

14 transactions with these Ontario ministries set out

15 in this next paragraph are related parties through

16 the common control of the Province of Ontario.

17 A. Ministries or agencies or

18 corporations but, yes.

19 Q. And so you're disclosing

20 the related party transactions?

21 A. Yes.

22 Q. Moving topics, then, from

23 the formal directive powers, I would like to

24 discuss the informal directive powers where the

25 Minister of Energy has made requests or demands of

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1 MR. NEUFELD: He can see it.

2 PRESIDING ARBITRATOR MILES:

3 As long as we know what consent is, we are good.

4 MS. SHERKEY: That's my

5 understanding, that he can see it.

6 PRESIDING ARBITRATOR MILES:

7 All right. Thank you for that.

8 BY MS. SHERKEY:

9 Q. If we turn to Tab 7, I

10 would like to discuss the TransCanada

11 negotiations.

12 And you're familiar with the

13 TransCanada plant cancellation and relocation; is

14 that right?

15 A. Yes, I am.

16 Q. And I have set out here

17 your testimony before the standing committee on

18 justice policy of the Ontario legislature on

19 May 7th, 2013; do you recall giving that

20 testimony?

21 A. I do.

22 Q. And your testimony was

23 under oath; is that right?

24 A. It was, yes.

25 Q. And it was true?

1 A. Yes. To the best of my
 2 knowledge and belief.
 3 Q. So to just go through
 4 some of the chronology of the TransCanada
 5 relocation, I am going to turn over to the next
 6 tab at Tab 8 which is the Auditor General's
 7 report.
 8 Do you recognize this
 9 document?
 10 A. I do, yes.
 11 Q. And this was a report
 12 related to the cost to cancel and relocate
 13 TransCanada's facility; is that right?
 14 A. It was, yes.
 15 Q. And you read this before?
 16 A. Many years ago but, yes.
 17 Q. So at page 12 of this
 18 document. Are you there?
 19 A. I am, yes.
 20 Q. And is the Tribunal there
 21 as well?
 22 I have highlighted the
 23 paragraph here that sets out:
 24 "In the fall of 2008, the
 25 OPA set in motion the

1 procurement of an 850
 2 megawatt gas-fired
 3 electricity generation
 4 plant in the southwest
 5 GTA."[as read]
 6 Do you recall that?
 7 A. Yes.
 8 Q. And, ultimately, through
 9 that process, we have reached the conclusion, over
 10 on the next page, with the first highlighted
 11 paragraph on the right under that chart that says:
 12 "In September 2009, the
 13 OPA announced that it had
 14 accepted TransCanada's
 15 bid for that
 16 procurement."[as read]
 17 Is that right?
 18 A. Yes.
 19 Q. And the project contract
 20 was signed in October 2009?
 21 A. I believe so, yes.
 22 Q. And the OPA was the
 23 contractual counterparty to that contract?
 24 A. It was, yes.
 25 Q. The Government of Ontario

1 was not the contractual counterparty?
 2 A. That is correct.
 3 Q. And, under this contract,
 4 as set out at the next paragraph, TransCanada was
 5 responsible for obtaining all the necessary
 6 permits and approvals; is that right?
 7 A. Yes, that is correct.
 8 Q. And the plan was for the
 9 plant to reach commercial operation by
 10 February 2014, and then the OPA would have the
 11 obligation to pay TransCanada a monthly amount for
 12 the 20-year term of the contract; is that right?
 13 A. Yes.
 14 Q. And the end of this
 15 paragraph sets out that the expected revenues was
 16 something in the scale of \$2.7 billion?
 17 A. Yeah, that's what it
 18 says.
 19 Q. And then the next
 20 paragraph discusses the contract's force majeure
 21 provisions.
 22 And it provides that the
 23 contract had a force majeure provision in the case
 24 of extraordinary events occurring beyond the
 25 control of the contracting parties.

1 And that would obligate the
 2 OPA to push back the commercial operation date; is
 3 that right?
 4 A. Yes.
 5 Q. And one of those force
 6 majeure provisions was that, if the commercial
 7 operation date was extended by more than
 8 24 months, the OPA could terminate the contract
 9 without costs or payments of any kind; right?
 10 A. Yes.
 11 Q. And that's akin to
 12 Article 10.1(g) of the FIT Contract; would you
 13 agree with that?
 14 A. It is similar, yes.
 15 Q. And so, in the OPA's
 16 view, that termination provision provided a viable
 17 mechanism to cancel the project if TransCanada
 18 couldn't obtain necessary permits and approvals;
 19 do you agree with that?
 20 A. Yes.
 21 Q. And, in this case, a
 22 force majeure event did occur; is that right?
 23 A. Yes.
 24 Q. And, if we look at the
 25 bottom of this page, what is described as being as

1 a result of an interim control bylaw by the Town
2 of Oakville, TransCanada couldn't get the permits
3 it needed to proceed with construction; right?

4 A. Yes.

5 Q. And, at the bottom of the
6 page on the right, the report goes on to describe
7 that TransCanada then had meetings with the
8 Premier's office where it left the meeting with
9 the understanding that, if the government
10 cancelled the plant, TransCanada would be kept
11 whole.

12 Are you aware of that?

13 A. I am, yes.

14 Q. And so, over on the next
15 page, we see that the Minister of Energy announced
16 the cancellation of the proposed plant in
17 October 2010; right?

18 A. Yes.

19 [Redacted text block]

[Redacted text block]

[Redacted text block]

18 [Redacted] and going back to the top of
19 this page -- I am looking above where the bullets
20 are -- the OPA sent a letter to TransCanada
21 informing it of the termination decision and
22 setting out, in this letter, that TransCanada was
23 entitled to reasonable damages, including the
24 anticipated financial value of the original
25 contract; is that right?

A. Yes.

[Redacted text block]

16 Q. The OPA then began
17 negotiating with TransCanada on a replacement
18 plant; is that right?

19 A. Yes.

20 Q. And, if we look over on
21 the right side of this page, there is a sentence
22 that reads:

23 "The government set the
24 following requirements
25 for the OPA's

1 negotiations with
 2 TransCanada."[as read]
 3 And it sets out three bullets;
 4 do you see that?
 5 A. Yes, I do.
 6 Q. And that's correct?
 7 A. To the best of my
 8 recollection.
 9 Q. And by "set the
 10 requirements", [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 14 Q. Down under the heading
 15 4.2.2, the OPA, it says working within the
 16 above-noted requirements.
 17 [REDACTED]
 [REDACTED]
 19 A. I am sorry. Where are
 20 you reading from there?
 21 Q. That first paragraph
 22 under 4.2.2.
 23 A. We were seeking to find a
 24 location for the replacement facility, yes.
 25 Q. Working within the

1 above-noted requirements; right?
 2 A. Yes, that is correct.
 3 Q. And you identified the
 4 Kitchener-Waterloo-Cambridge area as the ideal
 5 location?
 6 A. That was certainly one
 7 location that was identified around this.
 8 Q. And, in December 2010,
 9 just in the next paragraph, TransCanada and OPA
 10 executed a memorandum of understanding for a
 11 potential plant in that area?
 12 A. Yes.
 13 Q. And then you guys began
 14 negotiating terms for that; is that right?
 15 A. That is correct.
 16 Q. And one of the terms
 17 being discussed, if we go over the next page, was
 18 the rate the OPA would pay to TransCanada; is that
 19 right?
 20 A. That would have been one
 21 of the terms, yes.
 22 Q. And so if we look at the
 23 second paragraph.
 24 TransCanada made a proposal
 25 and the OPA went back with a counterproposal for a

1 much lower rate; do you see that?
 2 A. I do see that, yes.
 3 Q. And TransCanada, unhappy
 4 with that, went back to the Premier's office and
 5 the Ministry of Energy; is that right?
 6 A. That's my understanding,
 7 yes.
 8 Q. The Minister's office,
 9 that's the Ministry of Energy office, then
 10 directed the OPA to make a second proposal?
 11 A. I don't recall
 12 specifically. I don't have a personal memory of
 13 that but it is what's indicated in the report.
 14 I don't have any reason to
 15 dispute. I just don't have a personal
 16 recollection of this.
 17 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 23 Q. But, as a result of the
 24 direction from the Minister's office, it increased
 25 its offer to TransCanada?

1 A. As I say, I don't have a
 2 recollection going back 12 years to this
 3 particular step in the process. But, you know, I
 4 take it as what's in the report. I will accept
 5 that.
 6 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 11 Q. And then if we look over
 12 at page 17, in September 2012, the Ministry
 13 announced the OPA had reached an agreement in
 14 principle with TransCanada; right?
 15 A. Yes.
 16 Q. And that was going to be
 17 a plant at the site of OPG's Lennox generating
 18 station in Napanee?
 19 A. That is correct.
 20 Q. And the OPA informed us
 21 that the Minister of Energy told the OPA to locate
 22 the new plant in Napanee; is that right?
 23 A. That is correct. That
 24 is -- there were discussions that led into the
 25 ultimate negotiation which led to the Lennox site

1 being chosen.
 2 Q. And the Lennox site was
 3 chosen even though the OPA didn't think it was an
 4 optimal location because it would result in higher
 5 costs?
 6 A. There were some gas
 7 service issues, certainly, at the Lennox site.
 8 Q. But the OPA complied with
 9 the Minister's request or direction?
 10 A. Yes.
 11 Q. Okay. That is all my
 12 questions on TransCanada.
 13 I have a couple questions
 14 related to the moratorium.
 15 The moratorium was a decision
 16 made by the Ontario government; is that right?
 17 A. That is correct, yes.
 18 Q. The OPA had no
 19 involvement in that decision?
 20 A. That is correct.
 21 Q. It was informed of the
 22 decision after it had been made?
 23 A. Yes.
 24 Q. And it was only informed
 25 shortly before it was announced publicly?

1 A. Yes.
 2 Q. The OPA took steps to
 3 implement the moratorium; is that right?
 4 A. I am not quite sure I
 5 understand what you mean by "implement the
 6 moratorium".
 7 Q. I can be more specific.
 8 It returned FIT applications
 9 for offshore wind proponents after the moratorium
 10 was announced; right?
 11 A. Yes.
 12 Q. It told applicants we are
 13 not going to accept more offshore wind
 14 applications?
 15 A. That is correct.
 16 Q. And you did that as a
 17 result of the moratorium?
 18 A. Yes.
 19 Q. But there had been no
 20 formal directive from the government to do that?
 21 A. There had not been, no.
 22 Q. I am going to change
 23 topics now. We are going to move on from the
 24 relationship with the Ministry of Energy and move
 25 to the IESO's negotiations with Windstream in

1 2017.
 2 If we go to Tab 10, this is a
 3 letter from Windstream to Mr. Killeavy asking to
 4 set up a meeting.
 5 Have you seen this document
 6 before?
 7 A. Yes.
 8 Q. Would you have been made
 9 aware of it at the time?
 10 A. I don't recall.
 11 Q. And, over on the next
 12 tab, the parties met on January 12th, 2017. You
 13 did not attend but were you made aware of this
 14 meeting?
 15 A. So, at this juncture, I
 16 was not the vice president responsible for
 17 contract management.
 18 I would have been made aware,
 19 at a high level, of matters related to contracts
 20 generally. But I might not have been specifically
 21 had this particular meeting flagged to my
 22 attention.
 23 Q. At this time,
 24 Mr. Killeavy was reporting to Ms. Butler?
 25 A. That is correct.

1 Q. And so you have no reason
 2 to doubt the contents of the meeting minutes but
 3 you also have no knowledge of what took place?
 4 A. Yes. I don't have any
 5 direct knowledge of what took place or was
 6 informed of the specifics of this meeting at the
 7 time.
 8 Q. And, at the second
 9 paragraph from the bottom, Ms. Helbronner, who is
 10 Windstream's legal counsel, asked the IESO
 11 representatives what happens on May 5th, 2017.
 12 And Mr. Killeavy indicated the IESO does not know
 13 at this point.
 14 And that's consistent with
 15 your knowledge too; no termination decision had
 16 been made at this point?
 17 A. Yes, that's my
 18 understanding.
 19 Q. And, prior to this
 20 meeting with Windstream, the Ontario government
 21 had not directed the IESO, formally or informally,
 22 as to how to conduct its negotiations with
 23 Windstream?
 24 A. That is correct.
 25 Q. The Ontario government

1 never told the IESO to adjust the terms of the
 2 contract to the moratorium?
 3 A. Not to my knowledge, no.
 4 Q. It didn't give the IESO
 5 an update on the status of the moratorium prior to
 6 this meeting?
 7 A. No. Not to my knowledge.
 8 Q. And the IESO did not
 9 reach out to the government at that time to seek
 10 that information?
 11 A. Not at that time.
 12 Q. And if we turn over the
 13 tab --
 14 A. But, of course we did,
 15 prior to the decision to exercise the 10.1(g)
 16 right in terms of the contract, reach out to the
 17 government in respect of the moratorium.
 18 Q. You are referring to the
 19 letter that was sent as part of the analytical
 20 framework --
 21 A. That is correct, yes.
 22 Q. -- we are going to
 23 discuss that in the fall of 2017.
 24 A. Okay.
 25 Q. But, at this time, you

1 did not?
 2 A. At that time, no.
 3 Q. And this February 9th,
 4 2017, letter the IESO sent to Ms. Baines, have you
 5 seen it before?
 6 A. Yes.
 7 Q. And, in it, the IESO
 8 confirmed it was not willing to amend the FIT
 9 Contract in any way; is that a fair summary?
 10 A. That's not prepared to
 11 change the FIT Contract in the manners that are
 12 discussed in the numbered paragraphs.
 13 Q. Yeah. It was not going
 14 to extend the milestone commercial date of
 15 operation or the date of an event of default;
 16 right?
 17 A. That is correct.
 18 Q. It was not going to waive
 19 any rights under the FIT Contract, including the
 20 10.1(g) termination right?
 21 A. That is correct.
 22 Q. And it had not made a
 23 decision as to whether to exercise its termination
 24 right?
 25 A. Yes.

1 Q. And that was true?
 2 A. Yes.
 3 Q. To your knowledge?
 4 A. To my knowledge.
 5 Q. And so just orient us in
 6 timing.
 7 You are aware that Windstream
 8 commenced its Ontario application in March 2017
 9 against the IESO?
 10 A. Yes.
 11 Q. And, in that application,
 12 it sought to restrain the IESO from exercising its
 13 termination right due to delays caused by the
 14 Ontario government?
 15 A. Yes.
 16 Q. And the parties agreed,
 17 through counsel, that while that application was
 18 underway, the IESO would not exercise its
 19 termination right when it arose after May 4th,
 20 2017; is that right?
 21 A. Yes.
 22 Q. And when the IESO is
 23 deciding whether to exercise its termination right
 24 under Section 10.1(g), that's a case by case
 25 factual-specific exercise; is that right?

1 A. Yes. That is correct.
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 Q. So it's not automatic
 21 that, when a Section 10.1(g) right arises, the
 22 IESO will exercise it?
 23 A. No, that's correct. The
 24 IESO will -- it does have broad discretion but we
 25 want to make a thoughtful decision that's

1 reasonable, which is what we believe we did.
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
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 [REDACTED]
 [REDACTED]

16 A. That is correct.
 17 Q. And, if we turn over to
 18 Tab 16, I believe this is the letter you were
 19 referring to earlier where you said -- where you
 20 noted that you had made inquiries about the status
 21 of the moratorium; is that what you were referring
 22 to?
 23 A. Yes.
 24 Q. And you were sending this
 25 letter to the Ministry of the Environment to

1 inform your decision-making process; right?
 2 A. That is correct.
 3 Q. And that was because, to
 4 undertake this process, you needed to seek
 5 information; is that fair?
 6 A. Yes, yes.
 7 And we had, as you're aware,
 8 previously sought information from Windstream
 9 directly about any communications that they had
 10 had with the government with respect to the status
 11 of the moratorium and the site release policy.
 12 Q. And the IESO wasn't --
 13 wouldn't pre-make a decision until it received all
 14 that information and assessed the situation fully?
 15 A. Well, certainly, it was
 16 my decision to make and I made that decision and
 17 communicated that decision on February 20th, after
 18 reviewing the materials.
 19 So --
 20 Q. Only after receiving all
 21 the information?
 22 A. After I received the
 23 recommendation material, yes.
 24 Q. And that's exactly where
 25 we are going to look at Tab 17. This is the

1 recommendation memo you were just referring to.
 2 A. Um-hmm.
 3 Q. And so it was upon
 4 reviewing this memo that you made the decision?
 5 A. Yes, that's correct.
 6 Q. And that decision was
 7 communicated to Windstream on February 20th, 2018;
 8 is that right?
 9 A. That is correct.
 10 Q. So the decision was made
 11 some point between February 16th and
 12 February 20th?
 13 A. The decision was made, I
 14 reviewed the material over the weekend, and then
 15 communicated that decision to the team.
 16 MS. SHERKEY: If I could just
 17 have one moment.
 18 BY MS. SHERKEY:
 19 Q. Just one final topic.
 20 Earlier in our discussion
 21 today, we talked about the cancellation of the
 22 procurement contracts pursuant to the July 13th,
 23 2018, directive.
 24 A. Yes.
 25 Q. And you had mentioned

1 there were 751 cancelled projects?
 2 A. Yes.
 3 Q. And I take it that you're
 4 aware it was reported publicly that the Ontario
 5 government paid \$231 million to cancel those
 6 contracts?
 7 A. Yeah, that is inaccurate
 8 as well.
 9 Q. What is accurate?
 10 A. It's probably around half
 11 of that amount. The \$231 million refers to the
 12 preconstruction liability limit, the aggregate of
 13 that for the 751 contracts.
 14 And so that would be the most
 15 that the Ontario government would have paid to
 16 cancel those particular contracts.
 17 In practice, we had been
 18 working through with counterparties over the last
 19 few years and just that work is just about done.
 20 It's -- and it's roughly about half of that.
 21 Q. Do you have any --
 22 A. I also note that that
 23 also doesn't reflect the analysis that there were
 24 actually several hundred million dollars of
 25 savings for ratepayers from the cancellation of

1 those contracts.
 2 Q. On what's been reported
 3 publicly is that two of the 751 were wind
 4 projects; are you aware of that?
 5 A. I certainly recall a
 6 large majority were small solar facilities.
 7 Q. Do you know the total
 8 amount of megawatts cancelled among those 751?
 9 A. They were all quite small
 10 and they sort of -- half a megawatt range. So
 11 it's probably something in the range, I am going
 12 to say, something like 350, 370 megawatts. But
 13 that's subject to check.
 14 Q. Had any of these projects
 15 reached NTP?
 16 A. None of the projects had
 17 reached NTP.
 18 Q. I think that was part of
 19 the directive, right, that they were pre-NTP?
 20 A. Yes, that's correct.
 21 MS. SHERKEY: Those are all my
 22 questions.
 23 MR. NEUFELD: Thank you, Madam
 24 President. I have very brief follow-up.
 25 RE-EXAMINATION BY MR. NEUFELD:

1 Q. Mr. Lyle, you were asked
 2 an awful lot about the TransCanada decision and
 3 brought through many, many minutes of questioning
 4 on that situation and all the apparent
 5 similarities with Windstream.
 6 You weren't asked about
 7 differences so I would like to ask you about the
 8 differences and I would like to ask you if you are
 9 aware of what the Windstream I Tribunal found on
 10 this matter. I am going to take you to that, if
 11 you need.
 12 A. Yeah. So I am aware that
 13 the Windstream I Tribunal made a finding that the
 14 TransCanada facility was not a similarly situated,
 15 or similar circumstances facility.
 16 It is, of course -- or was a
 17 combined cycle gas-fired generation plant,
 18 approximately 900 megawatts. And it was procured
 19 through a competitive RFP procurement process as
 20 opposed to a standard offer program.
 21 Q. So it wasn't a FIT
 22 Contract?
 23 A. It was not, no.
 24 MR. NEUFELD: Thank you.
 25 That's it.

1 PRESIDING ARBITRATOR MILES:
 2 Okay, Mr. Lyle, I think you are released. Thank
 3 you very much very, very much for coming.
 4 THE WITNESS: Thank you.
 5 PRESIDING ARBITRATOR MILES:
 6 And for your very straightforward answers and we
 7 understand you were managing a conflict this
 8 afternoon so thank you for --
 9 THE WITNESS: Thank you.
 10 PRESIDING ARBITRATOR MILES:
 11 For prioritizing us in your conflict. We
 12 appreciate that.
 13 THE WITNESS: Appreciate that.
 14 Thank you.
 15 PRESIDING ARBITRATOR MILES: I
 16 have a question. I will start with the Claimant.
 17 Were any -- I think I saw
 18 Mr. Tetard around. But were any of your experts
 19 present for the opening?
 20 MS. SHERKEY: Yes.
 21 PRESIDING ARBITRATOR MILES:
 22 All of them? Both of them? All of them? You
 23 have got lots; haven't you.
 24 MS. SHERKEY: So Ms. Shelley
 25 can better advise on our side.

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1 PRESIDING ARBITRATOR MILES:
 2 Okay.
 3 MS. SHELLEY: Yes, I believe
 4 that they tuned in. Mr. Tetard, I am not sure.
 5 But for sure some of Secretariat tuned in. One of
 6 their representatives was in the room yesterday.
 7 I believe some were online for the opening of the
 8 Claimant. And there were some in the room for the
 9 opening of the Respondent as well.
 10 PRESIDING ARBITRATOR MILES:
 11 Okay. Very good.
 12 Same question, Mr. Neufeld.
 13 MR. NEUFELD: Can you repeat
 14 the question. I am sorry.
 15 PRESIDING ARBITRATOR MILES:
 16 Was Mr. Guillet in the room during the openings?
 17 MR. NEUFELD: He was.
 18 PRESIDING ARBITRATOR MILES:
 19 He was.
 20 MR. NEUFELD: Yes.
 21 PRESIDING ARBITRATOR MILES:
 22 Okay. Very good.
 23 The reason --
 24 MR. HAUSER: Sorry for an
 25 interruption --

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1 those reports should have been self-evident and we
 2 would hope that they have tailored their
 3 presentations tomorrow to respond to the
 4 particular points that we were interested in and
 5 obviously concerned about.
 6 So, if they haven't done that
 7 yet, then that will be homework for this evening.
 8 We will have questions
 9 tomorrow. So, yes, so don't book an early supper.
 10 So we will start at 9 with the
 11 presentation from Secretariat.
 12 Remind me, José Luis, the
 13 procedural order is for the presentations, the
 14 demonstratives to come to us immediately before or
 15 an hour before?
 16 MR. ARAGÓN CARDIEL:
 17 Immediately before.
 18 MS. SHERKEY: If you would
 19 like the presentation earlier, I am sure we can
 20 arrange that.
 21 PRESIDING ARBITRATOR MILES:
 22 How to make friends, Ms. Sherkey. I really would.
 23 Would the Respondent be
 24 opposed to the Claimant providing just an
 25 electronic copy of that to the Tribunal just

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1 PRESIDING ARBITRATOR MILES:
 2 Oh, Alonso, I am so sorry. Thank you. You need
 3 to be able to flash the lights or something at us.
 4 Yes, please, let us out.
 5 MR. HAUSER: Sorry for
 6 interrupting. Thank you, Madam President.
 7 --- CONFIDENTIAL TRANSCRIPT ENDS AT 2:25 p.m.
 8 PRESIDING ARBITRATOR MILES:
 9 Don't apologize. Thank you so much.
 10 Very good.
 11 Okay, so that's the close of
 12 fact witness testimony.
 13 And, for tomorrow, we have the
 14 expert testimony, at least the quantum and
 15 economic experts.
 16 And my question to the parties
 17 was to check whether or not the testifying quantum
 18 and economic experts were in the room during the
 19 opening.
 20 And the Claimants confirmed
 21 yes, if not in the room, in the virtual room. And
 22 Mr. Neufeld has just confirmed the same for
 23 Canada's experts.
 24 The reason I ask is no doubt
 25 obvious. Our interest in particular issues in

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1 30 minutes before?
 2 MR. NEUFELD: No, of course
 3 not.
 4 PRESIDING ARBITRATOR MILES:
 5 Okay.
 6 And, if we get there, that we
 7 change sides over the lunch break, then perhaps we
 8 could do the same over the lunch break. Yes, so
 9 Mr. Guillet's presentation.
 10 All right. Very good. I
 11 better check before I say this, just give me one
 12 moment.
 13 José Luis assures me I am
 14 allowed to do this.
 15 So just a forewarning.
 16 We are not anticipating it
 17 right now but we really would like to leave
 18 tomorrow with the full benefit of the experts on
 19 the various issues that are troubling us, in which
 20 case, we understand the procedural order permits
 21 us to put them together or put certain experts of
 22 like discipline together.
 23 And so just a forewarning that
 24 we are not entirely close to doing that. We don't
 25 intend -- we will proceed as normal per the

1 schedule but, if there's particular issues at the
2 end of the day that we feel would benefit from
3 that, we might bring folks together on that.
4 So certainly Mr. Tobis,
5 Mr. Milburn, and Mr. Tetard are not to go anywhere
6 after they are finished testifying.
7 And there is no sequestration,
8 obviously. They are experts; right.
9 All right, okay. So early
10 finish.
11 So any housekeeping before we
12 leave for tomorrow? Ms. Sherkey, Mr. Terry, no?
13 Ms. Neufeld, no?
14 Okay. So we will stick to
15 9 o'clock and we will see Secretariat here then
16 and just send us and José Luis an email with the
17 slides at 8:30. Thank you.
18 --- Whereupon matter adjourned at 2:30 p.m., to
19 resume Wednesday, February 7, 2024,
20 at 9:00 a.m.
21
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23
24
25

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