

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

BETWEEN:

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

CLAIMANTS

- and -

GOVERNMENT OF CANADA

RESPONDENT

TRANSCRIPT OF PROCEEDINGS  
HELD BEFORE JUDGE BRUNO SIMMA (PRESIDING ARBITRATOR),  
PROFESSOR DONALD McRAE, and PROFESSOR BRYAN SCHWARTZ  
held at the offices of Arbitration Place,  
333 Bay Street, Suite 900, Toronto, Ontario  
on Monday, February 26, 2018, at 9:36 a.m.

VOLUME 7 - FULL TRANSCRIPT {REVISED}

CONDENSED TRANSCRIPT WITH WORD INDEX  
APPEARANCES:

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Brent Johnston  
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Alex Baer  
Frank Borowicz, QC  
Randy Sutton

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1 Toronto, Ontario  
 2 --- Upon resuming on Monday, February 26, 2018,  
 3 at 9:36 a.m.  
 4 PRESIDING ARBITRATOR: It  
 5 looks like we are all set. This is the Day 7 of  
 6 our hearing, and the day will be devoted to the  
 7 examination of what I call the quantum experts.  
 8 And the quantum expert for the  
 9 investors is Mr. Rosen.  
 10 Mr. Rosen, I hope you feel  
 11 comfortable with the respondent breathing down  
 12 your neck, so to speak.  
 13 THE WITNESS: I feel both  
 14 sides breathing down by neck.  
 15 (Laughter)  
 16 PROFESSOR McRAE: And us.  
 17 THE WITNESS: Equally  
 18 comfortable.  
 19 PRESIDING ARBITRATOR: Okay.  
 20 Would you be so kind and read the statement that  
 21 you have in front of you.  
 22 WITNESS DECLARATION: HOWARD ROSEN.  
 23 MR. ROSEN: I solemnly declare  
 24 upon my honour and conscience that I will speak  
 25 the truth, the whole truth and nothing but the

1 truth, and that my statement will be in accordance  
 2 with my sincere belief.  
 3 PRESIDING ARBITRATOR: Thank  
 4 you.  
 5 Can I give the floor to  
 6 Mr. Nash for the direct.  
 7 MR. NASH: Thank you, Judge  
 8 Simma, and good morning.  
 9 EXAMINATION IN-CHIEF BY MR. NASH:  
 10 Q. You are Howard Rosen?  
 11 A. I am.  
 12 Q. You have submitted two  
 13 expert valuation opinions in this proceeding?  
 14 A. I have.  
 15 Q. The first is dated  
 16 December 15th, 2016?  
 17 A. Correct.  
 18 Q. And the second is dated  
 19 August 23rd, 2017?  
 20 A. Yes.  
 21 Q. Do you have any  
 22 corrections to make to those opinions?  
 23 A. No, I do not.  
 24 Q. You have been previously  
 25 qualified and accepted as an expert in

1 proceedings, including international arbitration  
 2 proceedings?  
 3 A. I have.  
 4 Q. Can you say approximately  
 5 how many different proceedings have you been  
 6 qualified as an expert in?  
 7 A. In national courts and  
 8 international arbitration?  
 9 Q. Yes.  
 10 A. Close to 200 times.  
 11 In international arbitration,  
 12 over 30 times.  
 13 Q. You are a CPA, chartered  
 14 accountant?  
 15 A. I am.  
 16 Q. And you are also a  
 17 chartered business valuator?  
 18 A. Yes, I am.  
 19 Q. What is that?  
 20 A. Chartered business  
 21 valuation is a degree you obtain through a further  
 22 course of study after you become a professional  
 23 accountant. It's approximately a three-year  
 24 course where you sit exams every year and then a  
 25 uniform final exam. And it trains the

1 professional in further elements of finance and  
 2 economics and business valuation.  
 3 Q. And how long have you  
 4 been --  
 5 A. It's a globally  
 6 recognized degree.  
 7 Q. Globally recognized?  
 8 A. Yes.  
 9 Q. How long have you been a  
 10 charter business valuator, approximately?  
 11 A. Since the mid-'80s.  
 12 Q. Thank you.  
 13 MR. NASH: Those are my  
 14 questions.  
 15 PRESIDING ARBITRATOR: Thank  
 16 you, Mr. Nash.  
 17 And I call on respondent, it's  
 18 already -- we have the presentations first, okay,  
 19 sorry. So you have the floor for the  
 20 presentation.  
 21 THE WITNESS: Thank you.  
 22 Good morning. I am going to  
 23 spend approximately 30 minutes and just review  
 24 some of the important points of the quantum issues  
 25 in this case.

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1 Mr. Nash just went through my  
2 CV. I would only add one thing in my CV that I  
3 think is important. Besides being a professional  
4 and understanding the academic approach to  
5 business valuation, I have also, on my own  
6 account, as a principal and as an advisor, been  
7 involved personally in over 30 transactions.

8 So I frequently assist  
9 companies. I sit on the boards of public  
10 companies, and, on my own account, I make  
11 investments in companies. And so I have 30-plus  
12 years of experience of buying and selling  
13 businesses, and so it gives me not only an  
14 academic understanding on the approach of how to  
15 look at the value of a business but also allows me  
16 to bring some practical skills to bear in this  
17 question.

18 I should also point out that,  
19 aside from the qualifications that Mr. Nash  
20 referred to, I am known as a qualified valuator  
21 under the CIMVal mining code for Canada. And  
22 CIMVal are the regulations that deal with the  
23 valuation of mineral properties in Canada, and I  
24 am recognized as someone with a great degree of  
25 experience in that area and a qualified valuator.

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1 in the but-for world. So we know where it's  
2 situated, we know the size of it, we know the  
3 approximate number of contained, measured and  
4 indicated resources, the project life, [REDACTED]  
[REDACTED]

8 It was an aggregate pit,  
9 rather an aggregate crushing complex. That is a  
10 fairly simple process of taking a large rock and  
11 crushing it into smaller rocks, putting it through  
12 a screen. It's unlike other mining properties  
13 where there is a physical process and then a  
14 chemical process to extract pay metal from ore.  
15 This is simply crushing rocks and putting it  
16 through a screen.

17 It was ready to be financed by  
18 the investors, and they had made the decision to  
19 make the investment without the necessity of a  
20 full feasibility study or an NI 43-101 that are  
21 commonly referred to in the mining industry.

22 On Slide 8, this is a summary  
23 of the due diligence process that I went through  
24 with my team to review the Whites Point Quarry to  
25 determine the lost profits. And so we have

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1 If we turn to Slide 5 in the  
2 presentation, this is just a summary of the  
3 damages conclusions, and you can see that they are  
4 split between past losses and future losses.  
5 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT.  
6 9:41 A.M.

7 THE WITNESS: And there's an  
8 asterisk beside the past loss of profits, and this  
9 is a cash flow analysis. And the asterisk simply  
10 indicates that that calculation takes into account  
11 that the claimant, by this point in time, would  
12 have invested some [REDACTED] in addition to  
13 their initial investment, so it's net of that  
14 number.

15 We can see that the past lost  
16 profits to the end of December 2016 and the  
17 present value of future lost profits totals about  
18 \$308 million. There's a further adjustment  
19 for tax equity, which I will discuss. There's a  
20 calculation of pre-award interest, and we have a  
21 total.

22 So I'd like to turn now to the  
23 overview and put this into context. In Slide 7,  
24 there's some blue boxes that give an approximation  
25 for what the Whites Point Quarry would have been

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1 different types of individuals that are involved.

2 But I really want to just step  
3 away from the slide for a second and talk about  
4 the damages experts and the approach we have  
5 taken. So, like many cases you have sat on in the  
6 past, you have got two experts that have vastly  
7 divergent views, and you have a tribunal trying to  
8 reconcile vastly divergent views, which is not an  
9 easy thing for a tribunal to deal with.

10 The divergent views of the  
11 experts stem from several areas. And,  
12 principally, they come from a view on what the  
13 appropriate valuation date is, then instructions  
14 about how to treat permitting risk, instructions  
15 how to deal with mitigation, and then their  
16 interpretation of how other experts deal with cost  
17 inputs and market prices. And these lead to two  
18 different, very different conclusions by the  
19 damages experts.

20 I heard in the opening, both  
21 the claimant and respondent's counsel, one  
22 referring to this as not a start-up and the other  
23 referring to this as absolutely a start-up. And  
24 those words, from a commercial point of view, have  
25 important context.



1 When you think of a start-up  
2 business, you can think of the group of us up here  
3 starting a new business today, deciding to  
4 manufacture this table. And we know nothing about  
5 where we are going to produce it, how much it is  
6 going to cost to produce, where we are going to  
7 sell it, if it's even going to be in style, who  
8 wants to buy it. That's a start-up.

9 This operation was not a  
10 start-up. The Claytons had experience and had  
11 been in business for many years, two generations.  
12 They understood the rock business, the aggregate  
13 business.

14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 When they  
18 didn't have the expertise, they went out and hired  
19 the expertise.

20 The respondents state that the  
21 claimants' damages' claim is speculative, that  
22 what I have created is something that is just mere  
23 speculation. So you have to look at the facts and  
24 the evidence to decide is that correct or not? Is  
25 this based on the facts in the evidence, or is  
this something that was simply made up?

1 metallurgists and other chemists to deal with how  
2 that's extracted. That's a feasibility study.  
3 They didn't require one. They made a decision  
4 that they wanted to get into this business.

5 Mr. Lizak had identified the  
6 resource. They determined the stone was suitable  
7 for the New York and New Jersey market, and they  
8 assembled an experienced team. They designed the  
9 plant, and the marine terminal had been designed  
10 to a conceptual level. They were familiar with  
11 the shipping because

12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 They had the capital  
16 committed, and they began the EIS process.

17 [REDACTED]  
18 [REDACTED]  
19 As I understand the evidence,  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1 As I said, the claimants have  
2 a long track record of experience and success in  
3 the aggregates and related business. They have  
4 been partners in New York Sand & Stone since 1998,  
5 [REDACTED]  
6 [REDACTED]

7 And the Claytons, in the early  
8 2000s, made an investment decision as a family,  
9 with their own money. They didn't do the kind of  
10 feasibility study that a public company would do,  
11 nor were they required to. They were financing  
12 this; it was their decision.

13 Feasibility studies for mining  
14 projects can be volumes deep. I have seen  
15 hundreds of them. And they can cost tens or  
16 hundreds of millions of dollars to produce. And  
17 they deal with, once a resource is identified, in  
18 order to turn it into a reserve, you have to show  
19 that it's economically feasible, you can sell it  
20 economically. That's essentially a feasibility  
21 study.

22 And because most of these deal  
23 with a mineral that's contained in ore, there's  
24 chemical processes, there's yield degradation,  
25 that's all sorts of issues that are dealt with by

1 [REDACTED]  
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]

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The commercial risks posed by this dynamic would far outweigh the benefits of owning a dedicated, stable, customizable resource.

Actual market data supports the economic assumptions. Experts from both the claimant and the respondent support economic market assumptions regarding the profitability of selling stone into the New York market. We heard Dr. Chereb a couple days ago talk about the enormous prices and significant margins that could be made in the New York market.

So the differences relate mainly to assumptions about productivity,

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operating costs of the quarry, and freight.

The claimants' model is based on actual expert employees that were charged with building the quarry and the terminal. These are the people that were given the job to do it.

The claimants' model assumptions were given to external experts, and this is what Slide 8 is all about. And those external experts checked those calculations and assumptions for reasonableness.

The respondent's experts, on the other hand, critiqued the modelled design and theorized

And when asked in cross-examination, the witness said they had never seen that in reality, in practice.

The respondent's experts critiqued the shipping cost based on a theory

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And, as I said, the claimants' expert model is based on the actual evidence.

The claimants' revenue model is based on

Again, as I -- as we heard from Dr. Chereb, eventually at least Dr. Chereb agreed with the claimants' position in the short term. He said, "Well, at least up till today and maybe in the near future, prices will remain very high". And then he theorized they might not in the future, which, again, I disagree with.

It was also said that my model contained no element of risk, it's a risk-free

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model. And that's not true. Simply not true. The model of looking from the beginning of operations until today's date incorporates all the actual evidence of the marketplace. Whether prices were high or low, whether shipping rates were high or low, everything from the actual market was incorporated.

The forecast into the future, this 50-year forecast into the future actually is not a 50-year forecast; it's less. But this is how businesses are bought and sold. And although we are not valuing the business at that date, we are forecasting the profits that it would earn from that date, it's discounted at a discount rate that includes business risk, so it is a risk model.

And looking at this 50 years that people have said, "Well, 50 years has to be speculative because it's simply 50 years", if you think about the way present values work, the last 15 years account for about 13 per cent of the damages, the last 25 years of the model account for about 30 per cent of the damages. So most of it's in the short-term period, most of the damage calculation.



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1 And ultimately, if you think  
2 about it -- and again, Dr. Chereb seemed to agree  
3 that the margins were extraordinarily high --  
4 these calculations are based on a profit margin of  
5 about [REDACTED], that's all. Nothing  
6 extraordinary.

7 So Slide 8 is a depiction of  
8 that. It lists the people from the Clayton team,  
9 the subject matter that they were concerned with  
10 and the input they had into the model. There were  
11 other contemporaneous witnesses -- Mr. Kontak,  
12 Mr. Fougere, and Mr. Morrison -- dealing with  
13 geology, operating costs and freight. And on the  
14 right side, these are the witnesses that dealt  
15 with some of the other risks that were identified,  
16 and they gave their opinions.

17 If we turn to Slide 9, Canada,  
18 in its opening, this is Canada's slide from their  
19 opening, and they said, well, really, there's  
20 eight elements to the business, that we agree they  
21 had the land, but they didn't have the resource,  
22 they didn't have the permits, they didn't have the  
23 construction, they didn't have production, they  
24 didn't have shipping, they didn't have sales, and  
25 if they didn't have that, they couldn't repeat.

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1 witness statement.

2 And then simply, once you have  
3 all those things, you just repeat.

4 So my opinion, the claimants  
5 have met the standards, at least from a commercial  
6 point of view. I can't speak to a legal point of  
7 view, but I can tell you, from a commercial  
8 perspective, they have met those, they have met  
9 that burden.

10 Slide 12. So how do we  
11 measure damages? So I have noted the tribunal's  
12 award on jurisdiction and liability and that the  
13 concept of full reparation for unlawful act should  
14 be the measure of damages, and my interpretation,  
15 at least as I understand it, is what would the  
16 claimants have received, most likely?

17 If you flip to Side 13, so how  
18 do you quantify full reparation? Investors were  
19 deprived of the profits they likely would have  
20 generated by the operation of the quarry. So it's  
21 the but-for profits less the actual profits.  
22 Since they have not made any actual profits, it is  
23 simply the but-for profits.

24 I have a quote from Professor  
25 Marboe's book on calculating damages that I have

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1 And as I've just gone through the evidence, and  
2 again if we flip to Slide 10, you will see in the  
3 yellow boxes, this is just a summary of what I  
4 have said, essentially, they do tick all the  
5 boxes. They did have all of these issues  
6 addressed.

7 And flipping to Slide 11  
8 again, Canada's slide, but I have now corrected  
9 it, at least what I feel should be corrected.

10 For the resource, you have  
11 Mr. Lizak, Mr. Kontak and Mr. Cullen's evidence.  
12 For the permits, you have the legal experts and  
13 SNC Lavalin on permitting. And, again, I can't  
14 comment on that.

15 For the construction, you have  
16 the quarry, you have Mr. Wall and Mr. Bickford,  
17 Mr. Washer. For the marine terminal, Seabulk and  
18 SNC Lavalin. And the financing, Mr. Forestieri.

19 For the production, you have  
20 the evidence of John Wall, Paul Buxton, Tom Dooley  
21 and Mr. Clayton.

22 For the shipping, the evidence  
23 of CSL from Mr. Morrison. And for the sales, the  
24 man who ran New York Sand & Stone, Mr. Dooley.  
25 And you have Mr. Lizak and Mr. Wick's expert

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1 in my report, and I repeat it here because it  
2 helps guide my thinking:

3 "It does not matter that  
4 a reasonable businessman  
5 in the past has foreseen  
6 certain profits. In  
7 order to calculate the  
8 amount of lost profits to  
9 be compensated in a  
10 damages award, a  
11 comparison has to be made  
12 between the profits that  
13 could have been earned  
14 with and without the  
15 breach. The valuation,  
16 therefore, has to be made  
17 as at the date of the  
18 award."[as read]

19 And I agree with that.

20 And I'd like you to think  
21 about, if you take a different approach, if you  
22 look at 2007 and say, "I must look at it from the  
23 day of the breach", by definition, unless it's an  
24 expropriation, in which case there's clear reasons  
25 why, in a lawful taking, you look at the day

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1 before the breach, the day before the  
2 expropriation, because the expropriating authority  
3 is allowed to take the asset and there's an  
4 exchange, there is a fair market value at that  
5 date.

6 But in something like a breach  
7 of contract or a breach of a treaty obligation  
8 where you are trying to determine lost profits, if  
9 you guess at 2007 what would have happened  
10 afterwards, by definition you are over- or  
11 undercompensating the claimant. Because if I had  
12 a great business plan and the market was going up  
13 and there's a breach of contract, and I calculate  
14 damages on that basis without any hindsight, you  
15 are going to overcompensate me if there's a fall  
16 in the market afterwards. And I have seen  
17 respondents argue, "Well, there was a fall after  
18 the valuation date, after the breach date, you  
19 should take that into account". In fact, a lot of  
20 that creeps into the Brattle calculations. They  
21 use a 2007 valuation date, but they employ the use  
22 of hindsight extensively. And we know what  
23 happened in 2008 with the recession, and all of  
24 that creeps into their analysis, so it's not truly  
25 a valuation as at 2007.

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1 existed in the marketplace between the date of the  
2 breach and date of our valuation. And as I said,  
3 we calculate them in the current period and the  
4 future period. We wrote this report in 2017, I  
5 used -- or 2016, I used December 2016 as a cutoff  
6 point, and that's a proxy for the current date.  
7 It should be the date of the award, truthfully,  
8 the damages actually should be measured on that  
9 date, but this is a proxy for that date.

10 Slide 17, measuring the loss  
11 of the date of the breach does actually, as I  
12 said, does not actually achieve full reparation.

13 Brattle also goes to some  
14 offers and transactions that says they may, they  
15 may be indicators of value. Mr. Chodorow does  
16 acknowledge that they are not perfectly  
17 comparable, but he cites them because they are  
18 much lower than the conclusions that I arrive at.  
19 In fact, some of them are higher than the  
20 conclusions he arrives at.

21 But these are either by date  
22 or by stage of development. These are strictly  
23 not comparable. They don't represent negotiations  
24 between arm's-length parties who are under no  
25 compulsion to transact. There has been some

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1 If we turn to Slide 14, these  
2 are conceptual and instructional differences, and  
3 I think it's helpful for the tribunal. Brattle  
4 may not agree with my characterization, but this  
5 is how I interpreted the instructions and the  
6 concepts of the two different experts. And I  
7 think it's just helpful for you to have them side  
8 by side in a summary fashion.

9 So compensation, actual  
10 profits plus the present value of future  
11 forecasted profits. But when Brattle does make  
12 this calculation, because they have an argument on  
13 mitigation which I don't address because I think  
14 it's a legal issue, they also do a present value  
15 of expected profits before considering mitigation  
16 or permitting risk.

17 We have different dates, the  
18 use of hindsight as the basis of the calculation,  
19 the primary inputs, what we relied on, and then  
20 the various other factors listed on page 14.  
21 Again, for your consideration, I think it was  
22 useful for you.

23 And now to the actual  
24 calculations. So in Slide 16, we looked at the  
25 approximately 10 years of actual information that

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1 evidence about [REDACTED]

2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 These are not fair market value  
7 transactions contemporaneous with any valuation  
8 date that should be relied on.

9 Interestingly, there is an  
10 unsolicited offer from [REDACTED] in 2007 that's  
11 close to Mr. Chodorow's valuation date that he  
12 indexes up to about [REDACTED] by, I think,  
13 either my valuation date or the current date, but  
14 more on that later.

15 Brattle was instructed, and  
16 this is very important, to assume that the EIS was  
17 an accurate representation of the expectations of  
18 the claimant in or around the breach date. To  
19 that end, Brattle frequently comments on the  
20 assumptions employed in my report, and if I differ  
21 from them, they cite these as errors, which,  
22 again, from my point of view, in exchanging expert  
23 reports, I didn't find as helpful.

24 In the rejoinder report,  
25 Brattle chooses to restate many of my positions,  
and I suggest they were restated completely



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1 inaccurately, and then goes on to criticize how  
2 they restated my position, which I am not in a  
3 position to respond to. I can't respond to a  
4 make-believe construct, nor did I have an  
5 opportunity to.

6 So what is the EIS?

7 It's a document from the  
8 mid-2000s. Is it relevant to a lost profits  
9 analysis to give the investors full reparation,  
10 nearly a decade later when you have actual  
11 information to follow, I suggest not. And I  
12 suggest, as we see on Slide 18, that Brattle  
13 relies on the EIS selectively. They have changed  
14 many of the EIS inputs for information after their  
15 valuation date. The throughput of the mill, the  
16 shipping, the sales volumes, the CapEx. Where the  
17 EIS did not give prices, they have taken the  
18 numbers that I used that are based on actual  
19 information after their valuation date and  
20 adjusted them downwards. Almost their entire  
21 analysis, [REDACTED]

[REDACTED], was based on hindsight.

23 And interestingly, where they  
24 said they were going to stick to the information  
25 in the EIS, [REDACTED]

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1 Time doesn't permit me to go  
2 through in detail, but for your reference, those  
3 names are there.

4 On Slide 21, frequently when  
5 you have experts with diverging opinions, you try  
6 and reconcile the results to see where  
7 numerically, if the tribunal decides, well, I like  
8 some of that position and some of the other  
9 position, how do I reconcile between the two? And  
10 it was in Canada's opening, and I think it was in  
11 Mr. Chodorow's report as well.

12 But in truth, in reality, you  
13 can't reconcile these two. You can numerically  
14 figure out the difference between them, and,  
15 depending on the order that you stack these in,  
16 valuation date and related issues may be the  
17 biggest or it may be the second biggest or the  
18 third biggest, depending, because these are not  
19 completely isolated. They interact with each  
20 other. But these are completely two different  
21 concepts. One is based on 2007, allegedly, with  
22 selective use of hindsight, and one is based on  
23 actual data as at the most current date when I was  
24 writing my first report. These numbers  
25 conceptually are not reconcilable.

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1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED] That, they  
4 departed from the EIS.

5 On Slide 19, I have a bit of a  
6 timeline, and, again, I think it will help the  
7 tribunal just to see what are the stages of  
8 development.

9 So we have the development  
10 stage, we have the permitting stage, and then on  
11 the far right, we have the damages phase. And in  
12 between, we have got about 10 years. And this is  
13 the actual information that we learned during that  
14 period that we brought to bear on our  
15 calculations. The actual size of the resource,  
16 the plant design, the output from the quarry,  
17 operating and capital expenditures, shipping rates  
18 and prices, that's all incorporated in our  
19 analysis.

20 If you turn to Slide 20, you  
21 will see this is a page of our analysis, and it  
22 shows who the individuals were from that earlier  
23 slide who contributed to verifying, when we did  
24 our due diligence, verifying, to verifying the  
25 reasonableness of these numbers.

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1 I am going to speak very  
2 briefly now about the tax equity adjustment.

3 So, again, as I understand the  
4 concept of full reparation and putting the  
5 claimants back in the position they would have  
6 been but for the breach, you need to make them  
7 whole.

8 When they operated the quarry  
9 in the but-for world, they would have paid taxes  
10 in Canada, they would have repatriated the money  
11 back to the US [REDACTED]

12 [REDACTED] They would have paid taxes  
13 but got credit for the Canadian taxes. As  
14 Mr. Forestieri has said, that tax rate is about [REDACTED]

15 So on a hypothetical million  
16 dollars, they would have retained [REDACTED] round  
17 numbers.

18 If they receive an award of a  
19 million dollars now, that award is net of the  
20 Canadian tax already, and so they are going to pay  
21 the US tax. The combination of those two, because  
22 there is no tax credit now for the Canadian taxes,  
23 leaves them with a deficit, leaves them with [REDACTED]  
24 out of the million. In order to put them on equal  
25

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1 footing, you need to gross up any award, because  
2 it's on an after-tax, after-Canadian-tax basis,  
3 you need to gross it up by about, well, by 148 per  
4 cent, 1.48, and that's a tax equity adjustment.

5 I also dealt with pre-award  
6 interest. Again, there's some differences, not  
7 necessarily on the rate or compounding versus  
8 simple interest which tribunals frequently have to  
9 hear different evidence on. Here, the pre-award  
10 interest difference between how Brattle and I deal  
11 with it is how do you deal with the investment  
12 period? I choose to deal with it one way; Brattle  
13 chooses to deal with it a different way. Brattle  
14 feels I am in error. I am happy to answer  
15 questions about that.

16 And finally -- I see I have  
17 about four minutes left. Finally, I provide this  
18 summary of approach and methodology. It's several  
19 pages long. Again, if the tribunal in their  
20 deliberations -- it's actually five or six pages  
21 long, seven pages long. If the tribunal, in their  
22 deliberations, wanted to see how the experts  
23 stacked up on more granular level of differences,  
24 this is where we have a colour-coded chart. Where  
25 Brattle and I agree, it is green. Where Brattle

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1 and I completely disagree, it's red. And where we  
2 have a slight disagreement or disagreement that is  
3 small in quantum, I have coloured it orange or  
4 yellow. So it will help the tribunal going  
5 through the evidence and the positions of the  
6 experts. And as you are going through these  
7 issues one by one, you can say, well, you know  
8 what, I prefer the evidence of Brattle over FTI or  
9 FTI over Brattle, it will allow you to isolate  
10 these differences.

11 It's in quite a bit of detail,  
12 and I am sure Brattle will have a chance to review  
13 this in the next few hours while I am in  
14 cross-examination, and if there are any  
15 corrections to be made, I am sure they will bring  
16 it up in their presentation. But I have tried to  
17 be as completely transparent as possible in  
18 describing the relative positions of the two  
19 experts and just colour coding to assist the  
20 tribunal.

21 And I thank you, those are my  
22 comments.

23 PRESIDING ARBITRATOR: Thank  
24 you, Mr. Rosen.

25 So the floor goes to

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1 Mr. Spelliscy for cross-examination.  
2 CROSS-EXAMINATION BY MR. SPELLISCY:

3 Q. Good morning, Mr. Rosen.

4 A. Good morning.

5 Q. I had one question for  
6 you, or clarification with respect to your  
7 statement that you were not making any  
8 corrections.

9 You were here during the  
10 testimony where Mr. Morrison corrected his  
11 shipping rates; is that right?

12 A. I was, yes.

13 Q. And you are not  
14 correcting your report to reflect the correction  
15 he made; is that right?

16 A. I can. It's less than 1  
17 per cent, I can make that correction. I was  
18 waiting to be asked about it to give a more  
19 precise result.

20 Q. You were asked if you  
21 were going to make any corrections. Are you  
22 making that correction or not, Mr. Rosen?

23 A. Certainly. You can  
24 subtract about 2.7 million from the 308 million.  
25 That is the effect.

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1 Q. Okay.

2 A. I have actually got the  
3 number written on the inside of my presentation.

4 Q. So you are making that  
5 correction to your statement?

6 A. Agreed.

7 Q. I would like to turn  
8 first to your statement and your theory. So you  
9 say you began your analysis by calculating the  
10 discretionary after-tax cash flows of Whites  
11 Point, and then you calculated the money that the  
12 investors would have received because the profits  
13 represent money available for distribution to the  
14 investors. And you rely on the witness statement  
15 of Mr. Forestieri to -- in order to calculate what  
16 would, in your words, put the investors back into  
17 the position they would have been absent the  
18 breach.

19 I am going to look at some  
20 documents quickly so I can ask you some questions.  
21 They are in the binder in front of you. They are  
22 confidential documents. I will not ask about the  
23 confidential parts in an effort to remain in  
24 public session, and so we are not going to put  
25 them up on the screen.

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1 --- REPORTER'S NOTE: Claimants held up  
2 confidential sign.

3 BY MR. SPELLISCY:

4 Q. The first is, let's come  
5 to Mr. Forestieri's explanation of what he is  
6 doing, and it's at paragraph 28, which is at  
7 Tab 20 in the binder in front of you.

8 A. Sorry, paragraph 28?

9 Q. Paragraph 28. And we are  
10 not going to look at the first sentence, which has  
11 been designated confidential. We are simply going  
12 to look at the second sentence, which is public:

13 "Bilcon of Delaware is  
14 the sole shareholder of  
15 Bilcon of Nova Scotia.  
16 The investors, William  
17 Clayton, Douglas Clayton  
18 and Daniel Clayton that  
19 Mr. Forestieri then  
20 defined as a  
21 shareholder/investors --  
22 are the sole shareholders  
23 of Bilcon of Delaware and  
24 have been throughout."[as  
25 read]

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1 Do you see that?

2 A. I do.

3 Q. And then in paragraph 29,  
4 which again we won't pull up and we won't discuss  
5 the substance, so we can stay public, but you will  
6 agree with me here that throughout his  
7 calculation, he is referring to the  
8 shareholders/investors which he has defined to be  
9 the three younger Claytons; correct?

10 A. I believe that's correct.

11 Q. Now, Mr. Rosen, in your  
12 theory where you say you are calculating the  
13 distributions and the tax gross-up that you say  
14 the investors should receive, you have used a  
15 different definition of the investors; have you  
16 not?

17 A. If you can point me to  
18 it, I can acknowledge it.

19 Q. Let's come to  
20 paragraph 1.1 of your first report.

21 A. So is that in your binder  
22 or do I need that separately?

23 Q. I expected your own  
24 counsel to give you your reports. If he has  
25 not --

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1 MR. NASH: We have been  
2 following the practice of putting the expert  
3 reports of the other side into our  
4 cross-examination binders.

5 MR. SPELLISCY: That's fine.

6 THE WITNESS: I now have it,  
7 Mr. Spelliscy.

8 BY MR. SPELLISCY:

9 Q. So turn to paragraph 1.1.

10 A. The first report?

11 Q. The first report.

12 A. Yes.

13 Q. So your definition here  
14 in your first report of investors includes another  
15 individual, Mr. William Ralph Clayton; correct?

16 A. Correct.

17 Q. So, Mr. Rosen, you would  
18 agree with me that you have seen no evidence  
19 whatsoever that Mr. William Ralph Clayton is  
20 entitled to any distributions or any tax gross-up  
21 as a result of damages awarded to Bilcon of Nova  
22 Scotia; correct?

23 A. I would agree.

24 Q. Perhaps you can tell me,  
25 Mr. Rosen, on what basis, as an independent expert

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1 here to advise this tribunal as to what it should  
2 award, how you could possibly include Mr. William  
3 Ralph Clayton in your calculation of what the  
4 investors should receive in this case?

5 A. I just took the style of  
6 the claim. Mr. Ralph, William Ralph Clayton is  
7 included in the style of the claim, and so it was  
8 simply included.

9 Q. And, yet, you took it in  
10 the style of the claim, and then you concluded,  
11 your conclusion is this money should be awarded by  
12 the tribunal to the investors, and that includes  
13 Mr. Clayton Senior, who you now acknowledge  
14 doesn't have any right to any of these  
15 distributions on your theory; isn't that right?

16 A. On the basis of the  
17 Bilcon of Nova Scotia, Bilcon of Delaware and the  
18 shareholders of Bilcon of Delaware, that is  
19 correct. This was, again, there's no economic  
20 impact of him being included or not. I simply  
21 picked up the names from the style.

22 Q. There's no economic  
23 impact to the total of your value, but there is an  
24 impact on the decision of this tribunal whether to  
25 award him damages under your theory; correct?

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1 A. That would be a legal  
2 matter, but as a layperson, it sounds right.

3 Q. And so you included that  
4 because the claimants instructed you to include  
5 it?

6 A. I believe when they  
7 provided me with the award on jurisdiction and  
8 liability, I think this is the style of the claim,  
9 so I just took it from that.

10 Q. The style of the claim.  
11 And you didn't look behind that to see whether the  
12 people that you were telling this tribunal in your  
13 independent opinion should be awarded damages  
14 actually should be awarded damages under your own  
15 analysis, you didn't verify that?

16 A. Again, there is no  
17 economic impact to that. I just simply took the  
18 names off the cover of the decision.

19 Q. That's not my question,  
20 Mr. Rosen.

21 You didn't verify that the  
22 people you say should be awarded damages actually  
23 should be awarded damages?

24 A. I assumed they were the  
25 same, and apparently that was an error.

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1 A. I think it is a legal  
2 question. I think it's also one of economics.  
3 And I have done some, you know, I have been doing  
4 this a long time, and I have presented before many  
5 tribunals. And I have done a lot of reading on  
6 the subject, and I have my own opinion; but,  
7 ultimately, it is a matter for the tribunal to  
8 decide, certainly not me.

9 Q. So it is a legal thing.  
10 You would agree with the statement that,  
11 ultimately, the appropriate valuation date is a  
12 question that's to be decided by the tribunal?

13 A. Yes.

14 Q. Therefore, you should not  
15 be expressing an opinion on it; correct?

16 A. I think as a quantum  
17 expert, I can tell you from an economic  
18 perspective what I think achieves the standard  
19 that this tribunal has to deal with. But, as I  
20 said, ultimately that decision rests with them and  
21 only them.

22 Q. And only them. I am not  
23 sure I understand, Mr. Rosen. So you accept that  
24 it is a legal question. You accept that it rests  
25 with the tribunal, and yet you did not take an

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1 Mr. William Ralph Clayton is not a shareholder of  
2 Bilcon of Delaware.

3 Q. Let's move to another  
4 area, Mr. Rosen. I would like to discuss, first,  
5 dates at which you valued the lost profits of  
6 Bilcon of Nova Scotia.

7 Now, I want to turn first,  
8 particularly in light of your presentation, to  
9 paragraph 1.15 of your first report, which can be  
10 found on page 4.

11 A. Yes, I am with you.

12 Q. Okay. You say in the  
13 second sentence here that you are not offering  
14 opinions on legal matters. And I think you said  
15 that this morning as well; do you see that?

16 A. Yes.

17 Q. So I need to clarify with  
18 you, Mr. Rosen, were you instructed to undertake  
19 your valuation as of December 31st, 2016?

20 A. Was I instructed to, no.  
21 I chose that date.

22 Q. So you would not agree  
23 with me, Mr. Rosen, that the appropriate date on  
24 which an arbitral tribunal should value loss is a  
25 legal question?

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1 instruction on using December 31st, 2016?

2 A. Whether to use the date  
3 of the breach or a current date, I made that  
4 decision on my own, yes.

5 Q. So you made the decision  
6 on your own on what you say now is essentially a  
7 legal question for this tribunal, even though you  
8 are not a legal expert?

9 A. Certainly the lawyers  
10 that retained me did not instruct me which to do.  
11 There has been a lot of debate and a lot written  
12 about this. It's been discussed at conferences  
13 and in books and in cases. I have been involved  
14 in cases when the valuation date was subsequent to  
15 the date of the breach, so this was a matter, from  
16 my point of view, of an interpretation of the  
17 economics of full reparation. And I am sorry, I  
18 am not trying to be disrespectful; it's a bit of  
19 an odd angle here.

20 So I took that upon myself,  
21 but certainly, I discussed this with counsel. And  
22 they did not say, no, you can't do that, you must  
23 do another date, you must choose a different date.  
24 They left that to me to decide.

25 Q. In your second report



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1 now, Mr. Rosen.

2 A. Yes.

3 Q. In paragraph 3.7 --

4 A. Yes.

5 Q. -- you say here that you  
6 were instructed by counsel that the breach in this  
7 case is a continuing breach and, therefore, that  
8 fed into your, what you say now, is your  
9 determination that lost profits as of the current  
10 breach is appropriate.

11 So just for me to clarify,  
12 your analysis here depends on the assumption that  
13 the tribunal has found a continuing breach in this  
14 case?

15 A. Well, it says  
16 "furthermore", so I have made some decisions that  
17 I think rest in economic principle of full  
18 reparation, and, furthermore, counsel has  
19 instructed me, so on top of that, that this breach  
20 has not been cured and it remains a breach to  
21 today's date. And that was the instruction at  
22 that time. From that, what I interpreted was that  
23 the information during this period, where the  
24 breach had not been cured, was relevant. That may  
25 or may not have been correct from a legal

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1 perspective; that's simply how I interpreted it.  
2 But that was not the determining factor.

3 Q. Okay, but you took an  
4 instruction that the breach was a continuing  
5 breach, and that wasn't determinative, but it  
6 played into what your decision on the appropriate  
7 valuation date should be?

8 A. As we can see in the  
9 first report, I already made a decision from an  
10 economic perspective on how you would achieve full  
11 reparation. And I was responding here, and I  
12 haven't read the whole section 3 in context, but I  
13 imagine I am responding to Brattle's approach of  
14 using a different date, and so I am trying to  
15 buttress the argument and more fully explain what  
16 I understand. But that had been chosen in the  
17 first report. So, certainly this was not  
18 determinative of my approach.

19 Q. Let's come back to that  
20 first report, then. So at paragraph 4.3, which is  
21 on page 13, you can turn to it although I think  
22 you discussed it already here today because you,  
23 in your presentation, you explain that your  
24 analysis is comprised of two elements, past loss  
25 profits from January 1st, 2008, to December 31st,

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1 2016, and future lost profits from that date  
2 forward. And you've said in your presentation  
3 this morning that you have chosen December 31st,  
4 2016, as a proxy for the date that the damages  
5 award is rendered.

6 A. Correct.

7 Q. Now, here, in  
8 paragraph 4.3, what you say is you have brought  
9 the past lost profits forward to the award date  
10 and you have discounted what you call the future  
11 lost profits to the award date; that was your  
12 approach?

13 A. Essentially, yes.

14 Q. Now, you undertook in  
15 your reports to update your reports and valuations  
16 if new information became available; correct?

17 A. Did I reserve the right  
18 or did I undertake?

19 Q. I think you probably  
20 reserved the right. You reserved the right to  
21 change that?

22 A. Yes, that's generally the  
23 language we use, yes.

24 Q. And you didn't exercise  
25 that right, you didn't update your reports at any

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1 time; did you?

2 A. You are talking about the  
3 date, the valuation date?

4 Q. I am talking about the  
5 information in the market, the valuation date,  
6 your valuation date, it is still done as of -- in  
7 fact, done as of, if I am right, November 15th,  
8 2016, is the last bit of market information used;  
9 correct?

10 A. Yeah, I mean, I did not  
11 redo the calculations for the second report to  
12 update the passage of time. This is -- it's a  
13 matter of practicality. You could update your  
14 calculations quarterly until the hearing. You  
15 could continue to update them, anticipating an  
16 award. It's a very expensive process for the  
17 claimant. And, again, the tribunal has in the  
18 past and is always free to instruct quantum  
19 experts to update their calculations because we  
20 just don't know when the date of the award is. So  
21 that's simply a proxy for some current time.

22 Q. So your valuation, then,  
23 is based on facts in existence at a point  
24 relatively close to the date when you submitted  
25 your first expert report; accurate statement?

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1 A. Broadly speaking, I  
2 mean, if something disruptive in the marketplace  
3 had happened, I probably would have -- I think I  
4 would have noted that, but broadly speaking,  
5 that's correct.

6 Q. Something disruptive in  
7 the marketplace. You have submitted no new  
8 valuation of the tax adjustment based on the new  
9 US tax laws; have you?

10 A. Well, that's an  
11 interesting topic. That's very recent. I don't  
12 think it's a law yet, but, again, I am not a  
13 lawyer.

14 Q. You don't think the US  
15 tax laws are a law yet? I am not a -- you know,  
16 I'm not a US tax lawyer, but I have certainly seen  
17 the news reports.

18 A. I have seen the news  
19 reports that it has been passed in the House, but  
20 I don't know if it's been enacted yet. And,  
21 certainly from the people I have spoken to, the  
22 effect of these tax changes is not perfectly well  
23 understood. Some of the people I have spoken  
24 to -- again, there is no evidence on this, but I  
25 did check to see if it would have, one of the

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1 things that occurred to me, would this have a  
2 material impact on the tax gross-up calculation.  
3 And I think you questioned Mr. Forestieri about  
4 this, and his information is on the record, but  
5 it's, again, broadly speaking, consistent with  
6 what I have heard, some rates have been lowered,  
7 some deductions have been eliminated. No one's  
8 certain if it's going to be exactly the same, but,  
9 in this particular case, the speculation is it  
10 will be broadly the same, but in terms of  
11 performing damages calculations, the approach I  
12 think most practitioners adopt is you deal with  
13 the legislation that's in place at the time  
14 because with every new government, there's always  
15 going to be tax changes.

16 Q. Mr. Rosen, you told us  
17 that you are thinking of as, as of the award date  
18 and you need to take into account the situation as  
19 of the award date. And you say there is always a  
20 possibility of tax change. That is true. But you  
21 didn't, you haven't done an analysis to see if  
22 your tax rate calculation, which you say, I think,  
23 would offer up to \$140 million in damages, is, in  
24 fact, still accurate at all to this tribunal; have  
25 you? You haven't done that analysis?

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1 A. As I said, I have availed  
2 myself of tax experts to inquire. I have not had  
3 the opportunity, because it is very recent, to  
4 submit more materials in this arbitration. So  
5 anything I can tell you is anecdotal by -- of what  
6 tax experts have told me. There is no evidence  
7 before this tribunal, so I would not offer an  
8 opinion. I can only tell you anecdotally what has  
9 been told to me by experts, but I wouldn't hold  
10 that out as an expert opinion. The information I  
11 received is there is no material difference, but  
12 there is no evidence on the record about that,  
13 other than what I have just said and, I believe,  
14 what Mr. Forestieri said.

15 Q. Let's turn to Tab Number  
16 13 of the binder, Mr. Rosen. This is transcript  
17 from day 2 of this hearing, and it is a transcript  
18 of Mr. Forestieri, among others. Turn in here to  
19 page 404. I am looking at line 6 through 15.

20 A. 404, line?

21 Q. It's mini book, so 404,  
22 line 6 through 15.

23 A. Yes, I have it.

24 Q. And I believe you just  
25 said, "The information I have received is there is

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1 no material difference, but there is no evidence  
2 on the record other than that and what  
3 Mr. Forestieri says".

4 So here is what Mr. Forestieri  
5 said, Mr. Rosen. The question:

6 "The change in the code  
7 does not change this  
8 analysis?

9 "ANSWER: I could not  
10 even speak to the change  
11 in the code at this  
12 moment."[as read]

13 Did you consider that, in  
14 giving your evidence today, that the tax gross-up  
15 is still \$140 million and will be as of the award  
16 date when you suggest that this tribunal should  
17 value the lost profits?

18 A. I will say two things  
19 about that: one, that you have quoted one Q&A  
20 selectively, and we can read through where  
21 Mr. Forestieri says he doesn't believe it's any  
22 change. He said he is not a tax expert -- if I am  
23 recalling his evidence, he said, "Look, I am not a  
24 tax expert. I rely on [REDACTED]. I think they  
25 told me there's no material change". I think

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1 that's the substance of what he said. We can read  
2 it.

3 And I'd also say, again,  
4 because something potentially disruptive,  
5 potentially disruptive, has happened, this  
6 tribunal is free to instruct the quantum experts,  
7 because we haven't had a chance to offer evidence  
8 to this tribunal, to take that into account in  
9 assisting it with a final award.

10 Q. So we should come back  
11 for another hearing so that we can ask you  
12 questions, and we should redo this thing because  
13 of your solution of using the current award date  
14 valuation; correct?

15 A. No, not at all. Not at  
16 all. And I don't think that's a fair  
17 characterization of what I said or what I mean.

18 What I simply said is and  
19 what's happened in other tribunals is there is a  
20 particular question the tribunal is concerned  
21 about and they say, "I am giving it to both  
22 experts. You two go away and you meet. You are  
23 both reasonable people, these are facts. Make the  
24 calculation. Submit it to counsel. Counsel will  
25 submit it to the panel, we can decide if it's

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1 relevant or not".

2 Once the tax law changes are  
3 known better, that can be done. That's -- we  
4 don't have to reconvene. It can simply be  
5 submitted. And this is what's happened in the  
6 past.

7 Q. You would agree with me,  
8 Mr. Rosen, that the past lost profits that you  
9 quantify were not actually earned by Bilcon of  
10 Nova Scotia; correct?

11 A. Correct, correct, that's  
12 the counterfactual, that's the but-for world.

13 Q. So when we looked at your  
14 paragraph earlier, and you would agree with me  
15 that, in your approach, you actually do not apply  
16 a discount rate to those lost profits; correct?

17 A. Nor would it be  
18 appropriate to --

19 Q. Just answer my question.  
20 We can get to your model. You can get to it on  
21 redirect. I am just asking whether you did apply  
22 a discount rate.

23 A. Well, you wouldn't apply  
24 a discount rate to something that has happened in  
25 the past. You incorporate actual evidence of the

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1 market, and that factors in the risk. A discount  
2 rate implies a future event.

3 Q. That's a future event,  
4 right.

5 So I want to understand that a  
6 little bit, because as we have just discussed,  
7 then, the dividing line for your discounted  
8 profits and your non-discounted profits is a date  
9 that just happened to be a date close to when you  
10 filed your first report under the schedule created  
11 by this tribunal; correct?

12 A. Yes, and as explained, it  
13 should be the date of the award if, in theory, if  
14 you can incorporate all of the risks that are  
15 known in the marketplace to that date. Simply  
16 when you are writing a report in 2016, you don't  
17 know, and so you can only incorporate information  
18 in the marketplace to that date. This is the  
19 common way that quantum experts deal with these  
20 issues.

21 Q. I want to understand  
22 this, Mr. Rosen. So you are aware, are you not,  
23 that the tribunal decided to bifurcate these  
24 proceedings between liability and damage; correct?  
25 A. Correct.

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1 Q. And you are aware,  
2 Mr. Rosen, that the claimants filed their original  
3 memorial and expert reports on July 25th, 2011;  
4 are you aware of that?

5 A. I don't know the exact  
6 date, but I will take your word for it.

7 Q. Okay. And so if this  
8 case had not been bifurcated and you had prepared  
9 your report then, the cash flows that you  
10 calculated would have been future from July 2011  
11 rather than just July 2016; correct?

12 A. Correct.

13 Q. If we go to your first  
14 report at page 28. And if we are pulling it up,  
15 we should use the public version. There is a  
16 line, not in the chart, but there is a line at the  
17 top of the page that is confidential. We won't  
18 talk about that. We will stay in public session.

19 A. I am on page 28.

20 Q. You provide a chart of  
21 the discretionary cash flows you say would have  
22 been earned, and you divided it into the past loss  
23 profits and the future lost profits; right?

24 A. Correct.

25 --- REPORTER'S NOTE: Claimants held up

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1 confidential sign.

2 BY MR. SPELLISCY:

3 Q. So if, in fact, this case  
4 had not been bifurcated, then what happens, on  
5 your approach, is that the past lost profits from  
6 2011 to 2016 move over to the future lost profits  
7 item; correct?

8 A. Correct, by definition.

9 Q. By definition. So that's  
10 \$83 million that you have calculated of future  
11 lost profits and which was not discounted which is  
12 now being discounted if this tribunal had not  
13 decided to bifurcate this case; correct?

14 A. For very good reason.

15 Q. I understand that, but  
16 just, correct, that is what happened?

17 A. Yes, that is mechanically  
18 what happened.

19 Q. That is mechanically what  
20 happened. And mechanically what happened is the  
21 only thing that becomes not discounted is the  
22 negative lost profits in the first three years;  
23 correct?

24 A. Yes, but understand, you  
25 are not just moving these numbers to the right

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1 into that column. These are based on actual  
2 prices in the marketplace. And so we wouldn't  
3 have known the actual prices in the marketplace.  
4 We would have been based on forecasted prices, and  
5 that's the reason they would have been discounted.  
6 So, and I know that's not what you asked me, but  
7 you implied that those numbers would simply go  
8 into a different column. They would be different  
9 numbers.

10 Q. Mr. Rosen, take a  
11 hypothetical with me.

12 A. Sure.

13 Q. On your theory, there  
14 could be two investments of exactly equal value.  
15 They are affected, let's say, in exactly the same  
16 way by exactly the same unlawful measure at  
17 exactly the same time and each brings a claim to  
18 investment arbitration, same treaty.

19 A. I understand.

20 Q. One case, the tribunal  
21 happens to be busier and adopts a slower schedule,  
22 and it renders its award two years later than the  
23 other.

24 So, so that I understand, and  
25 I believe this is what you are saying, your

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1 opinion is that the investor who happens to get  
2 the slower tribunal receives a higher award,  
3 because the lost profits are only discounted back  
4 to the award date, than the investor who gets the  
5 slower tribunal; that's what you are saying?

6 A. No, that's completely  
7 inaccurate, that's completely inaccurate. Because  
8 what you fail to take into account, again, you can  
9 always theorize these things in a static  
10 environment. Your theory depends on the fact that  
11 when you move the valuation date, nothing  
12 happened. No new facts became known. So look at  
13 your valuation in 2007. In 2008 was the beginning  
14 of the massive global recession. Let's say in the  
15 two years in your hypothetical, that happened.  
16 The one with the slower tribunal would have  
17 received substantially less and maybe no damages  
18 if they were in the financial institution  
19 industry. It's a completely different thing. You  
20 are taking actual market data into account to  
21 determine what the claimants would have received  
22 as opposed to guessing at the earlier date of the  
23 breach. That's simply the difference of approach.

24 Q. You are only talking  
25 about price, Mr. Rosen; right?

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1 A. I am talking about  
2 everything. Costs could have changed, fuel costs  
3 could have changed.

4 Q. But we don't know,  
5 Mr. Rosen, what the cost of the Whites Point  
6 Quarry would have been, in reality?

7 A. And there again, we  
8 disagree about what the word "know" means. We  
9 don't know with certainty because it was never  
10 built. That I will agree with. That's reasonable  
11 and it's common sense. But what do you do when  
12 you buy a business or you start a new business or  
13 you open -- let's say you had a quarry and wanted  
14 to open another quarry. You make reasonable  
15 investigations to determine costs, and you verify  
16 them where you can. That's what people do all the  
17 time. Every investment decision is on that basis.

18 Q. So your past lost profits  
19 which you have not discounted for risk, because  
20 you say it was in the market, but your past lost  
21 profits assumed based on prices in the market, you  
22 say -- which we can come back to --

23 A. But --

24 Q. -- hold on -- based on  
25 past lost profits in the market also assumes



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1 construction, construction costs, operation,  
2 sales, all of those things are actually built into  
3 this based on evidence that you've seen prepared  
4 by the claimants in this arbitration as opposed to  
5 evidence in the actual world; right? Because we  
6 are in a but-for hypothetical world; isn't that  
7 right?

8 A. So that was a long  
9 question, so let me just unpack what you said and  
10 agree with most of it.

11 So we are in a hypothetical  
12 world, and it does depend on the claimants being  
13 able to execute their business plan, as we think  
14 we have reasonably diligenced, but it's not a  
15 known number, so I will agree with you.

16 The thing I disagree with is  
17 you say you haven't discounted, there is no risk  
18 in the number. The risk is in the number because  
19 you have used market data. So I just want to make  
20 sure we are clear about that. But other than  
21 that, I agree with your --

22 Q. There is no risk in this  
23 number that Bilcon of Nova Scotia would not be  
24 able to sell what it said it was going to sell  
[REDACTED] correct?

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1 A. They never actually sold  
2 it. [REDACTED]

3 [REDACTED] Again, when you reasonably  
4 diligence that, is it convincing or not, the  
5 tribunal has to decide. From my point of view, it  
6 met that standard that I was convinced.

7 Q. Met that standard that  
8 there was, again, my question, no risk in this  
9 number that Bilcon of Nova Scotia would not be  
10 able to sell what it said it was going to sell [REDACTED]

11 [REDACTED]  
12 A. Again, we disagree. You  
13 are sort of stuck on it has to have a discount  
14 rate. I am saying if it reflects actual market  
15 information. Stone's being sold, prices are  
16 established, ships are going. To me, that's  
17 evidence in the marketplace. That reflects the  
18 risk.

19 Q. Mr. Rosen, you would  
20 agree with me that it doesn't, that these numbers  
21 here do not affect -- do not actually reflect  
22 marketplace information of any purchases by [REDACTED]  
23 [REDACTED] You just said, I thought, that  
24 we are aware that, in fact, [REDACTED]  
25

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1 [REDACTED]  
2 A. But you said any, any  
3 [REDACTED] So, again,  
4 the evidence was that [REDACTED]

5 [REDACTED]  
6 [REDACTED] Mr. Dooley gave evidence on that. I  
7 was convinced by his explanations and  
8 understanding of the marketplace and in speaking  
9 with Mr. Wick and his understanding of the  
10 marketplace that that was a reasonable explanation  
11 why there was that delta, why there was that  
12 difference.

13 Q. So we --

14 A. So when you said there is  
15 no evidence of that and there is no risk, you and  
16 I disagree.

17 Q. You will agree with me,  
18 you will agree with me, I think you just did, that  
19 what you did was not look at what [REDACTED]  
20 [REDACTED] and then accepted  
21 the evidence of Mr. Dooley and Mr. Wick to assume  
22 that [REDACTED]  
23  
24  
25

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1 [REDACTED]  
2 correct?

3 A. Based on the evidence of  
4 Mr. Dooley and Mr. Wick, I think Mr. Lizak also  
5 weighed in on that issue, but, yes, based on my  
6 understanding and their explanations to me, I was  
7 satisfied from a commercial perspective that it  
8 was reasonable to assume that, yes.

9 Q. And you factored in no  
10 risk that that assumption was wrong in these  
11 numbers, the past lost profits numbers, no risk  
12 the assumption was wrong in these numbers? That's  
13 my question.

14 A. No, you can't say there  
15 is no risk in that number. It's based -- the risk  
16 is reflected in [REDACTED]

17 [REDACTED] And so the  
18 explanations made sense. They rang true  
19 commercially. You can't say they are devoid of  
20 risk. They are certainly not certain, but they  
21 are reasonable. So they are not devoid of risk.  
22 [REDACTED] And, again, the  
23 prices are the other half of the equation that  
24  
25



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1 reflects the risk.

2 Q. Sorry, Mr. Rosen, I still  
3 don't understand. You say they are not devoid of  
4 risk, they are not certain. But you would agree  
5 that by not applying -- you treated these profits  
6 as 100 per cent certain for Bilcon of Nova Scotia.  
7 You have not reflected -- you said this is a  
8 marketplace, this is actual marketplace, but you  
9 have said also that, in fact, it's an assumption,  
10 it's an assumption that you have accepted based  
11 upon Mr. Wick, Mr. Lizak, Mr. Dooley, that [REDACTED]

14 My simple question is, there  
15 is nothing in here, because you have not  
16 discounted, that reflects that there is any risk  
17 associated with those assumptions coming true;  
18 isn't that right?

19 A. No. That's not. And,  
20 again, I think we are talking at cross-purposes.

24 then you could fairly say, "Mr. Rosen, it's a  
25 hypothesis, it never happened, there were no sales

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1 marketplace, I have looked at the delta, and the  
2 delta was small enough and the explanations were  
3 reasonable enough, sufficiently reasonable, from a  
4 commercial perspective, it satisfied what I  
5 thought was necessary. That's not a zero risk.  
6 That's not an imaginary sale. But I will agree  
7 with you, it does not have a discount rate applied  
8 to it because it occurs in the past, not in the  
9 future.

10 Q. It's not an imaginary  
11 sale. You will agree with me that this is --  
12 let's take your 2013 number, past lost profits.

13 A. Yes.

14 Q. You will agree with me,

15 [REDACTED]  
16 [REDACTED]; would you agree with that?

18 A. Yes, I agree.

19 Q. That's just a fact?

20 A. Factually correct.

21 Q. Now, I want to  
22 understand, because you said this is real  
23 marketplace data.

24 Can you turn to two paragraphs  
25 above, paragraph 5.19 in your first report.

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1 in the New York market. That's an unrisksed  
2 number, isn't it, and shouldn't you think about  
3 risking that number?"

4 And then I might say, "I  
5 looked at other things or there was nothing else  
6 to look at, you are correct, that's a completely  
7 unrisksed number". But in this case, the risk is  
8 reflected in the activities of the actual market.  
9 I know it's not the risk as you are defining it,  
10 and you are defining risk in terms of a discount  
11 rate, but understand what risk is. I mean, there  
12 is a clear definition, and I think maybe there is  
13 a little bit of a misunderstanding what risk is.  
14 And when I taught at the university, my students  
15 used to get this wrong too.

16 People think risk is a  
17 negative outcome, the probability of a negative  
18 outcome. That's not the definition of risk. The  
19 definition of risk is an outcome that you don't  
20 expect, either better or worse. Things could have  
21 been better, they could have been worse, that's  
22 risk.

23 So when you say you haven't  
24 reflected risk, I have reflected actual prices, I  
25 have looked at the actual sales of stone in the

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1 A. Yes.

2 Q. Here you write:

3 [REDACTED]  
4 [REDACTED] s  
5 [REDACTED]  
6 read]

7 A. Correct.

8 Q. Okay. So coming back to  
9 your chart, Figure 5.9.

10 A. Yes, I am there.

11 Q. I thought you just said  
12 to me a few minutes earlier that these prices  
13 reflect actual market price data. But, in fact,  
14 [REDACTED] isn't that right?

15 A. [REDACTED]

16 [REDACTED] I would  
17 have to go back to the documents to see what we  
18 looked at for actual. Let me just see... It says  
19 right there in paragraph 5.20, it says:

20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED] as read]



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1 Q. Which is what I  
2 understood, Mr. Rosen, but I am trying to  
3 understand your testimony that you just gave that  
4 numbers in the past lost profit column actually  
5 represented actual prices. So that's not true, at  
6 least with respect to [REDACTED]; right?  
7 A. [REDACTED] would be based on  
8 [REDACTED], so those were  
9 not [REDACTED]; that's correct.  
10 Q. In fact, [REDACTED]  
11 [REDACTED]  
12 A. One year further out.  
13 Q. One year further out,  
14 but, in fact, it is not based on actual market  
15 data?  
16 A. Well, based on actual  
17 market data for [REDACTED]  
18 [REDACTED]  
19 Q. [REDACTED]. Okay, but  
20 you would agree with me on your explanation of why  
21 these items are in past lost profits, that at  
22 least [REDACTED] should be in the other column; wouldn't  
23 you?  
24 A. I mean, the one year and  
25 the discounting effect and the proximity of the

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1 Q. No, you said -- I am  
2 sorry, your answer was, it doesn't say [REDACTED].  
3 That was your answer on the record. Perhaps we  
4 have it wrong on the record.  
5 A. No, I just think we were  
6 talking at cross-purposes.  
7 There is no [REDACTED]  
8 [REDACTED]. So all I said was, what it was based on,  
9 it's [REDACTED]. It's just  
10 [REDACTED]. It is not [REDACTED]  
11 Q. That number is exactly  
12 the same, though, as [REDACTED],  
13 it's calculated in exactly the same way; correct?  
14 A. [REDACTED]  
15 [REDACTED] yes.  
16 Q. So it's not a [REDACTED]  
17 [REDACTED]; correct?  
18 A. Correct.  
19 Q. Mr. Rosen, you also say  
20 in your report that you took it as an instruction  
21 that, absent the breaches, the investors would  
22 have constructed and operated a quarry and marine  
23 terminal at Whites Point; correct?  
24 A. Yes.  
25 Q. So you don't have an

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1 prices, it's not a material difference.  
2 Q. I am not asking whether  
3 it's a material difference. I am asking whether  
4 your report is accurate, Mr. Rosen.  
5 A. I believe it's accurate,  
6 yes.  
7 Q. You believe it's accurate  
8 even though your explanation was that [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED] correct?  
12 A. It doesn't even say [REDACTED]  
13 [REDACTED]. It just says [REDACTED]  
14 [REDACTED]  
15 Q. Well, paragraph 5.19 says  
16 [REDACTED];  
17 does it not?  
18 A. Right, that's what I just  
19 said.  
20 Q. So it is a [REDACTED]  
21 [REDACTED] correct?  
22 A. Sorry, then I have  
23 misunderstood your question. I say [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

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1 independent opinion on that?  
2 A. Correct.  
3 Q. Let's, then, come back  
4 to, and we can discuss, and I think this is where  
5 we do need to ensure we go into confidential  
6 session.  
7 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT  
8 10:46 A.M.  
9 BY MR. SPELLISCY:  
10 Q. I want to begin with your  
11 analysis where you talk about calculating the  
12 discretionary after-tax cash flows that would have  
13 been generated from the Whites Point project. And  
14 you mention this in your presentation, and I think  
15 you are right, we have very different views on  
16 what the Whites Point project is.  
17 So let's try and see what some  
18 of those differences are.  
19 You would confirm for me, and  
20 we don't need to go there because I think there  
21 are parts designated confidential, but you would  
22 confirm for me that, in your summary of the  
23 project, in your first report, you provide a  
24 description, you cite the revised project  
25 description that Bilcon filed with regulators in



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1 late November 2006; correct?

2 A. Could you take me to that  
3 paragraph? I just want to make sure the cite is  
4 correct.

5 Q. Sure.

6 Again, we won't pull it up on  
7 the screen, but it is on page 10 of your first  
8 report, paragraphs 3.7 to 3.12.

9 A. So in the first paragraph  
10 there, it describes the physical characteristics  
11 and references to the revised project description,  
12 page 6.

13 Q. Right. And there are  
14 actually cites all the way throughout to certain  
15 parts of the reply as project description;  
16 correct?

17 A. Correct.

18 Q. You also cite in there to  
19 certain, and you say at the stage, to certain  
20 evidence prepared for the purposes of this  
21 arbitration; correct?

22 A. Yes.

23 Q. Now, in neither of your  
24 reports, Mr. Rosen, do you cite to a single other  
25 document other than the revised project

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1 description that was prepared by Bilcon prior to  
2 this arbitration arising; correct? Not one other  
3 document; is that right?

4 A. I am sorry, in my  
5 description of the project?

6 Q. In anywhere in your  
7 report, do you cite to a single other document  
8 contemporaneously prepared by Bilcon in 2000 --  
9 well, while the project was in its ordinary course  
10 of business before this dispute arose?

11 A. I haven't checked, but I  
12 am sure you have, so I will take your word for it.

13 Q. Turn to page 15 of your  
14 first report, paragraph 5.2.

15 A. Yes.

16 Q. You talk about that you  
17 calculated the discretionary tax flow -- or  
18 after-tax cash flows of Whites Point by  
19 considering, and you have got them, 13 different  
20 factors.

21 Given the time we have, we  
22 won't go through them all, but I would like to  
23 discuss some of them.

24 And I believe we are in  
25 confidential, so let's turn to Item B in your

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1 thing, which is how much aggregate was to be  
2 produced by the Whites Point Quarry.

3 You are aware, Mr. Rosen, that  
4 what we have heard this week is [REDACTED]  
5 [REDACTED] you are aware of  
6 that?

7 A. I am.

8 Q. And since you have been  
9 sitting here, you are aware that what the  
10 claimants said about [REDACTED] in their opening  
11 argument -- you can see it at Tab 12 of your  
12 binder if you want, page 68 at that tab, line 17  
13 to 19, that [REDACTED]  
14 [REDACTED]

15 A. Tab 12, which one?

16 Q. Tab 12, page 68. Just an  
17 excerpt of this. We didn't print out all 300  
18 pages.

19 A. This is Mr. Nash's  
20 opening?

21 Q. Mr. Nash's opening, the  
22 claimants' representation to this tribunal.  
23 If you look at lines at the

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1 end, he is talking about [REDACTED] George  
2 Bickford, you'll see in the middle paragraph  
3 there, says:

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED] [as read]  
7 He says at the last sentence  
8 in that middle paragraph:  
9 [REDACTED]  
10 [REDACTED] as  
11 read]  
12 Do you see that?  
13 A. I do.  
14 Q. Were you here for the  
15 testimony of Mr. Bickford, Mr. Rosen?  
16 A. I was.  
17 Q. And you heard  
18 Mr. Bickford then say, in response to a question  
19 about whether or not [REDACTED]  
20 [REDACTED]; do you recall  
21 that? You can turn to Tab 14 in your binder if  
22 you'd like.  
23  
24  
25



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1 A. Sure, I remember words to  
2 that effect, but I don't want to -- which page  
3 would you like to direct me to?  
4 Q. Tab 14, which is day 4,  
5 the page is 1173.  
6 A. He notes that it was  
7 [REDACTED]  
8 Q. He notes it was  
9 [REDACTED] in his answer. He is  
10 asked a question:  
11 "So it's your testimony  
12 you and Mr. Wall had  
13 [REDACTED]  
14 He says:  
15 "Correct. [REDACTED]  
16 [REDACTED] as read]  
17 Right?  
18 A. Right. But then he  
19 qualifies it by saying there weren't [REDACTED]. So I  
20 think he was [REDACTED]. I --  
21 Q. Sure. [REDACTED]  
22 [REDACTED]; right?  
23 A. Well, I don't know what  
24  
25

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1 working together closely with Mr. Buxton; correct?  
2 A. Correct.  
3 Q. And you heard Mr. Buxton  
4 confirm that this week as well. It is at the same  
5 tab in your binder if you want to look, page 1232,  
6 21 to 23.  
7 A. 1232?  
8 Q. 1232. It says --  
9 A. Sorry, which line?  
10 Q. Line 21, and the  
11 question:  
12 "And you worked with John  
13 Wall on the Whites Point  
14 project throughout?  
15 "Yes, I did." [as read]  
16 Do you see that?  
17 A. Yes.  
18 Q. And since you were here  
19 for Mr. Clayton's testimony, you also heard his  
20 testimony that, by 2006, Mr. Buxton and Mr. Wall  
21 were actually working together in the same office  
22 in Digby, Nova Scotia; do you recall that?  
23 A. I do recall that, and I  
24 remember that from my own discussions with him.  
25 Q. So you accept all this

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1 he meant. You would have to ask Mr. Bickford what  
2 he meant. But, certainly, it was a [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 Q. And you were here for  
7 Mr. Clayton's testimony, Mr. Rosen?  
8 A. I was.  
9 Q. And you heard him confirm  
10 this week that Mr. Wall, who we just -- he  
11 referenced there, was the quarry operator and that  
12 Mr. Clayton considered him highly capable;  
13 correct, you recall that?  
14 A. Yes, yes, and I met with  
15 Mr. Wall, and I would add, I would add agreement  
16 to that point.  
17 Q. And in preparing your  
18 opinion, then, you were aware of Mr. Wall's  
19 testimony that in his preparation of [REDACTED]  
20 [REDACTED] are you aware of that?  
21 A. I am.  
22 Q. And you, in preparing  
23 your evaluation, you reviewed his testimony, so  
24 you are familiar with his testimony that he was  
25

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1 evidence and testimony as true; correct?  
2 A. Correct.  
3 Q. So you accept that, by  
4 the middle of 2006, Mr. Wall, Mr. Buxton, working  
5 closely together, both in the same office, and  
6 they had [REDACTED] right?  
7 [REDACTED]  
8 A. Subject to the [REDACTED]  
9 [REDACTED] that's semantics, but [REDACTED]  
10 [REDACTED], I would agree with you.  
11 Q. And you heard Mr. Buxton  
12 confirm in testimony as well that it was him who  
13 prepared the environmental impact statement and  
14 commissioned the relevant study; do you recall  
15 that?  
16 A. From Mr. Buxton, yes, I  
17 recall that.  
18 Q. So I want to come to the  
19 revised project description, which is at Tab 1 of  
20 your binder, the one that you did say you looked  
21 at and relied upon.  
22 A. Yes.  
23 Q. It is Exhibit R-581, for  
24 the record. You see from the front of this  
25 document, it's dated, the very first page,



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1 November 2006; correct?  
 2 A. Correct.  
 3 Q. So you will agree with  
 4 me, then, given what we just went through, that  
 5 this EIS was submitted by Bilcon of Nova Scotia to  
 6 the joint review panel months after Mr. Wall and  
 7 Mr. Buxton, again, working closely together in the  
 8 same office, with the [REDACTED] in  
 9 [REDACTED] hand; correct?  
 10 A. Other than some of the  
 11 adjectives that you added there, gratuitously, I  
 12 would agree with that. They were working together  
 13 at that time.  
 14 Q. They were working  
 15 together in the same office; right?  
 16 A. Correct.  
 17 Q. Let's go to page 24 of  
 18 R-581 to see how in this context, Mr. Buxton and  
 19 Mr. Wall described the Whites Point project under  
 20 the heading "The Project".  
 21 A. Yes.  
 22 Q. Okay. Look at the first  
 23 sentence, what it said, what Mr. Buxton wrote to  
 24 the JRP:  
 25

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1 production and shipment  
 2 of all aggregates is 2  
 3 million tons."[as read]  
 4 Do you see that?  
 5 A. Yeah, actually, this is  
 6 where I was going to go, this exact paragraph.  
 7 Q. Okay. Let's look at just  
 8 one more part of this, it says:  
 9 "Bilcon noted the  
 10 capacity of the  
 11 production line will be  
 12 48,000 tons per week."[as  
 13 read]  
 14 Do you see that?  
 15 A. I do.  
 16 Q. And you will recall  
 17 Mr. Buxton just a few days ago confirmed here to  
 18 this tribunal that the word "capacity" referred to  
 19 the maximum production output for the plant; do  
 20 you recall that?  
 21 A. I do.  
 22 Q. If the capacity of the  
 23 production line is 48,000 tons per week,  
 24 Mr. Rosen, and it operated at the capacity of 40  
 25 weeks, like you assumed, it could not produce more

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1 "The Whites Point Quarry  
 2 is a small basalt rock  
 3 quarry designed to  
 4 produce 40,000 tons of  
 5 aggregate per week,  
 6 approximately 2 million  
 7 tons per year over a  
 8 50-year project life."[as  
 9 read]  
 10 Do you see that?  
 11 A. I do.  
 12 Q. Let's keep going through.  
 13 A. Do you want me to comment  
 14 on it or just asking me to recognize it?  
 15 Q. Just recognize it for  
 16 now. We will get to the question.  
 17 A. Okay, fair enough.  
 18 Q. Turn to page 135 of this  
 19 document.  
 20 A. I am there.  
 21 Q. You see here we have  
 22 Bilcon's response to an information request from  
 23 the JRP concerning the rate of shipment. And  
 24 Bilcon again responds:  
 25 "The design annual

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1 than 2 million tons; could it?  
 2 A. The math from that would  
 3 suggest that.  
 4 Q. [REDACTED]  
 5 [REDACTED] correct?  
 6 A. Not based on that math,  
 7 no.  
 8 Q. We can move past the EIS  
 9 because you said the EIS was an early planning  
 10 document. Let's go to Tab Number 9 in your  
 11 binder.  
 12 A. And just remember,  
 13 that's -- the date is the date of submission, not  
 14 necessarily date of preparation. But I don't know  
 15 if we've heard any evidence on that, but that's  
 16 just the date of submission.  
 17 Q. Right. Let's go to Tab  
 18 Number 9, which is Exhibit C-154. So this  
 19 actually is a testimony from Mr. Buxton at the  
 20 joint review panel hearing.  
 21 A. Yes.  
 22 Q. Let's turn to page 29 --  
 23 A. I am there.  
 24 Q. -- in this document.  
 25 Mr. Buxton told the JRP in his

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1 testimony -- so this is now current. There isn't  
2 this difference between submission and  
3 preparation. What he said:  
4 "This is a processing  
5 plant, a marine terminal  
6 which will be designed  
7 and which we hope to  
8 operate for a 50-year  
9 period and which will  
10 produce 2 million tons of  
11 crushed, washed aggregate  
12 per year."[as read]  
13 Do you see his testimony?  
14 A. I do.  
15 Q. At the next tab in your  
16 binder, which I think is Tab Number 9.  
17 A. Tab 10?  
18 Q. Sorry, Tab 10, yes.  
19 A. This is Mr. Buxton again?  
20 Q. In fact, Exhibit C-155.  
21 Page 344.  
22 A. Yes.  
23 Q. Okay, this is Mr. John  
24 Wall's testimony; do you see that?  
25 A. Yes.

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1 A. Those are their words at  
2 that time, yes.  
3 Q. At that time. At that  
4 time.  
5 Let's turn to Tab Number 18 in  
6 your binder. This is testimony from Mr. Buxton,  
7 sworn testimony at the jurisdiction and liability  
8 phase in front of this tribunal in 20 -- I hate to  
9 date myself, but '13, I believe. And you will see  
10 here on page 354 --  
11 A. Yes.  
12 Q. -- Mr. Buxton is asked:  
13 "And the quarry  
14 production would be  
15 approximately 2 million  
16 imperial tons of  
17 aggregate a year. That  
18 is what was  
19 contemplated?"[as read]  
20 And his sworn testimony in  
21 this tribunal, 2013, not EIS, 2013, was:  
22 "Yes, that is what was  
23 contemplated."[as read]  
24 Do you see that?  
25 A. Yes.

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1 Q. And he says:  
2 "That quarry -- "[as  
3 read]  
4 And he is referring, as you  
5 see a couple lines up, to a quarry:  
6 "I operated a quarry on  
7 the Hudson River floating  
8 barges for New York  
9 City."[as read]  
10 Ms. Judith Peach says:  
11 "Well, what... how does  
12 the size of that quarry  
13 compare?"  
14 Mr. John Wall's testimony in  
15 front of the JRP:  
16 "That quarry did a  
17 million or two a year.  
18 We are proposing to do  
19 two here."[as read]  
20 Do you see that?  
21 A. I do.  
22 Q. So in front of the JRP,  
23 Mr. Buxton and Mr. Wall are both representing in  
24 their testimony that it is a 2-million-ton quarry;  
25 correct?

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1 Q. Two million imperial  
2 tons, that's 2 million short tons per year; right?  
3 A. Correct.  
4 Q. And I take it you would  
5 believe that Mr. Buxton was neither lying nor  
6 misrepresenting the facts in either his testimony  
7 to the JRP or his testimony to this very tribunal?  
8 A. I have always found  
9 Mr. Buxton to be very straightforward with me. I  
10 would expect he would be the same with the JRP.  
11 This was his understanding of the project at these  
12 times.  
13 Q. His understanding of the  
14 project, working with Mr. Wall, the proposed  
15 quarry manager, in the Digby office, as they were  
16 preparing and designing it; correct?  
17 A. Again, I can only tell  
18 you what the transcript says of what Mr. Buxton  
19 says. And you had Mr. Buxton here, and you asked  
20 him these questions, and his responses are on the  
21 record as well. So I can only read what he has  
22 already put on the record for you.  
23 Q. Right. And you didn't  
24 take this evidence, including what he said in the  
25 liability phase under oath in front of this



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1 tribunal, you didn't take this evidence into  
2 account in preparing your valuation; did you?

3 A. You can't say that I  
4 didn't take it into account.

5 Q. Did you see this  
6 testimony before today?

7 A. Well --

8 MR. NASH: If counsel could  
9 allow the witness to complete his answer.

10 MR. SPELLISCY: I think it's  
11 more important, before he says "I didn't take it  
12 into it account", to have on the record whether  
13 he's seen the evidence before today.

14 MR. NASH: What you think is  
15 important is not relevant. What the witness wants  
16 to say in response to your question is relevant.

17 MR. SPELLISCY: As long as  
18 it's in response to my question.

19 BY MR. SPELLISCY:

20 Q. I will rephrase.

21 Have you seen this evidence  
22 before today?

23 A. I can't recall  
24 specifically if I saw it before I wrote my  
25 reports. I was certainly aware of Mr. Buxton's

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1 then, I think that's a fair comment.

2 PRESIDING ARBITRATOR:  
3 Mr. Spelliscy, may I ask, what would be a good  
4 point for a coffee break? We have one and a half  
5 hours. You indicate.

6 MR. SPELLISCY: My next words,  
7 Judge Simma, were "let's look at another factor,  
8 freight". So before we look at another factor,  
9 let's take a coffee break.

10 PRESIDING ARBITRATOR: Okay,  
11 thank you. So coffee break, and we resume again  
12 at 11:20.

13 --- Upon recess at 11:04 a.m.

14 --- Upon resuming at 11:23 a.m.

15 PRESIDING ARBITRATOR: We are  
16 all back, and please continue.

17 BY MR. SPELLISCY:

18 Q. Thank you, Judge Simma.

19 Mr. Rosen, let's talk about  
20 another one of your assumed inputs to your  
21 valuation, which is freight.

22 As you point out in your reply  
23 report, Mr. Rosen, in paragraph 5.29, one of the  
24 major differences between yourself and  
25 Mr. Chodorow is that he relies on freight rates

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1 views on the size and capacity of the plant and  
2 quarry based on the EIS that was discussed with  
3 him when we met. And my thinking and -- well, was  
4 based on his discussions with me. It was not  
5 constrained to the EIS. I can't recall whether I  
6 saw this evidence or not. But this is consistent  
7 with what he said in the EIS.

8 Q. And he said it again in  
9 2013, as we saw, in front of this tribunal; right?

10 A. Yes, and I think you put  
11 these questions to him when you were examining  
12 him.

13 Q. You would agree with me,  
14 would you not, Mr. Rosen, that, as far as you are  
15 aware, the very first time that you have ever seen  
16 any statement by the claimants or by Bilcon of  
17 Nova Scotia that the production volume would be  
18 [REDACTED] was in the expert  
19 reports and witness statements prepared for the  
20 damages phase of this proceeding; correct?

21 A. I think that's a fair  
22 comment. There are pieces of information in other  
23 documents that may suggest as well. They don't  
24 come to mind immediately, but if they do while I  
25 am still up here, I will remind you. But until

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1 [REDACTED], whereas you  
2 rely on [REDACTED].

3 You would agree with me,  
4 Mr. Rosen, that nowhere anywhere in the project  
5 that Bilcon described prior to this arbitration  
6 did they ever discuss a weekly -- a shipping rate  
7 of 49,500 tons; correct?

8 A. Not that I've seen.

9 Q. Okay. Now, Mr. Rosen,  
10 you recall -- you were here for Mr. Fougere's  
11 testimony?

12 A. I was.

13 Q. Okay. And you recall his  
14 evidence that sometimes Panamax size ships were  
15 used to ship from Auld's Cove to New York Sand &  
16 Stone?

17 A. I don't specifically. I  
18 don't doubt it, but I don't specifically remember  
19 it.

20 Q. Let's go to Tab 15 in  
21 your binder. And we can turn to page 1621 at line  
22 2.

23 A. Yes.

24 Q. And the question -- I  
25 think this is actually on redirect -- says:



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1 "And you'll see that [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED] do you see  
 10 that?"[as read]  
 11 He says:  
 12 "I do."[as read]  
 13 And the question:  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED] do you see  
 18 that?  
 19 "I do."[as read]  
 20 [REDACTED]  
 21 [REDACTED] do you see that  
 22 testimony?  
 23 A. I do.  
 24 Q. Okay. So that refreshes  
 25 your recollection. You mention that sometimes

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1 [REDACTED];  
 2 correct?  
 3 A. Correct.  
 4 Q. Okay. And you see just a  
 5 couple lines further down, Mr. Fougere confirms  
 6 that [REDACTED]  
 7 [REDACTED] correct?  
 8 A. Well, again, he says they  
 9 could [REDACTED]  
 10 [REDACTED]. So I don't know if he meant  
 11 [REDACTED]  
 12 I'm not sure what he meant there.  
 13 Q. You would agree with his  
 14 testimony that Panamax ships -- or you would agree  
 15 that Panamax ships are generally larger than  
 16 Handymax ships?  
 17 A. That's -- I think  
 18 Dr. Sterling talked about this too. There's some  
 19 confusion in the nomenclature with ships, but I  
 20 think, as a general principle, that's correct.  
 21 Q. And so you would  
 22 understand that if, in fact, these ships were  
 23 [REDACTED]  
 24 [REDACTED]; correct?

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1 A. If it was one of the  
 2 larger ones, as he says, it could be. It's  
 3 possible.  
 4 Q. Okay. Now, perhaps you  
 5 would agree with me that you might understand a  
 6 reason for this is that, [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED] correct?  
 10 A. That can be a limiting  
 11 factor.  
 12 Q. And in terms of [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 A. I haven't analyzed [REDACTED]  
 17 [REDACTED] I have certainly spoken to Mr. Morrison  
 18 about them. My understanding is [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED]  
 23 Q. And your understanding is  
 24 that he was talking about [REDACTED]  
 25 [REDACTED]

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1 A. I don't recall which.  
 2 Q. Now, you were here,  
 3 though, during Mr. Lizak's testimony as well, were  
 4 you?  
 5 A. I was.  
 6 Q. I think I saw you. And  
 7 you were here when we revisited his testimony in  
 8 front of this tribunal from the liability phase  
 9 that there was sufficient depth to bring ships  
 10 into port at New Jersey; do you recall that?  
 11 A. Again, I don't  
 12 specifically, but I'm happy for you to point me to  
 13 it.  
 14 Q. Sure. Let's go the  
 15 Tab 19 of your binder, which, again, is the  
 16 relevant excerpt from Mr. Lizak's testimony in  
 17 front of this tribunal. And he says in response  
 18 to a question, actually a question from Judge  
 19 Simma, he says:  
 20 "The other thing --"[as  
 21 read]  
 22 We are on page 319, and we are  
 23 on lines 5 through 12. He says:  
 24 "But the other thing is  
 25 crucial is that my client



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1 had the ability to import  
2 stone, and that is  
3 unusual, you know, to  
4 have. We had the dock  
5 down in --"  
6 He first says Nova Scotia but  
7 corrects himself.  
8 "-- or down in New  
9 Jersey. We had the  
10 adequate depth. That is  
11 unusual."[as read]  
12 Do you see the testimony?  
13 A. Yeah. I'm just going to  
14 read a little bit above it to make sure I  
15 understand what he is referring to, if that's  
16 okay?  
17 Q. Of course.  
18 A. Okay. I see. I have  
19 read it in context now.  
20 Q. Okay. So Mr. Lizak  
21 testified in front of this tribunal that they did  
22 have adequate depth in New Jersey; correct?  
23 A. He doesn't say for what.  
24 I don't know if that's a full ship or not. It's a  
25 little bit ambiguous, so I'm not sure I can help

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1 correct?  
2 A. I have familiarity with  
3 it from some of my other business ventures, but I  
4 am certainly not an expert in it.  
5 Q. Okay. I want one  
6 clarification from you, actually, Mr. Rosen. If  
7 you can turn to paragraph 522 of your first  
8 report, which is on page 20. I think this is just  
9 wording, but you write that:  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED] as read]  
13 Then in that paragraph, you  
14 then say:  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED] as read]  
18 Do you see that?  
19 A. I do.  
20 Q. Okay. So but this isn't  
21 intending to represent that there, in fact, was  
22 [REDACTED];

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1 you with that.  
2 Q. My question was just:  
3 You see that he has said that; correct?  
4 A. I see his testimony, yes.  
5 Q. And you haven't analyzed,  
6 in terms of your thinking, about whether coarse  
7 aggregates could be shipped into South Amboy with  
8 appropriate depths? That hasn't been part of your  
9 analysis; correct?  
10 A. My understanding from  
11 speaking with claimants -- the claimant,  
12 Mr. Clayton, and some of his employees that have  
13 testified here and certainly Mr. Morrison is that  
14 [REDACTED]. That's just what I  
15 understand. I'm certainly not an expert on  
16 shipping and water depths, but that was my  
17 understanding.  
18 Q. Right. Let's talk on  
19 cost, Mr. Rosen. You are have relied upon  
20 [REDACTED]  
21 [REDACTED] is that right?  
22 A. Principally, yes.  
23 Q. Principally. You are not  
24 an expert in bulk commodity shipping rates;  
25

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1 correct?  
2 A. I think we have to go to  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 Q. I'm asking -- well, you  
7 were here for Mr. Morrison's testimony; right?  
8 A. I was.  
9 Q. Okay. So maybe my  
10 question's not being understood. You understand  
11 that he confirmed that [REDACTED];  
12 [REDACTED];  
13 correct?  
14 A. I don't recall all of his  
15 testimony. I don't recall that. If it's in the  
16 record, it's in the record.  
17 Q. Well, if you can turn to  
18 Tab 14 just so we can understand the statement in  
19 your report. Tab 14 is, again, day 4, at  
20 page 1319. They're the lines 22 to 25.  
21 A. Sorry, 1319?  
22 Q. Right, 1319.  
23 A. Yup. Which line?  
24 Q. At lines 22 to 25. You  
25 see the question is asked:

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1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED] as  
5 [REDACTED]  
6 read]  
7 He says: [REDACTED] [as read]  
8 Do you see that?  
9 A. I do.  
10 Q. Okay. So that -- so when  
11 you wrote in your first report that [REDACTED]  
12 [REDACTED], were you under the  
13 mistaken impression that [REDACTED]  
14 [REDACTED]?  
15 A. The words are what they  
16 are, and it's referenced to Mr. Morrison's report.  
17 Page 11, so we could turn to his report and see  
18 what it's referenced to.  
19 Q. You would agree now with  
20 me that, in fact, [REDACTED]  
21 [REDACTED]; correct?  
22 A. I think it's simple if we  
23 just turn to the Tamarack report. We'll see what  
24 the quote is, if you like.  
25

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1 Q. Well, I'm asking about  
2 what your understanding is now. We can. I don't  
3 have it in your binder. We can pull it up. But  
4 you wrote, [REDACTED]  
5 [REDACTED]. Did you mean [REDACTED]  
6 [REDACTED] or what did you mean when you wrote  
7 that sentence? You don't know?  
8 A. I don't have perfect  
9 recollection of what was in the Tamarack report,  
10 and it's simply a reference to that. And if we  
11 can turn up the Tamarack report, we can solve the  
12 mystery.  
13 Q. Okay. Derek, can you put  
14 up the Tamarack. Page 11, please.  
15 I believe it's the first  
16 sentence there, but you tell me, Mr. Rosen -- it's  
17 your report -- as to what you were trying to  
18 summarize.  
19 A. Can you just scroll down  
20 just a little bit further to see if it mentions  
21 anything else about that?  
22 Well, his report said:  
23 "Freight rates below are  
24 based on [REDACTED]  
25 [REDACTED]"

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1 [REDACTED]  
2 [REDACTED] as read  
3 It does not say [REDACTED]  
4 [REDACTED]  
5 Q. You accept Mr. Morrison's  
6 evidence that [REDACTED]?  
7 A. I do. This is just --  
8 it's just citing [REDACTED].  
9 Q. Okay. So we are agreed  
10 based on Mr. Morrison's evidence? In fact, we can  
11 turn over. In Mr. Morrison's testimony, he  
12 explains further, at page 1320, starting at line  
13 1, right after that:  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 Do you see that?  
20 A. Yes.  
21 Q. Okay. So we can agree  
22 that there was, in fact, [REDACTED]  
23 [REDACTED] correct?  
24 A. Yes.  
25 Q. You've heard

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1 Mr. Morrison's testimony that [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 A. I believe that was part  
6 of it, yes.  
7 Q. Okay. And you accepted  
8 his evidence based on that representation?  
9 A. Well, understanding who  
10 Mr. Morrison is and his knowledge of the industry  
11 and the reference he made to [REDACTED]  
12 [REDACTED]  
13 [REDACTED] yes.  
14 Q. You didn't [REDACTED]  
15 [REDACTED]  
16 A. I did not.  
17 Q. When we have heard here  
18 before, you didn't [REDACTED]  
19 [REDACTED] did you?  
20 A. With that individual?  
21 No, I did not.  
22 Q. And you were here for  
23 Mr. Morrison's testimony about [REDACTED]  
24 [REDACTED]; do you recall that testimony?  
25



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1 A. Generally I do, yes.  
 2 Q. Okay. Let's look at  
 3 page 1374, the same tab in your binder,  
 4 Mr. Morrison's testimony, 1374.  
 5 A. Yes.  
 6 Q. And you see he is asked a  
 7 question about what would happen. You say the  
 8 question starting at line 12 is:

18 s read]  
 19 And then he says:

1 [redacted] [as read]  
 2 You forecast shipping prices  
 3 [redacted]  
 4 [redacted] correct?  
 5 A. Correct.  
 6 Q. Okay. And you do that  
 7 [redacted]  
 8 [redacted] correct?  
 9 A.  
 10 [redacted]  
 11 Q. He did not. So that was  
 12 your opinion of what shipping rates might do?  
 13 A. No.

14 [redacted]  
 15 You are looking at a model of cash  
 16 flows. And typically, when businesses are bought  
 17 and sold, buyers look at expected cash flows, and  
 18 they have to make some assumptions. They look for  
 19 market data, if there is. And in the absence of  
 20 market data, they make general assumptions that  
 21 prices will remain real, and they will increase  
 22 with inflation. Or if they have some reason to

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1 believe in the short or long term they will be  
 2 different, they can make assumptions about that.  
 3 But this is an assumption that was made about most  
 4 costs and revenue in the future.

5 Q. And you recall the  
 6 testimony of Mr. Morrison that [redacted]  
 7 [redacted] is that correct?

8 A.

24 Q. You base your freight  
 25 rates on [redacted];

1 correct?

2 A. Correct. [redacted]

3 yes.

4 Q. [redacted].

5 A. Yup.

6 Q.

11 A.  
 12 [redacted]  
 13 Q. Okay.

17 A. I think I used [redacted]  
 18 [redacted].

19 Q. Okay. Did you [redacted]

20 Mr. Morrison,  
 21 ?

22 A. Mr. Rosen.

23 Q. Mr. Rosen, did you look?

24 I called somebody else Mr. Rosen, so I'm one for  
 25 one.



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1 A. I heard that. I heard  
2 that.  
3 [REDACTED]  
4 [REDACTED]  
5 Q. [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 A. Again, [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 Q. But you would agree  
18 [REDACTED]; correct?  
19 A. I imagine they would've  
20 been, yes.  
21 Q. And so in your model, in  
22 your model, in your approach to damages, which is  
23 to use actual market information until November of  
24 2016 -- that's when you said you used it until --  
25 this is one where you didn't use those actual --

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1 that actual information; correct?  
2 A. So just to finish what I  
3 was trying to say, [REDACTED]  
4 [REDACTED] That's what I relied  
5 on. If there was a suggestion that [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED] But I've  
9 relying on [REDACTED].  
10 Q. Right. And in relying on  
11 [REDACTED] -- so that I  
12 understand, Mr. Rosen, you have a damages model  
13 that says you should be relying upon market  
14 information up until 20 -- November 15, 2016 was  
15 the number in your damages model. But you didn't  
16 rely on that market information for [REDACTED]  
17 [REDACTED]; you just didn't. You relied on  
18 [REDACTED];  
19 right?  
20 A. As you said, market rates  
21 were up to the end of 2015, and the model goes to  
22 2016. [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

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1 [REDACTED]  
2 [REDACTED]  
3 So if you're suggesting [REDACTED]  
4 [REDACTED]  
5 [REDACTED] and I relied on  
6 him.  
7 Q. And, in fact, you would  
8 agree that, in fact, what you assumed is tha [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 correct?  
12 A. [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 Q. And so the answer to my

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1 question is, yes, then, that that's what you did?  
2 A. I'm sorry. Your question  
3 was: [REDACTED]?  
4 Q. It works when we answer  
5 my question best, Mr. Rosen. In fact, my question  
6 was: [REDACTED]  
7 [REDACTED]  
8 [REDACTED] correct?  
9 A. [REDACTED]  
10 [REDACTED]  
11 Q. So yes?  
12 A. I think that's clear.  
13 Q. You think it's clear that  
14 it's yes? Your answer is yes?  
15 A. I think I've stated very  
16 clearly what I did. Your question had two parts.  
17 [REDACTED]  
18 [REDACTED] And I can tell you I didn't  
19 comment on [REDACTED]  
20 [REDACTED] which is why you didn't get a simple yes or  
21 no. It's simply, yes, it was based on [REDACTED]  
22 [REDACTED]  
23 Q. No. Mr. Rosen, I don't  
24 understand. [REDACTED]  
25 [REDACTED]

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1 [REDACTED] correct?  
 3 A. [REDACTED]  
 16 Q. You are aware, Mr. Rosen,  
 17 of course, that [REDACTED] correct?  
 19 A. [REDACTED]  
 25 Q. You're aware,

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1 Mr. Morrison, that [REDACTED]  
 3 A. Mr. Rosen.  
 4 Q. Mr. Rosen. I'm talking  
 5 about shipping. I want to say Mr. Morrison.  
 6 You are aware, Mr. Rosen, that  
 7 [REDACTED] correct?  
 9 A. I don't know that for a  
 10 fact.  
 11 Q. You don't know that?  
 12 Didn't ask Mr. Morrison that?  
 13 A. I simply asked him [REDACTED]  
 15 Q. You would agree with me  
 16 as a hypothetical, not knowing that, that if your  
 17 starting point for your analysis is [REDACTED]  
 23 A. You are asking me to  
 24 assume as a hypothetical that [REDACTED]

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1 Q. Yes, I am.  
 2 A. In that case, I would  
 3 agree with your assertion.  
 4 Q. I want to move on to  
 5 discussing revenues for Bilcon of Nova Scotia.  
 6 You would agree with me as a general proposition,  
 7 Mr. Rosen, that, until a project has received its  
 8 permits and its licensing conditions, it cannot  
 9 know for certain the conditions under which it  
 10 would be permitted to operate; right?  
 11 A. As a general proposition,  
 12 I agree with that.  
 13 Q. And you would also agree  
 14 as a general proposition that mitigation and  
 15 licence conditions can, in fact, affect revenue;  
 16 correct?  
 17 A. Mitigation is generally  
 18 an expense. I don't think it really affects  
 19 revenue, but it would -- if there was some  
 20 environmental aspect that required a mitigation  
 21 effort, that would be an expenditure, not  
 22 necessarily an effect on revenue.  
 23 Q. Right. But it would  
 24 decrease profits, then, if you had to spend more  
 25 on mitigation than you might have planned, it

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1 would decrease the amount of profits?  
 2 A. If it was an ongoing  
 3 expense, it would have an ongoing effect on  
 4 profits. If it was a one-time expense, it would  
 5 have just the same as a capital outlay.  
 6 Q. Right. Mr. Rosen, you  
 7 were here for Mr. Lizak's testimony, I believe you  
 8 said. And you were here for his testimony that  
 9 said [REDACTED] You were here for  
 12 that?  
 13 A. Again, I don't have  
 14 perfect recall about his evidence, but I'm sure  
 15 you've got a paragraph you can point me to.  
 16 Q. I do. Fortunately I  
 17 have time. Tab Number 15.  
 18 A. I'm still on Tab 15, yes.  
 19 Q. Okay. Page 1682.  
 20 A. Okay.  
 21 Q. Let me get there too.  
 22 PRESIDING ARBITRATOR: What  
 23 page, sorry?  
 24 MR. SPELLISCY: 1682, Tab  
 25 Number 15.



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BY MR. SPELLISCY:

Q. He says here -- the question is:

"You would agree that, in order to assess economic viability, it's important to consider where the aggregates, where the product will be sold, because that affects the product that can be obtained; correct?"[as read]

And he says:

"You have got to look at pricing in the marketplace, yes."[as read]

Do you see that?

A. I do.

Q. Okay. And you would agree with Mr. Lizak, who has stated in his witness written statements as well that pricing of aggregates is local; correct?

A. I believe that's correct.

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Q. Okay. You have not provided any analysis whatsoever if

correct?

A. That's correct.

Q. So, for example, you haven't provided any analysis concerning the alleged lost profits of Bilcon of Nova Scotia if it was selling

have you?

A. I have not. The prices, quite clearly, are based on

Q. So your report, then, and your analysis is based on the assumption that

is that right?

A. I think

Page 2185

A. It's agnostic. It's just simply revenue from those marketplaces regardless of

Q. Okay. And in your -- if I understand your opinion correctly, because of

correct?

A. Correct.

Q. So

correct?

A. For New York, yes.

Q. For New York. And you would agree with me that simply as a matter of fact there is

correct?

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A. There was

Q. Mr. Rosen, I'm not sure if we've covered Mr. Dooley, but I believe you were here. You were here for the testimony of Mr. Dooley?

A. I was.

Q. Okay. And you recall him confirming that,

is that right? Do you remember that?

A. I remember there was a discussion around a document. I don't know if it was

Q. Let's turn -- well, let's



Page 2187

1 turn to a couple of tabs. Let's turn to Tab  
2 number 14 in your binder first. This is day 4 of  
3 the hearing, and I'm going to look at page 1440.

4 A. Yes, I have it.

5 Q. The question at the  
6 bottom of line -- starting at line 20:

7 "You are familiar with  
8 the [REDACTED]

9 [REDACTED] as read]

10 He says:

11 "I am." [as read]

12 And then if we actually  
13 continue, we go through one, which was with him,  
14 if you look down.

15 "Let's take a look at [REDACTED]  
16 [REDACTED]. Turn to Tab 10.

17 This is C-1018, for the  
18 record. So this [REDACTED]

19 [REDACTED] as read]

20 Do you see that?

21 A. Yes.

22 Q. In his testimony?

23 A. Yes.

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1 Q. And we look to a few  
2 lines down, starting at line 20, we -- on  
3 page 1441, we say:

4 "You see 1018-1001. If  
5 you go to 03 in the  
6 document, it say, 'This  
7 is the [REDACTED]

8 Turn to page 6, which has  
9 got the label -043,

10 [REDACTED] as read]

11 And it says here in the last

12 sentence:

13 Do you see that?

14 A. I do.

15 Q. Okay. And I asked

16 Mr. Dooley:

Page 2189

1 He says:

2 "It does, yes."

3 And then I say:

4 And then we look at another  
5 one, and it says -- we go to [REDACTED] on  
6 the next page, on 1443, halfway down. This  
7 [REDACTED]

8 . And I ask:

9 [REDACTED] as read]

10 He says:

11 "Yes."

12 On line 14, we come to the  
13 same page 6, and I say:

14 "Read the second  
15 sentence." [as read]

16 So it says:

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1 It doesn't say [REDACTED]  
2 [REDACTED] in the text. I think that's an error in  
3 the transcript. It just says:  
4 [REDACTED]

5 [REDACTED] as read]

6 He says:

7 "I do." [as read]

8 Did you factor in the fact

9 that [REDACTED]

10 Mr. Rosen?

11 A. No, I did not. And,  
12 again, I'm not certain why [REDACTED]

Page 2191

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

10 Q. Mr. Rosen, we are just  
11 looking at his testimony, and we can go to the  
12 document itself, if you want, from [REDACTED]

13 [REDACTED]  
14 [REDACTED]  
15 You would agree with me that  
16 it's a simple fact; it's there black and white,  
17 [REDACTED]

18 [REDACTED]  
19 "That's what the document  
20 says; correct?"

21 A. Correct. [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

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1 [REDACTED] So I did not take that into  
2 account.

3 Q. You recall the testimony  
4 of Mr. Dooley, as well, that [REDACTED]

5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED] do you  
8 recall that testimony?

9 A. I recall and I agree with  
10 that. [REDACTED]

11 [REDACTED]  
12 [REDACTED]  
13 Q. Okay. And you recall the  
14 testimony of Mr. Fougere from earlier this week  
15 that [REDACTED]

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED] do you recall  
19 that testimony?

20 A. Yes. And I think I  
21 incorporated this analysis into my opening slides,  
22 but, yes, I do recall that evidence.

23 Q. In your analysis,  
24 nevertheless, you have assumed that Whites Point  
25 [REDACTED]

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1 would [REDACTED]  
2 [REDACTED] correct?

3 A. Yes. And from a  
4 commercial perspective, that is the only logical  
5 conclusion you can draw.

6 Q. The only logical  
7 conclusion is that, in the next 50 years, there  
8 would not be [REDACTED]

9 [REDACTED]  
10 [REDACTED] that's your  
11 testimony?

12 A. It's not simply a matter  
13 [REDACTED]

14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 And when you take your first economics  
19 course, that's right. [REDACTED]

20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

Page 2194

1 [REDACTED]  
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 Q. Well, Mr. Rosen, you said

22 [REDACTED]  
23 [REDACTED]

24 A. No. But they had [REDACTED]  
25 [REDACTED]

26 Q. Right. So you understand  
27 from Mr. Clayton's testimony that the Claytons  
28 [REDACTED]  
29 [REDACTED]  
30 [REDACTED]

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1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED] correct?  
 4 A. Until [REDACTED]  
 5 [REDACTED] yes.  
 6 Q. Right. Until [REDACTED]  
 7 [REDACTED]  
 8 And they [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED] correct?  
 11 A. Yeah. It's called [REDACTED]  
 12 [REDACTED] but yes.  
 13 Q. I've heard [REDACTED] too.  
 14 Mr. Clayton said [REDACTED]. But since you said  
 15 [REDACTED], we'll use [REDACTED]  
 16 A. Well, yeah, okay.  
 17 [REDACTED]  
 18 [REDACTED]  
 19 Q. And in the use of the [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED] correct?  
 22 A. Correct. And I think  
 23 that underlines exactly what I'm saying. I think  
 24 that supports it. [REDACTED]  
 25 [REDACTED]

Page 2196

1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 Q. And you would agree a [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED] right? You don't run that risk,  
 14 do you, Mr. Rosen?  
 15 A. I'm sorry. Run the risk  
 16 that [REDACTED]  
 17 [REDACTED]  
 18 Q. [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 correct?  
 23 A. No. But once [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

Page 2197

1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 Q. But [REDACTED]  
 10 [REDACTED]  
 11 correct?  
 12 A. Yeah. [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 Q. And your opinion, your  
 18 valuation, is on the assumption that the Whites  
 19 Point Quarry -- Bilcon of Nova Scotia's quarry  
 20 [REDACTED]  
 21 [REDACTED] correct?  
 22 A. Now you have the Chicago  
 23 based company Great Lakes, who is not in the  
 24 quarry business, and you have the Claytons who  
 25 have a quarry, and their employee from Amboy is [REDACTED]

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1 managing that business, and Great Lakes is [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 correct?  
 13 A. Yeah. I don't know if  
 14 there was another one. I don't know if there was  
 15 [REDACTED] I'm just  
 16 telling you I hypothesized, if there was, [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 correct?  
 22 A. No. But [REDACTED]  
 23 [REDACTED]  
 24 Q. Right. But my question,  
 25 Mr. Rosen, is: [REDACTED]



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1 [REDACTED]  
2 [REDACTED] correct? And you will  
3 have no other option?

4 A. That is one of the risks.

5 Q. That is one of the risks.

6 So if the Whites Point quarry came into existence

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED] right?

12 A. No. But you're -- again,  
13 we're -- now we're really in the hypothetical  
14 world. But you would have to assume that [REDACTED]

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

Q. And that's my question,

Page 2200

1 Mr. Rosen. Given that we can be confident with

2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED] Isn't that a  
11 possibility, Mr. Rosen?

12 A. There's a range of  
13 possibilities. I know, when Mr. Lizak went to  
14 Nova Scotia to look for sites, he had his choice.

15 [REDACTED]  
16 [REDACTED] If, in the  
17 hypothetical world, somewhere in the future, [REDACTED]  
18 [REDACTED]  
19 [REDACTED] In  
20 theory, it's possible.

21 Q. And you haven't  
22 considered that in your analysis?

23 A. There's a lot of things  
24 that are possible you can't consider, but  
25

Page 2201

1 that's --

2 Q. Especially 50 years down  
3 the road; correct?

4 A. No. Again, I'm saying  
5 that hypothetical you've just put is unlikely, but  
6 it's not impossible. I deal commercially with  
7 what's likely.

8 Q. As a matter of fact,  
9 Mr. Rosen, I think we talked about this earlier,  
10 but you would agree with me that [REDACTED]

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]

16 A. That's correct. Again,  
17 sorry, just to be corrected, [REDACTED]

18 [REDACTED]  
19 Q. Yes.

20 A. And so if you look at

21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

25 Q. Right. You'll recall  
Mr. Dooley's testimony about [REDACTED]

Page 2202

1 [REDACTED]  
2 [REDACTED] and you'll recall his testimony that  
3 he thought [REDACTED]  
4 [REDACTED] correct?

5 A. There's actually a

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

13 Q. So they were purchasing.  
14 But you would agree that they haven't -- [REDACTED]

15 [REDACTED]  
16 A. Yes.

17 Q. -- you just talked about

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 A. Not exactly. No, they  
22 haven't.

23 Q. And do you recall  
24 Mr. Forestieri's testimony, as well, that [REDACTED]  
25 [REDACTED]

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1 [REDACTED]  
2 Do you recall that just as a matter of  
3 fact?

4 A. I don't specifically. It  
5 could factually be correct, but if Mr. Forestieri  
6 said it, and I won't waste your time going to the  
7 transcript.

8 Q. Well, we can so everybody  
9 sees it.

10 A. Sure.

11 Q. Tab 13. Excerpt from day  
12 2 at page 389. If you look at line Number 12 --  
13 and before that, I will ask you: You are aware  
14 that, in 2011, your forecast -- the forecast  
15 you've got and you have used is that [REDACTED]

16 [REDACTED] correct?

17 A. I'm sorry. What page are  
18 you on?

19 Q. Sorry, I'm just asking  
20 you a question about your report. We can turn to  
21 it, but your report --

22 A. Oh.

23 Q. -- assumes [REDACTED]  
24 [REDACTED], I believe.

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1 A. Correct.

2 Q. And then up from thereon;  
3 correct?

4 A. Correct.

5 Q. Okay. And so for now on  
6 in this tab, Mr. Forestieri's testimony, page 391,  
7 line 11, he is asked:

8 [REDACTED]  
[as read]

17 He says:

18 [REDACTED]  
[as read]

19 A. Yes.

20 Q. Okay. So as a matter of  
21 fact, [REDACTED]  
22 [REDACTED]

Page 2205

1 A. [REDACTED]

2 Q. I [REDACTED]  
3 [REDACTED]

4 A. Yes, I agree. I agree  
5 with that.

6 Q. Mr. Rosen, in terms of  
7 prices, you were here for Mr. Wick's testimony;  
8 correct?

9 A. I was.

10 Q. And you rely upon  
11 Mr. Wick for a part of your market forecasts?

12 A. I do.

13 Q. Okay. And you were here  
14 when Mr. Wick said that market projections beyond  
15 2020 would be inherently inaccurate; do you recall  
16 that?

17 A. I do.

18 Q. And yet your forecast for  
19 the prices in the [REDACTED]  
20 [REDACTED] correct?

21 A. Correct. And, again,  
22 it's the exact same point I made before. When  
23 commercial actors are transacting, when businesses  
24 are bought and sold every day, these businesses  
25

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1 are assumed to go on for decades. And, yet,  
2 people transact every day based on their  
3 expectations. And when there's no specific  
4 forecast -- in fact the whole stock market depends  
5 on it, but every transaction specifically analyzes  
6 it. And where there's no specific forecast,  
7 assumptions with respect to real prices are  
8 adopted. That is very, very common, especially in  
9 the commodity business.

10 Q. Very common in the  
11 commodity business with the recognition by  
12 everybody there that, because you don't know what  
13 prices will actually be, you just use inflation?  
14 That's what you are trying to tell me?

15 A. Generally speaking, when  
16 you get past the short term, there's some  
17 commodities -- like, precious metals are more  
18 capable of having long-term forecasts, like gold  
19 and silver and platinum and things like that.  
20 But, generally speaking, industrial metals like  
21 iron ore and things like, have shorter -- they  
22 don't have forecasts. They have settlements every  
23 year. Same, coal has some short term forecasts.  
24 These kinds of stones do not, but yet there are  
25 still transactions and shares bought and sold



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every day. And what investors do is they make assumptions. And, generally speaking, my experience has been with forecast of commodities. And even in my agricultural commodity business, we look at real prices being stable in the future unless there is some macro event that is going to dramatically affect that. In the absence of that, real price stability is generally accepted.

Q. Even though you would agree with me that, in reality, when we get through the next 50 years, real price stability will not have been borne out; correct?

A. The future is inherently -- has some disagree of uncertainty, which is why we use a discount rate, why we factor business risk into that, and that's the way business operates. There is no certainty.

MR. SPELLISCY: Just give me one second.

PRESIDING ARBITRATOR: Sure.

BY MR. SPELLISCY:

Q. Mr. Rosen, I have been asked to clarify one more thing. Your understanding -- and it's with respect to the difference in the tax rates that you are

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calculating. Your understanding from paragraph, I think it's 2.6 of your first report, is that the need for the gross-up arises from a difference in the foreign tax credits that can be obtained on the income that would have been generated from operating the Whites Point Quarry versus the income that would come from an award. It's foreign tax credits; right?

A. It's a little more complicated than that. The model, the damages model, is based on a number that's net of Canadian taxes, and it's those Canadian taxes that give rise to a foreign tax credit. So it's the interaction between Canadian taxes and US taxes that you lose when you get a damages award. And so while it's -- while the Canadian tax is taken out of the damages award, when the award is taxed in the claimants' hands, assuming they are going to receive an award of damages, it's already going to be net of Canadian tax, and then they are going to pay US tax again. So it's going to have two taxes deducted from it.

Q. Right. So I'm at paragraph 2.6 of your first report. You say: "Foreign tax credits, the

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repatriation of the discretionary after-tax cash flows from the quarry operation to the investors, however, is subject to different tax treatment than an award of damages. Foreign tax credits that are otherwise available to the investors are not available from a damages award."[as read]

A. Correct.

Q. And you proceed: "Consequently."[as read]

Are you aware, Mr. Rosen, about the treatment of foreign tax credits in the new US tax laws?

A. I am not specifically, no.

MR. SPELLISCY: That's all my questions for now. Thank you.

PRESIDING ARBITRATOR: Thank

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you very much, Mr. Spelliscy. I give the floor to Mr. Nash for the redirect.

MR. NASH: Thank you, Judge Simma.

--- Brief recess taken at 12:13 p.m.

--- Upon resuming at 12:16 p.m.

RE-EXAMINATION BY MR. NASH:

Q. Welcome back, Mr. Rosen.

You were asked to confirm that

the -- [REDACTED] do you recall that?

A. Yes.

Q. Do you accept the volumes that you have referred to of sales by [REDACTED] for your modelling purposes?

A. Yes, I do.

Q. And why is that?

A. [REDACTED]

[REDACTED]



[illegible]

Q. You were asked about forecasting in the commodity business. How much of your practice is in the mining industry?

A. I'd say, over the last ten years, probably 75 per cent of the cases I have worked on have been related to primarily

mining, but other commodities as well, and also my business interests extend into global commodities in the agricultural space.

Q. You were also asked about changes to the US tax code. Is the possibility of changes to the US tax code accounted for in your model?

A. So the way you do damages valuations is you can only deal with the law as it exists on the date that you are doing it. And to the extent there is some change in the future, that's a change that's faced by, again, all businesses that transact. If you have specific knowledge about it or that knowledge becomes known with certainty prior to the date of an award, it can certainly be accounted for; otherwise, the practice is simply go with the current legislation.

Q. You were also asked about the application [REDACTED]

**Figure 1**

Q. How does your model account for the fact that the Whites Point Quarry has not been built and was not operational?

A. And that's always, probably conceptually, the most difficult thing to deal with, especially for a tribunal. There's nothing specific in -- that you can quantify that says, "Yes, there's X number of dollars that should be accounted for". If you have a proper business plan, if you have done your due diligence, especially when you have the benefit of hindsight now and you have done your due diligence on how it was going to be built, how it was going to be crushed, how it was going to be shipped, how it was going to be sold, you have overcome a lot of that. But the fact is they didn't build it, and so you don't have complete certainty.

And so in -- certainly in negotiations with businesses, you can look at it one of two ways. If I think additional costs would have been required -- and you see these sort of post-acquisition disputes where people give you reps and warranties, and the remedy is, well, we

will just give you what the cost was. If they are one-off costs, you can think of it that way. If they are degradation to revenue or increase in cost that's throughout the life of the project, then you can think of it in order of magnitude as a percentage of the damages. And, in my mind, you can deal with those uncertainties in one of two ways.

Q. There's been some discussion about tons and tonnes during the course of these proceedings, and today we heard imperial tons. Are you aware that an imperial ton is 1.12 short tons or 2.240 tons, short tons?

A. I was not aware of that. I only deal with metric, so I assumed, when it was represented that an imperial ton was the same as a short ton, I just assumed that Mr. Spelliscy was correct.

Q. There's also -- there was also a discussion today in questions from counsel about mitigation, uncertainty of mitigation costs, and so on. To your understanding, are mitigation measures costed in the capital costs and operational costs in this quarry?

A. So known mitigation costs



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1 are costed into the model.

2 Q. And are you aware or not  
3 of whether [REDACTED]

6 A. My understanding is [REDACTED]

10 Q. And you were asked about  
11 and turned to references about the project  
12 description in the EIS. Is your report based only  
13 on the project description or on other documents  
14 and facts?

15 A. Well, the EIS is one  
16 document of many that we looked at.

17 Q. You've had facts put to  
18 you today, and you've given answers to questions.  
19 Do any of those facts or any of those answers to  
20 the questions change your opinion in this matter?

21 A. No, they do not.

22 MR. NASH: Thank you very  
23 much.

24 PRESIDING ARBITRATOR: Thank  
25 you, Mr. Nash. No questions. Okay. Any

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1 [REDACTED] What do you do with that in terms  
2 of your final testimony there? Do you evaluate  
3 and say one's right or one's wrong? What do you  
4 do?

5 THE WITNESS: I think you have  
6 to look at the facts, and I think Dr. Chereb was  
7 perhaps helpful in his testimony on Saturday for  
8 the respondent when he said that [REDACTED]

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1 questions from the tribunal? Professor Schwartz.

2 QUESTIONS FROM THE TRIBUNAL:

3 PROFESSOR SCHWARTZ: Thank you  
4 for helping us out, Mr. Rosen.

5 The projections that you make  
6 start with an assumption that Whites Point Quarry  
7 would have been permitted; is that right?

8 THE WITNESS: That's correct.

9 PROFESSOR SCHWARTZ: And  
10 that's an assumption, that's not your independent  
11 evaluation of who's right or who's wrong?

12 THE WITNESS: Right.

13 PROFESSOR SCHWARTZ: Okay.  
14 Now, throughout the course of the hearing, you  
15 were here throughout?

16 THE WITNESS: For everything  
17 except the lawyers, although, sorry, I did hear  
18 Dean Sossin and the environmental lawyer, David  
19 Estrin, yeah.

20 PROFESSOR SCHWARTZ: So we had  
21 one expert, if I understood it correctly, who says  
22 that the hypothetical entry of Whites Point  
23 [REDACTED]

Page 2218

1 [REDACTED]

12 PROFESSOR SCHWARTZ: So you,  
13 in the course of hearing the experts on both  
14 sides, you made your own professional judgment  
15 about which narrative was more plausible, and  
16 that's embodied in your final testimony?

17 THE WITNESS: That's correct.

18 PROFESSOR SCHWARTZ: Okay.  
19 Now, you mentioned that risk is not necessarily  
20 downside. Risk is also things can turn out better  
21 than you expected.

22 THE WITNESS: That's why we  
23 invest money.

24 PROFESSOR SCHWARTZ: So when  
25 you mentioned that there was a discount for



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1 business risks, on the face of it, that's a little  
2 hard to process. Discount implies taking your  
3 estimate and reducing it, but if risk can be plus  
4 as well as minus, I don't quite understand what  
5 discount means.

6 THE WITNESS: Okay. So when I  
7 speak about discount, I'm accounting for the time  
8 passage of money, so a dollar today is worth more  
9 than a dollar a year from now, and also the risk  
10 of receiving that dollar. And that's the business  
11 risk. And so you have -- and there's measures of  
12 how experts generally agree on what business risk  
13 is. And, in this case, happily, this is not a  
14 fight about discount rates. We generally agree on  
15 methodology, although there are some minor  
16 disagreements. We generally agree on methodology.  
17 So a discount rate takes future cash flows and  
18 brings them back to present value.

19 In most cases, in treaty  
20 arbitrations, we are dealing with the taking of an  
21 asset. And so we have an expropriation, and so  
22 you only have a future to deal with. In this  
23 case, we don't. We have a breach of a clause  
24 that, from my point of view, can only be remedied  
25 with lost profits. And so you have the period

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1 concept that talks about why -- how much I'd  
2 rather have a dollar today than a dollar in ten  
3 years. It's nothing in particular to do with the  
4 facts of this case; right? It's not a way of  
5 discounting, "Oh, I don't know about shipping  
6 rates. I don't know about market rates". It's  
7 basically simply a money to month -- future money  
8 versus present money comparison?

9 THE WITNESS: If we used a  
10 risk-free rate of return, which sounds absurd, how  
11 can a discount be risk free, but -- so that only  
12 measure the time value of money. So you use a  
13 stable country's bond. You'd use a German bond, a  
14 Canadian bond, a US bond. You'd say that's a  
15 risk-free rate. That compensates you for waiting,  
16 for time, time value of money. On top of that,  
17 there's business risk. You're in the commodities  
18 business and the seaborne commodities business,  
19 and so you look for indications in the market of  
20 how you adjust your discount rate up to reflect  
21 the risks of receiving money from that business.  
22 And that's something that Brattle and FTI both  
23 did, but at different dates, but generally it's  
24 more or less the same methodology. So it does  
25 account for business risk specific to this case.

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1 from when the breach occurs to today's date.

2 And so how do you incorporate  
3 risk into that measure? We know when we spend the  
4 money. That's going to be with certainty. My  
5 father also used to tell me that, "I know if I  
6 give you my allowance, you're going to spend it".  
7 So that we don't need to risk adjust.

8 We might say, "Well, maybe  
9 it's going to cost a little more or a little less  
10 to build the plant". And, again, the tribunal can  
11 think about that. Is there sufficient contingency  
12 built into that as a one-time number?

13 The cash flows that are  
14 created from modelling from the date of operation  
15 to today's date, or the proxy for today's date,  
16 are based on actual market conditions as  
17 reasonably interpreted by experts and other  
18 witnesses, but that's based on actual market  
19 conditions. That's the advantage of using a  
20 current valuation date. That's how you build risk  
21 into the model.

22 So the discount only applies  
23 to the future period.

24 PROFESSOR SCHWARTZ: So when  
25 you speak of discount rate, that's a very general

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1 PROFESSOR SCHWARTZ: And risk  
2 here means upside as well as downside?

3 THE WITNESS: Risk is  
4 uncertainty, but it's generally measured as a  
5 reduction, because there's less than certainty in  
6 receiving those cash flows. So it's expressed as  
7 a negative number, but the definition of risk  
8 includes outcomes better than you expected.

9 It's why, for instance, when  
10 you put your money in a government bond and  
11 receive 1 or 2 per cent. You could take a  
12 corporate bond and receive 4 or 5 per cent. It's  
13 riskier. Things may go great for that company,  
14 but they might not, so you demand more as an  
15 investor. That's all it's expressing.

16 PROFESSOR SCHWARTZ: I wanted  
17 to explore a bit the relationship between expert  
18 valuation and market valuation.

19 We have had experts on both  
20 sides, or we are going to have both sides giving  
21 us their expert opinions. There was nothing here  
22 like share prices and publicly traded companies or  
23 anything that was of any assistance; is that  
24 right?

25 THE WITNESS: Because we are

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1 not valuing -- you know, most of the companies  
2 that are in this business, like Martin Marietta  
3 and Vulcan, these are big integrated companies.  
4 They have aggregate operations that are 50 years  
5 old, and some are five years old. Some are in the  
6 interior; some are on the coast. And they are  
7 really not very comparable, especially in size.

8 You know, it's interesting.

9 You have one data point. You have this  
10 unsolicited offer from [REDACTED] for the  
11 [REDACTED], which was around  
12 [REDACTED], which I think Brattle indexed to  
13 around [REDACTED] as a current date.

14 That's -- again, that's an  
15 indication what they thought they were prepared to  
16 pay. It's certainly not a negotiated price  
17 between arm's-length parties. And, you know,  
18 certainly the fact that the Claytons didn't follow  
19 it up and enter into negotiations suggests, to me  
20 at least, they didn't think it was sufficient from  
21 their point of view, so you might think of it as a  
22 floor. [REDACTED]

23 But that's sort of a data  
24 point out there. Interestingly, Brattle's DCF as  
25

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1 THE WITNESS: So Brattle did a  
2 DCF calculation. Assuming it was appropriate to  
3 do a DCF and assuming that mitigation was not  
4 required, they did one to provide a discounted  
5 cash flow analysis as at, they say, 2007. And as  
6 I said in my presentation, they actually didn't do  
7 that. They distorted their model by using a lot  
8 of information after 2007. But if you disregard  
9 that, they did a DCF and got to a number of  
10 6.3 million and said, "Yeah, but that's before  
11 permitting risk. That's assuming no permitting,  
12 and still you have to reduce that for permitting  
13 risk". That puts it sort of on the same basis as  
14 [REDACTED]

15 That's the only reason I  
16 mentioned it. I don't think either number is  
17 right, by the way, but I'm saying that, sort of,  
18 their apples-to-apples comparison doesn't line up  
19 very well.

20 PROFESSOR SCHWARTZ: So one  
21 apple was 6 million, and one orange was [REDACTED]  
22 [REDACTED]

23 THE WITNESS: S [REDACTED]  
24 And the amounts that they had to invest to  
25 build the project was a further [REDACTED], if you

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1 at the same date is 6 million on a permitted  
2 quarry, so quite a disconnect from their own data  
3 point. But that's the only data point I can think  
4 of that -- again, I don't think it's a fair market  
5 value indicator. I don't think it's a fair  
6 representation of value, but it's the only data  
7 point that's sort of proximate to at least the  
8 date of the breach.

9 PROFESSOR SCHWARTZ: You may  
10 not have this at your fingertips; I don't either.  
11 Was the [REDACTED] offer -- you mentioned it was on  
12 an [REDACTED]. Do we know whether there  
13 was any conditions there about, [REDACTED]

14 Do we know  
15 anything about that?

16 THE WITNESS: I believe that  
17 that's the case. It was, "We'll give you [REDACTED] in  
18 [REDACTED] on the assumption [REDACTED], or [REDACTED]  
19 [REDACTED]".

20 PROFESSOR SCHWARTZ: I see.  
21 And when you -- we have heard a lot of facts, so I  
22 don't have all these immediately present. Tell me  
23 a bit -- remind me again a bit about the Brattle  
24 \$6 million.  
25

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1 want another data point. I mean, these are all --  
2 they can help inform your thinking. I don't think  
3 any of them are determinative.

4 PROFESSOR SCHWARTZ: It sounds  
5 like your company has been doing this kind of  
6 estimation in a lot of contexts over a lot of  
7 time. Have you had the opportunity to compare  
8 your predictions with what the market ultimately  
9 decided? If we wanted to know whether your figure  
10 of X hundred million dollars is plus or minus Y  
11 per cent Z per cent of the time, is that anything  
12 you could even qualitatively speak to?

13 THE WITNESS: In an earlier  
14 case, another NAFTA dispute, we had someone coming  
15 in giving us oil prices because that was a factor  
16 to consider, and she had forecasted oil prices.  
17 And when she was hired, I asked the lawyers to  
18 check with her. I said, "Well, can we look at her  
19 prior forecasts from other years to see if she was  
20 right ever?" And she said, "No, you are not  
21 allowed to do that". And she said, "It doesn't  
22 matter".

23 I said, "How can it not  
24 matter? That doesn't make sense to me".

25 She goes, "Because people rely



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1 on my number, so when people are actually  
2 transacting, I'm the person that's most often" --  
3 that's what she said, "I'm the person that's most  
4 often quoted, and this is what people incorporate  
5 into their projections when they buy and sell  
6 businesses".

7 And I thought about it, and  
8 it's actually it's not -- it's not a ridiculous  
9 statement. People take forecasts that they think  
10 are reliable. You know, I just consulted on --  
11 it's a public transaction now. It just was  
12 completed the day before Christmas, this past  
13 Christmas. China Moly, which is one of the  
14 biggest mining companies in the world, bought the  
15 Louis Dreyfus Global Metals Trading Commodity  
16 Business, and I was their principal advisor and  
17 did the due diligence and negotiated the price.

18 Here, you had a projection of  
19 a company that was going to lose money for seven  
20 years that they paid half a billion dollars for  
21 because they thought there was some value down the  
22 road that they perceived. It's in the perception  
23 of the investors. And that's why when I was  
24 questioned about, "Is it reasonable to inflate  
25 this or project that?" in the real world, this is

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1 the way businesses are bought and sold. Just  
2 because it's hard doesn't mean you can't do it  
3 otherwise. Businesses would never transact, and  
4 we see transactions all the time.

5 And I will also say quite  
6 clearly: Where there is a reliable source of  
7 projection that takes into account disruptive or  
8 macro based events, those things are also  
9 considered. But in the absence of that, trends or  
10 real price increases, real price, keeping it flat  
11 in the future, is a very common way people deal  
12 with projections in determining price and value.

13 PROFESSOR SCHWARTZ: Okay.  
14 Could I ask you a little bit about prejudgment  
15 interest.

16 THE WITNESS: Certainly.

17 PROFESSOR SCHWARTZ: Both  
18 sides, I believe, used an American interest rate.

19 THE WITNESS: I believe that's  
20 correct.

21 PROFESSOR SCHWARTZ: The  
22 investment was going to be in Canada. Why would  
23 both sides -- don't necessarily speak for the  
24 expert on the other side, but what is the logic of  
25 using American interest rate rather than a

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1 Canadian interest rate?

2 THE WITNESS: I think the  
3 revenues are being derived in USD, and, because of  
4 that, you want to be true to that currency because  
5 inflation and interest rates follow the currency.  
6 And so to be consistent, you want to use that  
7 rate.

8 PROFESSOR SCHWARTZ: Oh, I  
9 see. And is that simple or compounded in your  
10 report?

11 THE WITNESS: I think we both  
12 agreed that it should be on a compounded basis,  
13 because commercial interest rates are compounded.

14 PROFESSOR SCHWARTZ: Okay.  
15 Thank you.

16 PRESIDING ARBITRATOR: Yes,  
17 Professor McRae.

18 PROFESSOR McRAE: I have a  
19 question, Mr. Rosen, that follows -- I think I  
20 maybe have two questions, but it follows in part  
21 from what Professor Schwartz was saying.

22 You have been questioned a lot  
23 about the fact that you are projecting to 50 years  
24 on the basis of a business that's never had any  
25 operation. Is that common in your experience?

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1 You have been involved obviously in a lot of  
2 investment disputes. Is that common that you are  
3 projecting on the basis of a -- profits of a  
4 business that's never actually had any operation?  
5 And then the other side of that, you have said,  
6 well, this is what people do in the market all the  
7 time. And the question for that is: Well, what  
8 is a normal projection? If you are buying a  
9 business -- and maybe it depends on which  
10 business you have -- but is it normal to project  
11 10 years into the future? Thirty years into the  
12 future? A hundred years into the future? And  
13 we're stuck at 50 here. But how does it fit with  
14 what actually happens in the market? And then go  
15 back to my first question: Is this common, in  
16 your experience, of investment arbitrations?

17 THE WITNESS: So the problem  
18 with a business that is stopped or taken -- in  
19 this case it's not taken, but it's interrupted  
20 before it gets going -- is it doesn't have a track  
21 record. And if you read all the decisions,  
22 tribunals really would rather have a company with  
23 a demonstrated track record, and they feel good  
24 about the evidence, that this was actually going  
25 to happen. And that's why there's been some

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1 discussion around whether this was a start-up or  
2 not.

3 In the commodity business,  
4 specifically the mining business, you are a serial  
5 start-up essentially, but they are not really  
6 start-ups. A start-up, again, implies we have an  
7 idea; we are going to build something; and there's  
8 unknowns everywhere. We don't know how much it's  
9 going to cost to build, or maybe we have some  
10 projections. We don't have any experience with  
11 this product. We don't know if it's going to be  
12 in fashion next year or not. We don't know how  
13 many people are going to compete with us, what  
14 price we can sell it at, or whether people are  
15 going to like the colour of it.

16 In the mining business and  
17 specifically, in this case, the aggregates  
18 business and more specifically with the Claytons  
19 and their experience, you have experienced  
20 management, which is one of the criteria I think  
21 tribunals rightfully look for, if they've got a  
22 track record of actually investing their money and  
23 building these businesses.

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1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]. And so what they were  
4 simply saying was, "Let's invest some money so we  
5 [REDACTED]. We know this business.  
6 We have owned quarries before. We have never  
7 built one. Let's get John Wall. This guy's done  
8 it. He is the best. Let's go out and hire this  
9 guy, and let's surround him with the people we  
10 need to get this thing done".

11 After that, it's not a  
12 complicated business. It's not one where you have  
13 to search for an ore that contains a metal that  
14 you have to have a chemical process to bring it  
15 out with cyanide or some toxin. It's not that  
16 complicated. When you talk to people who are  
17 engineers in the mining industry, they talk about  
18 it as, "We are just blowing stuff up, rolling it  
19 through some screens, and putting it on a ship".  
20 I mean, it's not -- obviously the people right  
21 here in the front of the room couldn't do it, but  
22 this is a pretty simple business.

23 So that answers the question:  
24 Have you ever seen a business that's never existed  
25 be treated this way by a tribunal, or should it be

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1 treated this way by a tribunal in calculating  
2 damages, because it didn't exist. It's not that  
3 kind of start-up business by its very nature.

4 And then the question as to  
5 what's a reasonable projection period, forecasts  
6 are usually done, depending on the business, for  
7 five years, sometimes ten years reliably. And I  
8 think that's a fair way to think about it.

9 After that period -- and this  
10 is what I was talking the convention and the  
11 valuation in a transaction world is. You assume  
12 it exists forever. You aren't doing a 50-year  
13 projection. You are doing a billion-year  
14 projection. And once you're out past 30 years,  
15 35-40 years, it doesn't matter much because, by  
16 discounting it back to present value, those  
17 numbers have very little impact on the total  
18 price. And that's why people don't get fussed  
19 about it. They call it the terminal value. And  
20 so every business that's bought and sold has a  
21 forecast period that they feel they can reliably  
22 forecast. It might be two years in some  
23 businesses because it's so volatile. Might be  
24 longer if it's less volatile, more predictable.  
25 And after that point, there's an assumption that

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1 things will continue, and that's why we use stable  
2 real pricing and do things based on inflation.  
3 And that is the way businesses are bought and  
4 sold, with long projection periods.

5 PROFESSOR McRAE: Okay. Thank  
6 you very much.

7 PRESIDING ARBITRATOR: Thank  
8 you, Mr. Rosen. This --

9 MR. SPELLISCY: I actually  
10 have -- sorry, did you have a question too?

11 PRESIDING ARBITRATOR: Okay.  
12 Who goes first?

13 MR. SPELLISCY: My cross,  
14 so...

15 PRESIDING ARBITRATOR: Okay.  
16 Yes, go ahead, Mr. Spelliscy.

17 FURTHER CROSS-EXAMINATION BY MR. SPELLISCY:

18 Q. Hello again, Mr. Rosen.  
19 I did have one question arising from something  
20 that Professor Schwartz asked you, which was:  
21 When you compared the Brattle valuation of 6  
22 million with what you said was an apples-to-apples  
23 comparison with [REDACTED]

24 So you said that the Brattle  
25 valuation was as of October 2007; correct?



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1 A. Correct.  
 2 Q. The [REDACTED]  
 3 that you suggested was apples to apples is  
 4 actually a valuation indexed to 2016; right?  
 5 A. Oh, but the Brattle  
 6 number actually declines, because he has negative  
 7 pre-award interest at the current date, so it's  
 8 about the same.  
 9 Q. No, no, that's not my  
 10 question. The value of [REDACTED] that you gave  
 11 is as of 2016; correct?  
 12 A. 2060?  
 13 Q. '16, one-six.  
 14 A. '16. Yeah. I said that  
 15 Brattle had indexed it to a current date.  
 16 Q. Right. And if you  
 17 actually indexed the [REDACTED] valuation to  
 18 October 27, 2007, as well, do you know what that  
 19 value is?  
 20 A. [REDACTED]  
 21 Q. [REDACTED]. You  
 22 think it's [REDACTED]? Have you read the Brattle  
 23 report on that? Do you know what their view on  
 24 that is?  
 25 A. I'm sorry. The offer was

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1 "they didn't", who didn't?  
 2 A. [REDACTED]  
 3 Q. They made one offer in  
 4 [REDACTED]; correct?  
 5 A. And it was memorialized  
 6 at a later date.  
 7 Q. Right.  
 8 A. But not revised.  
 9 Q. It was memorialized  
 10 saying, [REDACTED]  
 11 [REDACTED] correct?  
 12 A. Right. But it was not  
 13 revised for the passage of time.  
 14 Q. [REDACTED]  
 15 [REDACTED]; correct?  
 16 A. They had just -- that's  
 17 when it was memorialized. That's all I know.  
 18 Q. It was memorialized when  
 19 is your understanding, Mr. Rosen?  
 20 A. [REDACTED].  
 21 Q. Your understanding is it  
 22 was memorialized [REDACTED]?  
 23 A. Sorry, let's look at the  
 24 date. Let's look at the document.  
 25

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1 dated that date.  
 2 Q. The offer was dated in  
 3 [REDACTED].  
 4 A. Oh, so this is a point  
 5 that I brought out, actually, not that Brattle  
 6 brought out. I said if it had -- this is why I  
 7 thought the indexing was improper. It was an  
 8 improper index. I said, if indexing in the way  
 9 that Brattle had done it, the [REDACTED]  
 10 should have been revised down to [REDACTED], if you just  
 11 followed this sort of indexing off of these  
 12 general indices.  
 13 Brattle interpreted me to say  
 14 you can never use indexing. And, again, that was  
 15 one of the misstatements that I cited earlier. I  
 16 simply said, if that index was appropriate, that  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 Q. And that could make sense  
 21 in market conditions; correct?  
 22 A. No. That's what I'm  
 23 saying. They didn't. And that's why I said the  
 24 index that was used by Brattle was not reliable.  
 25 Q. I'm sorry. When you said

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1 Q. We will pull it up. And  
 2 I won't pretend to know the exhibit number, but  
 3 I'm sure somebody does.  
 4 Can you read the date on that?  
 5 A. I can't. Oh, here we go.  
 6 [REDACTED]. So I said [REDACTED]. I stand  
 7 corrected.  
 8 Q. It was memorialized in  
 9 [REDACTED]. If you scroll down to the letter,  
 10 please. This is Exhibit R-590:  
 11 "Acknowledgement of  
 12 [REDACTED] interest  
 13 during [REDACTED]  
 14 [REDACTED]. At that  
 15 time, we proposed [REDACTED]  
 16 [REDACTED] for the Digby  
 17 quarry. [REDACTED]  
 18 [REDACTED] [as read]  
 19 Do you see that?  
 20 A. Absolutely.  
 21 Q. Okay. So that was what  
 22 they proposed in [REDACTED]; correct?  
 23 A. Correct. As memorialized  
 24 in [REDACTED] And my point was: If the  
 25



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1 indexing suggested by Brattle was appropriate,  
2 they would have noted here that [REDACTED]  
3 [REDACTED], if it was appropriate to index  
4 offers.

5 Q. Well, why would they note  
6 that, Mr. Rosen? [REDACTED]

7 A. I'm just saying if it  
8 was -- I don't know what caveats they would have  
9 put on it. I don't know why it was -- was it  
10 written for some other purpose?

11 Q. Well, I think I know why  
12 it was written, but it's not important for me to  
13 give evidence here.

14 A. Okay. I don't know why  
15 it was written.

16 Q. And if you indexed a [REDACTED]  
17 [REDACTED] to make it an  
18 apples-to-apples comparison, it would be, as you  
19 said in your evidence, about [REDACTED]; correct?

20 A. That's from my report.

21 Q. Right. From your report?

22 A. Yes.

23 Q. So, in fact, the  
24 apples-to-apples comparison from Brattle's  
25

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1 would have used an index based on the public  
2 companies that have a variety of different  
3 holdings. And this is a whole other area. I can  
4 explain why I disagree with the indexing if you'd  
5 like me to.

6 Q. You would accept that, in  
7 the clarification for Professor Schwartz's  
8 question, that the comparison, if you wanted to  
9 have it at the same date, would not be six and [REDACTED]  
10 million, those are from different dates; correct?

11 A. Correct.

12 Q. Thank you.

13 PRESIDING ARBITRATOR: Thank  
14 you, Mr. Spelliscy. Mr. Nash.

15 FURTHER RE-EXAMINATION BY MR. NASH:

16 Q. Mr. Rosen, is forecasting  
17 for an industry such as the aggregates industry  
18 the same or different as forecasting for other  
19 industries? Let me give you an example, oil,  
20 technology, for example.

21 A. No, it is not.

22 Q. And, in your model, are  
23 you projecting into the future for 50 years?

24 A. No. Actually there is  
25 the period from 2008 to today's date, and then

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1 October 2007 number is not six and [REDACTED].  
2 It's six and [REDACTED], is it not?

3 A. The [REDACTED], if you  
4 accept that the index that was used was  
5 appropriate, which I don't.

6 Q. Right.

7 A. That was my point in my  
8 report.

9 Q. Okay. But I just want to  
10 clarify. You had said if you had gone apples to  
11 apples, it was six and [REDACTED] but it wasn't six and  
12 [REDACTED]. If you accept indexing, it was six and [REDACTED]  
13 correct, my date?

14 A. Actually, I think I said  
15 it was six and [REDACTED]. If indexed today, it would be  
16 around [REDACTED].

17 Q. It was six and [REDACTED]. The  
18 offer was for [REDACTED], Mr. Rosen.

19 A. Correct. That's what I  
20 am saying.

21 Q. And so indexing the offer  
22 between [REDACTED] and October of 2007 would have  
23 had no effect on value, in your opinion?

24 A. I'm saying the offer  
25 wasn't indexed, and so I don't know why Brattle

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1 from today's date, which was 2016, to 2060, so  
2 it's 44 years, 45 -- 44 years in the future.

3 Q. You referred to  
4 Dr. Chereb's evidence about the lucrative market  
5 in New York. And I'm not sure if I heard you  
6 correctly, but did you say that that was helpful  
7 to the respondent or to the claimant?

8 A. No. I said I found the  
9 respondent's expert's evidence helpful in  
10 understanding the New York market.

11 MR. NASH: Thank you.

12 PRESIDING ARBITRATOR: Thank  
13 you, Mr. Nash. I think I'm right in assuming that  
14 this is the end of your examination. Thank you  
15 very much.

16 THE WITNESS: Thank you.

17 PRESIDING ARBITRATOR: It's 11  
18 to one, so I guess we will have our lunch break.  
19 And so we are going to meet again for Mr. Chodorow  
20 at two, 2:00 p.m. Thank you very much.

21 --- Upon luncheon recess at 12:49 p.m.

22 --- Upon resuming at 2:08 p.m.

23 PRESIDING ARBITRATOR:  
24 Everybody seems to be ready, even the president of  
25 the tribunal. And we proceed to the examination



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1 of Mr. -- how do you want your name to be  
2 pronounced, Chodorov (pronunciation)?  
3 THE WITNESS: Chodorow.  
4 PRESIDING ARBITRATOR:  
5 Mr. Chodorow, welcome. Would you please read the  
6 statement that you have in front of you.  
7 WITNESS DECLARATION: DARRELL CHODOROW  
8 MR. CHODOROW: I solemnly  
9 declare upon my honour and conscience that I will  
10 speak the truth, the whole truth and nothing but  
11 the truth, and that my statement will be in  
12 accordance with my sincere belief.  
13 PRESIDING ARBITRATOR: Thank  
14 you.  
15 Ms. Zeman, please direct the  
16 witness.  
17 MS. ZEMAN: Thank you.  
18 EXAMINATION IN-CHIEF BY MS. ZEMAN:  
19 Q. Good afternoon,  
20 Mr. Chodorow.  
21 A. Good afternoon.  
22 Q. You heard Mr. Rosen talk  
23 this morning about his qualifications. Can you  
24 provide the tribunal with a description of your  
25 background and qualifications?

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1 should also note, I do have also some experience  
2 in the field of mining and aggregates. I would  
3 not characterize myself as an expert, but I do  
4 have experience in that field.  
5 So I have corrections in both  
6 reports. So, to start with the first report, I  
7 had an inadvertent statement on page 5 of my  
8 June 9th, 2017, report. And that's in  
9 paragraph 13. And in that sentence, I am  
10 describing the evidence related to confirmation  
11 that certain invoices were paid. And I  
12 inadvertently said I was looking for confirmation  
13 in the form of receipts and invoices, whereas I  
14 meant to say in the form of receipts and other  
15 payment confirmations. And that's in paragraph 13  
16 on page 5.  
17 And the same thing is repeated  
18 again on page 17 in paragraph 50.  
19 And in my second report, I  
20 have one correction to make in two places. And  
21 that's related to what we heard earlier this week,  
22 which involves [REDACTED]

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1 A. Yes, I have a bachelor's  
2 degree in economics from Brandeis University and  
3 an MBA from Yale University. I am a principal  
4 with the Brattle Group in Washington, D.C., which  
5 is an international economic consulting firm. And  
6 I have been with the Brattle Group. I started in  
7 1991 and been there since, with the exception of  
8 two years when I was in grad school and then two  
9 years when I was commuting back and forth between  
10 New York and Michigan where my wife was getting  
11 her degree.  
12 I have had a focus on quantum  
13 of damages over the course of my career, and I  
14 have a significant amount of experience in  
15 international arbitration.  
16 I have served as an expert  
17 before in matters before ICSID tribunals, ICC,  
18 LCIA, AAA, and ad hoc arbitration tribunals, as  
19 well as before the various federal and state  
20 courts in the US and the District Court of Cyprus.  
21 Q. I know you have a  
22 presentation to give, but before we get to that,  
23 do you have any corrections to make to your  
24 report?  
25 A. Yes. By the way, I

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1 [REDACTED]  
2 [REDACTED]  
3 And so on page 8,  
4 paragraph 27, what was 6.3 million should be  
5 5.5 million. And in paragraph 183, the  
6 6.3 million figure should be 5,472,954, a level of  
7 false precision, of course.

8 Q. We will provide updates  
9 of the relevant schedules in due course that will  
10 reflect those corrections.

11 So if you're ready,  
12 Mr. Chodorow, please proceed with your  
13 presentation.

14 And I should note for the  
15 record that we should go into confidential session  
16 at this point.

17 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT  
18 2:13 P.M.

19 THE WITNESS: And I apologize,  
20 I've still have got a bit of a cold this week that  
21 I have been nursing, so I hope not to have any  
22 coughing fits during the course of this.

23 So I was asked to provide  
24 opinions in three different areas in this matter.  
25 The first is, what are the historical costs



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1 associated with the Whites Point project?

2 The second is I was asked to  
3 evaluate whether Mr. Rosen's DCF valuation was  
4 reliable. And the third, I was asked to estimate  
5 the claimants' loss.

6 So, I am first going to start  
7 with historical costs. And we received a number  
8 of invoices in approximately 150 exhibits from the  
9 claimants that identify all of the expenses  
10 associated with the project, and I was asked to  
11 quantify the total amount for the period from  
12 April of 2002, when Bilcon of Nova Scotia first  
13 entered into the project, and October of 2007,  
14 which is when the JRP report was issued.

15 And that number I estimated to  
16 be [REDACTED], and that's the  
17 number that Mr. Forestieri said that he agreed  
18 with during his testimony.

19 In addition to quantifying  
20 this total amount, which reflects expenditures by

21 [REDACTED]  
22 I was also asked to look at two additional  
23 numbers. The first is the total expenditures by  
24 Bilcon of Nova Scotia, BNS, over that same period.  
25 And when you exclude payments from [REDACTED]

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1 profitability? And in this case, the answer to  
2 that is, no, we don't have that kind of  
3 information here.

4 The next is I would look at  
5 whether the project was ever constructed, and we'd  
6 therefore have certainty about the completion  
7 costs associated with the project. And, again, in  
8 this instance, the answer's no.

9 I would want to understand if  
10 the project had a final design, and my  
11 understanding, based off of the testimony that I  
12 heard this week, is that it had [REDACTED]

13 [REDACTED]  
14 Next is, in mining projects,  
15 as well as many other types of projects, it's  
16 common to conduct careful feasibility studies  
17 before investing large sums of money. And those  
18 kinds of studies have oftentimes detailed  
19 marketing plans, detailed estimates of costs and  
20 careful financial analysis to evaluate whether the  
21 project should proceed. And in this case, the  
22 claimants have said that they understood that the  
23 project was feasible but that they didn't conduct  
24 any of these kinds of analysis, so that when we  
25 asked for them, we didn't receive any kind of

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1 [REDACTED] that [REDACTED] drops to  
2 [REDACTED] dollars.

3 And I was also asked to  
4 quantify the expenditures on the JRP process, with  
5 the instruction to use the period from November of  
6 2004 through October of 2007, and that figure was  
7 [REDACTED] dollars.

8 And once I had done that, I  
9 was asked to identify where I could confirm that  
10 amounts shown in specific invoices were paid, and  
11 I did that, and it appears that roughly, roughly  
12 half of those amounts were paid. There are more  
13 details on this in my report.

14 Next, I will turn to the  
15 question about whether Mr. Rosen's valuation is  
16 reasonable. I am going to start by talking about  
17 the reliability of the DCF in this instance.

18 And I will start with the  
19 background that's relevant for the project, which  
20 is, when I am going to conduct a DCF valuation, I  
21 start to look for the types of relevant  
22 information that I would want to see in order to  
23 develop a reliable forecast of cash flows. And so  
24 the first place I would look is does the project  
25 have an operating history and a record of

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1 analysis like that.

2 In addition, I'd want to see  
3 contemporaneous price and cost forecasts that were  
4 used to evaluate the project. And, again, we  
5 asked for that information, but there was no such  
6 information available.

7 The next, the next thing is I  
8 would want to know what kind of evidence there is  
9 for the assumed market for this product. And, in  
10 this case, there's an assumption made about [REDACTED]

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 So, again, I think there's not  
18 good evidence of that.

19 And, finally, one needs to  
20 think about the question of permitting risk and  
21 approvals risk, and that's an issue which I  
22 understand is in dispute in this proceeding, but I  
23 have been instructed to assume that those types of  
24 risks did exist for this project.

25 So there is a significant



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1 amount of information that I'd want to see but  
2 that's not available in this context to develop a  
3 DCF analysis. In the absence of this kind of  
4 information, Mr. Rosen developed a number of  
5 assumptions that he uses in his DCF. And as you  
6 heard Mr. Rosen say earlier, there's disagreement  
7 between us about how reliable those figures are.  
8 And I would agree with that. I don't think I have  
9 time to get into all of the details, but I am  
10 going to walk through a few of these quickly now.

11 So we will start with  
12 permitting risk. So Mr. Rosen's analysis assumed  
13 that there was a straight line between JRP  
14 hearings and the retention of any provincial and  
15 federal government approvals and permits with  
16 normal conditions associated with them. But this  
17 is one possible path that the project may have  
18 taken but for the breach, but there are a number  
19 of places where this process might get derailed.  
20 So the first is that the JRP -- and this is based  
21 off of the testimony of experts that went earlier  
22 this week. It's not my personal opinion because I  
23 am not an expert in this area.

24 The first is that there could  
25 have been a JRP report that had a negative

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1 recommendation without being in breach. The  
2 second is that, even if there had been a JRP  
3 report with a positive recommendation, either the  
4 Nova Scotia and/or the federal government could  
5 have chosen to reject the project. And, finally,  
6 even if both of those government entities approved  
7 the project, there was a chance that permits  
8 either might not be obtained or they may come with  
9 onerous and costly provisions that could impact  
10 the profitability of the project.

11 And, so, as an economist  
12 conducting a valuation, these are important  
13 factors that have to be considered because any  
14 potential buyer considering purchasing this  
15 project would have put a discount on for these  
16 factors to the extent that this risk exists.

17 In addition, you have heard  
18 some discussion about prices, and the claimants  
19 have used

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1  
2  
3  
4  
5  
6  
7  
8  
9 Now, the next thing is we have  
10 heard about

Page 2255

1 [REDACTED]

18 The next place where we

19 deviate is related to [REDACTED]

21 [REDACTED]. And this is a very important factor. So

Mr. Rosen has been instructed to assume [REDACTED]

[REDACTED]

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1 [REDACTED]

23 And the effect of this, of

24 accounting for these factors would be that the

25 [REDACTED]

Page 2257

1 [REDACTED]

18 So Mr. Rosen and I end up with

19 very different cost structures. So Mr. Rosen

20 estimates that, in 2016, it would cost roughly

21 [REDACTED] to produce and ship these

22 aggregates, whereas when you use the adjusted

operating cost assumption reflecting [REDACTED]

[REDACTED] you end up with higher operating

25 costs.

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1 And then there's a difference

2 in the assumptions about freight costs as well.

3 And I think it's important to note an issue that

4 came out in Mr. Rosen's cross-examination, which

5 is he relies on [REDACTED]

[REDACTED]

21 And so the problem is, again,

22 [REDACTED]

[REDACTED]



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1 And, finally, Mr. Rosen's  
2 valuation date fails to account for real market  
3 risks that would be facing the claimants if they  
4 had continued to develop this project. And, the  
5 longer the arbitration here would take, the less  
6 market risk he would incorporate into his  
7 analysis. So if this proceeding were held in  
8 2060, there would be no discounting at all. But,  
9 so the issue is that there are market risks that  
10 were being faced by the project at the time of the  
11 breach, and those are not accounted for in his  
12 cash flows because the past lost profits reflect  
13 no discounting at all to reflect the market risks  
14 that the claimant would have faced as at the  
15 breach date, and the future lost profits are not  
16 discounted back to the breach date. They are  
17 discounted only to today.

18 So, next, I am going to go to  
19 the consistency of Mr. Rosen's DCF with market  
20 evidence. And just to start with, as I mentioned,  
21 there's a lot of information that one would really  
22 want to see to conduct a reliable analysis that's  
23 not available here. And, so, in that situation,  
24 it becomes really important to try and test it  
25 against benchmarks and market evidence that may be

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1 [REDACTED]  
2 [REDACTED]  
3 So the first thing I do is I compare  
4 that to the Clayton Group's operating history from  
5 2001 to 2016, and, as Mr. Forestieri confirmed,  
6 the gross profit margins earned by the Clayton  
Group as a whole never exceeded [REDACTED]

16 So, in addition to this, what  
17 I -- I have also done a comparison for 2011  
18 through 2016. The yellow line represents the  
19 profitability of the Clayton companies in terms of  
20 gross profit, and the red line shows the annual  
21 profitability assumptions for Whites Point in  
22 Mr. Rosen's model.

23 Now, you have heard many times  
24 that there are other companies out there that sell  
25 aggregates. And some of them are publicly traded

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1 available to explain what's going on.

2 And Mr. Rosen didn't conduct  
3 any analysis or use any kind of benchmarks in his  
4 report to test his results, and that's really  
5 important when you have a project that's never  
6 been built, never operated, doesn't have detailed  
7 plans. And so just to put a few things in  
8 context, the claimants have invested roughly  
9 [REDACTED] Canadian dollars or [REDACTED] US  
10 dollars in the project, and Mr. Rosen's valuation  
11 turns that into \$308 million through the damages  
12 analysis. And that's a pretty extraordinary jump  
13 in value. And it's not that -- it's not that such  
14 changes in value can't happen, but there needs to  
15 be a clear explanation about all -- about why such  
16 a big difference exists, and I have not heard that  
17 here. So, I have looked at other things as well.

18 So there was some discussion  
19 about the profitability associated with the  
20 project. Mr. Rosen's analysis assumes gross  
21 profit margins for the project that average almost  
22 [REDACTED] over its entire operating life. Now,  
23 those are pretty rich margins. [REDACTED]

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1 companies for which we can see their profit  
2 margins, and so we have taken a look at those.

3 And if you start with Vulcan  
4 and Martin Marietta, which are the two companies  
5 whose businesses are primarily comprised of  
6 aggregates, what you see is that their profit  
7 margins, their gross profit margins, on average,  
8 are around 30 per cent or so. And, so, if these  
9 profitable -- very profitable quarrying conditions  
10 existed, they would be really interested in  
11 building new capacity in these markets.

12 In addition, Mr. Rosen  
13 identified a number of other potential comparable  
14 companies in his discount rate analysis. So we  
15 looked at those as well, but they are less -- they  
16 have a smaller proportion of the business in  
17 aggregates, but the conclusion is the same.  
18 Nobody in the industry is making these kinds of  
19 profits.

20 Now, the next thing is that we  
21 have two transactions in the project and one  
22 offer. So, in 2004, Nova Stone exited the  
23 project, and the amount that the, that Bilcon of  
24 Nova Scotia paid to acquire Nova Stone's interest  
25 in the project implied a value for the project of



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1 [REDACTED]  
2 In 2002, when Bilcon of Nova  
3 Scotia first entered into the Whites Point  
4 project, the compensation that it paid would have  
5 implied a value for the project of [REDACTED].  
6 And we also have the [REDACTED] offer, and which  
7 the claimants requested [REDACTED]  
8 [REDACTED] that [REDACTED] send  
9 them a letter identifying the offer that they made  
10 in [REDACTED], which was  
11 [REDACTED].

12 Now, all of these are  
13 inconsistent with Mr. Rosen's valuation, which is  
14 far higher, but it's not a fair comparison because  
15 we know there can be changes in market conditions  
16 over time. And to account for those changes in  
17 market conditions, what I have done is I have  
18 provided an index value associated with each of  
19 these to bring them to Mr. Rosen's valuation date.

20 And what you can see is the  
21 [REDACTED] turns into [REDACTED], the [REDACTED]  
22 turns into [REDACTED], and the [REDACTED]  
23 offer turns into [REDACTED].

24 So, again, market conditions  
25 don't seem to explain the change and overall

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1 to sell. All of that information shows the  
2 project operating differently from how Mr. Rosen  
3 modelled it.

4 And that's why the market  
5 benchmarks are so important to ask, what is the  
6 overall reasonableness of the result of his model?  
7 Which is a question that he never asked. He's  
8 taking inputs, running them through his model and  
9 they give him an output. And he assumes that that  
10 output is reasonable by virtue of the assumption  
11 that the inputs are reasonable, and I don't think  
12 that's appropriate without conducting some serious  
13 investigations.

14 So, finally, I was asked the  
15 question of what was claimants' loss. And we will  
16 start with this. This is a diagram from my report  
17 which just highlights that Mr. Rosen has assumed a  
18 valuation that is effectively like an  
19 expropriation, which is the entire blue box here  
20 of lost profits was taken away as a result of the  
21 breach.

22 Now, I was asked to conduct a  
23 similar DCF analysis of the lost profits of the  
24 project. And I have caveats on this because I am  
25 using a lot of information from Mr. Rosen's model

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1 valuation in Mr. Rosen's model.

2 And there are, of course,  
3 caveats associated with each of these which are  
4 discussed further in my report and I don't have  
5 time to get into now, but we are not talking about  
6 small differences here. We are talking about  
7 differences of, you know, 20, 30, in some cases,  
8 and, you know, down to about a factor of 6 or 7.

9 The final thing to look at is  
10 to say, okay, well, what is the implied  
11 performance of the Claytons' investment. If they  
12 had taken their money and invested it in  
13 April 2002 in Martin Marietta, by the end of 2016,  
14 Mr. Rosen's valuation date, they would have earned  
15 a return of [REDACTED]. If they had done the  
16 same with an investment in Vulcan Materials, they  
17 would have earned [REDACTED]. But Mr. Rosen's  
18 analysis implies a return on the investment in the  
19 project of roughly [REDACTED].

20 And so we are really in a  
21 situation where we have a project where there's  
22 very little contemporaneous information to rely  
23 on, and there's been a DCF put forth. But it's  
24 not based off of the contemporaneous information  
25 about what the project was, where it was intending

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1 that I can't check myself, and so I can't vouch  
2 for its reliability or reasonableness.

3 But when you make a number of  
4 the changes that are discussed in my report, it  
5 suggests that, as of the breach date, that value  
6 was \$5.5 million. It's in the range of the market  
7 value indicators, as I discussed before. The  
8 [REDACTED] was made in [REDACTED]. But  
9 between [REDACTED] and October of 2007, the  
10 market value of publicly traded aggregates  
11 companies dropped by roughly a third, and that's  
12 why I have adjusted that figure down, and it's  
13 only [REDACTED] here. And, now, that's for [REDACTED]  
14 [REDACTED]. To the extent that [REDACTED]  
15 [REDACTED], that would reduce  
16 those values further.

17 But both Mr. Rosen's analysis  
18 and my analysis, they focus on the total lost  
19 profits, or total profits that might be generated  
20 if the quarry was built. But the reality is that  
21 the Claytons didn't lose the project. They had an  
22 opportunity, I am instructed, to pursue mitigation  
23 through judicial review, which would have allowed  
24 to them to go through a process that would allow  
25 them to undo the effects of the breaching JRP.



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1 And what that means is there was the potential  
2 through pursuing this mitigation to restore a lot  
3 of those profits that would otherwise be loss.

4 There was a question that -- I  
5 was instructed to assume that this was a path  
6 available to the claimants and that they did not  
7 take this path. But if one were to believe  
8 Mr. Rosen's valuation, it would seem strange not  
9 to pursue the -- not to pursue the judicial review  
10 because, number one, the costs are only a small  
11 portion of the lost profits associated with the  
12 project; and, also, the claimants have said that  
13 the Whites Point project was very strategically  
14 important. So both those factors suggest that the  
15 pursuit of mitigation would have been reasonable  
16 from an economic perspective. I can't speak to  
17 the legal perspective.

18 And I was asked to estimate  
19 the loss based off of the DCF analysis that I  
20 conducted as of the breach date to provide an  
21 estimate of what those, what the loss is,  
22 accounting for mitigation. And there was the cost  
23 of judicial review, which I was instructed that  
24 Judge Evans estimated to be roughly 100,000 US  
25 dollars. The project would have returned and had

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1 a second JRP hearing. I was instructed to assume  
2 that the costs associated with that would reflect  
3 the cost from May of 2007, when the JRP hearings  
4 started, through October of 2007, when the JRP  
5 issued its report, and those amount to roughly  
6 [REDACTED].

7 And the potential exists that,  
8 by delaying the project, it could reduce the  
9 present value of profits associated with the  
10 project. And we tested for that by estimating the  
11 present value of lost profits as of the breach  
12 date and after a four-year delay associated with  
13 the pursuit of a judicial review and found that  
14 there was not a decline in the value of the  
15 project. And that was primarily related to two  
16 factors.

17 The first is that [REDACTED]

And the second is that [REDACTED]

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1 [REDACTED]  
2 [REDACTED] And so those two factors mean that, as  
3 a result of the delay, in my DCF analysis, there  
4 was not a diminution of value.

5 So those are my conclusions.  
6 Thank you for your time, and I welcome any  
7 questions.

8 PRESIDING ARBITRATOR: Thank  
9 you, Mr. Chodorow. I give the floor to Mr. Nash  
10 for your cross-examination.

11 CROSS-EXAMINATION BY MR. NASH:

12 Q. Mr. Chodorow, you are a  
13 consultant; that's correct?

14 A. That is correct.

15 Q. You filed two reports in  
16 this matter?

17 A. That's correct.

18 Q. And you filed two  
19 different CVs in this matter; that's correct?

20 A. I don't remember if I  
21 included an update CV in my second report. Did I?  
22 I would have to double-check.

23 Q. You did.

24 A. Okay.

25 Q. And your work as a

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1 consultant has, I think you have described it,  
2 covered a broad array of industries, including the  
3 petroleum industry?

4 A. Um-hmm.

5 Q. Yes?

6 A. That's correct.

7 Q. You have consulted with  
8 the petroleum industry; that's right?

9 A. That's correct.

10 Q. And the natural gas  
11 industry?

12 A. That's correct.

13 Q. And the electricity  
14 industry?

15 A. That's correct.

16 Q. Biotechnology?

17 A. That's correct.

18 Q. Pharmaceuticals and  
19 chemicals?

20 A. That's correct.

21 Q. Financial services and  
22 gaming?

23 A. That's correct.

24 Q. That involved a dispute  
25 over a gaming license in Asia; right?

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1 A. One of my gaming cases  
2 did, yes.  
3 Q. Consumer products  
4 industries, you were a consultant to them?  
5 A. That's correct.  
6 Q. High technology?  
7 A. That's correct.  
8 Q. Media and transportation?  
9 A. That's correct.  
10 Q. Mutual funds and  
11 cosmetics?  
12 A. That's correct. And I  
13 think it's important to note that I am not here  
14 providing opinions on -- as an expert on mining.  
15 I am here --  
16 Q. I understand.  
17 A. -- providing opinions as  
18 an expert on the quantification of damages. And I  
19 do have industry knowledge. I have worked in a  
20 wide variety of commodity projects, which is noted  
21 on my resume, that includes things like iron ore,  
22 nickel, aggregates, as I mentioned earlier, coal  
23 mining, so a wide variety of different cases.  
24 Q. Let's go to page 3 of  
25 your CV, which is, I think, following page 81 in

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1 Q. And as I have read your  
2 CV, that is the one and only cement, concrete,  
3 aggregates transaction or matter you have  
4 consulted in; am I incorrect?  
5 A. Well, so the answer to  
6 that would be, yes, this is only representative  
7 experience. I don't list all of my cases on my  
8 CV; otherwise, it would be extraordinarily long.  
9 And, in fact, on page 2, it says "Representative  
10 Experience".  
11 Q. So you're not a concrete,  
12 aggregates, cement expert; that's correct?  
13 A. No, sir. It's certainly  
14 been an issue in more than one case that I have  
15 been involved with, but I am not claiming  
16 expertise in that area.  
17 Q. You heard Mr. Rosen say  
18 that, in recent years, 70 per cent of his  
19 experience in valuation is in the mining industry;  
20 you heard that?  
21 A. I heard that, but I don't  
22 think that's particularly relevant here because --  
23 Q. Well, let's move on to  
24 relevance in a moment.  
25 A. He is not bringing a lot

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1 Tab 1.  
2 A. Okay.  
3 Q. So if you go to the very  
4 end of your report, which I believe is page 81.  
5 A. Yes.  
6 Q. And flip over to the next  
7 page.  
8 A. Okay.  
9 Q. And go to page 3 of 6.  
10 A. Okay.  
11 Q. And go to the middle of  
12 the page, the middle bullet.  
13 A. The middle bullet.  
14 Q. "Mr. Chodorow advised on  
15 the fair market value of  
16 the assets during  
17 negotiations over the  
18 sale of a controlling  
19 state in a large cement,  
20 aggregates, and ready-mix  
21 concrete business."[as  
22 read]  
23 You consulted on that  
24 transaction?  
25 A. Yes.

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1 of mining expertise here. Right? He is taking in  
2 assumptions related to his DCF from others, but he  
3 is not, he is not using any specialized mining  
4 expertise in this case, nor am I. My knowledge of  
5 aggregates markets and mining generally is useful,  
6 but it's not something that I am purporting to  
7 have expertise on.  
8 Q. So you think that your  
9 one or two cases in the cement, aggregate,  
10 concrete industry is sort of comparable to his 70  
11 per cent of his practice in mining; is that what  
12 you are saying?  
13 A. I am not trying to  
14 suggest that I have the same mining expertise as  
15 Mr. Rosen. I would say that I don't. But, again,  
16 the opinions that he is expressing are not  
17 opinions of expertise in mining. They are things  
18 where he is making assumptions from people who are  
19 providing what seems to be expertise in mining,  
20 but his opinions are not. And I will note that --  
21 Q. I think I understand --  
22 A. I --  
23 Q. I think -- I understand.  
24 That's not really an answer to my question.  
25 A. -- but I will also note



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1 that I don't think Mr. Rosen mentioned any  
2 specific experience in aggregates.  
3 Q. So you don't have a  
4 professional designation as an accountant; that's  
5 correct?  
6 A. That's correct, although  
7 I was a teaching assistant for an accountant at  
8 Yale University.  
9 Q. That was, what, 25 or 30  
10 years ago?  
11 A. Let's see, 23, 24.  
12 Q. All right, close enough.  
13 You are not a CPA; that's  
14 correct?  
15 A. That's correct, but I  
16 am --  
17 Q. You do not have a  
18 professional designation as a valuator; that's  
19 correct?  
20 A. That's correct, but I  
21 have an MBA from Yale, and for more than  
22 two decades, I have worked with some of the  
23 leading experts in corporate finance in the world,  
24 including Professor Stew Myers at MIT, who  
25 literally --

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1 reasonableness of this  
2 claim. In doing so, I  
3 have been instructed to  
4 assume that:  
5 A, the damages should  
6 make the claimants whole  
7 for the effects of the  
8 breach as of the 22nd of  
9 October, 2007, the date  
10 when the JRP completed  
11 its report."[as read]  
12 So you were instructed to  
13 choose a valuation date of October 22nd, 2007;  
14 that's correct?  
15 A. That's correct.  
16 Q. And you followed those  
17 instructions throughout both reports; that's  
18 correct?  
19 A. That's correct.  
20 Q. And you have assumed  
21 throughout that the appropriate valuation date is  
22 October 22nd, 2007; that's correct?  
23 A. That's correct, although  
24 in doing this, there's a lack of information, as I  
25 noted during my discussion, in places, I just

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1 Q. I am just asking about  
2 your qualifications.  
3 A. -- who literally wrote  
4 the book.  
5 Q. My question was: Do you  
6 have a professional designation as a business  
7 valuator? And your answer is no; that's correct?  
8 A. No, that's correct.  
9 Q. That's correct, thank  
10 you.  
11 A. I come at this from the  
12 perspective of an expert in economics and  
13 corporate finance, which are the relevant factors  
14 that I opine on here.  
15 Q. If you go to page 83 of  
16 your report, please. First report, Tab 1.  
17 A. Okay. Page 83?  
18 Q. I am sorry, paragraph 83.  
19 I misspoke.  
20 A. Okay.  
21 Q. Which is on page 29. And  
22 you say in paragraph 83, before the A, B, Cs, last  
23 sentence:  
24 "I have been asked to  
25 evaluate the

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1 simply don't have any data. And, so, in some  
2 places in my DCF, I did rely upon assumptions that  
3 were provided to Mr. Rosen, and those are not  
4 necessarily ex ante in every case, but it's simply  
5 I don't have access to information.  
6 Q. I am not talking about  
7 the information you had. I am talking about the  
8 assumption you were instructed to make, and that  
9 was October 22nd, 2007, is the appropriate  
10 evaluation date?  
11 A. That's correct.  
12 Q. And you followed that  
13 instruction; correct?  
14 A. I attempted to do so as  
15 best as possible, but, again, I was lacking  
16 certain information because we simply don't have  
17 access to any kind of contemporaneous forecast  
18 information that the Claytons would have had.  
19 Q. On the question of the  
20 date, you did not offer a valuation of any other  
21 date; that's correct?  
22 A. That's correct.  
23 Q. In the second note here,  
24 B, absent the breach, you were instructed to  
25 assume that there remained uncertainty as to

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1 whether Whites Point would be able to obtain the  
2 permits and approvals necessary to build and  
3 operate the quarry.

4 That, I would call permitting  
5 risk. You were instructed to assume that there  
6 was permitting risk for the project; that's  
7 correct?

8 A. That's correct.

9 Q. And you followed those  
10 instructions throughout the writing of your first  
11 and second report?

12 A. I did, except in a couple  
13 of places, I noted where figures that I was  
14 providing did not reflect that particular risk.

15 Q. And, C, you were  
16 instructed to assume that the claimants had a  
17 legal right to pursue judicial review of the JRP  
18 process, that's correct?

19 A. That is correct.

20 Q. And you followed those  
21 instructions throughout both?

22 A. Again, I had the DCF  
23 analysis before accounting for that, and then --  
24 and then I later account for that.

25 Q. I am just asking you what

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1 you were instructed to assume.

2 A. Well, you said --

3 Q. You were --

4 MR. SPELLISCY: No, I am  
5 sorry, the question was, "and you followed those  
6 instructions", you asked whether he followed.

7 BY MR. NASH:

8 Q. And you followed those  
9 instructions throughout; that's correct?

10 A. So what I was explaining  
11 is that I have some analyses that are before  
12 accounting for that risk, and I tried to be  
13 careful in noting which were before that risk and  
14 which were after.

15 Q. We will get to permitting  
16 risk a little later.

17 And then the final instruction  
18 you were instructed to assume was that the  
19 operational characterizations of Whites Point made  
20 by the claimants in certain documents during the  
21 project planning and environmental assessments  
22 were an accurate representation of their  
23 expectations at the time.

24 The long and short of that  
25 assumption, as I understand, is that you based

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1 your analysis mainly on the EIS; correct?

2 A. Well, there's the EIS and  
3 there's the 2004 business plan.

4 Q. And those are the only  
5 two; that's correct?

6 A. Well, I am trying to  
7 think if there are more documents. I think those  
8 were certainly the main two. We requested further  
9 information from the planning documents from the  
10 claimants, and this is the only information that  
11 ended up being available.

12 Now, that, I will note that in  
13 that last, in that last bullet, I wasn't able  
14 to -- I didn't comply with it. I didn't have  
15 information on the pricing of aggregates in New  
16 Jersey, so I used an assumption delivered to New  
17 York, although I have seen no document or evidence  
18 to suggest that New York was the intended  
19 destination for the aggregates that might have  
20 been produced at the Whites Point Quarry.

21 Q. Did you read the EIS?

22 A. I reviewed many portions  
23 of it.

24 Q. Did you read the portions  
25 that referred to New York?

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1 A. I certainly saw no, no  
2 significant discussion of it in the project  
3 description.

4 Q. Is that what you were  
5 relying upon when you wrote your report and made  
6 repeated references to New Jersey and not New  
7 York?

8 A. That's one of the two  
9 things.

10 Q. What else? What other  
11 part of the EIS?

12 A. Well, the other document  
13 that I relied on [REDACTED] is the 2004  
14 business plan.

15 Q. I am on to the EIS only.  
16 I am only asking you about the EIS.

17 A. But that was specifically  
18 created by the Clayton companies, as reflected by  
19 the first page.

20 Q. I am only asking you  
21 about the EIS, and I am asking you the portions of  
22 the EIS that you reviewed for the purpose of your  
23 report. You told me about the project  
24 description. What else did you read?

25 A. I reviewed other parts.



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1 I don't remember all of them now. The project  
2 description is the primary component that I relied  
3 upon because that's the one that talked about some  
4 of the economic and operational components that  
5 were most relevant to DCF analysis.  
6 Q. And that's the one that  
7 talked about New Jersey?  
8 A. That's correct.  
9 Q. And for Canada, it's  
10 better for the aggregate to be going to New Jersey  
11 and not New York; isn't it?  
12 A. I would suspect so.  
13 Q. Right, because --  
14 A. Because prices are  
15 probably lower.  
16 Q. Lower in New Jersey and  
17 because we heard from Dr. Chereb -- you were there  
18 for his evidence last week, or a couple days ago?  
19 A. I was.  
20 Q. And you heard that he  
21 said that New York City is an unbelievably, I am  
22 paraphrasing, lucrative market; do you remember  
23 that?  
24 A. It is, but I would  
25 disagree with one of the ways --

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1 short --  
2 MR. SPELLISCY: And that's  
3 your fault --  
4 MR. NASH: -- we have none to  
5 waste.  
6 MR. SPELLISCY: And that's  
7 your fault. And we are here, and I did let  
8 Mr. Rosen answer context. I asked him to answer  
9 my questions. He did, he said he heard the  
10 evidence. But if he thinks the evidence needs  
11 characterization and context, then he can. The  
12 same respect I showed to Mr. Rosen.  
13 MR. NASH: I am going to  
14 suggest we move on to my next question, which is  
15 at Tab 12.  
16 MR. SPELLISCY: I am going to  
17 suggest that he be allowed to give the context he  
18 wants, and if Mr. Nash wants to try and move it  
19 on, I ask for a ruling from the tribunal.  
20 THE WITNESS: I can give a  
21 short answer to that.  
22 MR. NASH: Thank you.  
23 PRESIDING ARBITRATOR: Go  
24 ahead.  
25 THE WITNESS: Which is that

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1 Q. I am asking you about if  
2 you heard that evidence.  
3 A. I heard that evidence,  
4 and I think that's correct, but I don't think  
5 that's the relevant characterization to think  
6 about in valuing Whites Point. If Dr. Chereb's  
7 views about the profitability of the New York  
8 market are true, [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 Q. Well, we are on to a  
13 whole different --  
14 A. -- source of confusion.  
15 Q. -- answer to another  
16 question I had --  
17 MR. SPELLISCY: No. No, no.  
18 No, this is -- we can read the question back.  
19 MR. NASH: The question was  
20 did he hear the evidence. And now I'm getting an  
21 explanation to another question, which is  
22 qualification. I am going to move on.  
23 MR. SPELLISCY: I understand  
24 time is short.  
25 MR. NASH: Time is very

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1 Mr. Chereb said that the New York market was  
2 attractive, [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 PRESIDING ARBITRATOR: Thank  
10 you.  
11 THE WITNESS: With respect to  
12 the profitability, I think Mr. -- or Dr. Chereb  
13 was speaking about [REDACTED]  
14 [REDACTED]  
15 BY MR. NASH:  
16 Q. Could you turn, please,  
17 to Tab 12. And this is in reference to your  
18 statement that, as I understand it, you saw no  
19 reference to New York or New York City in the  
20 materials that you read. Have I got that correct?  
21 A. I have certainly seen  
22 reference to New York, but --  
23 Q. And not New York City?  
24 A. Pardon?  
25 Q. But not New York City?



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1 A. I have seen references, I  
2 believe, to New York City, but they weren't -- the  
3 ones that I saw were not focussed on the  
4 destination of the aggregates that would be  
5 shipped from Whites Point. Every place that I saw  
6 there seemed to tell a consistent story, which is  
7 the same I saw in the business plan, which is the  
8 aggregates were intended to go to New Jersey.  
9 Q. Can we go to the fourth  
10 paragraph down, the first page of Tab 12?  
11 A. Yes.  
12 Q. "Bilcon will ship by  
13 common carrier." [as read]  
14 Go to the last sentence:  
15 "Testing of the Whites  
16 Cove rock indicates that  
17 it will produce a  
18 high-quality crushed  
19 product meeting the  
20 standards required in New  
21 Jersey and New York." [as  
22 read]  
23 Did you see that?  
24 A. I do see that.  
25 Q. Did you see it when you

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1 Bilcon -- from Whites Point --  
2 Q. Could you go to the next  
3 page, please?  
4 A. -- but that they may  
5 eventually go there.  
6 Okay.  
7 Q. Could you go to the next  
8 page, please?  
9 There's a title "Management of  
10 Potential Adverse Environmental Effects", and then  
11 there's a title "Corporate Experience in Operating  
12 Quarry and Industrial Operations". Go down to the  
13 fourth paragraph under that title, which says:  
14 "Clayton is also a 50 per  
15 cent owner of Amboy  
16 Aggregates, which dredges  
17 sand from the Atlantic  
18 Ocean and has an  
19 investment in aggregate  
20 distribution terminals in  
21 Brooklyn, New York, and  
22 Amboy, New Jersey." [as  
23 read]  
24 Now, my question is did you  
25 read that when you reviewed the EIS?

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1 reviewed the EIS?  
2 A. I probably did. This  
3 doesn't tell me, though, that the product is --  
4 that the aggregates were intending to be shipped  
5 from Bilcon of Nova Scotia to New York.  
6 Q. Did you see anything in  
7 the EIS saying that the aggregates going from  
8 Whites Point would be shipped to New York?  
9 A. I don't recall seeing  
10 anything like that.  
11 Q. Let's go to the next  
12 page --  
13 A. But it's important to  
14 know that the Claytons' own operations in New  
15 Jersey were sometimes supplying New York City or  
16 New York State, and you can see that on their  
17 website any point in time where it says --  
18 Q. Let's go to the next  
19 page --  
20 A. -- where it says that  
21 even now [REDACTED]  
22 [REDACTED]  
23 So the fact that they are saying they would like  
24 it to meet New York standards doesn't mean that  
25 the aggregates are going to New York from

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1 A. I probably did. But,  
2 again, this is not saying that the aggregate is  
3 going to New York. It's simply describing the  
4 operations that the Clayton companies have.  
5 Q. So you don't infer  
6 anything from that with respect to where this  
7 aggregate from Whites Point might be going; is  
8 that correct?  
9 A. Well, you can infer -- if  
10 one was to try and use it that way, you could  
11 infer it's going all over the place, it's going to  
12 the different the sand mines, that it's going to  
13 the ready-mix plants. Right? This is simply a  
14 list of experiences. I certainly don't interpret  
15 this as saying that the aggregates were intended  
16 to go to New York.  
17 Q. So moving on and  
18 returning for a moment to your permitting risk  
19 assumption you were instructed to make, you were  
20 provided, for your second report, with evidence  
21 from both the claimants and respondents regarding  
22 the claimants obtaining environmental approvals  
23 and permits; do you recall that?  
24 A. Yes.  
25 Q. Do you recall, from



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1 Canada, you reviewed the reports of Peter Geddes,  
2 Lesley Griffiths, Tony Blouin and Robert Connelly?

3 A. Yes, I did.

4 Q. Do you recall that you  
5 reviewed, from the claimants, the reports or  
6 statements of David Estrin, Lorne Sossin, Paul  
7 Buxton and others regarding the permitting risk  
8 issue?

9 A. I did see those.

10 Q. You did see those?

11 A. Yes.

12 Q. For your second report?

13 A. I believe I did.

14 Q. Right.

15 A. I don't know if it was  
16 before or after I filed my second report, --

17 Q. Also, SNC Lavalin, Peter  
18 Oram, if I didn't mention those names, you recall  
19 receiving all of those?

20 A. Yes.

21 Q. And, in your reports, you  
22 accept the evidence of Canada's witnesses in  
23 support of the instructions you received to assume  
24 permitting risk; correct?

25 A. I described the evidence

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1 permitting risk.

2 Q. But you don't mention  
3 Lorne Sossin and David Estrin and SNC Lavalin and  
4 Peter Oram and Paul Buxton on the question of  
5 permitting risk; do you, in your second report?

6 A. That's correct, because I  
7 understand that Mr. Rosen has accepted that  
8 assumption. I am not weighing the evidence.  
9 That's not my job here. I am simply describing --

10 Q. I don't disagree with you  
11 on that.

12 You cite, starting at around  
13 paragraph 51 of your rejoinder report, the  
14 evidence given by Lesley Griffiths, Peter Geddes,  
15 Tony Blouin, Robert Connelly, you devote at least  
16 a paragraph to each one of those people. And is  
17 it to be inferred from that that you took their  
18 position as being supportive of the assumption you  
19 were instructed to make, which was that there was  
20 permitting risk; is that so?

21 A. From my perspective, it  
22 was important to understand what the risks that  
23 they saw were because there's an implication as to  
24 what those risks are as to how they should be  
25 incorporated into a report. So there are the

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1 that they have indicated.

2 Q. And you stated as support  
3 for the assumption that there was permitting risk;  
4 correct?

5 A. Well, that's my  
6 understanding of what Canada believes the  
7 permitting and approvals risk is.

8 Q. And you ignore the  
9 evidence of the claimants' expert and witnesses  
10 with respect to that assumption; that's correct?

11 A. I don't think that's true  
12 at all.

13 Q. You don't cite them at  
14 all; do you?

15 A. I don't cite them.

16 Q. No.

17 A. But I recognize that  
18 there is an instruction that there is no  
19 permitting risk in Mr. Rosen's report.

20 Q. Isn't --

21 A. I don't say whether --  
22 whether the instruction I have received is correct  
23 or the instruction he has received is correct; I  
24 am simply explaining the two positions. Clearly  
25 in my report, I mention that Mr. Rosen assumes no

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1 risks such as, you know, that there would be no --  
2 no approvals granted. Right? That's pretty clear  
3 how that would affect the DCF analysis. But there  
4 are also others which have an economic impact but  
5 don't necessarily result in no project if there's  
6 an adverse outcome.

7 Q. So could you turn to your  
8 rejoinder report, please, which you will find at  
9 Tab 2. And go to page 15.

10 A. Okay.

11 Q. Under the title  
12 "Mr. Rosen does not account for permitting risk".

13 A. Okay.

14 Q. And go over the page to  
15 paragraph 49 -- 48 first:

16 "I was instructed by the  
17 respondent's counsel that  
18 Mr. Rosen's assumption of  
19 no permitting risk is  
20 unreasonable."[as read]

21 So you were -- you took that  
22 instruction; correct?

23 A. That's correct.

24 Q. And then in the next  
25 paragraph:

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1 "Ms. Griffiths opines  
2 that the JRP could have  
3 reasonably concluded that  
4 the project would have  
5 resulted in significant  
6 adverse environmental  
7 effects." [as read]  
8 And then you go on.  
9 So you cite Ms. Griffiths in  
10 support of the instruction you were given that  
11 there was no permitting risk; that's correct?  
12 A. Well, I cite this for the  
13 instruction of the potential paths that the  
14 project could take. The opinion from Mr. Rosen,  
15 the direct line from non-breaching JRP report to  
16 an operating project is clear, I don't need to  
17 discuss that.  
18 Q. You don't need to discuss  
19 that when you're instructed to make the  
20 assumption; that's correct?  
21 A. Because I have already  
22 discussed that path on the prior page.  
23 Q. Right. So where is your  
24 consideration of Mr. Estrin and Lorne Sossin, Dean  
25 Sossin's opinions and others that there was no

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1 MR. SPELLISCY: There was a  
2 question asked "Do you recall that?" And then  
3 when Mr. Rosen started to answer, it was  
4 interrupted -- Mr. Chodorow started to answer, he  
5 was interrupted. So I would ask that the witness  
6 be allowed to actually answer the questions before  
7 the next question is asked.  
8 THE WITNESS: So I think if  
9 you go back to my slide on permitting risk --  
10 actually, maybe you can turn to page 18, 18 of my  
11 report.  
12 BY MR. NASH:  
13 Q. Well, I didn't ask you at  
14 all about page 18 of your report.  
15 A. But I think if you take a  
16 look at Figure 2 on page 18, it simply highlights  
17 all of the different paths that the project may  
18 have taken, and one of them is the path that  
19 Mr. Rosen assumes.  
20 Q. You made that point.  
21 If you can go to Tab 11,  
22 please, of the binder.  
23 This is a letter from Canada  
24 to our firm, and at the bottom, it says:  
25 "Request 37, Canada

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1 permitting risks so that you could juxtapose,  
2 well, Ms. Griffiths says that, on the one hand,  
3 but now there's this other person, very eminent  
4 person who says this, on the other hand, that  
5 there's no merit to that assumption; where's your  
6 consideration to that?  
7 A. I am not providing any  
8 view on the merit of either parties' views with  
9 respect to permitting and approvals risk. I think  
10 it's quite clear that I am simply taking it as an  
11 instruction, but it's important to understand when  
12 doing a damages analysis, what are the  
13 implications? One might ask the exact same  
14 question of Mr. Rosen, who I don't recall ever  
15 citing to any of the, any of the opposing expert  
16 reports related to permitting risk.  
17 Q. But he also didn't raise  
18 all the ones that supported his position or the  
19 position that he took with respect to permitting  
20 risk; do you recall that?  
21 A. Well, I think he --  
22 Q. What he did, what you did  
23 was you chose to assume or to apply all of the  
24 opinions that Canada presented in support of the  
25 instructions you were instructed to make.

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1 stipulates that it has no  
2 examples where a  
3 proponent of a project  
4 which received  
5 environmental assessment  
6 approval from the  
7 Government of Canada  
8 under the version of the  
9 CEAA applicable to Whites  
10 Point EA and applied to  
11 the Department of  
12 Fisheries, Oceans,  
13 Transport Canada, or  
14 Natural Resources Canada  
15 for any permits, licenses  
16 or authorizations  
17 required for the  
18 operation of a project  
19 was denied those permits,  
20 licenses or  
21 authorizations." [as read]  
22 Did you see that letter before  
23 you wrote your opinions?  
24 A. I didn't because I am not  
25 expressing an opinion on the probability of moving



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1 down this line.  
 2 But this is also not, this is  
 3 also not confirmation that the Whites Point  
 4 project would have been built and operating. I  
 5 mean, there are clearly examples. One I heard  
 6 earlier this week was the Bayside Quarry seeking  
 7 to expand, and its efforts to do so were rejected  
 8 by, I believe it was, I think it was provincial  
 9 authorities, but I don't remember for sure.  
 10 And we also have instances  
 11 like the Belleoram Quarry which was moving almost  
 12 in parallel with Whites Point, and it received its  
 13 approval, but it didn't move forward for economic  
 14 reasons, which tells me that there are reasons to  
 15 believe that quarries might not have a direct line  
 16 from one to the other, but I don't, I don't have  
 17 an opinion on likelihood of any of those --  
 18 Q. You don't have any  
 19 opinion on that at all?  
 20 A. I don't.  
 21 Q. You don't have any  
 22 opinion on the likelihood of that happening or  
 23 non-likelihood of that happening?  
 24 A. No, but I'll certainly  
 25 note that there is evidence that economic risk can

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1 were granted approval,  
 2 Mr. Connelly finds that  
 3 the project was subject  
 4 to the risk of not  
 5 obtaining required  
 6 permits."[as read]  
 7 And I am going to suggest that  
 8 you made that quote -- you quoted Mr. Connelly  
 9 there in support of the assumption that you were  
 10 instructed to make was that there was permitting  
 11 risk; is that correct?  
 12 A. I am quoting him because  
 13 it's important to understand what the risks are.  
 14 And I am not expressing an opinion on whether the  
 15 probabilities are high or low, and I have no  
 16 opinion on whether what Mr. Connelly even said was  
 17 valid.  
 18 Q. So to the extent that you  
 19 are making any determination of whether the  
 20 instruction to assume permitting risk was a  
 21 reasonable one, you are relying on Canada's  
 22 experts for the answer to that question; that's  
 23 correct?  
 24 A. I have no expertise to  
 25 evaluate permitting risks. And I have been asked

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1 prevent quarries from operating.  
 2 Q. Go to paragraph 52 on  
 3 page 17.  
 4 A. Of my --  
 5 Q. Of your second report.  
 6 A. Second report, okay.  
 7 Q. You say on paragraph 52,  
 8 page 17:  
 9 "Even if Whites Point  
 10 were granted approvals,  
 11 Mr. Connelly finds that  
 12 the project was subject  
 13 to the risk of not  
 14 obtaining required  
 15 permits under both the  
 16 Fisheries Act and the  
 17 Navigable Waters  
 18 Protection Act."[as read]  
 19 Just stopping there. Are you  
 20 with me?  
 21 A. Sorry, I hope I am in the  
 22 right report.  
 23 Q. Paragraph 52, page 17.  
 24 A. Sorry about that.  
 25 Q. "Even if Whites Point

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1 to make an assumption. I stated clearly what my  
 2 assumption was and applied that assumption.  
 3 Q. And you have got no  
 4 expertise --  
 5 A. That's correct.  
 6 Q. -- in that area?  
 7 A. That's correct.  
 8 Q. Did you retain SCMA, or  
 9 were they retained by somebody else for you?  
 10 A. I did not retain SCMA.  
 11 Q. So did you have any input  
 12 in respect to the retainer of SCMA as the experts  
 13 in aggregate?  
 14 A. I did not.  
 15 Q. Were you involved at all  
 16 in the preparation of SCMA's reports?  
 17 A. I asked them questions  
 18 and --  
 19 Q. Were you involved at all  
 20 in the preparation of their reports?  
 21 A. And I saw a draft of  
 22 their report, which prompted me to ask some  
 23 further questions, but I haven't studied it in  
 24 detail.  
 25 Q. Were you involved at all

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1 in the preparation of their reports beyond what  
2 you have just said?

3 A. Not beyond what I have  
4 just said.

5 Q. You have assumed, adopted  
6 and relied upon SCMA's price forecast in your  
7 assessment of potential profits for Whites Point;  
8 that's correct?

9 A. That's correct. Which is  
10 consistent with the economic principle that

[REDACTED]

15 Q. I understand that  
16 explanation. I just want a very clear answer,  
17 that you have assumed, adopted and relied upon  
18 SCMA's price forecast in your assessment of the  
19 potential profits for Whites Point; that's  
20 correct?

21 A. That's correct.

22 Q. And you have assumed that

23 [REDACTED]

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1 that's correct?

2 A. That's correct.

3 Q. And that was as a result  
4 of assuming, adopting and relying upon SCMA's  
5 analysis for that purpose?

6 A. That's correct.

7 Q. And you have assumed,  
8 adopted and relied on SCMA's identification of  
9 actual and potential competitors for your  
10 analysis?

11 A. I have relied on their  
12 analysis. I haven't dug in detail into all of the  
13 assumptions that they make, but if -- whatever  
14 assumptions they make are reflected in the results  
15 of their analysis and therefore incorporated into  
16 mine.

17 Q. You have assumed, adopted  
18 and relied on SCMA's identification of actual and  
19 potential competitors for your analysis; is that  
20 correct?

21 A. I think implicitly I  
22 have, yes.

23 Q. That is correct?

24 A. That seems fair.

25 Q. You have assumed that

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1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED] that's correct?

4 A. I do. And I think it's  
5 reasonable to -- I have seen no evidence to  
6 suggest that

[REDACTED]

16 Q. So you have assumed,  
17 adopted and relied on the assumption -- on the  
18 conclusion from SCMA that, when

[REDACTED]  
[REDACTED]; isn't that correct?

22 A. I don't think -- I  
23 certainly didn't interpret SCMA as making that  
24 assumption. I interpreted them as simply saying

25 [REDACTED]

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1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]

11 Q. Could you turn to page 63  
12 of your first report at Figure 12, please. And  
13 that's at Tab 1.

14 A. Yes.

15 Q. You have got that in  
16 front of you?

17 A. I do.

18 Q. So what Figure 12 shows  
19 is that,

[REDACTED]  
[REDACTED] right?

21 A. Uh... Let's see.

22 Q. Did you know --

23 A. Yeah, I think that's  
24 right.

25 Q. Do you know how far



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1 Belleoram is from New York City?  
 2 A. It's further than Whites  
 3 Point.  
 4 Q. Quite a bit further?  
 5 A. I don't know in terms of  
 6 sailing time.  
 7 Q. So you have assumed that,  
 8 [REDACTED]  
 9 [REDACTED]  
 10 correct?  
 11 A. That's correct, those are  
 12 Mr. Rosen's assumed volumes.  
 13 Q. And you've assumed that  
 14 Belleoram would also be shipping; correct?  
 15 A. That's correct.  
 16 Q. And that assumption is  
 17 based on the information that you relied upon from  
 18 SCMA; correct?  
 19 A. No, that's not from SCMA.  
 20 Q. Where do you get that  
 21 assumption?  
 22 A. I believe that I got the  
 23 dark blue data, I think I took that from some  
 24 trade data that the US government collects.  
 25 Q. This is your own little

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1 bit of independent research on that?  
 2 A. Yes.  
 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. Right.  
 21 A. [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

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1 [REDACTED]  
 2 [REDACTED]  
 3 Q. Well, let's just stop  
 4 there for a minute.  
 5 A. Okay.  
 6 Q. We are sitting here now  
 7 in 2018.  
 8 A. Yes.  
 9 Q. Belleoram was approved in  
 10 2007?  
 11 A. Yes.  
 12 Q. It's in Newfoundland?  
 13 A. Yes.  
 14 Q. It hasn't delivered an  
 15 ounce of stone anywhere; you know that?  
 16 A. That's correct.  
 17 Q. You know that it never  
 18 opened?  
 19 A. That is correct, but  
 20 this --  
 21 Q. And you are accepting  
 22 that this is [REDACTED]  
 23 [REDACTED]  
 24 A. I do. [REDACTED]  
 25 [REDACTED]

Page 2310

1 Q. Isn't it like saying  
 2 there's a potential competitor out in Ohio that  
 3 never opened?  
 4 A. Well, so, the margins  
 5 that Mr. Rosen is forecasting, I heard discussion  
 6 of the, in the opening, of modest margins of [REDACTED]  
 7 [REDACTED] And, you know, in the aggregates industry,  
 8 when you look at data, those are far from modest.  
 9 And any --  
 10 Q. So what has that got  
 11 anything to do with my question about Belleoram  
 12 not opening and not delivering an ounce of stone?  
 13 MR. SPELLISCY: I think if you  
 14 let him explain, you might find the answer to your  
 15 question.  
 16 MR. NASH: It's a very  
 17 circuitous answer, I got to say.  
 18 MR. SPELLISCY: I don't think  
 19 that it is.  
 20 THE WITNESS: I apologize. I  
 21 will try to make it as direct as possible, which  
 22 is simply, if the margins -- you recall the graph  
 23 of [REDACTED], roughly [REDACTED] margins that  
 24 Mr. Rosen is assuming for Whites Point, and if  
 25 those margins were to remain for decades, as his

Page 2311

1 model assumes, [REDACTED]

16 BY MR. NASH:

17 Q. So you were in the  
18 hearing room on the other side of the building a  
19 couple of days ago when we were discussing with  
20 Mr. Power and Mr. Ward this operating cost  
21 analysis; were you there for that?

22 A. Yes, I was.

23 Q. Did you have any input --  
24 and that's Exhibit 0756, for the record. Did you  
25 have any input into this operating cost analysis?

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1 this can be on my time. But that sort of  
2 response, he has asked, he asked him if he relied  
3 on it. Mr. -- if he wants to ask him if he  
4 relied upon it but not give him a chance to  
5 explain what he relied upon, that's not an  
6 appropriate question. He says he relied upon it,  
7 Mr. Chodorow goes to explain what he relied upon  
8 and then he gets cut off. So if he wants to say,  
9 "Did you rely upon it?" he should be allowed to  
10 explain in what way he relied upon it.

11 Back to the claimants' time.

12 PRESIDING ARBITRATOR: Can we  
13 have a cooling off period of five minutes, please,  
14 okay, apparently, yes.

15 --- Upon recess at 3:23 p.m.

16 --- Upon resuming at 3:27 p.m.

17 PRESIDING ARBITRATOR: Okay,  
18 we can continue.

19 THE WITNESS: Thank you.

20 PRESIDING ARBITRATOR:

21 Mr. Nash.

22 BY MR. NASH:

23 Q. So I think we can make  
24 this simple for you, Mr. Chodorow. Could you go  
25 to page 64 of your report, please?

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1 A. I didn't, but I will note  
2 that a number of times, you were quoting a [REDACTED]  
3 but --

4 Q. That's not my question,  
5 that is not my question. And please answer my  
6 question.

7 A. Okay.

8 Q. Did you have any input  
9 into this document?

10 A. No, I never analyzed  
11 that.

12 Q. You relied entirely upon  
13 Mr. Ward's and Mr. Sutherland's and Mr. Power's  
14 analysis for the question of operating cost; is  
15 that correct?

16 A. That's correct, but,  
17 again, I will note, the [REDACTED] --

18 Q. Excuse me. That is not  
19 an answer to my question. It's additional opinion  
20 evidence or fact evidence. I have not asked you  
21 about it, and I'd ask you not to share it. What I  
22 wanted to know --

23 MR. SPELLISCY: This can be on  
24 my time.

25 I have got plenty of time, so

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1 A. Which one?

2 Q. Report Number 1.

3 A. Okay.

4 Q. Paragraph 171.

5 A. Yes. Okay.

6 Q. "I rely on the forecast  
7 of operating costs  
8 provided in the SCMA  
9 report." [as read]

10 Stop there. That is true;  
11 correct?

12 A. That is correct.

13 Q. And you rely upon SCMA  
14 for the identification of actual and potential  
15 competitors to Whites Point; that's correct?

16 A. Yes. That's implicit in  
17 my assumption of their prices.

18 Q. And you rely upon SCMA's

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 A. Yes. And I think it's  
24 important to note that that's not an assumption  
25 that [REDACTED]



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1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 but I do rely on those operating costs.  
7 Q. As Mr. Ward calculated  
8 them?  
9 A. That's correct.  
10 Q. Did you make any inquiry  
11 into the intention by Mr. Ward that the [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 A. As I said, I haven't  
16 looked into the details of those calculations?  
17 Q. Did you make any  
18 independent assessments of those calculations?  
19 A. No, I did not.  
20 Q. Did you make any  
21 independent assessment of any of the operating  
22 costs shown in Exhibit 0756?  
23 A. 0756? I have forgotten.  
24 Q. That's the big chart.  
25 A. Oh, no, I didn't. I

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1 calculation of freight rates for your analysis?  
2 A. I did. But I'll note  
3 that I had views on the reliability of the  
4 application of Mr. Morrison's freight calculation.  
5 Q. My simple question is:  
6 Did you assume, adopt, and rely upon Marsoft's  
7 calculation of the freight rates?  
8 A. I did.  
9 Q. If you go to page 6 of  
10 that same report, paragraph 17, paragraph 17, you  
11 say:  
12 "Mr. Rosen's DCF analysis  
13 contains a number of  
14 methodological flaws."[as  
15 read]  
16 And the first bullet is:  
17 "Mr. Rosen's analysis  
18 ignores mitigation.  
19 Mr. Rosen calculates lost  
20 profits as if the project  
21 was fully  
22 expropriated."[as read]  
23 Now, here, as I gather, you  
24 question, and perhaps even attack, Mr. Rosen's DCF  
25 model on the basis of this fact that he -- you say

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1 didn't rely on that data.  
2 Q. Could you turn, please,  
3 to page 54 of that same report.  
4 A. Okay.  
5 Q. At paragraph 146 --  
6 A. Yes.  
7 Q. -- you say in the second  
8 line:  
9 "Mr. Morrison assumes a  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 However, this is  
17 only one of a number of  
18 errors that cause the  
19 freight rates assumed by  
20 Mr. Rosen to be  
21 substantially  
22 understated, as described  
23 in the expert report of  
24 Sterling."[as read]  
25 My simple question is: Did  
you assume, adopt, and rely upon Marsoft's

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1 he ignores mitigation; have I got that right?  
2 A. Well, so his first report  
3 didn't discuss mitigation. And I do critique him,  
4 and as you can see is in the two paragraphs, I  
5 state that this is based off of the instruction  
6 that there was an opportunity to mitigate. And I  
7 -- as you can see in the last sentence, I'm saying  
8 "if so". So I'm not expressing an opinion that  
9 there should have been mitigation or not.  
10 Q. So you were instructed to  
11 assume that the claimants could or should  
12 mitigate; correct?  
13 A. That's correct.  
14 Q. And you attack Mr. Rosen  
15 for failing to follow the same instruction,  
16 because he ignores mitigation; correct?  
17 A. Well, he didn't have an  
18 instruction on mitigation. The instruction on  
19 mitigation only came in his second report. There  
20 was no consideration of the potential for  
21 mitigation in his first report.  
22 Q. So you say he was flawed  
23 -- methodologically flawed in ignoring mitigation?  
24 A. Yes. I would say it's a  
25 methodological flaw to not consider mitigation.



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1 Q. It was a methodological  
2 flaw for Mr. Rosen not to follow the same  
3 instructions that you had been given by Canada to  
4 take mitigation into account; is that what you are  
5 saying?

6 A. No. I'm saying that  
7 Mr. Rosen's first report didn't even discuss the  
8 concept of mitigation. It simply assumed that  
9 there was no way to mitigate the losses. And the  
10 -- he did, in his second report, have an  
11 instruction on mitigation, but that instruction  
12 was added rather than being an instruction in his  
13 original report.

14 Q. Let's, then, go to the  
15 second methodological flaw of Mr. Rosen:

16 "He does not value the  
17 loss as of the breach  
18 date."[as read]

19 Paragraph 17, second bullet.

20 A. Yes.

21 Q. Now, you were instructed  
22 by Canada to evaluate the loss as of the breach  
23 date; correct?

24 A. That's correct.

25 Q. And you say that

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1 Mr. Rosen made a methodological flaw in his  
2 analysis by not adopting the instruction you were  
3 given; correct?

4 A. That's correct. I  
5 probably should have said, "In the context of my  
6 instruction, that would be a methodological flaw".

7 Q. In the context of your  
8 instruction?

9 A. Yes, that's right.

10 Q. And in the context of  
11 your instruction, in the third bullet, that  
12 Mr. Rosen ignores permitting risk as a  
13 methodological flaw, should you have said in the  
14 context of the instructions you were given?

15 A. Yeah. That's probably  
16 fair to say.

17 Q. And you say that  
18 Mr. Rosen should have assumed that the EIS defined  
19 the Clayton's business expectations pre October  
20 22, 2007; is that correct?

21 A. I'm simply noting that  
22 Mr. Rosen deviates from any contemporaneous  
23 evidence about the project.

24 Q. You say, in paragraph 18:  
25 "Mr. Rosen also

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1 calculates lost profits  
2 using numerous  
3 assumptions that are  
4 different from those that  
5 BNS communicated to the  
6 environmental impact  
7 statement and reflected  
8 in other contemporaneous  
9 documents."[as read]

10 So my sense of that is that  
11 you are saying that was a mistake; is that right?

12 A. I'm simply noting that  
13 the -- many of the assumptions that Mr. Rosen  
14 makes are favourable relative to those that were  
15 discussed in the EIS.

16 Q. And one of those  
17 assumptions is that, further down the paragraph:  
18 "Mr. Rosen uses a freight  
19 cost that assumes [REDACTED]"

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1 [REDACTED] [as read]  
2 I'm going to suggest to you  
3 that you would cite that as being an error on  
4 Mr. Rosen's part, to assume that there would be  
5 [REDACTED].

6 A. I would certainly say  
7 that I have seen no evidence to support that in  
8 the context of the contemporaneous documents  
9 associated with the planning of this project.

10 Q. And so, against all  
11 logic, that you would [REDACTED]

16 [REDACTED] You say it's rational to look back to  
17 EIS to say, "Well, they say that in the EIS, so it  
18 must be that that's what they intended those were  
19 their expectations"?

20 A. It would be my  
21 expectation that the statements that were  
22 communicated to the JRP were consistent with the  
23 planned operations of the quarry at the time. If  
24 you are saying that they -- if you are saying that  
25 they are not reflective of their expectations,  
then one might, one might find it reasonable to



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1 deviate from it.

2 Q. Did you ask any questions  
3 about what an EIS was?

4 A. I know what an EIS is.

5 Q. You know what an EIS is.  
6 It's an early-stage document, conceptual document.  
7 For the purpose of evaluating environmental risks  
8 in the context of the development of a project so  
9 that matters can be taken into account in that  
10 development for the ultimate environmental impacts  
11 to be mitigated and monitored.

12 A. I don't know that I would  
13 characterize it that way. I think maybe I don't  
14 have a deep enough understanding, but I will  
15 certainly say that many of the statements, such as  
16 [REDACTED], they weren't made in  
17 2002 or 2004. They were things that were being  
18 said even in the middle of 2007. And it's my  
19 expectation that, if they are saying those things  
20 to the JRP, that's consistent with their  
21 expectations at the time.

22 Q. So you weren't an expert  
23 on EIS' before you got this project, were you?

24 A. No.

25 Q. And you weren't an expert

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1 in Canadian environmental law before you received  
2 this mandate, were you?

3 A. And I'm neither of those  
4 now.

5 Q. And you accepted the EIS  
6 as being -- the defining the parameters of the  
7 Claytons' business expectations; that's correct?

8 A. Well, I will note a  
9 couple things. The first is the EIS is, in many  
10 places, consistent with the 2004 business plan,  
11 but also, you know, there just were no documents.  
12 I'm trying to understand what it is that the  
13 claimants were intending to do with this project,  
14 and the EIS may not be the best place to look, but  
15 in this case, it turns out to be the only place to  
16 look to understand their contemporaneous  
17 expectations, because there's simply no other  
18 documentation.

19 Q. And so, in doing that,  
20 you ignore all of the evidence that has come  
21 forward in this proceeding which explains the  
22 circumstances pre 2007 to refute what you have to  
23 say about the Claytons' business expectations;  
24 isn't that right?

25 A. So can you be specific

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1 about what information you are referring to?

2 Q. Paul Buxton gives an  
3 explanation in his Witness Statement Number 2,  
4 reply witness statement, saying, [REDACTED]

5 [REDACTED] I'm paraphrasing. "It  
6 was because [REDACTED]"

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED] You ignore that, don't you?

12 A. Well, again, I do, but  
13 it's not because, it's not because of Mr. Buxton's  
14 statement. It's because I've been instructed to  
15 evaluate the project as the claimants themselves  
16 described it at the time.

17 Q. You have been instructed  
18 to do that with respect to two documents, the EIS  
19 and the 2004 business plan; correct?

20 A. Well, if I had other  
21 documents, I would have used those, but those  
22 are --

23 Q. Those are the ones you  
24 had?

25 A. -- those are the only

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1 available documents.

2 Q. So you're stuck with  
3 those; right?

4 A. I have no other documents  
5 to refer to.

6 Q. You prepared a discounted  
7 cash flow analysis of the Whites Point Quarry as  
8 of October 22nd, 2007; that's correct?

9 A. Yes.

10 Q. You did not prepare a  
11 discounted cash flow analysis of the quarry  
12 project as of 2016; that's correct?

13 A. That's correct.

14 Q. Just give me one moment.  
15 Can you turn to Tab 6, please.

16 A. Okay.

17 Q. This is an invoice from  
18 Atlantic Coast Materials, dated September 14th,  
19 2007, which is about five weeks before the JRP  
20 issued its report, from Atlantic Coast to [REDACTED]

21 [REDACTED] Do you see that?

22 A. I do.

23 Q. And do you see that there  
24 is [REDACTED]

25 A. I do.



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1 Q. [REDACTED] ?

2 A. I do see that.

3 Q. Now, wouldn't that be a  
4 contemporaneous document?

5 A. Well, so my understanding  
6 is that, at this time, this was reflective of [REDACTED]

18 Q. It could be. Did you  
19 make any inquiries as to whether it was?

20 A. Well, so I saw these, and  
21 it was my understanding that these were -- these

25 Q. Did you make inquiries

1 with respect to [REDACTED]

6 A. I didn't. For the  
7 freight rates, I relied upon Marsoft.

8 Q. You just relied upon  
9 Marsoft?

10 A. I did.

11 Q. And you ignored the  
12 contemporaneous evidence available, produced in  
13 this proceeding? This document's been produced.

14 A. It's been produced.

15 Q. Yes.

16 A. But, again, this is not  
17 evidence of [REDACTED]

22 Q. And you don't know for  
23 how long?

24 A. I don't know for how  
25 long.

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1 Q. This is pretty good  
2 contemporaneous evidence of what [REDACTED]  
3 [REDACTED]; wouldn't you agree?

4 A. This is not a contract  
5 for Whites Point. This is [REDACTED]

17 MR. NASH: Thank you,  
18 Mr. Chodorow. Those are my questions.  
19 PRESIDING ARBITRATOR: Thank  
20 you. Redirect will be done by Ms. Zeman.  
21 RE-EXAMINATION BY MS. ZEMAN:  
22 Q. Mr. Chodorow, Mr. Nash  
23 took you to Tab 12 of your binder, which, if we  
24 can go there, is an excerpt -- or several excerpts  
25 from the EIS document in particular on page 2 in

1 this tab. He brought you to this document. Can  
2 you see at the bottom of the page there what  
3 chapter and subsection this is?

4 A. Chapter 6, the  
5 introduction to the EIS, and it looks like the  
6 proponent's description of the project.

7 Q. Can you read what's above  
8 that line there on the bottom?

9 A. Starts with "the Clayton  
10 block?"

11 Q. No. On the very bottom  
12 there.

13 A. Chapter 6, "Introduction  
14 to the EIS", page 9, section 6.1, "The Proponent".

15 Q. Okay. Now, I'd like to  
16 bring up Exhibit R-577, which is the entirety of  
17 this document. It's up on the screen here. So we  
18 are looking here, first, at the table of content,  
19 which is page 126 of the PDF. Do you see that  
20 section 6.1 on the page there?

21 A. Yes, I see it.

22 Q. Okay. And do you see  
23 what the name of the next section title is?

24 A. "Project Overview and  
25 Purpose."



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1 Q. Okay. So I'd like to go  
2 down to page 133 of the PDF to situate ourselves  
3 in the chapter here. So you see here it's section  
4 6.1. Now, if we go down to the next page, does  
5 this look like the page that Mr. Nash took you to?  
6 MR. NASH: I object. This  
7 doesn't arise from my questioning at all.  
8 MS. ZEMAN: Mr. Nash took  
9 Mr. Chodorow to this page, and I'm simply placing  
10 it in the context of the entire EIS.  
11 THE WITNESS: So, sorry, what  
12 was the question?  
13 BY MS. ZEMAN:  
14 Q. Do you recall Mr. Nash  
15 bringing you to this page?  
16 A. I do.  
17 Q. Okay. Now, if we may go  
18 to page 140 of the PDF.  
19 MR. NASH: No, I object to  
20 this. I asked Mr. Chodorow questions about one  
21 topic on three specific pages in respect to his  
22 evidence as to whether he had seen reference to  
23 aggregate going to New York or New York City. We  
24 don't do a review of the entire document now to  
25 put it all in context. It was a very specific

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1 location of the project  
2 is shown on map 1. The  
3 purpose of the proposed  
4 project is to quarry  
5 basalt rock and ship  
6 processed aggregate  
7 products to New Jersey.  
8 The quarry property is on  
9 private land and  
10 comprises approximately  
11 380 acres. See map 2.  
12 PID number of the  
13 property is 30161160.  
14 The location of the  
15 marine terminal along the  
16 Bay of Fundy coast is  
17 44 degrees north, 27 --"  
18 I don't know what those --  
19 Q. I think that's all right.  
20 Can you comment on this  
21 paragraph with respect to the questions that  
22 Mr. Nash was asking you about references in the  
23 EIS about aggregates going to New York City.  
24 A. So I think it just  
25 confirms my response, which was that the claimants

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1 question.  
2 MS. ZEMAN: As is mine. I'm  
3 simply laying the foundation to respond to the  
4 specific proposition that you just mentioned with  
5 respect to Mr. Chodorow seeing whether there's any  
6 reference here in the document about aggregates  
7 going to New Jersey or New York.  
8 BY MS. ZEMAN:  
9 Q. And so, in this section,  
10 which arises directly from the specific sentence  
11 that Mr. Nash had Mr. Chodorow read out, can you  
12 read the first three sentences of this page and  
13 comment on them with respect to Mr. Nash's  
14 questions to you about whether you had seen any  
15 references in the EIS about shipments of  
16 aggregates being made to New York City?  
17 A. I'm sorry. You said the  
18 first paragraph?  
19 Q. Yes.  
20 A. "The proposed Whites  
21 Point Quarry and marine  
22 terminal is located in  
23 Little River, Digby Neck,  
24 Digby County, Nova  
25 Scotia. The regional

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1 are describing in this earlier section what their  
2 operations are, but if -- they are not in this --  
3 in the EIS describing the aggregates as being  
4 intended to go to the New York operations. They  
5 are intended to go to other parts of the company.  
6 Q. So a number of times  
7 Mr. Nash asked you about your reliance on SCMA's  
8 cost curve analysis, which is Exhibit R-756, that  
9 very large document that he was referring to. You  
10 started clarifying what it was specifically that  
11 you relied on in that analysis. Can you provide  
12 that clarification?  
13 A. Sure.  
14 MR. NASH: I just want to make  
15 sure that there is no new evidence given about  
16 that document following up on Mr. Ward and  
17 Mr. Power's testimony. They were both asked in  
18 detail questions about the content of that  
19 document. They were the ones that contributed to  
20 its preparation, Mr. Ward in particular.  
21 Mr. Chodorow is not here to expand upon the  
22 evidence of what those figures in that document  
23 may mean, may not mean. He had no input into it.  
24 He relied upon it. That's it.  
25 MS. ZEMAN: Mr. Chodorow was

asked about what he relied on with respect to this document. I think it's fair that he provide an explanation as to which parts of this document he may have relied on for his analysis.

MR. NASH: If it's limited to that, I have no objection, but very limited to that.

THE WITNESS: So I heard the testimony associated with this the other day, and I understand this [REDACTED]

[REDACTED]. And what I was going to note earlier is that there's a

MR. NASH: This is where I take --

MS. ZEMAN: Mr. Chodorow is explaining what he responded to or what he relied on in his reports from this analysis.

THE WITNESS: I think I can make it quick if that's helpful.

1 PRESIDING ARBITRATOR: Go ahead.

THE WITNESS: So there was a

getting a little bit absurd here. He is trying to explain. He is asked specifically if he relied on this document. He was asked if he had any input into it. He was asked if he had seen it. All those things were asked. He is now saying he did see it. He is now saying what his conversations from his personal knowledge were with SCMA about it. He is trying to explain how he relied on this document. Mr. Nash did not have to take him to this document. He did. He made an insinuation about it. He asked if he relied. He has to be allowed to answer. Maybe Mr. Nash doesn't want the evidence out, but he has to be allowed to answer as to what he relied upon and what his understanding was of the document. We can go back and forth, but if it's going to continue, let's just get a ruling from the tribunal.

MR. NASH: I have one comment, Judge Simma and members of the tribunal, if he is speaking about in the time before he prepared his opinions that he made inquiries and he spoke about that with Mr. Ward or Mr. Powers, I have no objection. If he is speaking about a time period which is subsequent to the signing of either of his opinions, I strongly object.

MR. NASH: Excuse me.

**THE WITNESS:** And the special

was --

MR. NASH: I am going to object to this. He is speaking about the preparation of the document. He is speaking about inputs into that document. And he had no inputs into the document. He didn't prepare it. He relied upon it. That's it.

MS. ZEMAN: He confirmed that he relied upon it, and he has an understanding about what assumptions went into that. He is merely trying to explain which assumptions he understands that he relied upon in his reports.

THE WITNESS: So what I was going to say is that there was [REDACTED]

MR. NASH: Let me --

MR. SPELLISCY: This is

PROFESSOR SCHWARTZ: Could you just clarify for us the following? It's a problem that's come up before. It's not enough to be asking about the same document. You have to be asking about the same issue in the document that Mr. Nash asked about. I'm not saying you're not, but could you just explain to us how it's asking about the same issues that Mr. Nash raised.

MS. ZEMAN: Mr. Nash asked Mr. Chodorow whether he relied on this analysis that SC Market Analytics had put together with respect to their analysis in Mr. Chodorow's report. The question is about what specific understandings he has about that document, which was prepared before he signed his report, in incorporating that analysis into his report.

PRESIDING ARBITRATOR:  
Mr. Chodorow, you have a short answer to that question?

THE WITNESS: I do.

PRESIDING ARBITRATOR: So go ahead.

THE WITNESS:



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1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 BY MS. ZEMAN:  
7 Q. So Mr. Nash asked you  
8 also about the operating costs for the Whites  
9 Point Quarry that you relied on in your analysis.  
10 Is Exhibit R-756, this cost curve analysis, the  
11 source for the operating costs for the Whites  
12 Point Quarry that you incorporated into your  
13 reports?  
14 A. Sorry, you're talking  
15 about the large spreadsheet?  
16 Q. Yes.  
17 A. No, I think that comes  
18 from another source.  
19 Q. Okay. Thank you.  
20 A. I don't remember the  
21 exhibit number.  
22 MS. ZEMAN: Those are my  
23 questions.  
24 PRESIDING ARBITRATOR: Thank  
25 you very much. No remarks. So that gets us to

1 the tribunal. Professor Schwartz.  
2 QUESTIONS FROM THE TRIBUNAL:  
3 PROFESSOR SCHWARTZ: Okay.  
4 Looking at the big picture in the case, maybe two  
5 of the most useful summative documents are, if you  
6 look at your large red book, Figure 14.  
7 THE WITNESS: I've got two of  
8 them. Sorry about producing them.  
9 PROFESSOR SCHWARTZ: June 9th,  
10 2017.  
11 THE WITNESS: Okay.  
12 PROFESSOR SCHWARTZ: Figure  
13 14, on page 69, and I'm going to draw figures from  
14 that, but just so you know where I got them,  
15 page 69. That's where I'm going to be getting  
16 your -- the figures I'm going to refer to.  
17 THE WITNESS: Okay.  
18 PROFESSOR SCHWARTZ: And then  
19 I think, just to simplify things, I think all we  
20 really have to look at is page 20 of your report  
21 from today, the thin red one.  
22 THE WITNESS: I don't have a  
23 paper copy of that. Thank you.  
24 PROFESSOR SCHWARTZ: So I'm  
25 going to -- if we look at the documents together,

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1 we have the Brattle estimates; we have the Rosen  
2 estimates; and we have the market evidence. So  
3 reading the two together, we've got all three.  
4 So I'm just trying to  
5 understand how to compare, contrast, reconcile the  
6 three together.  
7 So we can do the three  
8 together. We can just look at these and then just  
9 fill in from Figure 14 your figures, put them in  
10 here, and then we have all three figures together  
11 in one place.  
12 THE WITNESS: Okay. So --  
13 PROFESSOR SCHWARTZ: So I  
14 start off with unpermitted. By the way, the far  
15 left margin, I think the very first figure is [REDACTED]  
16 [REDACTED] but, in Figure 14, it's actually  
17 [REDACTED]. It doesn't make that much  
18 difference.  
19 THE WITNESS: Yes. They are  
20 just rounding for presentation purposes.  
21 PROFESSOR SCHWARTZ: Oh, okay.  
22 And then if we look at the next figure, so Rosen  
23 there is [REDACTED], and you have [REDACTED];  
24 right?  
25 THE WITNESS: So the -- so I

1 think, then, if you take the roughly [REDACTED]  
2 figure at the time of the transaction and if you  
3 bring it forward to October of 2007, you get this  
4 roughly [REDACTED] figure in the report itself.  
5 And if you brought that same figure forward to  
6 December 31st of 2016, you would get [REDACTED].  
7 And so the version that is in the presentation is  
8 bringing these forward with the indexation  
9 approach to Mr. Rosen's valuation date --  
10 PROFESSOR SCHWARTZ: Right.  
11 THE WITNESS: -- whereas the  
12 tables in the report bring them forward to the  
13 October 2007 valuation date.  
14 PROFESSOR SCHWARTZ: So you  
15 are at [REDACTED]; Rosen report is at [REDACTED].  
16 How much of the difference there is just because  
17 of the different approach to tax gross-ups.  
18 THE WITNESS: So this would be  
19 -- not reflect any tax gross-ups. This is just --  
20 and that's why on slide 20 and on the table I  
21 compare it to just the simple output of the DCF  
22 analysis.  
23 PROFESSOR SCHWARTZ: Okay.  
24 So, there, it's a two to one ratio, but in the  
25 larger picture, the divergence is going to get a



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1 lot bigger. That's one of the things I'm trying  
2 to understand.

3 THE WITNESS: Yeah.

4 PROFESSOR SCHWARTZ: [REDACTED]  
[REDACTED] versus [REDACTED], whereas, we get to the end of  
6 the story, we are orders of magnitude apart.  
7 Okay.

8 So the next figure, there's a  
9 market figure of [REDACTED], and then the Rosen  
10 figure is [REDACTED] and you are [REDACTED]

11 THE WITNESS: That's correct.

12 PROFESSOR SCHWARTZ: Okay.  
13 Now, just trying to understand, you end up with  
14 8.7. If I go to the very far right where it's  
15 Rosen Valuation 308, you are going to end up with  
16 8.7?

17 THE WITNESS: That's correct.  
18 That's the result of my DCF from my first --

19 PROFESSOR SCHWARTZ: So how  
20 could -- why is the [REDACTED] so much -- why are you  
21 [REDACTED] million in 2002, but you end up with 8.7?  
22 Shouldn't it be smaller?

23 THE WITNESS: So this is -- so  
24 the 8.7 reflects the outcome of the DCF analysis  
25 that I was asked to do as of the breach date. As

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1 I mentioned, I think that I don't have a lot of  
2 visibility into many of the inputs that I have  
3 assumed from Mr. Rosen, so I can't see how many of  
4 them were calculated. I don't consider that  
5 number to be very reliable for many of the same  
6 reasons that I say Mr. Rosen's \$308 million  
7 valuation is not reliable.

8 So -- but I'm trying to put it  
9 into context to check the order of magnitude.

10 PROFESSOR SCHWARTZ: Okay.  
11 I'm sorry. I'm still not quite following.

12 You are going to end up with a  
13 valuation of 8.7 million at the end of the day?

14 THE WITNESS: Yeah. So  
15 what -- now I see the source of confusion. I  
16 think probably what that should have said is  
17 Brattle DCF as opposed to Brattle valuation.

18 PROFESSOR SCHWARTZ: Okay.  
19 Brattle DCF versus -- what would the Brattle  
20 valuation be instead of the DCF?

21 THE WITNESS: Well, that's the  
22 problem is I don't deem any of these to be all  
23 that reliable. I think they together provide a  
24 range, but, again, a lot of the types of  
25 information that I would want to rely upon to

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1 conduct a valuation are simply not present in this  
2 case.

3 PROFESSOR SCHWARTZ: So we are  
4 kind of apples and watermelons when we get to the  
5 very far right, because that's a valuation and you  
6 are doing a DCF?

7 THE WITNESS: Yes.

8 PROFESSOR SCHWARTZ: And we  
9 are not -- so I really don't know what the Brattle  
10 valuation would be to compare it with the Rosen  
11 valuation on the very far right; is that correct?

12 THE WITNESS: That's correct.  
13 You know, I would say it's somewhere between --  
14 you know, the best one can do is between [REDACTED]  
15 million and [REDACTED] million, and the Brattle DCF  
16 falls within that range. But these are -- it's  
17 all imperfect information.

18 PROFESSOR SCHWARTZ: Okay. If  
19 I'm looking at the [REDACTED] -- sorry, I'm looking at  
20 2002, where you have [REDACTED] million.

21 THE WITNESS: Yes.

22 PROFESSOR SCHWARTZ: Is that  
23 contingent on permitting?

24 THE WITNESS: Yes. And the  
25 reason is that, for the 2002 transaction, [REDACTED]

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1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED] And so -- and there were provisions that  
4 allowed the claimants to [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 PROFESSOR SCHWARTZ: Okay. So  
8 the [REDACTED] million, just to confirm, like the --  
9 sorry, the [REDACTED] million, like your [REDACTED] million,  
10 both contingent on permitting?

11 THE WITNESS: That's correct.

12 PROFESSOR SCHWARTZ: And by  
13 "permitting" you mean both -- yeah. You mean  
14 permits after whatever environmental assessment?

15 THE WITNESS: Yes. Conclusion  
16 and then the approval.

17 PROFESSOR SCHWARTZ: And then  
18 the recommendations are made.

19 Okay. So when I move from  
20 left to right, there is significant diversions,  
21 [REDACTED] versus [REDACTED] versus [REDACTED] versus [REDACTED] But  
22 then when I get to the end of the story, the  
23 divergence is orders of magnitude. It's not just  
24 two to one. It's ten to one, at least.

25 THE WITNESS: Well, I would



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1 say, on slide 20, it's about 6 to 1 or a little  
2 more than that at the low end of the range. So  
3 the [REDACTED] million -- the [REDACTED] million multiplied by six  
4 gets you almost to Mr. Rosen's valuation.

5 PROFESSOR SCHWARTZ: Maybe we  
6 are talking about different things. I'm just  
7 comparing your valuations with Rosen valuations.  
8 So I start at the left. I get [REDACTED] versus [REDACTED]

9 THE WITNESS: Yes.

10 PROFESSOR SCHWARTZ: About two  
11 to one. Then I get [REDACTED] million versus [REDACTED] about  
12 two to one. And then I get [REDACTED] million versus  
13 [REDACTED], still about two to one. And I get way over to  
14 the very last figure, and the divergence between  
15 valuation and valuation is now at least 10 to 1.

16 THE WITNESS: Yes.

17 PROFESSOR SCHWARTZ: Okay. So  
18 what happens between leading up to that very last  
19 set of valuations that the divergence has gone  
20 from two to one to orders of magnitude to one.

21 THE WITNESS: Okay. So now I  
22 understand the question. If you turn to slide 24.

23 So there are a number of  
24 things that are happening that explain the  
25 difference, and I think Mr. Rosen had a similar

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1 the breach, so the breach date, but not account  
2 for anything else, and then still assume that 41  
3 per cent is the change in value. Actually I  
4 probably should have used one further down because  
5 the discounting to the breach date is the one that  
6 we do first.

7 PROFESSOR SCHWARTZ: Okay.  
8 I'm getting there. Just a few more things still.

9 THE WITNESS: No problem.

10 PROFESSOR SCHWARTZ: But  
11 wouldn't the factors you mentioned in your last  
12 slide, the 41 per cent, the 21 per cent, the 12  
13 per cent, why wouldn't they be reflected in your  
14 earlier valuations, the [REDACTED] million, the  
15 [REDACTED] million, the [REDACTED] million?

16 THE WITNESS: Well, those  
17 actually, those do reflect the -- we don't need to  
18 make specific adjustments because these are based  
19 off of two transactions and one offer that  
20 provides an estimate of the market value, and a  
21 lot of those assumptions are already built into  
22 there. So when you look at the 2004 GQB buyout,  
23 that roughly [REDACTED] valuation, it already  
24 would account for the project's expected operating  
25 costs, the expected prices and volumes that the

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1 slide, although it didn't have magnitudes  
2 associated with them. But the first is to do the  
3 valuation on the breach date in a way that puts  
4 the claimants into the position that they would  
5 have been in on that day but for the breach. And  
6 so that's a significant component. That accounts  
7 for roughly 41 per cent of the difference.

8 Accounting for the [REDACTED]  
9 [REDACTED] on prices, as I discussed, that  
10 accounts for roughly 21 per cent of the  
11 difference. Correcting the operating costs  
12 related to each of the -- related to the -- this  
13 issue about [REDACTED]

14 here, that's about 12 per cent. The freight cost  
15 difference is about 14 per cent, and then the  
16 difference in volumes and a few other things  
17 amounts to a difference of about 10 per cent.

18 And one thing that's important  
19 to understand is the percentages are all dependent  
20 upon the order in which you make changes. So if  
21 discounting to the breach date was the last one,  
22 then all the others would have a much larger  
23 impact. So you -- so it wouldn't be economically  
24 appropriate to select, say, I want to discount to  
25

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1 project would produce, et cetera. So those are  
2 all incorporated into there.

3 Now, one difference that isn't  
4 incorporated is that there would be discounting  
5 all the way back to 2004. That's implicit in that  
6 valuation. And so that's one of the things that  
7 the indexation adjusted for, it moves these  
8 forward through time to account for changes in  
9 market conditions and the increase in the value of  
10 the project over time.

11 PROFESSOR SCHWARTZ: Okay.  
12 Sorry to persist with it. I'm just trying to make  
13 sure I understand here.

14 My understanding is that  
15 Figure 14, the darkened bars are based on Brattle  
16 valuations.

17 THE WITNESS: So what these  
18 are is each one of them is -- takes the bar on the  
19 right, which is the amount that was actually  
20 implied as the value on the transaction date, and  
21 says we know that market conditions changed  
22 between April of 2004 and October of 2007. And  
23 the way that we reflect that is we say, "Okay. We  
24 can see what's happening to publicly traded  
25 aggregates companies. Their value has increased



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1 by a factor of a little over 2 between the 2004  
2 buyout date and October of 2007. And if you go  
3 to -- in my second report, I try to provide just a  
4 little illustration of what these -- the  
5 indexation here is doing, if I can find the right  
6 page... I should go to the correct report. So in  
7 my second report at page... Here we go. Sorry,  
8 the second report at page 52.

9 So this diagram just  
10 illustrates the method. You can think about the  
11 dot on the left-hand side of the graph that's at  
12 \$100 as being reflective of the implied value of  
13 the transaction on the transaction date.

14 And then over time -- sorry,  
15 go ahead.

16 PROFESSOR SCHWARTZ: Well,  
17 again, I'm looking on page 20 of your report from  
18 today, and I fill in the figures from Figure 14,  
19 and my understanding is that when I -- I can go to  
20 each of these things, like [REDACTED] million, and compare  
21 that with your [REDACTED] and their [REDACTED] and compare it  
22 with your [REDACTED] and their [REDACTED] and compare them with  
23 [REDACTED] million. And, in each case, your figure is a  
24 discounted valuation.

25 THE WITNESS: Oh, so it ends

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1 up being lower because the value of aggregates  
2 producers increased in the interim.

3 If these could all be put on  
4 one page, so for the 2004 transaction, you could  
5 start and you could say, "An April of 2004, there  
6 was a transaction that implied that the value of  
7 the Whites Point project was [REDACTED]. Now,  
8 there hasn't -- there wasn't much progress in  
9 terms of developing the project, because it still  
10 was never built, et cetera. By October of 2007,  
11 you could insert into slide 20 something in the  
12 middle of those 2 bars, which is the [REDACTED] million.  
13 And so the [REDACTED] would be indexed based off  
14 of changes in aggregates market conditions to  
15 [REDACTED] as of October 22nd, 2008. And then if  
16 one continues to bring that value forward all the  
17 way to December 31st, to Mr. Rosen's valuation  
18 date, you would end up with [REDACTED]. So these  
19 are simply just adjusting the original transaction  
20 price that is observed through to one of our two  
21 valuation dates.

22 PROFESSOR SCHWARTZ: So I'm  
23 sorry. I still may not be there.

24 THE WITNESS: No worries.

25 PROFESSOR SCHWARTZ: Are you

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1 telling me, like, when I look a [REDACTED] and [REDACTED] and  
2 [REDACTED], I'm just looking at an indexed version of  
3 the market price?

4 THE WITNESS: Yes. It's an  
5 indexed version of the transaction price or, in  
6 the case of the [REDACTED], the offer price,  
7 through to the valuation date to reflect what ends  
8 up being in two of the cases an improvement in  
9 market conditions for aggregates, and, in the case  
10 of the [REDACTED] offer, it goes down because what  
11 happens is, between [REDACTED] and October of  
12 2007, the market value of publicly traded  
13 aggregates producers decline materially, so that  
14 would imply a decline in the value of Whites  
15 Point.

16 PROFESSOR SCHWARTZ: Okay. So  
17 I did misunderstand. I thought that the [REDACTED] and  
18 the [REDACTED] million were based on Brattle's  
19 independent, all things considered, estimates, but  
20 they are not. They are just indexed versions of  
21 the market prices.

22 THE WITNESS: That's correct.  
23 What I'm trying to do is put context around to  
24 understand not only what a DCF analysis says, but  
25 what does the market evidence suggest.

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1 PROFESSOR SCHWARTZ: Okay.  
2 And so the most important thing in looking --  
3 comparing expert opinion is actually just to go  
4 straight to the very far right where they have  
5 [REDACTED] as a valuation.

6 THE WITNESS: Um-hmm.

7 PROFESSOR SCHWARTZ: You have  
8 8.7, which is actually a DCF, not a valuation.

9 THE WITNESS: Correct.

10 PROFESSOR SCHWARTZ: And your  
11 valuation uncertain, but has a hot ceiling of  
12 [REDACTED] million.

13 THE WITNESS: That's what this  
14 would imply.

15 PROFESSOR SCHWARTZ: Okay.  
16 All right. I understand it now.

17 Now, if this is too vague or  
18 beyond your expertise, again, please just let me  
19 know, the difference between [REDACTED] and 308 by almost  
20 any standard and astronomically it's large.

21 THE WITNESS: That's correct.

22 PROFESSOR SCHWARTZ: And you  
23 have done valuations in a whole lot of contexts.  
24 How much of this is because reasonable experts  
25 arrive at different opinions, and how much is



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1 inherent in the nature of the problem presented to  
2 the two of you?

3 THE WITNESS: I think a big  
4 component of it comes from the nature of the  
5 problem that's being presented. And that arises  
6 because we are trying to value something for which  
7 there's little or no contemporaneous information  
8 available. And so I'm looking for the pieces of  
9 information that I could -- that I am able to find  
10 to understand what it implies about the value.  
11 And then, when I take that to slide 20, when I  
12 move each of those transactions to December of  
13 2016, what I find is that the implied values, even  
14 accounting for the changes in market conditions  
15 between the transactions or offer date, they  
16 simply don't explain the extraordinary return that  
17 would be implied by Mr. Rosen's DCF analysis.

18 PROFESSOR SCHWARTZ: So,  
19 again, if this is too vague a question or beyond  
20 your expertise, in a phase, you mentioned  
21 expropriation cases. Ordinarily we wouldn't  
22 expect two independent valuers to come out with  
23 a ten to one difference in an ordinary  
24 expropriation case.

25 THE WITNESS: I have certainly

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1 seen big differences, but this one is certainly  
2 large, and it just comes down to a question of  
3 what are the assumptions that are fed into the  
4 DCF.

5 Now, neither Mr. Rosen or I  
6 are independently estimating the factors that go  
7 into the DCF. We are relying on the inputs of  
8 others. And when I look at the assumptions that  
9 Mr. Rosen uses, I conclude that he has failed to  
10 account for potentially important economic or  
11 operational factors, in part base, relying on the  
12 analysis done by others. And that's, that's what  
13 drives it. And, in part, it's typical that, in  
14 cases there is a dispute as to what is the  
15 appropriate valuation date from a legal  
16 perspective, and that is a big component of the  
17 difference here.

18 PROFESSOR SCHWARTZ: Okay.  
19 I'm under the impression now that I do understand  
20 this, so I will stop before I ask another question  
21 and go past the culminating point of success.  
22 Thank you.

23 THE WITNESS: You're welcome.

24 PRESIDING ARBITRATOR0: Okay.  
25 Any reactions? No, that is not the case. So that

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1 brings this examination to the end. Right. And  
2 thank you, Mr. Chodorow, for your testimony.

3 THE WITNESS: Thank you.

4 PRESIDING ARBITRATOR: There  
5 is a couple of organizational issues to be  
6 discussed briefly, but I think it's not worth to  
7 have a coffee break because my expectation is that  
8 we are going to be out of here pretty soon.

9 The one question I would like  
10 to take up today with a couple of other questions  
11 coming up on Wednesday. It would be the changes  
12 to the transcript in response to the tribunal  
13 rulings.

14 You will recall that the  
15 tribunal decided to exclude from the record the  
16 testimony of Ms. Griffiths in response to  
17 questions about the contents of an article that  
18 Mr. Professor Doelle had written because that  
19 article was not on the record. That ruling  
20 stands, of course, and the tribunal will disregard  
21 the relevant portion of the hearing record. On  
22 the other side, the tribunal prefers not to erase  
23 the irrelevant text from the transcript. Rather,  
24 a note will be placed at page 820 of the  
25 transcript to inform the reader that the

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1 information from page 820, line 7 to 821, line 13,  
2 by ruling of the tribunal, is stricken from the  
3 record as inadmissible and will be disregarded by  
4 the tribunal.

5 The tribunal does not regard  
6 it as necessary to strike out any further portions  
7 of the transcript. This relates to questions --  
8 first that we have the question put by Mr. Nash to  
9 Mr. Connelly as to whether he was aware of the  
10 number of JRPs and putting a specific number to  
11 him. The question is considered to be admissible.  
12 This is page 1012 of the transcript.

13 The tribunal recalls, however,  
14 its ruling that it will not treat questions from  
15 counsel or information purportedly provided by  
16 counsel in the context of a question as evidence.

17 And that leaves us, then, with  
18 the matter of the use of the word "taint" or  
19 "tainted" by Canada. The tribunal feels that it  
20 need not adopt any measure in respect of that, the  
21 use of that word. It merely recalls that Canada  
22 has already confirmed on the record that, in view  
23 of the tribunal's ruling in respect of  
24 Ms. Griffiths' testimony, any concerns that Canada  
25 had have been addressed. And I quote from

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1 page 1068 of the transcript. I quote:  
 2 "Mr. Nash said that this  
 3 hearing had been  
 4 conducted fairly.  
 5 Indeed, it has, because  
 6 evidence that shouldn't  
 7 have been admitted into  
 8 the testimony yesterday  
 9 was stricken from the  
 10 record."[as read]  
 11 It's in the record that the  
 12 hearing has been conducted fairly, and I think  
 13 that is a sufficient, let's say, measure with  
 14 regard to this matter. That is what I wanted to  
 15 discuss right now.  
 16 And then that brings us to the  
 17 last question, that is: At what time of the day  
 18 or of the morning to begin the Wednesday closing  
 19 observations? And, in view of the fact that  
 20 Wednesday was really an additional day, which was,  
 21 in a way, offered to the parties, but which, of  
 22 course, had all kinds of problems with regard to  
 23 travel, the tribunal would very much suggest that  
 24 we start early, namely, at 8:30, if that was  
 25 acceptable to the parties. You will have all

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1 remaining time budget for each party of  
 2 three hours. So no more than three hours may be  
 3 allocated to closing statements.  
 4 Time remaining, I think that's  
 5 the measure that's of most interest now, is, for  
 6 the investors, one hour and 36 minutes and, for  
 7 Canada, technically 3 hours and 35, but capped to  
 8 three hours in this particular context.  
 9 While I have the floor, may I  
 10 just make one further announcement? We have  
 11 actually received a request by members of the  
 12 public to watch the last day of the hearing, the  
 13 closing statements, and we have instructed us to  
 14 accommodate that wish as was set out in procedural  
 15 order number 25. So just for your own planning  
 16 purposes, please plan on having the signs ready or  
 17 structure your closing in such a way that  
 18 confidential information can easily be flagged.  
 19 I'm happy to provide the names of those registered  
 20 in due course. It's essentially one local law  
 21 firm associate and two trained lawyers who wish to  
 22 follow this hearing.  
 23 PRESIDING ARBITRATOR: Okay.  
 24 And then there is an issue that Mr. Spelliscy  
 25 wants to raise, so Mr. Spelliscy.

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1 Tuesday, and it would take out the nervousness  
 2 that I'm sure you will not appreciate on the part  
 3 of the people here having thoughts other than  
 4 listening and digesting what you have to say.  
 5 Would that be acceptable?  
 6 MR. NASH: Totally acceptable,  
 7 and it would be interesting to get a measure of  
 8 the time available for the parties.  
 9 PRESIDING ARBITRATOR: Yes.  
 10 But would that also be acceptable?  
 11 MR. SPELLISCY: Yes, it is  
 12 acceptable. I also think it's a great idea to get  
 13 a time check and one other procedural question as  
 14 well.  
 15 PRESIDING ARBITRATOR: Okay.  
 16 So the 8:30 is confirmed. The time, what is the  
 17 time?  
 18 DR. PULKOWSKI: Thank you.  
 19 Briefly, just to recall the context in which this  
 20 arises, because we are now really getting to the  
 21 last stage, which has special rules in procedural  
 22 order number 25. So we have a total time budget  
 23 for each party of 21 hours, and that includes  
 24 opening and closing statements. And then there is  
 25 a ceiling regardless of the particular of the

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1 MR. SPELLISCY: Yes. I had a  
 2 question. In procedural order 25, paragraph 9.2,  
 3 there was the reference on February 24th, 2018:  
 4 "The tribunal shall  
 5 identify any further  
 6 issues or questions that  
 7 the disputing parties  
 8 should consider  
 9 addressing in their  
 10 closing statements."[as  
 11 read]  
 12 Obviously we recognize that  
 13 didn't happen on the 24th. We had -- when this  
 14 was drafted, we had, of course, contemplated the  
 15 quantum experts going by that time. We are  
 16 wondering whether the tribunal intends to identify  
 17 any further issues or questions in preparation for  
 18 the closing arguments pursuant to this paragraph  
 19 now.  
 20 PRESIDING ARBITRATOR: The  
 21 tribunal considers that the questions we asked  
 22 before in writing covered our concerns, and so we  
 23 are not going to have any further questions except  
 24 that, after the closing statements, there might be  
 25 some questions immediately referring to the text,



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1 or asking for clarification that is kind of small,  
2 small fry, but no big questions anyway.

3 Any further procedural issues?

4 Okay. That brings our hearing  
5 to an end, and we will see each other on Wednesday  
6 morning at 8:30 in that room probably; right?

7 Okay. Thank you very much.

8 --- Whereupon proceedings adjourned at 4:24 p m.,  
9 to be resumed on Wednesday, February 28, 2018, at  
10 8:30 a m.  
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