

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

- - - - -x

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

HEARING ON THE MERITS

Wednesday, October 20, 2010

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

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

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

**Also Present:**

**MS. MARTINA POLASEK,**  
Secretary to the Tribunal

**Court Reporter:**

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

**APPEARANCES: (Continued)****Counsel:**

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

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

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

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

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

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

**Counsel:**

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

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

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

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

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

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

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

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

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

## ALSO PRESENT:

On behalf of the United States:

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

On behalf of the United Mexican States:

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

## P R O C E E D I N G S

1  
2 PRESIDENT van HOUTTE: Good morning, ladies  
3 and gentlemen. If I'm not mistaken, now we will start  
4 with the witness examinations, and the first witness  
5 is Mr. Paul Phelan.

6 PAUL PHELAN, CLAIMANTS WITNESS, CALLED

7 PRESIDENT van HOUTTE: I guess you are  
8 Mr. Paul Phelan.

9 THE WITNESS: Yes, I am.

10 THE SECRETARY: Excuse me. Should we open  
11 the session at this time?

12 PRESIDENT van HOUTTE: Yes.

13 THE SECRETARY: Please open the session.

14 PRESIDENT van HOUTTE: Mr. Paul Phelan, can  
15 you just repeat: I hereby declare upon my honor and  
16 conscience and honor.

17 THE WITNESS: I declare upon my conscience  
18 and honor.

19 PRESIDENT van HOUTTE: That I will tell the  
20 truth and nothing but the truth.

21 THE WITNESS: That I will tell the truth and  
22 nothing but the truth.

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09:06:36 1 PRESIDENT van HOUTTE: Thank you very much.  
2 Will the Claimants start to examine or  
3 present Mr. Phelan?

4 MR. RIVKIN: Yes, we will do a direct  
5 examination under the agreed procedures and then turn  
6 him over for cross-examination.

7 PRESIDENT van HOUTTE: Thank you.  
8 Mr. Rivkin, you have the floor.

9 MR. RIVKIN: Thank you very much, Mr. van  
10 Houtte.

## D I R E C T E X A M I N A T I O N

11 MR. RIVKIN:

12 Q. Mr. Phelan, you submitted three Witness  
13 Statements in this case; is that right?

14 A. That is correct.

15 Q. And do you reaffirm the contents of those  
16 Witness Statements?

17 A. I do.

18 Q. And I think they're on the table behind you,  
19 actually, if you want to have them near you.

20 Let me ask you--in your--you may not need to  
21 refer to this--in your third and most recent Witness  
22

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

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

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

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

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

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

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

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

09:15:46 1 process through the life of the field. We had taken  
2 into account in the later years some assumptions  
3 relative to what would be normal decline in both  
4 production as well as costs, but the assumption going  
5 forward is based on the average that we had for the  
6 period 2004 to 2009.  
7 Q. And you said the 2008 was removed as an  
8 outlier--2006, sorry--was removed as an outlier. Can  
9 you explain the basis for that?  
10 A. Right. 2006, again, when we look at the fact  
11 that we're using--for a statistical average, we're  
12 using a limited number of years. We felt that 2006 in  
13 terms of the amount of spend on R&D would have  
14 actually been on the high side.  
15 Typically, within ExxonMobil, within HMDC,  
16 when we're doing our planning, certainly if we're  
17 coming up with an average, we looked at highs and  
18 lows, and certainly looked for normalization. So, in  
19 essence, from a statistical perspective, we just  
20 eliminated the outlier.  
21 Q. So, is that approach one you typically use in  
22 your industry when making any source of future plans

09:17:24 1 CONFIDENTIAL SESSION  
2 BY MR. RIVKIN:  
3 Q. Okay. Let me show you now, if you can turn  
4 in your binder to Claimants' Exhibit 144.  
5 A. I have it in front of me.  
6 Q. Can you identify what this document is?  
7 A. This particular document was prepared by our  
8 tax advisor within HMDC. It represents the Scientific  
9 Research and Experimental Development, the SR&ED  
10 claims from the period 1990 through to 2008 that HMDC  
11 submitted basically as claims to CRA.  
12 It also indicates those claims that have been  
13 accepted, or the amount of the claims, in each of the  
14 years that has been accepted by CRA. So, in essence,  
15 we have, of the [REDACTED] that was submitted for  
16 the period up to end of 2008, we see CRA in actual  
17 fact approved [REDACTED] of that.  
18 Q. And now does that document also reflect your  
19 education and training expenditures in these years?  
20 A. No. This is--education and training  
21 expenditures are not eligible under the SR&ED program.  
22 Q. Okay. And on average, what have they been?

09:16:52 1 or budgets?  
2 A. It is. And it is not exclusive to costs.  
3 We'll also look at it from a volume's perspective. If  
4 we feel there is a particular issue that's going to  
5 give us an outlier, then we certainly normalize that.  
6 MR. RIVKIN: At this point, Mr. President, I  
7 would like to ask that we turn off the feed and go  
8 confidential for a few minutes.  
9 PRESIDENT van HOUTTE: Okay. Yes. It will  
10 be done. And this time verified.  
11 THE SECRETARY: Please close the session.  
12 (End of open session. Confidential business  
13 information redacted.)  
14  
15  
16  
17  
18  
19  
20  
21  
22

09:19:14 1 A. On average, educational and training costs  
2 would basically be about [REDACTED] and it  
3 really depends on the period that we're looking at.  
4 Certainly in the, say, the '94 to '96 period, we were  
5 in the heyday of the construction activities at Bull  
6 Arm with Hibernia. During that period of time we saw  
7 certainly an increase in, for example, co-op students,  
8 which would ultimately bring that average up.  
9 Q. Production began in November 1997 at  
10 Hibernia; is that right?  
11 A. That is correct.  
12 Q. Now--and is the R&D spend in that year  
13 typical of production phase R&D?  
14 A. No. 1997, we had started several R&D  
15 projects associated with the construction work, so  
16 there were follow-on projects coming out of '95 and  
17 '96 into 1997.  
18 So, two facts. Number one is in 1997, some  
19 of those projects are related--most of the projects  
20 are related to construction-type design questions;  
21 and, secondly, we basically didn't start production  
22 until November of that year.

09:20:30 1 Q. Okay. And does this chart reflect what you  
2 said earlier about how R&D is usually higher during  
3 the design and construction phase than during the  
4 development and production phase?

5 A. It does. If you look at the period 1990  
6 through 1998, you will notice that there are some  
7 significant projects that were submitted by HMDC. The  
8 years particularly, when you look at '91 through '95,  
9 you notice there's a high incidence of activity  
10 relative to SR&ED claims. Certainly from an approval  
11 perspective, we weren't as successful as we would have  
12 hoped to be. However, again, on the CRA acceptance  
13 side, we certainly had more accepted during that  
14 period than we have seen since then in the production  
15 period.

16 Q. Okay. Now, the expenditures in 2005 and 2006  
17 are substantially higher. Can you explain why that  
18 was so?

19 A. [REDACTED]  
20 [REDACTED]  
21 We submitted that as a claim to CRA. So, in essence,  
22 if you were to talk about outliers, 2005 and 2006, if

09:22:59 1 submit the [REDACTED] to Stats Canada as part of the  
2 normal survey. Annually we are requested to provide a  
3 survey or provide a response in terms of the R&D.

4 So, in essence, we did submit--the owners did  
5 submit the [REDACTED] as part of the research and  
6 development. We have had dialogue with Stats Canada  
7 to try to confirm what amounts are there. What we can  
8 say is that we did report it to Statistics Canada. We  
9 do believe that it is in Statistics Canada's  
10 benchmark.

11 Q. Okay. Did the Board accept the [REDACTED]  
12 expenditures as eligible for Guidelines credit?

13 A. The Board had not accepted the [REDACTED]

14 Q. You say in Paragraph 10 of your Third Witness  
15 Statement that no additional expenditures on R&D are  
16 foreseen that will relate specifically to the AA Block  
17 or HSE, except in relation to a [REDACTED]  
18 contribution to one or more education and  
19 research-oriented legacy projects, which is required  
20 under the HSE benefits agreement.

21 Do you still agree with that statement?

22 A. Yes I do.

09:21:44 1 CRA had accepted those particular amounts, they  
2 certainly would be an outlier in any statistical  
3 average that we would have computed for going forward  
4 beyond those years.

5 Q. And did CRA accept the amounts for the [REDACTED]

7 A. No. CRA did not accept the amounts for the  
8 [REDACTED] We have--some of our owners have received  
9 assessments from CRA. Those that have are in the  
10 process of appealing that particular claim.

11 Q. Did HMDC believe that the [REDACTED] was, in  
12 fact, research and development?

13 A. Yes. HMDC had reported it as R&D. We  
14 believe very strongly that it fits into the category.

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 Q. By the way, do you know if this [REDACTED] has  
20 been taken into account for purposes of the Stats Can  
21 factor?

22 A. The--what I can indicate is that HMDC did

09:24:05 1 Q. Can you explain why you don't anticipate more  
2 R&D in connection with the AA Block?

3 A. Well, the AA Block was a block--when I say  
4 "block," it's a section of the reservoir, so we  
5 basically have--use alpha to denote different sections  
6 of the reservoir.

7 The AA Block was an area that we started to  
8 produce from last year. We had to strike a separate  
9 agreement with the Province in order to produce in  
10 that particular area.

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED] So the actual  
14 [REDACTED]  
15 construction activity associated or the  
16 well-construction activity is actually complete with  
17 no R&D associated with it.

18 Q. And how about HSE?

19 A. HSE is actually a separate project. It's a  
20 different group of working interest owners. We  
21 basically have a different player, being Alcor Energy,  
22 which basically has a 10 percent ownership.

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

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

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

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









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

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

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

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

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

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09:55:56 1 BY MR. GALLUS:  
 2 Q. Again, from an accounting perspective what  
 3 does it mean to not recognize contingent liability?  
 4 MR. RIVKIN: Do you understand the question.  
 5 THE WITNESS: If you go back to IN19, an  
 6 entity should not recognize a contingent liability.  
 7 Not recognize means not book it.  
 8 BY MR. RIVKIN:  
 9 Q. Okay. Thanks.

█ █ ██████████  
 ██████████  
 ██████████  
 14 Q. You see at the top of Page 1,884 there is a  
 15 definition of contingent liability.  
 16 A. Yes.  
 17 Q. You will see it describes a contingent  
 18 liability as two possibilities, a part (a) and a part  
 19 (b).  
 20 A. Yes.  
 21 Q. And part (a) says that "a contingent  
 22 liability is a possible obligation that arises from

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

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







10:27:12

[REDACTED]

[REDACTED]

10:30:43

[REDACTED]

[REDACTED]

11 Q. Okay. Let's move on. And I think we can  
12 turn the public feed on again now.

13 THE SECRETARY: Please open the session.

14 BY MR. GALLUS:

15 Q. Let's talk about Terra Nova for a moment.  
16 The ownership of Terra Nova is currently being--or  
17 it's currently subject to arbitration?

18 A. Maybe if you can just clarify the question.  
19 It's not quite arbitration.

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

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

22 Q. That's right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10:48:01 1 consider that.

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

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

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

20 Q. Okay. Thank you.

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

10:50:08 1 Q. Okay.

2 A. --was my comment.

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

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

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

9 A. Yes, I have.

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

12 A. That is correct.

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

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

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

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

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

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

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

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

16 Q. Okay. You've also testified about the

17 [REDACTED]  
18 A. Yes, I have.

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

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

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

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

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

17 Q. Okay.

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

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

10:52:45 1 It is what you just said, right?

2 A. Yes. For purposes of the Tribunal, can we  
3 bring up the--that particular exhibit?

4 Q. Sure. It's Claimants' Exhibit 144.

5 A. Thank you.

6 Q. It's the average from 1997 forward, what's  
7 been accepted by the CRA, is that right?

8 A. What I had stated earlier, and certainly the  
9 record would say, is from 1998 through to 2008.

10 Q. Okay.

11 A. And so if you do an average of that and  
12 compare that to the average that we've used in the  
13 claim, materially you're not that different. That's  
14 really the crux of my statement.

15 Q. If you took an average from 1998 to 2008 of  
16 what HMDC considered to be R&D, ordinary course R&D,  
17 during that time, would the average be higher?

18 A. So, I have two comments to make on that. The  
19 first is absolutely, and the average would be higher.  
20 And from a HMDC perspective, if the Board had approved  
21 the eligibility of the [REDACTED] then certainly we  
22 basically would, from a statistical average, want to

10:55:17 1 conservative going forward.

2 Q. Okay. Are any of those calculations that you  
3 discuss on the record?

4 A. They're with--if you look at what we've gone  
5 forward from the 2004 through 2009 period, that  
6 calculation is--

7 Q. But the verification back to 1998.

8 A. Oh, the verification? I just made the  
9 statement. I personally have done the calculation  
10 myself and verified that.

11 Q. I appreciate that.

12 A. As far as the 2004 through 2009, you'll find  
13 that in Mr. Rosen's report specifically outlining the  
14 assumptions that management does support.

15 Q. Okay. You also addressed the updated oil  
16 production forecast at Hibernia.

17 A. I did.

18 Q. This is Claimants' Exhibit 238.

19 A. Yes.

20 Q. This profile has not been submitted to the  
21 Board.

22 A. No. As I mentioned previously, this

10:54:06 1 be concerned about [REDACTED] an outlier. So,  
2 statistically we would still have used the same  
3 methodology to say the [REDACTED] is a significant  
4 one-off. The Board has not approved that, so we did  
5 not include it in our claim for average going forward,  
6 either.

7 Q. Coming back to the calculation of the  
8 normalized average for 2004 to 2009, just for the sake  
9 of argument, if we added back in the statistical  
10 outlier from 2006 R&D of Hibernia--

11 A. Yes.

12 Q. --the average would be higher; is that  
13 correct?

14 A. I think that's obvious. If you do a  
15 calculation adding in that particular year, you will  
16 find that the average would go up, but you're also  
17 talking about a low population. So, in other words,  
18 you've only got six years, so a single year can  
19 distort your normalized average.

20 Again we tested and calibrated that  
21 normalized average against what I pointed out earlier  
22 and felt comfortable that we were actually

10:56:10 1 particular profile is the amendment to the Development  
2 Plan updated for the latest information. So the Board  
3 happened to have the amendment to the Development  
4 Plan. That would have, for example, in 2010, reported  
5 about [REDACTED] that you see in the 2010  
6 column.

7 So, we have given both the--yourselves as  
8 well as the Tribunal--the most recent information that  
9 our folks--our reservoir team--have come up with.

10 MR. DOUGLAS: Okay. Those are my questions.  
11 Thanks very much, Mr. Phelan.

12 THE WITNESS: Thank you.

13 PRESIDENT van HOUTTE: Very well.

14 MR. GALLUS: I think Canada has no more  
15 questions for the witness.

16 (Comment off microphone.)

17 MR. RIVKIN: I have a few short questions, if  
18 I may.

19 PRESIDENT van HOUTTE: Please.

20 MR. RIVKIN: Thank you.

21 And if we can keep it in closed session.

22 Thank you.





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

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

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

[REDACTED]

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

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

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

[REDACTED]

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

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

[REDACTED]

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

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

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

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

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

11 ARBITRATOR JANOW: Okay. Thank you so much.

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

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

19 THE WITNESS: Okay.

20 ARBITRATOR SANDS: --quite clear.

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

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

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

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

[REDACTED]

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

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

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

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

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

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

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

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

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

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

22 THE SECRETARY: Yes, we are.

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

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

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

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

20 THE WITNESS: Yes.

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

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

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

6 THE WITNESS: It's CE-144?

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

9 THE WITNESS: Yes, I have that.

10 ARBITRATOR SANDS: "Hibernia" at the top.

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

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

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

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

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

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

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

21 THE WITNESS: No, I did not.

22 ARBITRATOR SANDS: Were you aware that

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

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

6 PRESIDENT van HOUTTE: Thank you.

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

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

15 PRESIDENT van HOUTTE: We know, yes.

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

19 PRESIDENT van HOUTTE: Yes. Thank you.

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

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

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

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

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

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

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

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

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

7 THE WITNESS: Thank you.

8 (Witness steps down.)

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

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

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

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

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

22 PRESIDENT van HOUTTE: Okay, of course.

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

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

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

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

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

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

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

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

11:44:34 1 A. One of the things we tried to do with  
2 this--with this group was identify some areas of  
3 potential industry R&D joint activity, and we went  
4 through a discussion process and identified these two  
5 broad areas as areas where we saw potential for  
6 further dialogue.

7 MR. RIVKIN: Members of the Tribunal, so far  
8 none ever the questions have gotten into specifics,  
9 but I just want to remind counsel for Canada that if  
10 he starts asking about specific conversations of the  
11 industry, then we need to move into closed session.

12 MR. LUZ: Absolutely. In fact, after these  
13 background questions, I'll indicate we will move into  
14 closed session because the rest of my questions will  
15 relate to the documents and so on that we agreed on.  
16 So, these are just focused on what he's already said  
17 in his Witness Statement.

18 BY MR. LUZ:

19 Q. So, as you said, industry--once the  
20 Guidelines were in place, industry decided to get  
21 together and think of useful R&D projects that might  
22 be done on a joint basis amongst all of the companies

11:46:52 1 lot of hard work and thinking, a lot of brain power by  
2 the companies to come up with a priority list of R&D  
3 projects for joint industry collaboration.

4 A. That's correct.

5 Q. Okay. And I'd like to talk to you about some  
6 of these joint industry projects a little bit later.

7 A. Okay.

8 Q. Before we do, I'll just ask you about some of  
9 the other Hibernia-specific projects that you talked  
10 about in your Witness Statement. I won't get into  
11 details now, but just generally to go through your  
12 Witness Statement.

13 Your second statement mentions that there  
14 were, in addition to the joint industry projects, some  
15 Hibernia-specific projects that ExxonMobil was  
16 considering.

17 A. That's correct.

18 Q. Okay. And just to run them off and not to  
19 talk into detail, there were [REDACTED]

21 A. It would be helpful for me if you could  
22 reference--

11:45:45 1 operating offshore Newfoundland.

2 A. That was one of the things we talked about,  
3 yes.

4 Q. Okay. And you had a lot of meetings to do  
5 this?

6 A. Yes.

7 Q. And could you describe generally what the  
8 process was? Did each of the companies sort of  
9 identify particular R&D projects that they thought  
10 would be useful or interesting and then get together  
11 and discuss them? Just generally describe what the  
12 process was.

13 A. It was similar to that. We initially asked  
14 each company to identify a short list of some  
15 opportunities that they saw were larger opportunities  
16 with potential for industry participation, and then we  
17 put this list together and compared them and then we  
18 tested for interest, and it became apparent from those  
19 discussion that--that there were these two broad areas  
20 that I mentioned that had some promise for further  
21 industry discussion.

22 Q. Okay. So, just to sum up, there has been a

11:47:47 1 Q. Sure.

2 A. --the section and I'll follow with you.

3 Q. If you could go to your Second Witness  
4 Statement, Para 16.

5 A. Okay.

6 Q. All right. It's saying that in October 2009  
7 you met with the Board to review plans for meeting the  
8 Guidelines requirement at Hibernia. HMDC pre-viewed  
9 plans for [REDACTED] Hibernia R&D projects: [REDACTED]

13 Those are the [REDACTED]

14 A. That's correct.

15 Q. Okay. I will come back to those and discuss  
16 them shortly, but I wanted to confirm that those were  
17 the [REDACTED] Hibernia ones.

18 I think at this point we should probably  
19 close the public session and go confidential.

20 THE SECRETARY: Please close the session.

21 (End of open session. Confidential business  
22 information redacted.)

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

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

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

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



11:57:50

[REDACTED]

11:59:59

[REDACTED]

11:58:55

[REDACTED]

12:00:54

[REDACTED]



12:07:11

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12:29:02

[REDACTED]

12:32:04

[REDACTED]

12:30:15

[REDACTED]

12:33:03

[REDACTED]







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

[REDACTED]

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

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

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

12:53:46

4 ARBITRATOR JANOW: Thank you very much.  
 5 Sorry for the additional lunch delay.  
 6 PRESIDENT van HOUTTE: We have no further  
 7 questions. Thank you very much, Mr. Ringvee. That's  
 8 the end of your testimony. You will remain in the  
 9 room, I guess, and you may be called later on if it is  
 10 absolutely necessary, but you will be informed about  
 11 it.

12 THE WITNESS: Okay.

13 (Witness steps down.)

14 PRESIDENT van HOUTTE: Thank you very much.  
 15 Now we will have a break. Would it be feasible to  
 16 resume at 2:00, or is that too short? 2:00.

17 (Whereupon, at 12:54 p.m., the hearing was  
 18 adjourned until 2:00 p.m., the same day.)

19  
 20  
 21  
 22

02:04:23

1 PRESIDENT van HOUTTE: Thank you.  
 2 Now, it's for Mr. Gallus to present the  
 3 witness?

4 MR. GALLUS: Thank you.

5 We just have a couple of brief direct  
 6 questions--

7 THE SECRETARY: Mr. Gallus, do we open the  
 8 session?

9 MR. GALLUS: Yes, this session is open.

10 THE SECRETARY: Please open the session.

11 MR. GALLUS: We just have a couple of quick  
 12 direct questions before we handover to the Claimants  
 13 for cross-examination.

14 DIRECT EXAMINATION

15 BY MR. GALLUS:

16 Q. Mr. Fitzgerald, you said you were in the  
 17 hearing room earlier this morning. Were you in the  
 18 hearing room yesterday?

19 A. No, I was not.

20 Q. If you were here yesterday, you would have  
 21 heard that the Tribunal asked me several questions  
 22 with regard to the regulatory requirement or the

1 AFTERNOON SESSION

2 PRESIDENT van HOUTTE: Do we call  
 3 Mr. Fitzgerald now?

4 MR. GALLUS: That's right. Mr. Fitzgerald.

5 PRESIDENT van HOUTTE: Mr. Fitzgerald.

6 JOHN FITZGERALD, RESPONDENT WITNESS, CALLED

7 PRESIDENT van HOUTTE: Good afternoon,  
 8 Mr. Fitzgerald. I don't know to what extent you have  
 9 been sitting in this hearing room in the morning or  
 10 so?

11 THE WITNESS: Yes, sir. I was here this  
 12 morning.

13 PRESIDENT van HOUTTE: Okay, fine. Thank  
 14 you.

15 Can you just repeat, I hereby declare upon my  
 16 conscience and honor...

17 THE WITNESS: I hereby declare upon my  
 18 conscience and honor...

19 PRESIDENT van HOUTTE: ...that I tell the  
 20 truth and nothing but the truth.

21 THE WITNESS: ...that I will tell the truth  
 22 and nothing but the truth.

02:05:00 1 regulation of the Operators under the Atlantic Accord  
 2 Implementation Act, and I did my best to defer those  
 3 questions to Board members such as yourself.

4 The Tribunal, however, was unrelenting and  
 5 eventually did force me to answer a couple of those  
 6 questions. However, I thought we might take the  
 7 opportunity now just to get you to clarify a couple of  
 8 things with regard to that regulatory environment.

9 And first with regard to Section 45(2) of the  
 10 Atlantic Accord Implementation Act, can we pull up  
 11 CA-11 and go to Page 23.

12 Can you read the screen, then,  
 13 Mr. Fitzgerald?

14 So, if we can just scroll down to--yeah, a  
 15 bit further down and just highlight 45(2) there.

16 Can you see that?

17 A. Yes, I do.

18 Q. So that's Section 45(2) of the Atlantic  
 19 Accord Implementation Act before you?

20 A. Yes.

21 Q. And Section 45(2) describes the requirement  
 22 of a Benefits Plan?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 Do you see that?

6 A. Yes.

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

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

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

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

18 Do you see that?

19 A. Yes.

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

22 A. Yes.

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

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

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

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

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

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

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

7 Q. Good. Okay.

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

11 A. Yes.

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

14 A. Sections of the statute, yes.

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

18 A. Could.

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

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

22 Q. Yes.

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

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

15 A. Yes.

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

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

20 Q. Exactly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

03:30:50 1 Province."

2 A. Yes.

3 Q. Let's move on to the 1990--actually, before

4 we do that, let's ask one more question about this

5 document.

6 Mr. Rivkin also referred you to the next

7 paragraph, and there it's listed: The commitments

8 most significant to Canadian supplies include...

9 The second bullet there is: Support for the

10 principle of technology transfer.

11 A. Yes.

12 Q. Does the technology transfer include research

13 and development and education and training?

14 A. There is certainly an education component of

15 it. It could include research and development

16 depending upon just what the project at hand was.

17 Q. Let's move on to the 1990 Hibernia Framework

18 Agreement. This is the agreement to which Mr. Rivkin

19 referred you, where the Governments reached an

20 agreement with the Operators with regard to fiscal

21 benefits.

22 Did the Board play any role in that

03:33:12 1 after all the Board is an entity of the Provincial and

2 Federal Governments. Perhaps you could just speak

3 briefly to the relationship of the Board to the

4 Federal and the Provincial Government and the

5 independence that the Board has.

6 A. The Board was created to be a stand-alone

7 agency to administer the Act. The employees of the

8 Board are not members of either the Federal nor the

9 Provincial Public Service. The members of the Board

10 itself are appointed three by the Government of

11 Canada, three by the Government of Newfoundland and

12 Labrador, and one jointly. The jointly appointed

13 member is the Chairman.

14 The Chairman--the Vice-Chairmen are nominated

15 from those appointed by the two Governments--by each

16 Government, by the two Government. So the

17 Vice-Chairmen are appointed by both Governments, and

18 they hold office for a fixed term. That term is six

19 years. I know that when term was chosen, it was

20 chosen so that it would extend beyond the term of the

21 Government that appointed them.

22 There was great apprehension that when the

03:31:56 1 agreement?

2 A. No, it did not.

3 Q. And did that agreement affect the Operators'

4 obligation under Section 45 to expend on research and

5 development and education and training?

6 A. No. It may have created obligations on the

7 Board or on the Proponent out of the arrangement that

8 it entered into with the Government directly, but as

9 for its obligations under the provisions of the Act

10 and the approved Benefits Plan, it didn't change

11 those. If they undertook to do something extra than

12 they had undertaken to do before in their

13 representations to the Board, that fell within the

14 scope of those activities, they would have

15 been--become acceptable as elements meeting the--their

16 obligations. But it didn't change the Plan per se.

17 Q. This might be a helpful opportunity to

18 clarify the relationship between the Board and the

19 Federal and the Provincial Governments. Mr. Rivkin

20 seemed to indicate that, even though the Board was not

21 a Party to this 1990 agreement, that it would have

22 been sort of consumed in the whole process because,

03:34:37 1 Board was created in the corridors of industry that it

2 would not be independent, that it would be just

3 another instrument of the two Governments. And while

4 there's a limited scope within the legislation for the

5 Board to be issued directives by both Governments,

6 it's also explicitly says that the Board is to act

7 independently in administering the Act.

8 So, the Board certainly considers itself to

9 be an independent agency. It is not indifferent to

10 the fact that the two Governments which it represents

11 have interests, so it tries to keep itself informed of

12 what those interests are so it can take them into

13 account when it makes its decision.

14 The only directive which I can recall the

15 Board receiving in the 13 years that I had tenure

16 there was in relation to how it would--it should deal

17 with a requirement under a piece of Federal

18 legislation that was expiring, and that was the only

19 directive that the Board ever received from either--or

20 from the two Governments or any direct expression of

21 how the Government believed it should do something or

22 other in any case. We had no interference, if you

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

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

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

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

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

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

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

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

13 PRESIDENT van HOUTTE: Claimants' Bundle 32.

14 MR. GALLUS: Thank you.

15 PRESIDENT van HOUTTE: It is CO-32.

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

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

03:37:22 1 expenditures were inadequate?

2 A. It just chose not to.

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

5 A. We had some concerns--

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

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

11 BY MR. GALLUS:

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

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

18 Q. Thank you.

19 QUESTIONS FROM THE TRIBUNAL

20 PRESIDENT van HOUTTE: Thank you,  
21 Mr. Fitzgerald--or thank you, I'm sorry, Mr. Gallus.

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

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

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

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

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

22 PRESIDENT van HOUTTE: And say these persons

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03:41:15 1 who received those Guidelines, what do you think they  
2 were thinking in '86? First of all, that the  
3 Guidelines are there and then after one year that they  
4 are no longer mentioned.

5 ARBITRATOR JANOW: (Off microphone.)

6 PRESIDENT van HOUTTE: Yes, what should they  
7 have been thinking? What did you expect that they  
8 were thinking?

9 THE WITNESS: Well, I have to tell you that I  
10 don't know what they were thinking. If it had been me  
11 on the other side, I can give you an opinion of what  
12 it might have conveyed to me, if that's of any  
13 interest to you.

14 PRESIDENT van HOUTTE: Yes, of course.

15 THE WITNESS: To me, if I had seen that, it  
16 would mean that someone over at the Board--these were  
17 issued in draft format--someone over at the Board was  
18 thinking along these lines, where we're going to  
19 require expenditures for these purposes as part of  
20 your approval. We haven't decided what the amount is  
21 yet, so make a proposal. That's what I'd have  
22 received if I was the recipient of that.

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03:43:46 1 Actually, following on from that, could I ask  
2 a general question: When in relation to that document  
3 in '86 you on the Board turned your mind to these  
4 issues, were you assisted in any way by a legal  
5 advisor?

6 THE WITNESS: At that time, the Board did not  
7 have in-house counsel in place.

8 ARBITRATOR SANDS: So, on what basis did the  
9 Board determine what it could and could not do by  
10 reference to the Implementation Acts and the Accords?

11 THE WITNESS: On the plain reading of the  
12 statute, and if there was a doubt, we would put a  
13 question to either the Federal--it would have gone to  
14 the Federal Department of Justice. We would have  
15 sought the counsel of the assigned counsel in the  
16 Department of Energy, Mines and Resources.

17 ARBITRATOR SANDS: To the best of your  
18 recollection, when the Board inserted reference to the  
19 possibility of drafting Guidelines dealing with  
20 expenditures in '86, did it do so by reference to what  
21 it was able to do lawfully under the Acts and/or the  
22 Accords?

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03:42:27 1 I honestly cannot recall the discussions  
2 which led to these particular documents. This  
3 particular aspect of it was not within my direct  
4 day-to-day management at that time.

5 PRESIDENT van HOUTTE: And what is the, I  
6 would say, the duration of the impact of such a  
7 statement when it is not followed up with the result,  
8 in your view? Because now you get--you see a phrase,  
9 and then nothing happens.

10 Now, what--you as--

11 THE WITNESS: If I--I don't want to be  
12 flippant, but if I was a Proponent and I'd had a piece  
13 of paper from a regulator that had this clue in it,  
14 I'd breathe a sigh of relief when it didn't appear  
15 afterwards and say we got off the hook this time, but  
16 we'd better, you know, pay attention to what our  
17 commitments are because, obviously, somebody over  
18 there thinks it might be necessary to be more explicit  
19 on these matters.

20 PRESIDENT van HOUTTE: Thank you.

21 My colleagues?

22 ARBITRATOR SANDS: Thank you, Mr. Fitzgerald.

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03:45:05 1 THE WITNESS: I would believe that is  
2 it--believed that it--that what it was saying it had  
3 the statutory authority to do.

4 ARBITRATOR SANDS: Do you have any  
5 recollection of any conversations or communications on  
6 this issue? I appreciate it's 23 years ago. It's not  
7 a point without significance.

8 THE WITNESS: I have no personal  
9 recollection.

10 As I said to Mr. Chairman, that particular  
11 file or part of the Board's operation was not under my  
12 direct purview at the time. It was handled by the  
13 Chairman of the day and the manager for industrial  
14 benefits. So, these Guidelines would have been  
15 prepared in that department of the Board. That  
16 department at that time reported directly to the  
17 Chairman of the Board.

18 ARBITRATOR SANDS: Do you recall at all how  
19 much consideration and how intense was the  
20 consideration given to the question of Guidelines on  
21 expenditures?

22 THE WITNESS: In April of 1987--or 86, I have

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 THE WITNESS: That's correct.

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

10 THE WITNESS: Not at that time.

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

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

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

19 THE WITNESS: No, we were not.

20 ARBITRATOR JANOW: Okay, thank you.

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

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

8 ARBITRATOR JANOW: Okay. Thank you.

9 And if I may, just one more question?

10 PRESIDENT van HOUTTE: Sure, sure.

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

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

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

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

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

22 We--our own knowledge base was emerging at

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04:11:41 1 Professor.

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

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

11 ARBITRATOR JANOW: Okay.

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

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

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04:12:55 1 just don't think it's appropriate for me to try to  
2 answer your question.  
3 ARBITRATOR JANOW: Okay. I'm sorry if that's  
4 inappropriate. I apologize. But I guess what I'm  
5 trying to get a sense of is how the Board thought  
6 about the relationship between R&D expenditure and the  
7 actual needs of a project.  
8 THE WITNESS: It thought that they would be  
9 identified first out of the needs of the immediate  
10 project, and then out of the more broadly cast needs  
11 of the Proponent for its activities generally.  
12 So, in the Board's mind, it was never  
13 isolated to research which was uniquely or solely  
14 applicable in the Newfoundland offshore area. It had  
15 a much broader context than that. The reason for the  
16 Government's having put the requirement in place was  
17 to develop R&D capability generally, so they wanted to  
18 encourage through the development of oil-and-gas  
19 resources to building of that capability in the  
20 Province.  
21 Obviously, the first place you look is to the  
22 projects which are being immediately undertaken, but

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04:15:09 1 the Board looked at other regimes in Canada that dealt  
2 with--in foreign investments and the benefits that  
3 they were to provide?  
4 A. I have no recollection of that.  
5 Q. You don't recall if there was any--  
6 A. No--  
7 Q. --thing with--  
8 A. --one way or the other.  
9 Q. Okay. Thank you.  
10 PRESIDENT van HOUTTE: Thank you,  
11 Mr. Fitzgerald. That puts us at the end of your  
12 witness testimony. You are now a free man again, but  
13 I don't know whether you want to stay in the room and  
14 also tomorrow here or...  
15 THE WITNESS: With your permission, I may  
16 come back to listen to my former colleagues.  
17 PRESIDENT van HOUTTE: Okay, good. And  
18 tomorrow?  
19 THE WITNESS: Tomorrow.  
20 PRESIDENT van HOUTTE: Okay, good.  
21 THE WITNESS: And I may stay for the rest of  
22 the afternoon.

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04:14:15 1 as those you--as those projects develop and mature,  
2 you expect--the Board expected that the Proponents,  
3 through their owners, their owner companies, to  
4 identify initiatives, R&D initiatives which could be  
5 undertaken in the Province but might have application  
6 more generally in the oil and gas industry.  
7 ARBITRATOR JANOW: I see. Okay. Thank you  
8 very much for your patience.  
9 PRESIDENT van HOUTTE: Do you wish to address  
10 the witness?  
11 MR. GALLUS: We have nothing further for the  
12 witness.  
13 PRESIDENT van HOUTTE: Thank you.  
14 MR. RIVKIN: I have one question, if I may,  
15 just following up on Professor Sands's question.  
16 PRESIDENT van HOUTTE: It's a follow-up, yes?  
17 MR. RIVKIN: Yes, thank you.  
18 FURTHER CROSS-EXAMINATION  
19 BY MR. RIVKIN:  
20 Q. Mr. Fitzgerald, Mr. Sands was asking about  
21 various considerations that went into the drafting of  
22 the Accord Acts and its provisions. Do you recall if

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04:15:51 1 PRESIDENT van HOUTTE: It could be that you  
2 would be called again, but anyway that will be decided  
3 later.  
4 THE WITNESS: Okay. Thank you.  
5 PRESIDENT van HOUTTE: Thank you very much.  
6 (Witness steps down.)  
7 PRESIDENT van HOUTTE: I suggest we have a  
8 break until 4:30.  
9 (Brief recess.)  
10 FRANK SMYTH, RESPONDENT'S WITNESS, CALLED  
11 PRESIDENT van HOUTTE: Can we resume?  
12 MR. GALLUS: We can.  
13 I understand this might be quite quick.  
14 Canada has no direct questions for Mr. Smyth.  
15 PRESIDENT van HOUTTE: First of all, we have  
16 to--  
17 MR. RIVKIN: And we have no cross-examination  
18 questions of Mr. Smyth.  
19 PRESIDENT van HOUTTE: Okay. Then we will  
20 start.  
21 Good afternoon, Mr. Smyth.  
22 MR. RIVKIN: It becomes much better in the

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

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

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

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



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04:50:04 1 the Province, which is a big measure, it is accepted  
2 under the Guidelines as acceptable to quantify  
3 compliance with the Guideline.

4 PRESIDENT van HOUTTE: Another--and the last  
5 question is, I don't understand how, say, the  
6 Guidelines function in the two preliminary phases,  
7 exploration and development. I have the impression  
8 that there are some gaps there, but can you explain a  
9 little how it works. And exploration, I guess you  
10 have 0.6 percent of all the assets of the companies;  
11 is that it?

12 THE WITNESS: In the exploration phase, it is  
13 5 percent of their bid for land.

14 PRESIDENT van HOUTTE: Exploration, yeah,  
15 but--

16 THE WITNESS: The exploration phase.

17 PRESIDENT van HOUTTE: Yeah, exploration, but  
18 is there an initial phase?

19 THE WITNESS: The development phase of a  
20 project.

21 And in the case of exploration, industry came  
22 to the Board and asked for me to allow an amount they

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04:52:10 1 \$10 million for acreage and they choose to spend  
2 5 percent of that on R&D and E&T for whichever  
3 purpose, they are able to, when they claim to our  
4 office, because if an Operator doesn't spend the  
5 committed monies, 25 of it is retained by the Crown,  
6 so they have allowable expenditures process to go  
7 through with the Board to demonstrate in seismic work  
8 or drilling activity or whatever it might be on the  
9 lands to add up to their commitment. Five percent of  
10 that commitment can be R&D and E&T.

11 If they would spend more than that, and they  
12 have a project which they could apply that additional  
13 amount of expenditure on R&D, they could apply that  
14 surplus expenditure against a project that might  
15 emerge from that, if they were lucky enough to get the  
16 discovery.

17 PRESIDENT van HOUTTE: Then why didn't you  
18 just apply the benchmark for the whole project at the  
19 end--from the beginning to the end? Why do you have  
20 those separate regimes for the separate stages?

21 THE WITNESS: Because the Exploration Phase  
22 of our offshore is one where the exploration activity

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04:51:10 1 could spend for R&D in the Exploration Phase and use  
2 it as an allowable expenditure in their claim against  
3 what they bid for the land, and we did grant that.

4 PRESIDENT van HOUTTE: What if they spent  
5 more than 5 percent?

6 THE WITNESS: They could claim only up to  
7 5 percent for their--as an element of their allowable  
8 expenditures for the land exploration.

9 PRESIDENT van HOUTTE: What if they have  
10 spent actually more than 5 percent? It's lost?

11 THE WITNESS: Well, they have gained  
12 information from R&D, I guess, in the first instance.  
13 And beyond that, if they do proceed to a project  
14 setting in the development or operations phase, they  
15 could claim that money as an allowable expenditure for  
16 R&D and E&T in the course of development.

17 PRESIDENT van HOUTTE: But let's say the  
18 first--the 5 percent. What happens to the 5 percent?  
19 It's accepted under the exploration--in the  
20 Exploration Phase?

21 THE WITNESS: Yes.

22 So, if an Operator acquires offshore bids

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04:53:29 1 is one in five or more wells that you get success.  
2 You don't always lead from an exploration to a  
3 project.

4 And in order to get--by Operators request,  
5 they ask for an amount that they could--they could  
6 have for R&D and E&T in the Exploration Phase that  
7 enabled them to be able to get some credit if they  
8 chose to do.

9 There was a debate of the day that activity  
10 under land tenure should be--the funds should be  
11 channeled towards work on the land and not off the  
12 land if exploration or research activity might not be  
13 directly related to. But the Board, in its wisdom,  
14 decided to apply maximum 5 percent of its bid can be  
15 for R&D.

16 PRESIDENT van HOUTTE: But couldn't that be  
17 unfair for companies which go to a rather heavy  
18 Exploration Phase and then have a very lucrative  
19 exploitation?

20 THE WITNESS: The expenditure in R&D and the  
21 Exploration Phase are not mandatory, the 5 percent.

22 PRESIDENT van HOUTTE: Yeah, okay.

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

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

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

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

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

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

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

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

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

3 THE WITNESS: Yes.

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

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

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

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

22 ARBITRATOR SANDS: You didn't seek it?

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

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

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

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

05:03:13 1 THE WITNESS: No.

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

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

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

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

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

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

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

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

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

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

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

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

19 ARBITRATOR SANDS: Right.

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

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

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

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

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

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

20 THE WITNESS: Right.

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

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

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

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

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

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

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

5 THE WITNESS: They could choose to pay it.

6 PRESIDENT van HOUTTE: Sorry?

7 THE WITNESS: They could choose.

8 PRESIDENT van HOUTTE: What can they choose?

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

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

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

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

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

610

05:08:38 1 Phase.  
 2 PRESIDENT van HOUTTE: And what then under  
 3 the Guidelines?  
 4 THE WITNESS: The Guidelines provide for any  
 5 project for the development and, as it explains in the  
 6 Guidelines, the phases in the Development and  
 7 Operations Phase how the distribution of money  
 8 .5 percent in the Development Phase is mandatory, and  
 9 .6 percent for the whole.  
 10 PRESIDENT van HOUTTE: But let's now assume  
 11 they apply 5 percent of the expenditure because they  
 12 have to do such and they do it because, as we have  
 13 seen that is the area where a lot of research and  
 14 development is necessary.  
 15 THE WITNESS: Sure.  
 16 PRESIDENT van HOUTTE: Then they go to the  
 17 production phase, and they pay 0.5 percent of the  
 18 total project capital costs.  
 19 And we also have seen development is one of  
 20 the moments where research and development is very  
 21 intensive.  
 22 THE WITNESS: Yes.

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05:11:06 1 THE WITNESS: And I would comment that the  
 2 approach has strengths and weaknesses. Its strength  
 3 is its simplicity. Its weakness is some of the  
 4 argument you make, whether that's an appropriate  
 5 benchmark. You will recall in reading that--it's a  
 6 benchmark for R&D in Canada. It does not reflect  
 7 education and training.  
 8 The Board believes that the error induced by  
 9 discussions such as you might raise and I think I  
 10 understand where you're going is somewhat mitigated by  
 11 the fact we have not chosen to explore and identify  
 12 and add on an education-and-training factor as well to  
 13 the discussion. The Board did consider that matter in  
 14 that way.  
 15 PRESIDENT van HOUTTE: Thank you.  
 16 Thank you. That makes an end of your  
 17 testimony. Thank you very much, and you are now a  
 18 free man.  
 19 Will we hear the next witness?  
 20 MR. RIVKIN: How long do you think?  
 21 PRESIDENT van HOUTTE: I would really like  
 22 to--then we have heard all the witnesses of fact

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05:09:38 1 PRESIDENT van HOUTTE: Let's say nine  
 2 companies have paid the amounts I have said for  
 3 exploration and also the amount for development.  
 4 Then--and then, of course, the 10 also, but  
 5 the 10-12 is the only one that produces; and, under  
 6 the rules of the Guidelines, they have then to pay the  
 7 research and development, but their production is the  
 8 only production, but all under the statistics, the  
 9 Canadian Statistics, all the research and development  
 10 paid by the nine others will be included also in the  
 11 statistics, and that will be then the key to determine  
 12 how much research and development the only producer,  
 13 the 10 producer has to pay.  
 14 THE WITNESS: Yeah, yeah.  
 15 PRESIDENT van HOUTTE: That's much more than  
 16 reality, isn't it? My example is extreme, but to show  
 17 you that the formula is not a reflection of reality,  
 18 but now--  
 19 (Pause.)  
 20 PRESIDENT van HOUTTE: I see now it's a  
 21 mathematical formula, but you don't--I see the  
 22 weaknesses of the formula; let's put it that way.

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05:12:18 1 today, which would be excellent, if possible.  
 2 MR. RIVKIN: We have one witness of fact  
 3 tomorrow. Mr. Way can't testify until tomorrow  
 4 morning. The next witness would be Sarah Emerson.  
 5 PRESIDENT van HOUTTE: That's true.  
 6 MR. RIVKIN: There is some question whether  
 7 we ought to split up the two Pricing Experts. How  
 8 long do you think your cross-examination would be? I  
 9 have probably about 10 minutes of direct.  
 10 MR. LUZ: It would not take more than 20  
 11 minutes, and very likely less than that, so I think  
 12 it's entirely reasonable to think that we could do  
 13 both Pricing Experts today.  
 14 PRESIDENT van HOUTTE: That's fine.  
 15 MR. LUZ: Could we have a break before we  
 16 start?  
 17 PRESIDENT van HOUTTE: That's fine.  
 18 MR. RIVKIN: Mr. President, I ask the  
 19 proceedings to be closed for the rest of the day since  
 20 all of the Experts' testimony is to be closed.  
 21 THE SECRETARY: Please close the session.  
 22 MR. LUZ: I should point out, and perhaps we



05:28:54

[REDACTED]

7 Q. Okay. And how often have you testified?

8 A. In arbitration, I have testified two other  
9 times before the ICC.

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

12 A. Yes, I did.

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

[REDACTED]

05:31:06

[REDACTED]

05:29:54

[REDACTED]

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

16 A. I was asked to.

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

[REDACTED]

05:32:21

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

3 A. Yes, I have.

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

6 A. Um-hmm.

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

9 A. Yep.

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

17 A. Yes.

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

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

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

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

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

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

17 A. This one.

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

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

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

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

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

8 Q. Okay.

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

11 Q. Okay.

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

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

2 (Pause.)

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

5 Ms. Emerson, can you describe the document.

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

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

13 A. Absolutely, yeah.

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

16 What is described on this page?

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

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

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

21 Q. Thank you.

22 And in order to understand their world oil

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

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

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

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



05:51:01 1 A. Absolutely. Absolutely.  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 8 And I will tell you the key thing about this  
 9 that this has absolutely been an education for me as  
 10 well, the key thing about a price forecast in the case  
 11 where you're looking at a high cost asset like a  
 12 nonconventional oilfield is there is a long lead time  
 13 between the day you make the decision to do the  
 14 project and the day you get first oil, and sometimes  
 15 that can be 10 or 12 or 13 or 14 years.  
 16 So, you can't make that decision, you can't  
 17 commit that money, and then you send it to your board,  
 18 your investors, your stockholders if you haven't  
 19 thought about the future price of oil.  
 20 Q. One quick question: You heard the question  
 21 that was posed yesterday about the Reuters survey  
 22 that we have submitted as an additional exhibit?

05:53:23 1 Q. Okay. Ms. Emerson, in your experience, are  
 2 long-term oil price projections ever perfectly  
 3 accurate?  
 4 A. I wish they were.  
 5 No, I don't think--I think perfection is--  
 6 (Comment off microphone and laughter.)  
 7 A. Perfection is a difficult measure to reach.  
 8 Q. Can one nevertheless rely on projections?  
 9 A. Well, I think it's obvious that these  
 10 companies do rely on projections. You have to rely on  
 11 projections.  
 12 Q. And how would you describe the projection  
 13 that you have provided in this arbitration?  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

05:52:16 1 A. Yes.  
 2 Q. Is that survey available?  
 3 A. I actually after that session called Reuters  
 4 to be sure because I thought it was. What Reuters  
 5 does and has done for many years is they do a survey  
 6 of predominantly investment banks, although they also  
 7 include the EIA and the EIA's numbers in this, and  
 8 they publish that survey at the table, and then they  
 9 write an article with it. And the article you could  
 10 get off the Internet pretty much if you Google  
 11 "Reutter's Price Poll."  
 12 They don't put it in the article; they put it  
 13 on the Reuters Wire Service. The article summarize s  
 14 the table, but the table, in theory, you would have to  
 15 have subscription to the Reuters Wire Service.  
 16 Having said that, I called them and I said,  
 17 "Well, is that privileged information?" They told me  
 18 it was not because it was--it was also--the data was  
 19 also included in the Press Releases of most of the  
 20 Respondent. So they said, "If you called and asked  
 21 for the table, they would be willing to send it to  
 22 you."

05:54:40 [REDACTED]  
 2 Q. Do you think that oil prices could be lower  
 3 than your projection?  
 4 A. That's an interesting question.  
 5 I think, generally speaking, anything can  
 6 happen. I mean, I presented a price view, and there  
 7 is some variability. I think you have to expect the  
 8 fact that prices are volatile. There will be years  
 9 when the price is higher than the price year, there  
 10 could be years when the prices are lower. But on  
 11 balance, I would argue that if there is variability,  
 12 it will be more to the up side, and I base that on  
 13 three things:  
 14 One, as you know, and I'm sure you know that  
 15 oil comes from OPEC producers and non-OPEC producers,  
 16 and I'm sure you also are aware that the easy oil,  
 17 conventional oil, around the world is getting harder  
 18 to find, and many fields are getting older, and  
 19 they're beginning decline. So, increasingly, oil  
 20 companies are having to go into somewhat more frontier  
 21 areas, and that has increased the cost of production  
 22 in the non-OPEC production.

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

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

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

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

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

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

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

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

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

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05:57:27 1

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

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

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

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

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

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

22 So, when you take that into consideration,

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

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

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

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

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

18 THE WITNESS: Sorry.

19 BY MR. RIVKIN:

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

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

5 A. Yes, um-hmm.

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

8 A. Yes.

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

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

14 A. It is for this assignment, yes.

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

18 A. Yes.

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

22 A. Yes.

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

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

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

9 Q. Thank you.

10 MR. RIVKIN: I have no further questions.

11 PRESIDENT van HOUTTE: Thank you.

12 From this side...

13 CROSS-EXAMINATION

14 BY MR. LUZ:

15 Q. Thank you.

16 Hi, Ms. Emerson.

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

22 A. EIA, yeah.

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

3 A. Yes.

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

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

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

12 A. They present them as forecasts, yes.

13 Q. Okay.

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

17 A. Yes, it is.

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

21 A. Yes, it is.

22 Q. And you also stated in your Second Expert

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. RIVKIN: Thank you.

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

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CERTIFICATE OF REPORTER

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

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

\_\_\_\_\_  
DAVID A. KASDAN