

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

AND

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW, AS ADOPTED IN 1976

- - - - - x
In the Matter of Arbitration :
Between: :
: :
THEODORE DAVID EINARSSON, :
HAROLD PAUL EINARSSON, :
RUSSELL JOHN EINARSSON, AND :
GEOPHYSICAL SERVICE INCORPORATED, :
: ICSID Case No.
Claimants, : UNCT/20/6
: :
and :
: :
THE GOVERNMENT OF CANADA, :
: :
Respondent. :
- - - - - x Volume 1

HEARING ON JURISDICTION, MERITS, AND LIABILITY

Monday, March 3, 2025

Calgary Marriott Downtown Hotel
110 9th Avenue SE
Calgary, AB, T2G 5A6
Canada

The Hearing in the above-entitled matter
came on at 9:36 a.m. before:

MS. CARITA WALLGREN-LINDHOLM, President
MR. TREY GOWDY, Co-Arbitrator
MR. TOBY LANDAU KC, Co-Arbitrator

ALSO PRESENT:

On Behal of ICSID:

MS. GERALDINE R. FISCHER
Secretariat to the Tribunal

Realtime Stenographers:

MS. DAWN K. LARSON
Registered Diplomat Reporter (RDR)
Certified Realtime Reporter (CRR)
Certified Realtime Captioner (CRC)
Larson Reporting, Inc.
2564 West 280 North Street
Hurricane, Utah 84737
United States of America

APPEARANCES:

Attending on behalf of the Claimants:

**MS. MATTI LEMMENS
MR. VINCENT LANCTÔT-FORTIER
MS. MARIANNE BASTILLE-PARENT
Stikeman Elliott LLP
Bankers Hall, 4200 3 St SW West 888
Suite 4200
Calgary, AB, T2P 5C5
Canada**

Party representatives:

MR. HAROLD PAUL EINARSSON

APPEARANCES: (Continued)**Attending on behalf of the Respondent:**

MR. MARK LUZ
MS. SYLVIE TABET
MS. JULIA DEUTSCH
MS. ELENA LAPINA
MS. CAMILLE BÉRUBÉ-LEPAGE (virtual)
Trade Law Bureau
Global Affairs Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada

MS. MOLLY RUMPKE
Core Legal Concepts

MS. DAPHNÉE CAMPEAU
Global Affairs Canada

MR. ALEXANDER BLACK (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada & ISC Legal Services,
Indigenous Rights and Relations Portfolio

MR. PETER WIGEN (virtual)
Canadian Heritage Legal Services

MR. MARK KLAVER (virtual)
Office Legal Services Sector

MR. FRANCO BELLO (virtual)
MS. KIM PHILLIPS (virtual)
MS. JESSICA MACINTOSH (virtual)
MS. JEAN-FRANCOIS ROMAN (virtual)
Natural Resources Canada

APPEARANCES: (Continued)**Party Representatives:**

MR. SÉBASTIEN FOURNIER (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada

MR. SCOTT LITTLE (virtual)
MS. SUSANNA KAM (virtual)
MR. VINCENT BOULANGER (virtual)
Global Affairs Canada

MS. TARA SNELL (virtual)
MS. NATALIE GIASSA (virtual)
MS. PIERRE-LUC RACINE (virtual)
Innovation Science and Economic Development

MS. TIFFANY SANDERS (virtual)
MS. LYNETTE GIBBONS (virtual)
Canada Newfoundland & Labrador Offshore
Petroleum Board

Respondent's Party Representatives:

MR. MARKO VESELY
Canada Energy Regulator

MR. ALEX MILLER
Core Legal Concepts

MR. CHRIS REYNOLDS
Core Legal Concepts

Non-Disputing Parties:

MS. KRISTINA E. BEARD (virtual)
Office of International Claims and
Investment Disputes
U.S. Department of State

MR. ALAN BONFIGLIO RÍOS (virtual)
MS. PAMELA HERNÁNDEZ MENDOZA (virtual)
MR. ALDO GONZÁLEZ ARANDA (virtual)
Secretaría de Economía

C O N T E N T S**PAGE****PRELIMINARY MATTERS.....7****OPENING STATEMENTS****ON BEHALF OF THE CLAIMANTS:****By Ms. Lemmens.....28****By Ms. Bastille-Parent.....85****By Mr. Lanctôt-Fortier.....106****By Ms. Lemmens.....128****ON BEHALF OF THE RESPONDENT:****By Mr. Luz.....138****By Ms. Tabet.....175****By Ms. Lapina.....226****By Mr. Luz.....233****QUESTIONS FROM THE TRIBUNAL.....251****CONFIDENTIAL SESSION.....159-160**

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

2 PRESIDENT WALLGREN-LINDHOLM: Good morning,
3 everyone.

4 Apologies for the slight delay in starting
5 these proceedings. I declare opened this Hearing in
6 the Matter of an Arbitration under Chapter Eleven of
7 the North American Free Trade Agreement and the
8 UNCITRAL Arbitration Rules 1976 between Theodore David
9 Einarsson, Harold Paul Einarsson, Russell John
10 Einarsson, and Geophysical Service Incorporated, GSI,
11 as Claimants and the Government of Canada as
12 Respondent.

13 The arbitration is administered by the
14 International Centre for Settlement of Investment
15 Disputes, and it is ICSID Case Number UNCT/20/6.

16 I will now introduce the Members of the
17 Arbitral Tribunal and its Secretary and the Court
18 Reporter, and will thereafter ask the Parties' lead
19 Counsel to introduce their Counsel teams.

20 So to my right is Trey Gowdy from the United
21 States of America; to my left is Toby Landau KC from
22 Singapore -- or England.

1 ARBITRATOR LANDAU: Yes.

2 PRESIDENT WALLGREN-LINDHOLM: Both. Okay.

3 And myself as the presiding arbitrator, Carita
4 Wallgren-Lindholm from Finland, and then we have
5 Geraldine Fischer from ICSID, Secretary of the
6 Tribunal, and Dawn Larson as the Court Reporter.

7 Before we proceed to Counsel introductions,
8 I also recognize the presence of many Party
9 representatives on both sides, including family
10 members of the Einarssons.

11 I further recognize the presence of
12 representatives of Non-Disputing Parties, namely of
13 the Governments of Mexico and the USA respectively and
14 virtually.

15 Then I will give the floor to Counsel for
16 Claimants to introduce their team.

17 (Interruption.)

18 MS. LEMMENS: Thank you, Madam Chair for
19 that introduction. I am Matti Lemmens, lead Counsel
20 for the Claimants. I have with me my team from
21 Stikeman Elliott who represents all of the Claimants
22 in this matter. I have next to me Kira Lyseng,

1 Vincent Lanctôt-Fortier, Marianne Bastille-Parent.

2 Additionally I have with us this morning
3 members of PwC who are -- who prepared the Damages
4 Expert Report on behalf of the Claimants. So I have
5 Paul Sharp of PwC. We'll probably be mindful that you
6 have seen that name before, and his associate Mike
7 Dutka is with him.

8 Additionally we have one of the Claimants in
9 the room, Paul Einarsson. We have his wife and his
10 son.

11 PRESIDENT WALLGREN-LINDHOLM: Thank you,
12 Ms. Lemmens.

13 And Counsel for Respondent?

14 (Comments off microphone.)

15 MR. LUZ: Madam Chair, Members of the
16 Tribunal, thank you very much. My name is Mark Luz,
17 and I have with me Canada's legal team. Next to me is
18 Ms. Sylvie Tabet, Julia Deutsch, Elena Lapina, and
19 then we have our Paralegals Benjamin Tait, James
20 Adams, and I think Grace Mutombo is back
21 there -- yeah, as well. So that is Canada's legal
22 team.

1 We also have representatives from our client
2 group and our Technical Team, and I am seeing a few.
3 Marko Vesely is here representing the Canada Energy
4 Regulator, formerly the National Energy Board. And I
5 think that's the extent of our team.

6 PRESIDENT WALLGREN-LINDHOLM: Thank you very
7 much, Mr. Luz.

8 Before we proceed any further, I would like
9 to address one thing, and that is the presence of
10 witnesses in the room or virtually at this stage to
11 confirm that they are all such that they can sit in as
12 of now. And if we take the list of witnesses, I think
13 we have Paul Einarsson and he can sit in because of
14 the Regulation.

15 I'm just trying to find my PO11 here. Here
16 we go. He can sit in under PO11 Paragraph 12.14, and
17 then we have the persons from Canada, Mr. Dixit,
18 Makrides, and Bennett, and they are remote, at least
19 one of them, and I would like to understand what the
20 Parties have intended in their Regulations saying
21 that, unless agreed otherwise, factual witnesses shall
22 not be present in the Hearing room during the hearing

1 of oral testimony.

2 Does that mean that they can be present
3 during the Openings?

4 MR. LUZ: It does mean that they are able
5 to, but I don't believe any of our witnesses are
6 actually present for the Opening Statements.

7 PRESIDENT WALLGREN-LINDHOLM: Yeah. Good.
8 So we don't need to monitor this further at this
9 stage?

10 MR. LUZ: No, Madam Chair.

11 PRESIDENT WALLGREN-LINDHOLM: No. No.
12 Okay. Very good. Because this was not our drafting,
13 and, therefore, we were seeking the intention behind
14 the wording.

15 We will deal with sequestration separately
16 in relation to witnesses, but the Counsel are already
17 as of now invited to monitor the implementation of
18 sequestration rules when they become topical.

19 And, just for the sake of order, we assume
20 that Experts can sit in without limitation; right?

21 MR. LUZ: Yes.

22 PRESIDENT WALLGREN-LINDHOLM: This is --

1 MS. LEMMENS: We can confirm that, yes.

2 MR. LUZ: Canada as well.

3 PRESIDENT WALLGREN-LINDHOLM: Yes.

4 Canada as well.

5 Now, when it comes to access to Confidential
6 Information, we have discussed that at some length.
7 May I ask then that Counsel before addressing any such
8 information give an indication so that the Zoom
9 manager can turn off access during presentation? I
10 believe there's nobody that needs to leave the room at
11 such point, is there? We try to study the lists up
12 and down, and came to the conclusion that no.

13 MS. LEMMENS: Not that I'm aware of. I just
14 don't know who the individual is at the end of
15 Canada's table, so maybe that can get clarified.

16 PRESIDENT WALLGREN-LINDHOLM: That can
17 certainly be clarified.

18 MR. LUZ: It's Chris -- I'm sorry, I'm
19 drawing a blank on his last name -- from Core Legal.
20 He's our technical person that's going to pull up
21 slides and exhibits so that I don't have to try and
22 click at the same time. So apologies for not

1 introducing him.

2 PRESIDENT WALLGREN-LINDHOLM: Okay. And we
3 have gotten the USBs. But there is one more thing as
4 a household matter that we wanted to raise and that
5 is, it is not uncommon in proceedings of this kind
6 that we provide that private audio or video recordings
7 are not allowed, and I would like for the Parties to
8 comment on this, whether this is something that we
9 should set as a rule now.

10 MS. LEMMENS: I think we should set it as a
11 rule because we have a proper recording and we have
12 Dawn Larson here who is taking the stenography for
13 these proceedings.

14 PRESIDENT WALLGREN-LINDHOLM: And also a
15 detailed Regulation of how these proceedings become
16 public. Okay? And --

17 MR. LUZ: Agreed.

18 PRESIDENT WALLGREN-LINDHOLM: Agreed. Good.

19 MR. LUZ: And Madam Chair, I just
20 remembered. It's Chris Reynolds from Core Legal. So
21 I apologize for blanking on his last name, who is
22 controlling all of our technical stuff.

1 PRESIDENT WALLGREN-LINDHOLM: I will not
2 comment further. I will say thank you.

3 The schedule, it stands for now, as it was
4 appended to PO11. And is there anything in the purely
5 household -- on the household side that I have
6 forgotten?

7 (Comments off microphone.)

8 PRESIDENT WALLGREN-LINDHOLM: No? Not even
9 you? No.

10 Then I would like to ask the Parties if
11 there are any matters that they would like to raise up
12 front before we proceed to the Opening Statements. We
13 are aware that Canada wishes to address the Amended
14 Sharp PwC Report, or at least it indicated an
15 intention to address it at the commencement of the
16 proceeding.

17 MR. LUZ: If I may. Thank you, Madam Chair.
18 As the Tribunal is aware, on Friday afternoon, the
19 Claimants sent, without warning to Canada or
20 permission from the Tribunal, an amended Expert Report
21 from Mr. Sharp of PricewaterhouseCoopers. As we -- as
22 would be expected, a surprise filing of this Amended

1 Report has already caused prejudice to Canada, not
2 only in preparing for the first day of the Hearing,
3 but upending Canada's preparation for
4 cross-examination for Mr. Sharp as well as Brattle's
5 preparation for their presentation next week.

6 Needless to say, Canada objects strongly to
7 this last-second Submission. Claimants purport to
8 rely on Procedural Order Number 13, Paragraph 13.3(g)
9 to justify it, but I believe the Claimants have
10 misread the Procedural Order because all it says is
11 that every Expert Report shall contain a Statement
12 that, if the Expert considers a correction,
13 modification, or qualification is necessary,
14 notification shall be made to the Tribunal and
15 disputing Parties forthwith.

16 There is nothing in the Procedural Order
17 that gives carte blanche for an Expert to file without
18 warning or permission from the Tribunal a
19 substantively Amended Report that was originally filed
20 almost three years ago.

21 It is also all the more surprising that many
22 of the issues that are allegedly corrected in this

1 Amended Report were things that Canada raised along
2 with the Brattle Report in our Counter-Memorial in the
3 Brattle's First Report in 2023.

4 We are also in the position that we can't
5 check the new Report for correctness because the
6 Claimants still have not provided electronic work
7 papers, and we are really just not going to have much
8 time to address the Amended Report before next week
9 because we are obviously fully occupied with this
10 week's proceedings.

11 What the Amended Report essentially does is
12 show that the Claimant's entire approach to damages
13 has no credibility, but the fact remains that there is
14 prejudice that should not be countenanced.

15 Now, that said, Canada does intend to
16 cross-examine Mr. Sharp on the changes that he's made,
17 but we do request that the Tribunal allow Canada to
18 make further submissions on damages afterwards, if
19 necessary, and we also ask that Brattle,
20 our -- Canada's Damages Experts be given an additional
21 15 to 20 minutes during its presentation next week in
22 order to address the implications of the amended

1 Report.

2 Thank you.

3 PRESIDENT WALLGREN-LINDHOLM: Thank you,
4 Mr. Luz. Can I just get clarified, when you say
5 "afterwards," it means after what point in time?

6 MR. LUZ: It could mean in a Post-Hearing
7 Submission.

8 PRESIDENT WALLGREN-LINDHOLM: In a
9 post-hearing.

10 MR. LUZ: If -- if that's necessary. Again,
11 we haven't really had time to absorb the Report that
12 has been sent.

13 PRESIDENT WALLGREN-LINDHOLM: I understand.
14 But you are not proposing to submit it before these
15 Experts are heard, but it would be after the closure
16 of the Hearing?

17 MR. LUZ: That's right, Madam Chair.

18 PRESIDENT WALLGREN-LINDHOLM: Okay. Thank
19 you very much.

20 Ms. Lemmens?

21 MS. LEMMENS: Perhaps if I could just ask a
22 clarifying question of my friend on the other side.

1 When you say "submissions" are you talking
2 about written submissions or an additional Expert
3 Report?

4 MR. LUZ: It could be either. I think we
5 need some time to think about it, but we are going to
6 cross-examine Mr. Sharp on the Amended Report next
7 week.

8 PRESIDENT WALLGREN-LINDHOLM: Thank you
9 very --

10 MS. LEMMENS: Thank you.

11 PRESIDENT WALLGREN-LINDHOLM: Oh. Sorry.

12 MS. LEMMENS: Yeah.

13 PRESIDENT WALLGREN-LINDHOLM: Thank you. We
14 will discuss what we've heard now during one of the
15 breaks. And -- I beg your pardon?

16 (Comments off microphone.)

17 PRESIDENT WALLGREN-LINDHOLM: Pardon me?

18 ARBITRATOR LANDAU: I just -- it would be
19 helpful to have the Claimants' response, if there is
20 any, to what's just been said.

21 PRESIDENT WALLGREN-LINDHOLM: Okay. Sure.
22 I'm sorry.

1 (Interruption.)

2 MS. LEMMENS: Thank you. Thank you, Madam
3 Chair, and Mr. Landau, because we do actually have a
4 response, and I'm glad to hear that we are not talking
5 about whether there is leave to submit the Report
6 because it was unclear to us whether that was the
7 objection or whether we were dealing with something
8 different, which it sounds like we are.

9 We just wanted to note that PwC in its
10 Report actually had clarified that it reserved the
11 right to amend its Report, should its conclusions
12 change based on differing information. We also note
13 that PwC has a duty to amend its conclusions under the
14 PwC as these individuals are located in Calgary.

15 They operate under the Canadian Chartered
16 Business Valuator Standards, and those Standards also
17 require an amendment to be made in writing if their
18 conclusions, being the quantum, would change. So
19 they weren't able to just simply attend the Hearing
20 and then disclose new numbers as corrections to their
21 Report.

22 Probably no one has had a great opportunity

1 to review the Amended Report, but what we tried to do
2 is highlight with red underlining in the Report what
3 had changed. The methodology has not changed, and
4 the -- so the regression analysis that was conducted
5 by PwC has not changed.

6 It is some of the input numbers to the
7 normalized revenues that did change and then resulted
8 in different numbers, and you'll see that there's an
9 explanation, both on the cover page of the Amended
10 Report and, additionally, the two new Schedules that
11 you find at Schedule E-1 and E-2 of the Report are the
12 totality of the new inputs. And you'll see that they
13 are very short Schedules. So I just wanted to make
14 that clear and maybe that assists Canada in being able
15 to address the amendments.

16 We also note that we are of the view that
17 Canada has actually created some of this situation
18 itself.

19 Brattle's Second Report went beyond the
20 scope of a typical Rejoinder. It raised new issues
21 for the first time about documents that they had from
22 the first time that they had done their First Report.

1 So specifically they raised new issues about
2 Exhibits C-111 and C-112. They have had that from
3 prior to their First Report, but they raised issues
4 about it, new issues, in their Second Report. And so
5 we would say that fairness dictated that, in fact, we
6 should have had an opportunity to respond to those new
7 issues.

8 As the Panel would know, a Rejoinder
9 Report -- it's intended to be limited to just
10 responding to issues in the Reply Report of PwC, but
11 that is not what happened is what I'm trying to get
12 across there.

13 Canada certainly shouldn't be saying that it
14 was taken by surprise, by any means. These are all
15 related to issues that were raised by their own Expert
16 in their own Expert's Second Report, so they should be
17 familiar with the issues. They're not new, novel
18 issues that PwC has raised on its own accord outside
19 of just responding to the Rejoinder Report. And we
20 note that PwC, its amendments resulted in a quantum
21 downwards of approximately \$100 million, which is in
22 Canada's favor, and I would think that they would be

1 happy to see a revision downwards. It's certainly not
2 upwards.

3 So, in our view -- and I'm glad to hear that
4 Canada is not opposing it -- the fairness does weigh
5 in favor of permitting PwC to present its amended
6 Report. With respect to whether we have following
7 Expert Reports, I only note that, because it was a
8 response to Brattle's Rejoinder Report, I wouldn't
9 think that we'd need to have additional Expert Reports
10 thereafter, but perhaps Canada hasn't been able to
11 formulate a position in clarity just yet because they
12 are -- they were traveling to Calgary for this
13 Hearing.

14 And so, perhaps what we do is we reserve how
15 we would deal with that until maybe later in the
16 Hearing just so that we know that that is, in fact,
17 Canada's position that it would like to have some sort
18 of additional potential Expert submission. We have no
19 problem with also addressing it in written closing.
20 That's not an issue, of course. I just worry that, if
21 there is additional Expert Reports that then, perhaps,
22 we need to have additional cross-examination and we

1 would have already started cross-examination. It
2 starts to get a little bit messy in terms of how those
3 Expert Reports would look and whether they would
4 retread on ground that they have been cross-examined
5 on already. We would view that as unfair.

6 PRESIDENT WALLGREN-LINDHOLM: Thank you,
7 Ms. Lemmens.

8 Do you wish to comment further, or shall we
9 proceed?

10 MR. LUZ: I would. I probably have a good
11 15-minute speech to be able to respond, but I'll keep
12 it very brief.

13 There was nothing said by the Claimants
14 about how a supposedly corrected Report could be
15 submitted the Friday before the Hearing starts when
16 they have had Brattle's Report since November and how
17 that could be submitted without permission from the
18 Tribunal or even any kind of advance notice to Canada
19 that they would be doing this. I think it will become
20 fairly obvious, if it isn't already, that the excuse
21 that the Claimants have made that this was a reply to
22 so-called "new issues" that came up in Brattle's

1 Rejoinder Report is not true. This was a creation of
2 Claimants for not having appended any of the evidence
3 that supported its underlying damages analysis, and
4 I'm thinking in particular of Exhibit C-112, which the
5 Claimants submitted a chart with its Memorial and
6 Mr. Sharp's First Report and none of the evidence
7 supporting it.

8 So it's not appropriate to sort of shift the
9 blame to Canada for bringing up issues which the
10 Claimants themselves brought up.

11 I won't say much more about that, but I
12 certainly will say that it would be entirely unfair
13 for the Claimants to benefit from submitting an
14 amended Report the Friday before the Hearing and then
15 not allow Canada to be able to respond to that in
16 writing if we deem necessary. We're certainly not
17 interested in having a whole other round of
18 submissions, but the Claimants should not be able to
19 benefit from submitting an amended report in this way
20 and then not giving Canada the opportunity to properly
21 respond to it thereafter. I'm not saying we're going
22 to in a lot of detail, but it is something that we ask

1 the Tribunal to keep in mind and will reserve
2 our -- the specifics on that after the
3 cross-examination with Mr. Sharp.

4 PRESIDENT WALLGREN-LINDHOLM: Mr. Landau
5 wants to ask a question.

6 ARBITRATOR LANDAU: Sorry. Just very
7 quickly. You had suggested two procedural
8 accommodations: One was the possibility of further
9 submissions, which has been addressed. The second one
10 was the possibility of an additional 15-20 minutes to
11 Brattle. Is that to extend their presentation? Is
12 that where that comes?

13 MR. LUZ: It is. The Procedural Order
14 allows Damages Experts 30 minutes in which to be able
15 to present, but, just given the last-minute nature of
16 this, I think it's only fair and appropriate to give
17 Brattle a little bit extra time to be able to address
18 this, just given that we're going to have to --

19 ARBITRATOR LANDAU: I see. Thank you.

20 PRESIDENT WALLGREN-LINDHOLM: Ms. Lemmens,
21 did you address that in your comment? I don't think
22 so.

1 MS. LEMMENS: No, I didn't, but I think PwC
2 would like to also have an additional few minutes to
3 explain how they arrived at an amended report, if
4 that's going to occur. Certainly, we're not trying to
5 be unfair about it, and I don't know if you wish to
6 hear some comments in response to Mr. Luz's comments
7 about evidence not being provided. It's very clear
8 that the Brattle Report relies on Exhibits C-111 and
9 C-112 in making new issues in its Second Report. So,
10 just as fairness is being called upon by Mr. Luz on
11 behalf of Canada, fairness is also being called upon
12 on our side, and that's why there is an amended
13 report.

14 PRESIDENT WALLGREN-LINDHOLM: Thank you.

15 If there is nothing further, I will just
16 say, before we proceed to the Opening Statements, I
17 will thank the Parties for all arrangements and also
18 for the welcoming snow making me feel right at home.

19 So can we have the prints of the Opening
20 Statements? We have asked for printed Opening
21 Statements.

22 (Comments off microphone.)

1 MS. LEMMENS: Ms. Lyseng is just providing
2 those to you at this time. I believe we also emailed
3 them at 8:30, an hour before we started today. And I
4 believe, in Ms. Lyseng's email, it noted that there is
5 a little bit of Confidential Information contained in
6 the PowerPoint presentation. I don't think that the
7 oral -- the oral submissions that correlate with that
8 PowerPoint will contain much of any Confidential
9 Information, so I don't think we're worried there.
10 But, obviously, we can look at the Transcript
11 afterwards. I've tried to not include that in our
12 Opening Statement, but it is in the PowerPoint.

13 PRESIDENT WALLGREN-LINDHOLM: I understand,
14 and if there is something, you will then alert us to
15 that in arrears; right?

16 MS. LEMMENS: Yes. So in the
17 PowerPoint -- you'll probably notice it. It's a
18 little bit about Mr. Einarsson's nationality.

19 PRESIDENT WALLGREN-LINDHOLM: Yes, I see it.

20 MS. LEMMENS: And then there is some Seismic
21 Data just so that I could provide you with an example,
22 but those are the items I'm thinking of in terms of

1 what was confidential in the PowerPoint.

2 PRESIDENT WALLGREN-LINDHOLM: Understood.

3 Okay. Thank you.

4 So we will then leave the floor to Counsel
5 for Claimants.

6 MS. LEMMENS: Ms. Fischer, I'm not sure, are
7 you operating the connection to the screens in the
8 room so that we could put our PowerPoint up, or is
9 someone else? Sorry.

10 (Comments off microphone.)

11 MS. LEMMENS: Do you have a preference of
12 whether I stand or I sit?

13 PRESIDENT WALLGREN-LINDHOLM: It is your
14 choice.

15 MS. LEMMENS: Okay. I would normally stand
16 in court, but I don't have a lectern so it's a little
17 bit awkward.

18 PRESIDENT WALLGREN-LINDHOLM: That is fine.
19 Thank you.

20 OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

21 MS. LEMMENS: Thank you.

22 So to start this Arbitration, we intend to

1 provide an overview of the Claimants' case. In that
2 overview, we will retread over the Claimants' Memorial
3 and Rebuttal Memorial and provide some further color
4 to the case, as you would expect in an Opening
5 Statement. I'm going to set the stage on behalf of
6 the Claimants, speaking about the facts of this
7 matter, and then I will turn it over to my colleagues.
8 Marianne Bastille-Parent will speak to jurisdiction
9 and Mr. Vincent Lanctôt-Fortier will be speaking to
10 the Merits and damages, and then I will conclude our
11 Opening Statement.

12 So, as we all know by now, on April 21,
13 2016, approximately nine years ago, the Court of
14 King's Bench of Alberta, just a few blocks down from
15 here, issued a Decision in what we had called the
16 "Common Issues Trial." In that Decision, it told GSI
17 that it could not enforce its copyright in its
18 valuable Seismic Data. No compensation would be
19 payable for that confiscation of its valuable rights.

20 The Decision reads, at Paragraph 322,
21 that: "The Regulatory Regime has confiscated the
22 Seismic Data created over the offshore and Frontier

1 Lands and the CPRA is not apologetic for it, indeed,
2 it makes clear that there is no compensation for any
3 confiscation under the Act at Section 111(2)."

4 That finding became final on November 30,
5 2017, when Canada's highest court, the Supreme Court
6 of Canada, denied GSI's Application for leave to
7 appeal.

8 The Courts have crystallized Canada's
9 expropriation of GSI's most valuable asset. It left
10 GSI unable to enforce the copyright, and that
11 ultimately destroyed its business, that same business
12 that had laid the foundation for the offshore Canadian
13 oil-and-gas industry.

14 The Claimants, Theodore David Einarsson,
15 Harold Paul Einarsson, and Russell John Einarsson are
16 a father-and-son team of American investors in GSI,
17 the other Claimant in this matter. GSI was once a key
18 player in the Canadian offshore oil and gas
19 exploration industry, the one that oil-and-gas
20 companies knew and trusted and had come to rely upon
21 for the secrets as to where the oil and gas is.

22 The Einarssons are here today to simply seek

1 their just compensation in this Arbitration. They
2 have been substantially deprived of their investments
3 in breach of NAFTA Chapter Eleven.

4 The Claimants will demonstrate to this
5 Tribunal that the Tribunal has jurisdiction to hear
6 the Claimants' Claims, that the Canadian court
7 Decisions breached Articles 1110, expropriation, and
8 1106(1)(f), illegal performance requirement of NAFTA,
9 and that Canada has to pay the Claimants for its
10 breaches of Chapter Eleven of NAFTA as set out in the
11 amended Report of PwC.

12 Canada will attempt to persuade this
13 Tribunal to find against the Claimants, to find
14 against them on jurisdiction, and the reason that
15 Canada focuses there is because it has weak defenses
16 on the Merits. But its challenges to jurisdiction, we
17 submit, are equally weak. Canada has misstated facts.
18 It attempts to reargue the Alberta Decisions on points
19 that the Alberta Decisions have already determined
20 against Canada. They have embellished issues such as
21 the waiver issue under Article 1121 of NAFTA, and they
22 have incorrectly applied international legal

1 principles regarding Limitation Periods and
2 nationality.

3 Canada does not deny that it benefits from
4 the Alberta Decisions. Canada collects billions of
5 dollars in royalties from its offshore oil-and-gas
6 industry and has done so for years. Canada is simply
7 trying to get out of paying GSI the just compensation
8 that it deserves and it does so through a bunch of
9 technicalities that it raises in this proceeding.

10 We submit that Canada fails to establish any
11 of those defenses.

12 So let's talk about the facts in more
13 detail, and you're going to hear more about them in
14 the next two weeks, Tribunal. These were set out in
15 some detail in our Witness Statements from Paul
16 Einarsson, Davey Einarsson before he passed away,
17 Russell Einarsson, Ralph Maitland, George Lau, and
18 Allan Feir. I think we have a list of the -- just
19 bear with me.

20 Canada has elected to only cross-examine
21 Paul Einarsson in this Hearing. The other Witness
22 Statements, though, are equally important to the story

1 here. As we all know, Davey was the founder but
2 passed away last year. Russell was involved in the
3 Seismic industry for decades. Ralph Maitland explains
4 how scanning began to occur here in Canada and was
5 unknown to seismic companies like GSI. George Lau was
6 a former employer of what we call "Delaware GSI," who
7 created some of the Seismic Works at issue. Allan
8 Feir worked for the Claimant, the current GSI, also
9 creating some the Seismic Works of GSI. And we also
10 had a Seismic Industry Expert, Chip Gil. Canada did
11 not call him as a witness during this Hearing, and,
12 yet, he was the President of the seismic industry's
13 leading association at much of the relevant and
14 material times at issue here.

15 These are very important pieces of evidence
16 that Canada is, we say, attempting to downplay before
17 the Tribunal by not calling them as witnesses during
18 this Hearing.

19 So, as I said, there are four investors that
20 we speak about in this Arbitration. You have now the
21 estate of Davey Einarsson, who was the founder of GSI;
22 we have Paul Einarsson, the current CEO and President

1 of GSI; we have Russell Einarsson who was the former
2 Vice President of one of GSI's affiliates in Texas;
3 and we have GSI itself.

4 The Einarsson family has been involved in
5 the Seismic Data industry since the 1950s. Davey was
6 a pioneer in this field. He graduated in 1956 and
7 immediately went to work for Delaware GSI in 1956.
8 That company was incorporated in Delaware in 1938.
9 That company went on to be renamed Texas Instruments
10 in the 1950s. You may have heard of them related to
11 calculators, but, before they were into calculators or
12 any sort of warfare equipment, they were actually a
13 seismic industry business alone.

14 So -- and they then renamed in the 1950s.
15 Due to their expanding business, they continued to
16 maintain the Seismic Data industry arm as one of their
17 departments for decades to follow until it sold its
18 Seismic Data business to Halliburton in 1989. Russell
19 joined his father in the marine Seismic Data industry
20 from 1992-2013. During that time, he acted as a Vice
21 President in Houston, Texas. And the GSI that is the
22 Claimant today was incorporated in Canada in the

1 1990s.

2 In 1993 and 1994, through a series of
3 transactions, Halliburton sold its Canadian Seismic
4 Data collection to GSI. That's not the totality of
5 the Seismic Works. I just want to be clear. So there
6 is an older set of data that came from Delaware GSI
7 pre-1993, and then additionally GSI, the current
8 Claimant, created more Seismic Works, and that is the
9 totality of the Seismic Data collection.

10 The Seismic Works and GSI's intellectual
11 property rights therein were the life blood of GSI's
12 business. Throughout the 1990s and 2000s, the Seismic
13 Works allowed GSI to generate substantial revenues
14 that it reinvested in its business year after year.
15 It purchased seismic vessels and a processing center,
16 and that allowed it to create further Seismic Works
17 quickly and relatively cheaply because it controlled
18 all of the aspects of creating Seismic Data.

19 In the early 2000s, GSI employed
20 approximately 250 people. Paul Einarsson, he did a
21 brief stint on seismic vessels in the 1980s, but he
22 began to work in earnest in the industry in 1997.

1 That is when he relocated from California to this
2 city, Calgary, to assist his father, Davey, in
3 supporting and growing GSI.

4 For the Tribunal's benefit, Calgary, Canada
5 is essentially the Texas of Canada. This is where the
6 oil-and-gas industry, its heart, is located. All of
7 the major oil-and-gas companies would operate out of
8 this city.

9 So given that Paul's nationality is
10 contested in this case, I'd like to just take a little
11 foray into his nationality at this point, and then
12 I'll come back to speak more about some of the other
13 interactions with the Government.

14 Paul was born in Libya in 1964, born in
15 Tripoli. His dad was stationed there for Seismic Work
16 at that time. Davey had met an Italian-Egyptian woman
17 whom he married, Gina, and he settled into family
18 life. So he started to have his children.

19 Paul was in Libya with his parents. Russell
20 was born shortly thereafter, only 1965, so only a year
21 later, and they were there when Muammar Gaddafi rolled
22 his tanks into Tripoli during a military coup when

1 they were living there. They put up with that regime
2 for another couple of years, and then -- before they
3 left Libya in 1971, after it became clear that Gaddafi
4 was entrenched in power there.

5 In 1971, Davey moved his family to this
6 city, Calgary. As I said, it was the heart of the
7 oil-and-gas industry at that time. It still remains
8 so. And so this was the place to go for Davey because
9 he was born in Manitoba. So this was an easy move for
10 him.

11 They stayed here only a short while, from
12 '71 until 1975, when they resettled in Texas. So at
13 that time, Paul was approximately 11 years old and
14 Russell was 10 years old. They spent their
15 formative years in Texas. Paul was technically Libyan
16 by birth, so was Russell, until Paul, at least
17 naturalized to American citizenship in 1990. He went
18 to grades 5 through high school, grade 12, in the
19 United States, and he continued to live in the United
20 States thereafter until 1997 when he relocated to
21 Calgary to assist in growing GSI's business here.

22 Paul went to the University of Texas at

1 Dallas. He obtained an undergraduate in 1986 from
2 that university, and he obtained an M.B.A. from the
3 Southern Methodist University in 1988. That's also
4 down in the United States.

5 He met his wife during his post-secondary
6 studies in Texas. She's originally from Los Angeles,
7 or LA, California. Paul and his wife were married in
8 1989 in Dallas, Texas. Their first marital home was
9 in Dallas. They owned it from 1988 until 1995. Both
10 of their children were born there.

11 They resided in California then, from late
12 1995-1997. Davey -- sorry, Paul was working in
13 finance at that time, given his university education.

14 In 1997, his father, Davey, had asked Paul
15 to relocated with his family to the business hub here
16 in Calgary to support and grow GSI's business. At
17 that time, he understood that he would reside in
18 Calgary for only a few years to support the business
19 growing, after which he would leave it as a
20 well-established business here in Calgary running on
21 its own.

22 Paul's family moved here in 1997. During

1 their time in Canada, Paul and his family frequently
2 traveled back to the United States. That's where
3 their families were. That's where their friends were.
4 In 2004, Paul purchased a farm location on the way out
5 to the mountains from here. He uses that to store the
6 Seismic Works. GSI was legally required by the
7 Regulatory Regime to maintain its offshore Seismic
8 Data within Canada or risk surrendering it in full to
9 Canada.

10 And I just point you to -- in our
11 presentation here, I have the Canada Oil and Gas
12 Geophysical Regulations at Section 39. And I just
13 want to make the point here. It says: "Every
14 Operator shall, after completion of a geophysical
15 operation, retain in Canada the Seismic Data."

16 At (4) there, it says: "No person shall
17 destroy, discard, or remove from Canada any of the
18 information or material," and at (7), it says: "Every
19 Operator shall retain in Canada on reproducible film
20 the most recent fully processed, migrated, seismic
21 sections of the geophysical operation and shall not
22 destroy that film or remove it from Canada without the

1 written approval of the Chief Conservation Officer."

2 You are going to hear from Mr. Dixit, who
3 was the Chief Conservation Officer. He has since
4 retired. But what that essentially means is that GSI
5 is forced to continue to maintain its Seismic Data in
6 Canada or risk completely surrendering it to Canada.
7 If it ever wanted to leave, if it ever wanted to move
8 the Seismic Data down to Nevada where Paul lives now,
9 he wouldn't be able to do that without asking for
10 permission to do that. So that is why there continues
11 to be a farm here in Canada where the Seismic Works
12 are stored, and, of course, GSI has to do that on its
13 own dollar. It's not getting any funding from Canada
14 to do that, and it's no longer got a business. So
15 currently, that is being maintained by the Einarssons
16 on their own money.

17 So Canada even controls the location and the
18 maintenance of GSI's Seismic Data, even today.

19 In October 2006, Paul's family decided to
20 move back to California for at least the winters. As
21 you can see, it snows here, and Paul's wife, being
22 from Los Angeles, California, I don't think loves the

1 weather here. So I think she was eager to move back.

2 They engaged with GSI's CFO at the time for
3 tax-planning purposes on how to leave Canada.

4 Shortly thereafter, they engaged a realtor
5 in California to assist them with finding a permanent
6 home there and, unfortunately, due to the Global
7 Financial Crisis in 2008, they could not proceed with
8 the closing on that home. They made an offer, but
9 they could not complete.

10 Their intention to go back to the U.S. never
11 went away, though. In 2011, they finally purchased a
12 home in San Diego, California. From 2011 to 2016,
13 Paul resided, approximately, 45 percent of each year
14 in the U.S. and another 10 to 20 percent of the year
15 traveling to see relatives in other countries.

16 This is a fairly international family to
17 some degree. They have family in Australia. They
18 have family in Italy. And they have family in
19 Iceland. So they went to visit their family members
20 in all of those different countries regularly, leaving
21 Canada.

22 From 2013, Paul's family continued to make

1 arrangements to sell their family home in Calgary.
2 The Einarsson homestead in Arborg, Manitoba, and some
3 other commercial buildings were ultimately sold. The
4 homestead in 2013 and their commercial building here
5 in downtown Calgary, they sold in 2015. Despite it
6 being a tough real estate market in Calgary in 2015
7 and 2016, they were able to finally sell their home in
8 Calgary in September 2016.

9 Shortly after that, they filed a joint
10 departing tax return, Paul and his wife, and they left
11 with an effective departure date of January 1, 2017.

12 On February 27, 2017, they purchased their
13 principle residence in Nevada. They resided there
14 ever since. They still reside there today. They flew
15 in just last week just for this proceeding.

16 Paul has always been, and remains, an
17 American, first and foremost. You will hear from him
18 and you will see it yourself when he testifies before
19 you in this Hearing. He identifies as an American.
20 He's quite patriotic to the United States. It is
21 where he spent his formative years, so that is not
22 surprising.

1 In 1990, he applied for his American
2 citizenship through naturalization, rather than
3 claiming it based on his father's citizenship. His
4 father had both Canadian and American citizenship by
5 way of his birth, given where he was born in Manitoba.
6 But his mother was actually from the United States,
7 and so he had a birth right to citizenship. And,
8 therefore, Paul Einarsson did, as well.

9 He has, of course, developed some social
10 connections and work connections here. I met Paul
11 through work many years ago now. And I would call him
12 a friend, but I only see him when he's in town for his
13 court cases or this proceeding. So he's not here very
14 often.

15 While they lived in Canada, they used to
16 travel to the United States, as I said, to visit their
17 relatives. Both Paul and his wife have aging parents.
18 Paul's, of course, have now passed away. They were in
19 Texas. His mother and father were in Texas, and his
20 wife's parents were in Florida. His mother-in-law is
21 still there.

22 They attended family reunions for Christmas

1 and for American Thanksgiving. Their kids went to
2 University in the United States. One is now married
3 and lives in Australia, and the other one that is with
4 us today at this Hearing is married and living in the
5 United States at this time.

6 Since 2012 when they purchased the home in
7 San Diego, Paul's time in Canada, of course, became
8 more limited. They had a landing spot in the U.S.
9 that they liked to be at more than they liked to be
10 here.

11 Paul's intention to go back to the U.S. is
12 also evidenced by his investment-related decisions.
13 He maintained almost all his bank and investment
14 accounts and properties in the U.S. in Pearland,
15 Dallas and Napa.

16 The only remaining asset, as I mentioned, is
17 the farm with the Seismic Works. He also has always
18 paid taxes in the United States, even while he lived
19 in Canada. Any additional Canadian taxes were
20 actually paid by GSI because GSI had relocated him
21 here for its business. And so I will have my
22 colleague Marianne Bastille-Parent speak to the law

1 with respect to his nationality in due course.

2 I want to talk a little bit about what
3 Seismic Data is because there is not a lot of it in
4 the record before this Tribunal. And so I imagine
5 that it is probably a little bit esoteric for the
6 Tribunal to understand what this is all about at this
7 time.

8 It is a really confidential piece of
9 information, and that's why you don't actually see it
10 in the record before the Tribunal. And you
11 also -- you know, if you took to the Internet to try
12 and Google it, you don't see a lot of it on the
13 Internet either for good reason. This is a very
14 secret piece of information.

15 Seismic Data shows the layers of geology
16 under the Earth's surface. So the land that you walk
17 on is the surface, and under that is what we are
18 talking about. So as you may recall from science
19 class many years ago, there are sedimentary layers
20 under the Earth's surface. And it's that that we are
21 talking about in Seismic Data. That is the visual
22 that you see in Seismic Data.

1 It is used by the oil-and-gas industry to
2 identify the areas of interest for exploration,
3 development, and production of hydrocarbons. So of
4 interest in this present case, the Seismic Data
5 collected by GSI was mainly located off the shores of
6 Canada.

7 And so, I think, we've got the -- this is a
8 map from Mr. Dixit's Witness Statement. You can see
9 on the screen, where you see the pink and green -- it
10 doesn't really matter for my purposes right now
11 whether it should be pink or green -- but all of those
12 areas are where you see Seismic Data offshore of
13 Canada.

14 So we see it offshore on the east of Canada.
15 So you will see Nova Scotia would be towards the
16 southern part of the East Coast of Canada.
17 Newfoundland and Labrador, you will see a large green
18 patch there. That is where Newfoundland and Labrador
19 are located. You get up towards Greenland and
20 Baffin Island -- and then on this other side here,
21 closer to where you would see Alaska, that is the
22 Arctic or Beaufort Sea area.

1 You may see references to all of those areas
2 in the materials. So I just wanted to make sure that
3 you understood where those areas were located.

4 Collecting Seismic Data offshore is no small
5 task. I want to give you a little bit of a physics
6 lesson, so that you understand how Seismic Data is
7 created offshore.

8 This image here is taken straight out of the
9 Trial Decision in the Alberta Decisions. It is at
10 Paragraph 48, and it had come out of the one of the
11 Expert Reports that was tendered at that trial.

12 So although the integrity of this image when
13 I blew it up on the PowerPoint isn't perfect, I will
14 sort of walk you through it because I think you can
15 still see the visual.

16 You see that there is water. That's the
17 blue there in the image. You see a Seismic vessel.
18 It says "survey ship" there that is floating along on
19 the water. And it is dragging something behind it.
20 You can't read it very well, but it says "source of
21 shock waves [air gun]."

22 So the air gun is the Seismic source. And

1 you're probably wondering what the heck does that
2 mean? So that is something that emits waves of energy
3 down into the water. And those waves, like sound
4 waves, ultimately get reflected off of the numerous
5 layers under the geology and they reverberate back up
6 to the water surface.

7 And then there's a long cable that gets
8 dragged behind the same vessel. And that cable has,
9 essentially, the equivalent of a bunch of phone
10 receivers on it that collect the sound waves on the
11 back.

12 And, based on the information about how long
13 it takes for that sound wave to bounce back up, is how
14 you create the image that you see in Seismic Data.
15 And I have an image in a moment here. So you can see
16 they are called "hydrophones," but that's the same
17 thing that you could think of as a phone receiver,
18 obviously different technology, but same process or
19 idea.

20 And so you see down there -- you see the
21 seabed at the brown layer, and then you see different
22 sedimentary rock layers below. So you can see that

1 the different energy waves actually hit those
2 different rock layers at different times, and that
3 causes them -- they sort of spray out from the source
4 there, and then they bounce back at different
5 locations on the cable behind the ship. So you can
6 see, I think, there is four different examples of
7 shock waves.

8 And so that's how we create that image. It
9 is not unlike what you may see in an ultrasound when
10 you have a baby in an ultrasound. So ultrasound waves
11 are sent through the body, and they end up reflecting
12 off the things inside the body. And that's how they
13 create the image of the baby in the person's body.
14 That might be something that is more familiar to the
15 Tribunal in terms of what you have seen before.

16 A Seismic Operator goes out and it plans
17 where it's going to shoot one of these surveys. It
18 says this might be an area of interest. I think that,
19 you know, maybe there's an Exploration License bid
20 being had in that area coming up, maybe it knows that
21 the geology in that area looks interesting. So it
22 goes and figures out, I want to go and make Seismic

1 Data in this particular area --

2 And then it has to think about what kind of
3 air gun or Seismic source it going to use. There are
4 different varieties. And then it has to think about
5 how long its cables are going to be behind the ship.
6 They have to think about how frequently these
7 hydrophone receivers are going to be along the cable.
8 You might not have them spaced in the same way,
9 depending on the geology, the depth of the ocean, that
10 sort of thing.

11 And so there is a lot of things that go into
12 just simply creating a Seismic survey out in the
13 field. But then you have to take all of that
14 information back to the processing center where you
15 have geoscientists. These are geophysicists. They
16 are geologists. That are specifically trained on how
17 to reduce the noise that the ocean -- not literally
18 the things that we hear in our ear, but the noise that
19 is created by other energy waves that interfere with
20 the waves coming back that we want to hear in the
21 hydrophones.

22 So you might get turbulence in the water.

1 We don't care about that because we care about only
2 knowing about the geology below the ocean floor. So
3 you actually have to have skills that I don't have.
4 Certainly, I'm not a geoscientist. But they are able
5 to determine through repeated information in the
6 Seismic survey what is the most likely location of the
7 sedimentary layers and what is maybe, perhaps, a sound
8 that is coming from something else that doesn't matter
9 to us.

10 And that's why you can have data get
11 reprocessed. When it is reprocessed, other
12 geoscientists are looking at it and saying, "Well,
13 actually, I think that maybe if I did something a
14 little bit different, I would get a different image
15 and it would look a little bit different." So
16 reprocessing Seismic Data actually creates a different
17 visual. It will not create the same visual.

18 So when we talk about the information that
19 comes from out in the field, we call that "Field
20 Data," or "SEG-D" is a common term for it, as well.
21 I'm sort of not following my notes exactly. I don't
22 think it really matters that much. Anyway, but then

1 the processed data is called SEG-Y. You may see that
2 term in some of the materials before you today.

3 So here we've taken one of the exhibits that
4 was in the materials, and we have some Seismic Data
5 for you to see. So on the left-hand side, we call
6 that the "side label." It tells you a lot of
7 information about who created the data and what steps
8 they took to go out in the field to create the data,
9 and also what steps they took at the processing center
10 to create this visual image.

11 And then the visual image on the right is
12 the Seismic Data. There you see that there's various
13 lines. There are darkened lines, and then there is
14 lighter gray lines. That is supposed to be the visual
15 representation of the geology below the Earth's
16 surface, the different sedimentary layers.

17 You can see that this particular piece of
18 data is a piece of data that GSI/Halliburton had
19 created and is part of the Seismic Works that were at
20 issue today.

21 I have another visual for you, just so you
22 can see some examples. Here you see -- yet, again,

1 we've got the side label on the left-hand side. We've
2 got the GSI logo at the top. So that was created by
3 GSI. And then we have the information about what was
4 done to create this data. We even see, closer to the
5 bottom there, you actually see a visual representation
6 of a ship in the water pulling the cables to tell you
7 how it was situated and located. So you see that
8 there's a little ship closer to the bottom there.

9 But here you can see that there's a lot of
10 interesting geology that was captured, a lot of
11 different layers there. And on the side label it
12 says -- I know you can't read it in this particular
13 image, but we transcribed it for you so you can see it
14 better.

15 But it, specifically, says: "Proprietary
16 data of GSI. This data is the property of GSI and is
17 not to be copied, sold, or otherwise disclosed without
18 the prior consent of GSI. Notice: These materials
19 contain Confidential Information. All data, analyses,
20 studies, compilations, reports, and other information
21 represented on or contained in these media and the
22 media itself constitute Confidential Information and

1 trade secrets of Geophysical Service Incorporated.
2 GSI retains all proprietary rights to sell, trade,
3 license, disclose to the public or any third party,
4 copy or otherwise deal, in any other manner, with
5 these media. You are hereby notified that any
6 dissemination, distribution, or copying of this media
7 is strictly prohibited. Only Parties authorized by
8 GSI may acquire a right to use, reproduce, or
9 otherwise deal, in any other manner, with these media,
10 subject to the terms of their license, and such
11 Parties shall treat this information as confidential
12 and secret, and protect and hold the information in
13 confidence in the same manner that they treat their
14 own Confidential Information and trade secrets. But
15 in no event should they trade, sell, disclose to the
16 public, or any third party, or otherwise deal with
17 these media and the Confidential Information and trade
18 secrets contained herein without the prior written
19 consent of GSI. Notice these materials are copyright
20 protected. Geophysical Service Incorporated. All
21 rights reserved."

22 You get the idea. It was very, very clear

1 that GSI had put notices that this was Confidential
2 Information, that it was copyright. That's why it,
3 specifically, says it is copyright. And so this was
4 important to it.

5 Just so you understand where this came from,
6 it is from exhibit -- an exhibit that the Respondent
7 produced, Canada produced, out of its own data
8 library. It is Exhibit R-561. I see that we just
9 made a little bit of typo in the PowerPoint there. It
10 says "R-61", but it is R-561.

11 So GSI built its entire business on
12 collecting and creating this Seismic Data and
13 licensing it to oil-and-gas companies. More recently,
14 there has been interest in it from other industries
15 looking at other rare minerals. So it's not just
16 simply an oil-and-gas type of piece of information.

17 You have probably seen references to
18 exclusive or nonexclusive data in the materials before
19 the Tribunal in this proceeding. That's a reference
20 to the way in which the data is owned. It is not a
21 reference to what the visual Seismic Data looks like.
22 It's a legal term about how it is owned and dealt

1 with.

2 So the Seismic Data that GSI licensed to
3 oil-and-gas companies, that is nonexclusive data.
4 It's a nonexclusive license, whereby, you can have
5 multiple licensees to the same piece of information.

6 Exclusive data is where a Seismic contractor
7 might have worked for an oil-and-gas company and,
8 specifically, created data that the oil-and-gas
9 company asked -- it's basically a commissioned piece
10 of artwork. Please, create this painting for me, and
11 I'm going to own the painting afterwards.

12 So that's exclusive. The oil-and-gas
13 company, they don't want anybody to know what they are
14 doing. They don't want anybody to have the same
15 information. That's their competitive advantage in
16 having that information. And so they don't share it
17 with anybody. That's how it becomes exclusive.

18 So as you can imagine, going out and
19 creating this Seismic Data takes a lot of money. You
20 have got to use Seismic vessels. They have very
21 specific equipment like the cables, the source of the
22 Seismic waves. They've got to hire crews to man those

1 vessels while they are out at sea. You've got to
2 obtain some permits -- environmental, safety permits.

3 So not just simply those authorizations that
4 you may have seen in the materials being referenced by
5 Canada. You've got to think about
6 Research & Development. How do we think about where
7 the next great spot is to look at, or how can we get a
8 better imagine image of that particular spot? That is
9 all information and it is expensive to obtain.

10 They've got to hire really skilled
11 geoscientists to think about those things and also to
12 work in their processing center and create the image
13 that we see.

14 And so the Einarssons were investing in all
15 of that. In fact, GSI became the owner of the largest
16 offshore Seismic Data collection in Canada. GSI's
17 marine Seismic Data led directly to the discovery of
18 some of Canada's largest offshore oilfields, including
19 Sable Island, which is offshore of Nova Scotia; the
20 Bay du Nord and the Hibernia oilfield, which are off
21 the coast of Newfoundland and Labrador; and the
22 Amauligak oilfield in the Beaufort Sea that's closer

1 to Alaska in the Arctic.

2 So I now want to turn to talk about the
3 landscape governing the submission of Seismic Data to
4 the Canadian Government Boards.

5 So there are three Boards: There were
6 different names to some of the Boards, but essentially
7 there have only ever been three Boards. And so we've
8 got a map that came out of Mr. Dixit's Witness
9 Statement here. You'll see on the bottom right-hand
10 corner in gray, that's Nova Scotia. So that's the
11 CNSOPB, Canada-Nova Scotia Offshore Petroleum Board.

12 We've got in purple here near Newfoundland
13 and Labrador, the CNLOPB, that's the
14 Canada-Newfoundland and Labrador Offshore Petroleum
15 Board.

16 And then in pink at the top also on the West
17 Coast -- but no one is worried about the West Coast in
18 this Arbitration -- you see the Arctic.

19 And that is administered by the Canadian
20 Energy Regulator, CER. That was previously named the
21 NEB, the National Energy Board. It is located only
22 approximately four blocks down the street from here,

1 the NEB. It is open to the public to go to the
2 library and to go to the Frontier Information Office
3 where the data is located with the Canadian
4 government.

5 The Frontier Information Office also
6 previously resided in an entity called COGLA. I
7 believe it's the Canadian Oil and Lands
8 Administration -- Oil and Gas Lands Administration.
9 It was disbanded in the early '90s. So you may see
10 references to it in older materials.

11 Generally speaking in this Arbitration
12 proceeding, you're going to see references to the NEB,
13 even though it is now called the CER. That happened
14 after the trial, the Alberta Decisions. So that's why
15 you see references to the NEB in our materials.

16 So GSI had to obtain permits or
17 authorizations to carry out its fieldwork offshore.
18 Its processing work actually did not require a permit.
19 I just want to make that clear, that the processing
20 work happened in Calgary. And there is no permit to
21 have to use the various tools and workstations in a
22 Calgary office to create processed Seismic Data.

1 There was only a requirement to obtain an
2 authorization to go out to the field in the water.

3 As a condition for operating under the
4 geophysical authorizations or permits, GSI was
5 required to submit routine information to these
6 Canadian Boards about their work. And it submitted it
7 in the form of Reports. The Seismic Works were
8 included in those Reports.

9 This is what we allude to about when we talk
10 about specific performance requirements. And my
11 colleague Mr. Lanctôt-Fortier will be speaking to
12 Article 1106 of NAFTA in the Merits part of our
13 Opening Statement. These authorizations actually come
14 under a different Act than the Act that requires,
15 allegedly, the disclosure of the Seismic Data.

16 So the authorization comes under the Canada
17 Oil and Operations Act. And we have just put on our
18 PowerPoint slide the specific purposes of that Act
19 which are: Safety, protection of the environment,
20 accountability in accordance with the polluter pays
21 principle. Again, more safety, conservation of
22 oil-and-gas resources, economic efficiency and the

1 infrastructure out there.

2 This is different than the CPRA, which is
3 where the disclosure has occurred. The CPRA is about
4 promoting offshore oil-and-gas development. So the
5 purpose of the authorization does not quite match the
6 CPRA.

7 So starting in the mid-2000s, the Boards
8 began requiring GSI to also submit digital forms of
9 its data, so not just a paper copy or mylar. I'm not
10 sure if you are all familiar with mylar, but it is
11 sort of a plasticky sheet that you might have seen on
12 overhead projectors or in a microfiche machine.

13 And so now GSI was being asked to submit it
14 in an electronic format, in .PDF, .JPEG, .TIF files,
15 on CD-ROMs, that sort of thing.

16 Canada will tell you that they think that
17 the legal and regulatory landscape has been static.
18 It has not. The Alberta Decisions determined
19 otherwise, just as I specifically address this point.
20 That it is, in fact, something that changed over
21 the years. But it seems that Canada wants to continue
22 to argue the Alberta Decisions and relitigate it. We

1 do not. The Alberta Decisions are done.

2 They canvassed all of these laws. And the
3 Alberta Decisions also confirmed what GSI had said all
4 along, which was that its data was copyright.

5 So I also want to talk about the Copyright
6 Act. The Copyright Act protects copyright in certain
7 works as set out at Section 3. I just have it on the
8 screen for you so that you see it, but copyright in
9 relation to a work means the sole right to produce or
10 reproduce the work or any substantial part thereof in
11 any material form, whatever, to perform the work -- I
12 don't think we're talking about that here -- and if
13 the work is unpublished, to publish the work or any
14 substantial part thereof.

15 So it's two of those three rights that have
16 been taken from GSI: The ability to reproduce, and
17 the ability to publish because it was otherwise kept
18 strictly confidential.

19 Copyright now in Canada is for a term that
20 is the life of the author plus 70 years. That changed
21 after the Alberta Decisions. I just want to make that
22 note. So you may see references to 70 years instead

1 of 50 years. It was 50 years at the time of the
2 Alberta Decisions. It has since been extended to
3 70 years, as required of Canada under the new NAFTA,
4 the CUSMA, the Canada-U.S.-Mexico Agreement. So I
5 just wanted to make that clear.

6 So I think we've got the term of copyright
7 there. That was at the time -- and that one is the
8 50 years there.

9 And then I just wanted to make it clear,
10 because people often think about copyright in terms of
11 the author, when you work for a company, it is
12 generally the case that you are creating it for your
13 employer if you're creating something in the course of
14 your duties. That is how GSI had come to own the
15 Seismic Works that it created. And the Seismic Works
16 that were created before the Claimant GSI existed were
17 Seismic Works that the former entities had created and
18 they had transferred the ownership and the copyright
19 to the current GSI.

20 And so all of the Seismic Works, other than
21 with respect to the handing out of them at the Boards,
22 are otherwise enjoying their regular term of copyright

1 but for that exception.

2 So I now want to turn to talk about
3 disclosure. As I said, that happens under the CPRA,
4 the Canada Petroleum Resources Act. It protects the
5 confidentiality for submitted both exclusive and
6 nonexclusive Seismic Data for certain terms. We've
7 included that also in our PowerPoint so that you see
8 it.

9 This is not a section that says those
10 Seismic Works that you submitted, by the way, we're
11 going to disclose them after five years. It's a very
12 convoluted section. It says, information that was
13 provided to the Government under this other act, it
14 will be held privileged for a period of time. And
15 then there are exceptions to that privilege period.
16 And you can see that there are just sort of a D(2)
17 there of that Section 101 of CPRA. You see after the
18 expiration of five years following the date of
19 completion of the work being the Seismic survey.

20 So that is how the regulatory landscape
21 essentially works here in Canada when we talk about
22 the Regulatory Regime.

1 GSI also registered its copyright in its
2 Seismic surveys with the Canadian Intellectual
3 Property Office, another agency of the government of
4 Canada. So Canada was certainly made well aware that
5 the data was confidential and copyright based on the
6 Notices on the data itself, on the side label, and
7 numerous communications, but then also because it is
8 registered as copyright and that GSI is the owner at
9 the Canadian Intellectual Property Office.

10 So it seems as though Canada wants to
11 relitigate, as I said, the Alberta Decisions. We're
12 not here to do that, but my submissions in the next
13 part address some of -- a response to that argument.
14 We don't think that it's a live issue before this
15 Tribunal, though. I want to make that clear.

16 So they say -- oh, the Claimants knew things
17 and they knew ahead of time. Well, when you look at
18 it carefully, many of Canada's arguments, as I
19 mentioned earlier, were specifically rejected in the
20 Alberta Decisions. So Canada seems to make an
21 argument again that GSI consented to disclosure by
22 participating in a regulated activity.

1 Justice Eidsvik in the Common Issues
2 Decision said this about that argument. At
3 Paragraph 130 she said: "I will mention the permit
4 requirements only briefly later in these reasons.
5 They are not contentious and it is conceded that they
6 contain nothing to suggest that Seismic Data is
7 assigned or licensed to the regulatory bodies."

8 At Paragraph 317, she further said: "To
9 suggest that it has" -- "it" being GSI here -- "has
10 consented to the disclosure of its very valuable
11 Seismic Data, impliedly or not, does not sit well with
12 me. In my view, GSI has been forced to grant, in
13 effect, a compulsory license to permit its offshore
14 Seismic Data to be released and used by the public."

15 So we say this issue has been finally
16 determined. It's not for the Tribunal to revisit.

17 I want to also show you some examples, so I
18 have an example of a permit that GSI Delaware had for
19 some of the Seismic Works at issue. You'll see here
20 on the screen that there is a highlighted portion. So
21 the interim permittee was GSI Delaware in this
22 case: "Shall, within a reasonable time, after

1 completion of operations, submit a full Report to the
2 Director of Energy Resources on the results of all
3 exploratory work and carried out under the authority
4 of this interim permit."

5 And here's the important part: "And the
6 Province shall keep all such data confidential until
7 such release date may be mutually agreed upon."

8 That certainly doesn't give you the
9 impression that it is being handed out without GSI's
10 consent. So these are the things that we see in some
11 of the permits.

12 I also want to raise the concept of
13 Secondary Submissions. So I talked a little bit about
14 reprocessing of Seismic Data. So GSI and its
15 predecessors may have submitted Seismic Data to the
16 Boards as required, but they may do some further
17 processing on that Seismic Data or they may license it
18 to an oil-and-gas company who then does further
19 processing.

20 And those versions also got submitted to the
21 Boards, and those versions also are available at the
22 Frontier Information Office for all of us to go and

1 look at down the street. Those Secondary Submissions,
2 Canada tries to say, oh, well, you know, the really
3 high-quality Seismic Data, GSI has that and the
4 Boards -- they weren't required to give it to the
5 Boards. The Boards just took certain other things,
6 and we don't release that stuff.

7 Well, that is not true because what is
8 happening is the Boards are cataloging the Secondary
9 Submissions under an oil-and-gas company's name, not
10 GSI's name, and then disclosing it because it is
11 considered exclusive Seismic Data and is released
12 earlier. So that is not the case. They say, oh, we
13 don't give out certain types of nonexclusive Seismic
14 Data, don't worry, Seismic operators. But when your
15 licensees are also giving it to the Board and the
16 Board is handing those versions out, that's the same
17 thing.

18 And GSI -- there is no way that GSI has ever
19 been found to have consented to that process. GSI
20 didn't know that was even happening. Its licensees
21 were not allowed to do that under its own License
22 Agreements where it says keep it all confidential.

1 But they were doing it. They were seeking what are
2 called allowable expenditure credits. The oil-and-gas
3 companies would get a credit on their exploration
4 expenses that they could then reduce their fees to the
5 Government that they had to pay for having an
6 Exploration Permit or having a production permit. So
7 that was to benefit them and not GSI. GSI saw none of
8 that credit for itself.

9 GSI always believed it was protected by
10 copyright as you saw in the side label, for instance,
11 that I read out to you. And that was confirmed in the
12 Alberta Decisions. And the Regulatory Boards and the
13 Federal Government even sometimes confirmed that
14 understanding of GSI's. They did things like extend
15 confidentiality periods, they entered into License
16 Agreements with GSI for some Seismic surveys, and they
17 have signage at the Boards and borrower liability
18 agreements that specifically indicate that just
19 because it's available, the Seismic Data is available
20 at the Board, does not mean that it is not covered by
21 intellectual property laws.

22 So here we see the signage at the Frontier

1 Information Office down the street. It says: "The
2 Frontier Information Office library contains material
3 that may be subject to copyright, owned by those
4 providing the material. The copyright law of Canada
5 governs the making of photocopies or other
6 reproductions of copyright material. Copying may be
7 an infringement of the copyright law. The Frontier
8 Information Office is not responsible for, nor does it
9 authorize either implicitly or explicitly any
10 infringement of this law."

11 That certainly gives you the impression that
12 Canada isn't saying that it overrides the copyright
13 law. It leaves you with the impression that Canada
14 upholds its copyright law where it exists and applies.

15 We also see here the Frontier Information
16 Office has a clipboard with the Frontier Information
17 Office log. It specifically reads on this page: "The
18 Frontier Information" -- so this is if you want to
19 borrow some of the Seismic Data for a few days and
20 take it out of the Board office. It specifically
21 says: "The Frontier Information Office library
22 contains material that may be subject to copyright,

1 owned by those providing the material. The copyright
2 law of Canada governs the making of photocopies or
3 other reproductions of copyrighted material. Copying
4 may be an infringement of the copyright law".

5 So we see the exact same information, and
6 here you are actually required to sign it if you
7 borrow it. So an oil-and-gas company that goes down
8 to the Frontier Information Office that borrows some
9 of the material to go make copies of it, they sign
10 this that says that they acknowledge it too. That
11 certainly doesn't leave you with the impression that
12 there is no copyright at play.

13 If we go to the next one, I think, yeah.

14 So here we see an example of a License
15 Agreement that was entered into by one of the Canadian
16 government agencies with GSI, the current Claimant. I
17 believe it's the current Claimant. Sorry. I see that
18 it is 1993, so I might be wrong about that.

19 But here you see that the Canadian
20 government agreed to terms of how to deal with that
21 Seismic Data. It says: "All data delivered or
22 conveyed hereunder are proprietary to GSI and GSI

1 maintains trade secret and copyright interest in said
2 data."

3 So the Canadian government agreed to that
4 for that specific Seismic Data. It doesn't leave you
5 with the impression that the Canadian government
6 doesn't think that copyright exists in it or doesn't
7 think that it shouldn't be maintained in it.

8 Then I want to talk to you about specific
9 Minutes of a joint government and industry frontier
10 geophysical committee meeting in 1999. Here we have
11 just excerpted it. It specifically says: "This led
12 to further discussion on the issue of scanning
13 companies and copyright violations. NEB explained its
14 position that there is no transfer of ownership of
15 data from the Operators to the government when data is
16 submitted. The data is also not placed in the public
17 domain when the regulators release the information
18 from privileged status under the legislation.
19 Ownership of the data rests with the operators and
20 they must enforce that ownership if they feel their
21 data is being misappropriated."

22 That's the NEB's position in 1999. It

1 certainly doesn't leave you with the impression that
2 they didn't think that GSI had an enforceable
3 copyright.

4 Canada was certainly aware that the
5 Claimants were adamant that they had intellectual
6 property protections over the years. That is set out
7 in several letters. I won't go into them in great
8 detail. They are in the package of materials before
9 you, Tribunal.

10 I did want to bring your attention to a
11 further letter that the Government of Canada sent in
12 2010. They sent this to GSI. Here we see a letter
13 from Natural Resources Canada. That is the department
14 or Ministry of the Government in Canada that deals
15 with natural resources and minerals such as
16 oil-and-gas matters.

17 So Natural Resources Canada sends a letter
18 in June 2010 saying that they specifically -- at the
19 bottom there of the first page of the letter -- so the
20 last two points there: "With respect to data filed
21 with the Boards where the period of exclusivity has
22 expired, specifically paper or mylar images, the

1 Geophysical Survey of Canada, GSC, agrees not to
2 create SEG-Y data from scanned images without prior
3 written consent from the data owners until we obtain a
4 clear Legal Opinion from Justice Canada on potential
5 intellectual property issues."

6 So in 2010, Canada's not saying it is not
7 copyright, it's not saying our laws override -- these
8 other laws in the CPRA override copyright, they are
9 saying, gosh, we need to get a Legal Opinion on this,
10 but we won't be making any copies or reformatting it
11 in the meantime. That doesn't leave you with the
12 impression that they don't think it is important that
13 the data is copyright.

14 So GSI started to figure this out, and it
15 took a long time to figure some of this stuff out. It
16 started to make access to Information Act requests of
17 the Government. The Government actually opposed those
18 requests. And in 2003, GSI actually took that issue
19 to the Federal Court of Canada, and the Federal Court
20 of Canada ordered the Boards to give GSI the names of
21 the Parties that had been accessing GSI's Seismic Data
22 at the Boards.

1 So you'll see here -- I've just quoted from
2 that Decision. The Court said: "Apart from the
3 foregoing, I further conclude that none of the Boards
4 can succeed in resisting disclosure of the names of
5 requesters and the link between those names and the
6 information requested on any of the grounds for
7 exemption asserted by it. Put another way, I conclude
8 that the applicant is entitled to disclosure to it of
9 the names of those who requested of a Board the
10 release of information or data provided to that Board
11 by the Applicant" -- being GSI is the
12 Applicant -- "and the link between each such requester
13 and the data requested."

14 So GSI actually had to go to court just to
15 even find out who was accessing its data. The Boards
16 refused to cooperate. And then the Boards took years
17 to actually respond to those accessed Information Act
18 requests. So we get a Decision in 2003, and it is not
19 until 2007, '08, '09, '10, '11, '12, that GSI starts
20 to get some answers, and that's when it starts to sue
21 the oil-and-gas companies and the copy companies for
22 accessing its data and for copying its data.

1 That's why we get a whole bunch of copyright
2 infringement actions started in that time frame,
3 because that's when GSI found that out. So GSI didn't
4 know that before. It had no access to it. It is very
5 clear that it didn't have access when it is having to
6 go to court to actually get that information.

7 And so, then we see GSI tried to take some
8 other steps to stop some of this stuff from happening.
9 So they did a judicial review. The NEB wanted -- or
10 said that it had some surveys. They were still in the
11 privilege period. They had not been released. And
12 GSI decided to judicially review the potential release
13 of those data sets.

14 It did that in -- it was related to a
15 Seismic survey that was created in 2008. So because
16 of the privilege period in the Arctic, it was going to
17 be maintained as confidential based on the policies
18 for 15 years, so not until 2023 would it actually
19 potentially become open and available to the public.

20 And when GSI did a judicial review in the
21 Federal Court, the Federal Court of Appeal ultimately
22 said that the issues of disclosure were not ripe for a

1 Decision because the data was still confidential at
2 that time. This is back in 2011. And so they said,
3 well, I don't know, maybe it won't be disclosed. So
4 I'm the Court. I don't know what the Government is
5 going to do with it. It is currently confidential. I
6 can't do anything for you, GSI.

7 So that's kind of the lay of the land of
8 where GSI was at until we finally get to the common
9 issues proceedings. And one of the companies in the
10 common issues proceedings, Antrim, decided to try and
11 get a summary dismissal of GSI's claim, and they
12 relied on the Regulatory Regime and the laws to do so.
13 That was the Antrim Decision. And in the Antrim
14 Decision, the Alberta Court of Queen's Bench at the
15 time -- it's now the King's Bench -- said I can't give
16 you summary dismissal because the law is not clear
17 enough to me. You can go and read the Decision. And
18 that happened in early 2015.

19 GSI finally got one of its other cases, the
20 Calwest Case, set down for trial in later 2015. All
21 of the other defendants in the copyright infringement
22 claims said, oh, I need to participate in that trial

1 because I think there is some common issues that might
2 affect my case, in the Calwest Case.

3 So we went to trial on the Calwest Case, and
4 there was this sort of appendage added on to the
5 Calwest Trial, which is the Common Issues Trial. The
6 Common Issues Trial had two questions: One of the
7 questions was, can copyright subsist in Seismic Data;
8 and the second question was, what is the effect of the
9 Regulatory Regime on GSI's claims?

10 So one is general, but one is more specific.
11 The copyright question -- I see that Canada tries to
12 say, well, it is more general. It is not about GSI
13 Seismic Works. But the second question about what's
14 the effect of the Regulatory Regime on GSI's claims,
15 those are GSI's claims. That is specific.

16 As we all know, the Common Issues Decision
17 agreed with GSI. Yep, the data is copyright.

18 And then on the second question, they
19 actually kind of came up with their own answer.
20 Canada did not argue that it was confiscated and
21 neither did GSI. GSI argued in sort of in terrorem
22 argument of, well, if what Canada is saying that they

1 get to disclose this stuff and that's perfectly fine,
2 that is going to amount to confiscation. Don't do
3 that to me, Court. That's not what the legislation
4 should say. It doesn't allow this to happen. That
5 was GSI's argument before the Court.

6 And it was Justice Eidsvik that came up
7 with, it's confiscatory and it's a compulsory license,
8 you cannot enforce your copyright when your Seismic
9 Data is given out by the Boards.

10 So -- if we zoom forward.

11 So here we see the conclusion about
12 copyright. "In conclusion, the raw or field Seismic
13 Data is an original literary compilation work, and the
14 processed data is both an original literary
15 compilation work and an artistic compilation work in
16 the scientific domain. As such, they are protected
17 under Section 3 of the Copyright Act."

18 For the reasons I have outlined, there is no
19 need to resort to or rely on any presumption of
20 copyright. In other words, Justice Eidsvik reviewed
21 the law in great detail and reviewed the facts in
22 great detail about how to create Seismic Data, that's

1 how she came to that Decision.

2 And then just as that gets confirmed, we
3 then see the answers to the second question.

4 If we could...

5 Here I've already told you about how GSI was
6 found to not have consented to this, that it has been
7 forced to grant a compulsory license. And so at
8 Paragraph 318, Justice Eidsvik says: "In conclusion
9 on the second question, I find the Boards have not
10 breached GSI's rights under the Copyright Act by
11 copying, or allowing others to copy, the Seismic Data
12 GSI deposited with them. The specific legislative
13 authority in the CPRA and the Federal Accord Act
14 overrides the general rights contained in the
15 Copyright Act. Further, or in the alternative, the
16 Regulatory Regime created a compulsory licensing
17 system through which the Boards have the authority to
18 copy, and as a result, they are not infringing the
19 Copyright Act when they do so."

20 So, it did that. The way that Justice
21 Eidsvik went about doing it, and you'll see this in
22 the Decision, is that she first dealt with copyright

1 in order to find out whether there was copyright in
2 Seismic Data. Once finding out that there was, in
3 fact, copyright in Seismic Data, she then went on to
4 find out whether there was a conflict between the
5 Copyright Act protections and the Canada Petroleum
6 Resources Act, the CPRA disclosure.

7 And she said the CPRA, even though it
8 doesn't use the word "copy" or "copyright" or
9 "reproduce," or "publish," the fact that the privilege
10 period expires must mean that you can copy. And
11 therefore, there's a conflict between these two acts,
12 and I find that the CPRA is the more specific
13 legislation about Seismic Data than the Copyright Act,
14 which is not specifically about Seismic Data.

15 And using a principle called *lex specialis*,
16 which is a Latin term, maybe all of you are familiar
17 with it, certainly you have Expert Reports on it now,
18 it's a principle of statutory construction, that is
19 what she used to determine the conflict and decided
20 that one overrode the other.

21 And so the Common Issues Decision further
22 stated that GSI was not entitled to any compensation

1 for that compulsory license, that confiscatory
2 compulsory license.

3 The Common Issues Decision then went to the
4 Court of Appeal. So the Respondents, which included
5 Canada, did not appeal on the copyright determination.
6 And they also didn't cross-appeal about the arguments
7 that they make today, which are that GSI consented by
8 participating in a Regulatory Regime. Justice Eidsvik
9 found against that. Canada did not cross-appeal
10 against that finding. And so only GSI appealed about
11 the Regulatory Regime barring its copyright
12 infringement claims.

13 And the Court of Appeal finds -- and it's on
14 the screen here -- "As found by the Trial Judge, there
15 is no breach of copyright in this matter by the
16 Boards' disclosure of Seismic Data after the privilege
17 period, including allowing data to be copied. The
18 specific legislative authority of the Canada Petroleum
19 Resources Act and the Federal Accord Act overrides the
20 general rights contained in the Copyright Act.
21 Further, or in the alternative, the Regulatory Regime
22 created a compulsory licensing system through which

1 the Boards have authority to copy." That was the
2 trial Decision at Paragraph 318 that I just read to
3 you.

4 "Here, that means GSI's exclusivity to its
5 Seismic Data ends, for all purposes, including the
6 Copyright Act, at the expiry of the mandated privilege
7 period. Thereafter, GSI has no legal basis or lawful
8 entitlement to interfere or object to any Decisions
9 made by the Boards relating to its collected data."

10 And so, further, GSI had also appealed about
11 this connection to supposedly there being no
12 compensation. And the Alberta Court of Appeal
13 basically dispensed with the issue. They
14 said: "Given our findings on the first ground of
15 appeal, this issue need not be dealt with. The
16 correct statutory interpretation was reached by the
17 Trial Court in determining the legislation's
18 confiscatory nature as the data collected under the
19 Regulatory Regime, again, in keeping with its intended
20 purpose of dissemination following the privilege
21 period."

22 So, in other words, they left it alone. So

1 no compensation for GSI. And that's what brings us
2 here today is GSI has already litigated with Canada in
3 the Alberta Courts, in the Canadian Courts. Everybody
4 has had their time to deal with this. We are just
5 looking for the compensation. That's what makes it an
6 illegal expropriation.

7 Legal expropriation is where you get
8 compensated for it. Illegal is where you don't get
9 paid for it.

10 So I'm mindful that I also want to turn to
11 my friends because I think I have gone over much of
12 the facts at this point in time, and I want to turn it
13 now to Marianne Bastille-Parent to speak to the
14 jurisdiction, but I realize that we might need a
15 break.

16 PRESIDENT WALLGREN-LINDHOLM: Thank you very
17 much. We will break for 15 minutes, which means we
18 are back here at 11:30.

19 (Brief recess.)

20 PRESIDENT WALLGREN-LINDHOLM: No. But I
21 would like to start because it seems like we are
22 slipping a bit unnecessarily. So we try to set a good

1 example from Day 1.

2 MS. BASTILLE-PARENT: Perfect.

3 PRESIDENT WALLGREN-LINDHOLM: If we can,
4 yes.

5 So, can we now --

6 (Comments off microphone.)

7 PRESIDENT WALLGREN-LINDHOLM: Yes, this will
8 be fine.

9 So can we commence now?

10 MS. BASTILLE-PARENT: Yes.

11 PRESIDENT WALLGREN-LINDHOLM: Thank you.

12 MS. BASTILLE-PARENT: So as announced by my
13 colleague, Matti Lemmens, I will be going over
14 jurisdiction with you. And in the present case, to
15 give you a bit of a road map, there are three main
16 different jurisdictional issues.

17 First, Paul Einarsson's American nationality
18 and, thus, his qualification as an investor of another
19 Party other than Canada; second, the time limitation
20 of the Claimant's Claim under Article 1116(1) and
21 1117(1) of NAFTA and, third, the Claimant's compliance
22 with the waiver requirement enshrined in Article 1121

1 of NAFTA.

2 For efficiency purposes we will not go over
3 uncontested elements, but you may note from the outset
4 that the qualification of Davey Einarsson's estate as
5 investor of a Party, as an investor that is moving on
6 with Davey's prior Claim before his passing is not
7 contested by Canada.

8 So as regards the first contested element,
9 Paul Einarsson's nationality, I intend to be brief.
10 My colleague, Matti Lemmens, presented you with the
11 relevant facts underlying our contention that his
12 nationality is, has always been, and remains American,
13 but I would like to point to you a few additional
14 points as regards the applicable law regarding the
15 nationality of investors.

16 First of all, it is relevant to note that
17 NAFTA does not dictate how to deal with claims by dual
18 citizens, but Article 1131 of NAFTA, however, tells us
19 that international law applies. So we, thus, turn to
20 international law.

21 There are two relevant precedents for you to
22 be aware of. It is, in fact, very likely that you

1 know these cases already. They are quite well known.
2 The first case is the ICJ International Court of
3 Justice Nottebohm Case, which explains to us what is
4 the applicable test, the applicable legal test when
5 determining the nationality of an individual.

6 You have on the screen at the moment an
7 excerpt of Page 22 of this case, and I do not intend
8 to read it all with you, for efficiency purposes, but
9 the point is that -- it is highlighted in yellow.

10 The takeaway is that determining the
11 nationality of an investor is about determining which
12 country has actually -- the investor has the stronger
13 ties with which country, and determining said stronger
14 ties, is going to be based on a number of factors,
15 which were laid out in the second case that I would
16 like to bring to your attention, which is the UNCITRAL
17 Ballantine Case.

18 And at Paragraph 559 -- which is excerpted
19 on the visual before you, there is a list of the
20 factors that you shall consider in your determination.
21 Which are the investor's habitual residence, second,
22 the individual's personal attachment for a particular

1 country, third, the center of the person's economic,
2 social, and family life, and, fourth, the
3 circumstances in which the second nationality was
4 acquired.

5 Paul Einarsson has testified extensively
6 about these factors in his Witness Statement, and he
7 will provide an additional testimony later today, so I
8 will leave it at that in terms of the relevant facts,
9 but the contention that we put forward is that, as
10 I've mentioned, his nationality is, has always been,
11 and remains American.

12 The second -- moving on actually to the
13 second contested jurisdictional element, the time
14 limitation of the Claimant's Claim. So, in summary,
15 Article 1116 and 1117 of NAFTA provide that a claim
16 must be made by an investor, on its own behalf or on
17 behalf of an enterprise, no more than three years from
18 the date on which the investor acquired actual or
19 constructive knowledge that a breach has occurred and
20 that damages have been incurred as a result.

21 Rapidly, "actual" means that the investor
22 has knowledge of the breach and the related damages

1 and "constructive" means that the investor should know
2 of the breach and the related damages.

3 As explained by my colleague earlier, we
4 estimate that in the present case the trigger for the
5 three-year time limitation is November 30, 2017, which
6 is when the Alberta Decisions became final and
7 crystallized GSI's expropriation and intellectual
8 property transfer.

9 Contrary to what is alleged by Canada, the
10 Claimants do not bring a claim on the basis of the
11 Regulatory Regime, namely the CPRA. Their claim is
12 not that this Regulatory Regime is unlawful. That is
13 a mischaracterization and reformulation presented by
14 Canada, the Claimants' Claim is that the Alberta
15 Decisions are the relevant actionable breach of NAFTA.

16 The Notice of Arbitration is very, very
17 clear to that effect, meaning that this is -- and this
18 has always been the actionable breach brought forward
19 by the Claimants. So if there is any doubt referenced
20 to the very inception of this case is relevant to
21 clear out any doubt that may have been created by
22 Canada's submissions on this point.

1 You have on the screen an excerpt of the
2 Notice of Arbitration where you can see very clearly
3 at Paragraph 28 and 29 that it is the Alberta
4 Decisions that have deprived GSI of its copyrights and
5 trade secrets.

6 Time-wise, Canada is -- well, concedes that
7 the Alberta Decisions were rendered less than
8 three years prior to the filing of the Notice of
9 Arbitration, so if you, indeed, agree with the
10 Claimants that the trigger point is November 30, 2017,
11 the Notice of Arbitration was filed within the
12 three-year time limitation, without any doubt.

13 I do not intend to go into great details
14 about the merits of this contention, namely whether
15 the Alberta Decisions do indeed constitute a breach of
16 NAFTA because my colleague, Vincent Lanctôt-Fortier,
17 will do so at a later time. But I would like to
18 recall a few basic principles that are relevant for
19 your jurisdictional determination.

20 The first principle is that it is upon the
21 Claimants to decide their own cause of action and,
22 thus, to determine which actionable breach they bring

1 forward as a basis for their claim. It is a decision
2 that they made consciously, and they were entitled to
3 decide.

4 So Canada argues that the Claimants' cause
5 of action is, in fact, incurred in the Regulatory
6 Regime, as I have mentioned.

7 Canada adds that the Claimants knew of and
8 even suffered of the Regulatory Regime's effects for
9 at least a decade before the Alberta Decisions became
10 final, but we submit that, through this contention,
11 Canada is doing two things: First, it is rearguing
12 the Regulatory Regime, which the Claimants are not
13 doing, because the Claimants accepts the Alberta
14 Decisions. They do not contest them as such.

15 Second, Canada is mischaracterizing the
16 Claimant's Claim in this Arbitration as well as the
17 evidence. So we submit that caution should be
18 exercised with Canada's recharacterization of the
19 Claimant's Claim.

20 For jurisdictional purposes, the Measure at
21 issue shall be identified by reference to the
22 Claimants' submissions. That is a well-accepted

1 principle that, of course, the Claimants will bring
2 their own cause of action forward and they must match
3 their submissions or they must be in line with their
4 submissions. This was confirmed in many NAFTA
5 precedents. At the screen you can see an excerpt of
6 the Eli Lilly Case, which is, in fact, not a NAFTA
7 case, but an UNCITRAL one.

8 Actually -- my apologies, this is a NAFTA
9 case. And at Paragraph 163, we can read, "however, as
10 Claimant is the Party asserting the Tribunal's
11 jurisdiction to decide its substantive claim, the
12 alleged breach must, in the First Instance, be
13 identified by reference to the Claimant's
14 submissions." Again, this is a very well-accepted
15 principle in NAFTA precedents.

16 For your reference and your consideration,
17 we have also added in our PowerPoint an excerpt of the
18 Glamis Decision, which is to the very same effect. So
19 I will move on to our next point, but we submit that
20 these two Authorities very well confirmed what I have
21 just said. So whether the actionable breach as
22 characterized by the Claimants constitute a breach of

1 a substantive obligation under NAFTA is, in the end, a
2 matter to be determined on the Merits, not at the
3 jurisdictional stage.

4 I would like to point to you a passage, an
5 excerpt of the Alberta Court of Appeal Decision, which
6 is on the next slide. Yes. And it confirms, in fact,
7 that the Alberta Decisions' effect was to determine
8 GSI's Copyrights, and the point that I am making here
9 is that it was not a regulatory Decision, it wasn't a
10 Decision deciding on previous regulatory Decisions.
11 It is a judicial decision about copyrights.

12 And at the end of Paragraph 104 of the
13 Decision that I've just mentioned, it says
14 here: "That means GSI's exclusivity to its Seismic
15 Data ends, for all purposes, including the Copyright
16 Act, at the expiry of the mandated privilege period.
17 Thereafter, GSI has no legal basis or a lawful
18 entitlement to interfere or object to any decisions
19 made by the Boards relating to its collected data."

20 So this confirms what I've just said to you:
21 The Alberta Court of Appeal determined that GSI does
22 not have a legal entitlement to challenge the

1 Regulatory Regime itself nor previous Regulatory
2 Decisions. So this was not the litigation before the
3 Alberta court. It was a Copyrights litigation.

4 The second principle that I would like to
5 tell you about is that when assessing whether the
6 Alberta Decisions are an independent actionable
7 breach, the Tribunal ought to look at whether the
8 Regulatory Regime and the Alberta Decisions are
9 intertwined. In a nutshell, Canada argues that the
10 Alberta Decisions are not sufficiently detached from
11 the Regulatory Regime to constitute an independent
12 actionable Measure.

13 Canada adds that the Claimants are now
14 tolling the Regulatory Regime's time limitation. As
15 I've just mentioned, at the Alberta Decisions, are, in
16 and of themselves, judicial Decisions about the
17 application of copyright to -- copyright law to
18 Seismic Data. They are not administrative in nature.

19 They are not regulatory in nature, nor are
20 they anchored in the Regulatory Regime nor prior
21 Regulatory or Administrative Decisions or Measures.
22 So the point is that they are very well detachable.

1 They are not intertwined.

2 To this point the Claimants in the past have
3 tried to litigate administrative and -- actually
4 Administrative Decisions rendered by the Regulatory
5 Boards. They have tried that before, and as further
6 explained in our rebuttal at Paragraph 100, they were
7 told that these Claims were premature.

8 So again, Canada is contending that this
9 Arbitration is about the Regulatory Regime. This was
10 tried before, and it did not work, and this is not
11 what GSI is doing in the present arbitration. It is
12 challenging Judicial Decisions.

13 Another relevant element that you should
14 consider is that, before the Alberta courts, as I've
15 mentioned, the Claimants litigated copyright
16 infringement. It was following the Defendant's
17 presentation of their defense arguments that the
18 interplay between the Regulatory Regime and the
19 Alberta Decisions became an issue, but initially,
20 before the Alberta Courts -- again, the Regulatory
21 Regime was not challenged, nor prior Regulatory
22 Decisions.

1 So the Alberta Decisions became an
2 expected -- unexpected change in law, and this change
3 in Canada's legal landscape concerning copyright
4 protections created by the Alberta Courts is
5 independently justifiable under NAFTA. That is our
6 contention.

7 If you wished to refer to a case where a
8 similar issue was brought before a NAFTA Tribunal, we
9 suggest that the Eli Lilly is probably the most
10 relevant precedent for us.

11 In that case Patents were invalidated
12 administratively before judicial actions were
13 undertaken, and the Tribunal at the jurisdictional
14 stage was well aware of the previous regulatory
15 landscape that led to the Court litigations being
16 instituted, and it, nevertheless, determined that this
17 previous factual background, regulatory background was
18 detachable, was not intertwined with the following
19 court Decisions instituted by Eli Lilly, the Claimants
20 in that case.

21 I will not go over the facts more, for
22 efficiency purposes, but we do submit that Eli Lilly

1 is a very relevant case to consult. Canada in its
2 submissions in support of the argument that the
3 Regulatory Regime cannot be detached from the Alberta
4 Decisions relies heavily on the Apotex Case which I
5 believe this Tribunal may be familiar with.

6 And again, in that case -- in fact, we
7 submit that Canada should not exactly be relying on
8 this case because it supports the contention that
9 administrative and regulatory Decisions which
10 factually eventually lead to court decisions can very
11 well be detached from one another. Of course this is
12 a factual determination at the end of the day, but
13 there are several precedents demonstrating this
14 possibility.

15 And the third and final principle that is
16 relevant for us, I've just mentioned it. Actually, it
17 is that when assessing when the Claimants acquired
18 actual or constructive knowledge of the actionable
19 breach and related damages prior facts can be
20 considered as they provide factual background. Eli
21 Lilly, once again, is a very relevant case to that
22 point.

1 I will be very succinct on this principle
2 because it is a very well established and accepted
3 element that the Tribunal, when determining whether to
4 exercise its jurisdiction, can look at facts that
5 predate the actionable breach or that even predate
6 NAFTA. So this, in -- in theory, this is not even
7 contested by Canada. We submit in the present case
8 that Canada's conduct under the Regulatory Regime
9 since the 2000s, although it is not the actionable
10 breach, is, nevertheless, relevant because it
11 constitutes the factual background of the Alberta
12 Decisions and, in fact, this is the background that
13 explains why the Alberta Decisions were required and
14 why GSI needed its copyrights to be determined by a
15 judicial court.

16 On the screen, we have put excerpts of the
17 Clayton and, once again, the Eli Lilly Decisions. For
18 time purposes, I will not read them all with you, but
19 they're there for your reference. They simply confirm
20 the fact that prior events are typically considered
21 for jurisdictional purposes, for the purposes of
22 determining the actionable breach that constitutes the

1 trigger point of time limitation, but in no way do
2 these events testify all the time that the Claimants
3 knew of or should have known of the upcoming actual
4 breach -- actionable breach, pardon me. There is no
5 direct connection between the two. Prior facts are
6 just relevant to better assess whether the
7 Claimants -- whether the actionable breach occurred
8 and why it occurred, essentially.

9 In the present case, we submit that it is
10 more than evident that the Claimants could not foresee
11 the Alberta Decisions' outcome, although all the
12 previous facts that unfolded before said Alberta
13 Decisions became final. That is because, as I've
14 mentioned, the Alberta Courts, which created a new
15 legal norm, namely a novel compulsory license scheme
16 with confiscatory effects, as explained by Dr. Cameron
17 Hutchison and Prof. Nigel Bankes's Expert Report, was
18 a surprise for the Canadian legal community.

19 During this Hearing, you will have a chance
20 to hear both of these Experts, and they will explain
21 to you in great detail how and why the outcome of the
22 Alberta Decisions could simply not be anticipated and,

1 thus, how and why the Claimants'
2 so-called "constructive" knowledge of the effects of
3 such outcome could not exist before said Decisions.

4 To give you just an additional point,
5 Prof. Nigel Bankes comes from an Energy Law
6 background, and he will speak to the purpose of the
7 Regulatory Regime to help us better understand how
8 unpredictable it was that the Alberta Courts would
9 determine that said Regulatory Regime overrode the
10 Copyright Act. And Dr. Cameron Hutchison will explain
11 that the actual existence of a conflict between two
12 pieces of legislation, here the Copyright Act and the
13 CPRA, cannot be determined until said applicable
14 legislation is fully construed using the modern
15 principle, which is what the Alberta Courts did. This
16 means that, before they had completed this exercise,
17 this interpretation exercise, the Claimants could not
18 know the outcome of said exercise.

19 As mentioned by my colleague Matti Lemmens
20 earlier, the result of this interpretation exercise,
21 namely, that the CPRA creates a carve-out or an
22 exception to the Copyright Act, was then unknown, and

1 was unforeseeable.

2 So to conclude briefly on this point, we
3 submit that the trigger point of the time limitation
4 at issue is November 30, 2017, and everything that
5 happened before, regulatorily and
6 administratively- wise, although it is relevant to
7 understand why the Alberta Courts were necessary and
8 were actually instituted, it does not testify to the
9 Claimants' so-called "actual" or "constructive"
10 knowledge of the breach that they suffered and related
11 damages.

12 The third contested element in this case is
13 the waiver issue. Article 1121 of NAFTA provides that
14 the investor must waive all of its rights to initiate
15 or continue any proceedings with respect to the
16 Measure of the disputing Party that is alleged to be a
17 breach of NAFTA.

18 This waiver commitment is threefold: first,
19 it encompasses not to initiate proceedings; second,
20 not to continue proceedings; and, third, with respect
21 to the Measure alleged to be a breach of NAFTA. So
22 this is all connected. Canada contests that this

1 requirement is met for two reasons: namely because
2 the Claimants did not administratively terminate two
3 Domestic Actions against the CNLOPB and -- the
4 Province of Newfoundland and Labrador; and, second,
5 because they did not terminate a series of Domestic
6 Actions against private third parties for unpaid
7 license invoices.

8 Rapidly, let's begin by recalling the object
9 and purpose of Article 1121 of NAFTA. It is
10 well-established in NAFTA precedence that it is to
11 prevent the Claimants from pursuing concurrent,
12 domestic, and international remedies which could
13 either give rise to conflicting outcomes or lead to
14 double redress for the same conduct or measure at
15 issue.

16 On this point, I could refer you to the
17 International Thunderbird precedent as well as the
18 Waste Management precedent. They just confirm what I
19 have just said.

20 So in theory, it is possible for domestic
21 proceedings to coexist simultaneously with a NAFTA
22 Arbitration to the extent that this object and purpose

1 are met.

2 There are two components to this commitment.
3 There is one formal component and one material or
4 substantive component. The formal component here, I
5 will be very succinct because it is not contested, per
6 se. The formal component is basically to submit a
7 waiver in writing along with the Notice of
8 Arbitration. This Notice has to be clear, explicit,
9 unconditional. In the present case, it was a waiver
10 accompanies the Notice of Arbitration filed by the
11 Claimants.

12 Moving on to the second component, which is
13 more contested in this case, the substantive one. So
14 the substantive component entails that the Claimants
15 commit not to initiate or continue proceedings with
16 respect to the same Measure. This is, in other words,
17 a manifestation -- the waiver is a manifestation of
18 the written waiver filed alongside the Notice of
19 Arbitration.

20 This is an expression that -- actually, this
21 is an expression to give the defendant, Canada in this
22 case, certainty that it will not have to defend itself

1 in various forums for the same breach, for the same
2 damages.

3 We submit that, in the present case, this
4 commitment was honored.

5 It is well explained in our Claimants'
6 Memorial, so I will not spend too much time on that
7 for efficiency purposes, but the Claimants
8 discontinued a significant number of domestic
9 proceedings before initiating this Arbitration. So
10 they did do their homework, so to speak.

11 An important example is that they
12 discontinued an expropriation claim that was commenced
13 against Canada after the rendering of the Alberta
14 Decisions. That's an important element, but,
15 nevertheless, they discontinued it before filing the
16 Notice of Arbitration.

17 So let's talk briefly about the two actions
18 that remained administratively existent before the
19 Courts of Newfoundland and Labrador. It is a fact
20 that they were discontinued or dismissed after the
21 filing of the NOA. We submit, however, that this
22 constitutes an immaterial noncompliance with

1 Article 1121 of NAFTA. Canada adopts a strict
2 approach to this waiver requirement, but we submit
3 that this is not necessarily the state of the law on
4 Article 1121.

5 There are several cases that confirm what
6 I've just mentioned, and they are well explained in
7 our written submissions, but, for example, I could
8 refer you to -- doesn't matter -- the International
9 Thunderbird Gaming precedent and the Ethyl Corporation
10 precedent which do confirm that a more flexible
11 approach to this waiver requirement was adopted
12 before.

13 I will say that, in those two specific
14 cases, the immaterial noncompliance with the waiver
15 requirement was different. In fact, what happened is
16 that the Claimants filed their written waiver sometime
17 after the filing of their Notice of Arbitration.
18 These cases were not about administrative
19 or -- litigations not dismissed or discontinued before
20 the filing of the Notice of Arbitration, but we
21 submit, however, that these immaterial noncompliances
22 were -- our noncompliance in a -- so to speak, is as

1 immaterial as in those cases. And I will also add
2 that it is a novel question that you will have to
3 determine, whether such an immaterial noncompliance
4 with Article 1121 must bar your jurisdiction.

5 And, as regards the private actions that
6 were commenced by the Claimants against licensees, I
7 will refer you to our written submissions, but our
8 point is that they are based on totally different
9 breaches, contractual breaches, in those cases, that
10 the damages sought are equally different, and that it
11 is important not to conflate private parties who do
12 not have a right to claim under NAFTA and public
13 parties, such as the Government, which is liable under
14 NAFTA.

15 MR. LANCTÔT-FORTIER: Good day.

16 For once, my height is an advantage, except
17 when I played basketball, so I see the Members of the
18 Tribunal very clearly, so I will be sitting during my
19 submissions.

20 Throughout our Pleadings and this Hearing,
21 the Claimants will demonstrate that the Alberta
22 Decisions breach Article 1110 of NAFTA by confiscating

1 GSI's copyright in the Seismic Works through a
2 compulsory license in a manner tantamount to
3 expropriation.

4 I will first provide an overview of the
5 legal framework applicable to measures tantamount to
6 expropriation under NAFTA. And for ease of reference,
7 this section of our Opening Statement corresponds to
8 Part 4(a) of the Claimants' Memorial and Part 4(a) of
9 the Claimants' Rebuttal Memorial.

10 Article 1110(1) of NAFTA provides that
11 Canada cannot directly or indirectly nationalize or
12 expropriate an investment of an investor of another
13 party in its territory or take a measure tantamount to
14 nationalization or expropriation of such an
15 investment, except for a public purpose, on a
16 nondiscriminatory basis, in accordance with due
17 process of law in Article 1105(1) of NAFTA, and, on
18 payment of compensation.

19 Article 1110(1), therefore, prohibits, on
20 the one hand, direct and indirect expropriation and,
21 on the other hand, measures tantamount to
22 nationalization or expropriation. The distinction

1 between expropriation, whether direct or indirect, and
2 measures tantamount to expropriation, is that measures
3 tantamount to expropriation require no actual
4 transfer, taking, or loss of property by any person or
5 entity. Instead, measures tantamount to expropriation
6 are those that render the ownership of the foreign
7 investors' property ineffective or irrelevant.

8 The NAFTA Tribunal and the Waste Management
9 case provides the following explanation on this
10 concept at Paragraph 143 of the Award. And I will
11 read directly in the middle of the paragraph: "By
12 contrast, where a measure tantamount to an
13 expropriation is alleged, there may have been no
14 actual transfer, taking, or loss of property by any
15 person or entity, but, rather, an effect on property
16 which makes formal distinctions of ownership
17 irrelevant."

18 Moreover, a Claimant must demonstrate that
19 the measure at issue amounts to a substantial
20 deprivation of the investment, which is the case with
21 GSI's business, as a result of the Alberta Decisions,
22 as previously explained by my colleague Ms. Lemmens.

1 NAFTA Tribunals have also confirmed that a
2 domestic court decision, such as the Alberta
3 Decisions, can constitute a measure adopted or
4 maintained by a party for the purposes of NAFTA. Here
5 I refer you to the NAFTA Tribunal's Decision in the
6 Loewen Case, which states the following at
7 Paragraph 54 of the Award: "An adequate mechanism for
8 the settlement of disputes, as contemplated by Chapter
9 Eleven, must extend to disputes, whether public or
10 private, so long as the State Party is responsible for
11 the judicial act which constitutes the 'Measure'
12 complained of, and that act constitutes a breach of a
13 NAFTA obligation, as, for example, a discriminatory
14 precedential judicial decision. The principle that a
15 State is responsible for the Decisions of its
16 Municipal Courts supports the wider interpretation of
17 the expression 'measure adopted or maintained by a
18 party'."

19 The NAFTA Tribunal in Eli Lilly in the Eli
20 Lilly case also stated that judicial acts will be
21 attributable to the State by reference to
22 uncontroversial principles of attribution under the

1 Law of State Responsibility. The interaction of the
2 principles of State responsibility and decisions of
3 domestic courts that give rise to breaches of NAFTA
4 was affirmed by the NAFTA Tribunal in Azinian. As
5 follows, quoting the former President of the
6 International Court of Justice, Mr. Eduardo Jiménez de
7 Aréchaga: "The responsibility of the State for acts
8 of Judicial Authorities may result from three
9 different types of judicial decision. The first is a
10 decision of a municipal court clearly incompatible
11 with a rule of international law. The second is what
12 is known traditionally as 'denial of justice'. And
13 the third occurs when, in certain exceptional and
14 well-defined circumstances, a State is responsible for
15 a judicial decision contrary to municipal law."

16 As appears from Azinian, there are three
17 distinct scenarios where the responsibility of the
18 State may be found in international law following a
19 judicial decision. The Claimants' Claim under
20 Article 1110 NAFTA falls within the first scenario,
21 where a decision of a domestic court is clearly
22 incompatible with a rule of international law,

1 considering that the Alberta Decisions are
2 inconsistent with Chapter Seventeen of NAFTA, as I
3 will explain in a moment.

4 The Claimants do not allege denial of
5 justice, nor do they need to, in this case, for a
6 breach of Article 1110 NAFTA to be found. Canada
7 contends that a denial of justice is necessary for
8 judicial decision to constitute an actionable breach
9 under NAFTA, but its arguments are unfounded.

10 As stated by the NAFTA Tribunal in
11 Eli Lilly, a judicial act can constitute an
12 expropriation when it crystallizes a taking contrary
13 to Article 1110 NAFTA. Here is the relevant extract:
14 "It is possible to contemplate circumstances in which
15 a judicial act, or omission, may engage questions of
16 expropriation under NAFTA Article 1110, such as,
17 perhaps, in circumstances in which a judicial decision
18 crystallizes a taking alleged to be contrary to NAFTA
19 Article 1110."

20 The Tribunals Decision in Sistim, rendered
21 under the Türkiye-Kyrgyz BIT, offers an example of a
22 judicial Act that formed the basis of an expropriation

1 without a finding of denial of justice.

2 We have detailed this Decision at
3 Paragraphs 215 and following of the Claimant's
4 Rebuttal Memorial. But, in essence, the Tribunal in
5 Sistim concluded that the impugned domestic court
6 Decisions, which annulled a Share Purchase Agreement,
7 had deprived the Claimant of its property rights in
8 its investments, namely a hotel, just as if the State
9 had expropriated it by Decree, and that no
10 compensation had been paid to the Claimant.

11 The Tribunal came to these determinations
12 without any findings of denial of justice, rather
13 noting that the abrogation of the Claimant's property
14 rights amounted to a breach of the Türkiye-Kyrgyz BIT,
15 which forbids the expropriation of property unless it
16 is done for a public purpose in a nondiscriminatory
17 matter and upon payment of prompt, adequate, and
18 effective compensation, similarly to the conditions
19 provided under NAFTA.

20 Therefore, in the context of this
21 Arbitration, the Claimants only need to demonstrate
22 that the Alberta Decisions constituted an

1 expropriation that resulted in a substantial
2 deprivation of the Claimant's investments. This step
3 is clearly met in this case, as explained earlier by
4 my colleague Ms. Lemmens.

5 Two, the Alberta Decisions did not satisfy
6 one or more of the expectations to expropriation set
7 out in Article 1110(1). None of these exceptions
8 apply in this Arbitration.

9 And, three, the Alberta Decisions were
10 inconsistent with Chapter Seventeen, which would
11 satisfy the criterion from the quote in Azinian that
12 the Alberta Decisions were clearly incompatible with
13 the rule of international law. I will now briefly
14 explain this third requirement and the interaction
15 between Article 1110 and Chapter Seventeen.

16 Article 1110(7) of NAFTA confirms that
17 interference with intellectual property rights can
18 give rise to a violation of Article 1110 where that
19 interference is inconsistent with Chapter Seventeen of
20 NAFTA.

21 Article 1110(7) reads as follows: "This
22 Article does not apply to the issuance of compulsory

1 licenses granted in relation to intellectual
2 properties rights, or to the revocation, limitation,
3 or creation of intellectual property rights, to the
4 extent that such issuance, revocation, limitation or
5 creation is consistent with Chapter Seventeen."

6 The effect of Article 1110(7) of NAFTA is
7 that for any expropriation involving intellectual
8 property rights, any limitation or revocation that is
9 inconsistent with Chapter Seventeen will form the
10 basis of an Expropriation Claim under Chapter Eleven.

11 There are a few authorities that discuss the
12 interrelation between Chapter Eleven and Chapter
13 Seventeen. One of those Authorities on which both
14 Canada and the Claimants rely, but with very different
15 interpretations is a legal commentary of authors
16 Meg Kinnear, Andrea Bjorklund and John Hannaford on
17 Article 1110(7). And that authority is CLA-40 in the
18 proceedings.

19 So the relevant extract reads as
20 follows: "Article 1110(7) prevents an investor from
21 claiming that the host Government has expropriated its
22 investment by the issuance of a compulsory license

1 relating to intellectual property rights or the
2 revocation, limitation, or creation of intellectual
3 property rights, where such measures are consistent
4 with Chapter Seventeen of NAFTA. Chapter Seventeen of
5 NAFTA is entitled 'intellectual property.' It obliges
6 the NAFTA Parties to provide effective protection of
7 intellectual property rights and to ensure that
8 domestic enforcement procedures are available for
9 infringement of those rights.

10 "The express wording of Article 1110(7) to
11 the extent that such issuance, revocation, limitation,
12 or creation is consistent with Chapter Seventeen may
13 see application of the paragraph contingent on the
14 host Government acting consistently with
15 Chapter Seventeen."

16 And Canada relies on the second part of this
17 quote, which says: "Absent a provision, such as
18 Article 1110(7), one can imagine an investor claiming
19 that the issuance of a compulsory license, or the
20 revocation, limitation, or creation of intellectual
21 property rights effectively expropriated its
22 investment, resulting in an obligation on the host

1 Government to compensate for the loss caused by its
2 measures or to provide restitution of the intellectual
3 property rights. The mischief that such a claim would
4 cause domestic intellectual property regimes is
5 evident. Presumably, the drafters of NAFTA included
6 Article 1110(7) to avoid any such argument."

7 But when this second part says is that,
8 without Article 1110(7) and the contingency of the
9 States compliant with Chapter Seventeen, Claimants
10 could bring forward Expropriation Claims simply when
11 their intellectual rights are revoked or limited.
12 That is the mischief.

13 But, clearly, the application and host State
14 must comply with Chapter Seventeen of NAFTA. It is,
15 therefore, necessary to review the main provisions of
16 Chapter Seventeen and the protections it offers to
17 GSI's Seismic Works.

18 Chapter Seventeen of NAFTA is devoted
19 exclusively to providing a uniform minimum standard of
20 intellectual Property Law and enforcement under which
21 member nations must operate.

22 Article 1721 of NAFTA confirms that

1 intellectual property rights refers to copyright and
2 related rights. Article 1705(1) of NAFTA sets out the
3 specific protections that Canada must provide to
4 copyright holders, stating specifically that Canada
5 must protect the works covered by Article 2 of the
6 Berne Convention for the Protection of Literary and
7 Artistic Works.

8 Article 2 of the Berne Convention provides
9 that the expression "Literary and Artistic Works"
10 shall include every production in the literary,
11 scientific and artistic domain, whatever may be the
12 mode or form of its expression."

13 Accordingly, the Seismic Works fall within
14 the scope of intellectual property rights as defined
15 in Article 1721 NAFTA because they are copyrighted
16 works under Article 2 of the Berne Convention. As
17 we've seen, the Alberta Decisions confirm that the
18 Seismic Works are both an original literary
19 compilation work and an artistic compilation work
20 under Canadian copyright law, which law incorporates
21 the Berne Convention pursuant to Section 91 of the
22 Canadian Copyright Act.

1 As such, pursuant to Article 1705(2) of
2 NAFTA, Canada had the obligation to guarantee GSI's
3 rights to authorize or prohibit the public
4 distribution or the communication of the Seismic
5 Works. Importantly, pursuant to Article 7 of the
6 Berne Convention, Canada had the obligation to afford
7 the Seismic Works with these protections for the
8 duration of the life of the author and 50 years after
9 his death. As we've seen, the Alberta Decisions
10 violated these terms.

11 Article 1705(5) does provide the ability for
12 a State to limit or provide exceptions to the rights
13 afforded under Article 1705 NAFTA. However, these
14 exceptions or limitations must be narrowly
15 circumscribed.

16 Article 1705 reads as follows: "Each Party
17 shall confine limitations or exceptions to the rights
18 provided for in this Article to certain special cases
19 that do not conflict with a normal exploitation of the
20 work and do not unreasonably prejudice the legitimate
21 interest of the right holder."

22 As appears from the language of

1 Article 1705(5), it provides a three-step test to
2 determine whether limitation conforms with
3 Article 1705 NAFTA: One, it must be confined to
4 certain special cases; two, it must not conflict with
5 a normal exploitation of the work; and, three, it must
6 not unreasonably prejudice the legitimate interests of
7 the rights holder.

8 Article 1705(5) of NAFTA has not been
9 considered by any Tribunals, nor has it been the
10 subject of significant commentary. However, the Panel
11 of the World Trade Organization has considered that
12 Article 13 of the WTO Agreement on trade-related
13 aspects of intellectual property rights, so the TRIPS
14 Agreement, which is virtually identical to
15 Article 1705(5) of NAFTA.

16 And the interpretation of TRIPS provided by
17 the WTO panel do not bind this Tribunal, but they
18 illustrate what the ordinary meaning of each element
19 of the three-step test set out in Article 1705(5) of
20 NAFTA will likely entail in accordance with the Vienna
21 Convention on the Law of Treaties.

22 So regarding the first step of the test, the

1 WTO panel found that the ordinary meaning of certain
2 special cases means that the exception should be
3 clearly defined and should not be narrow in its scope
4 and reach. And this Decision is CLA-90 in the
5 proceedings for your reference.

6 And in this case, the compulsory license is
7 issued by the Alberta Decisions, was not confined to
8 certain special circumstances because it was poorly
9 defined and not narrow in scope or reach. For
10 example, the compulsory license has been used to
11 justify disclosing the Seismic Works that were
12 obtained through the Secondary Submissions, even
13 though neither GSI nor its predecessors submitted them
14 under the Submission Legislation.

15 The compulsory license also allows any
16 individual or entity in Canada to access the Seismic
17 Works for free. And regarding the second step of the
18 test, the WTO panel found that the ordinary meaning of
19 not conflict with a normal exploitation of the work,
20 means that the potential impact of the limitation
21 should not interfere with the ways that rights holders
22 normally extract economic value from the work.

1 And in this case, the compulsory license
2 issued by the Alberta Decisions directly conflicts
3 with the normal exploitation of the Seismic Works by
4 GSI. GSI earned its revenues by licensing the Seismic
5 Works to a small number of licensees and limiting the
6 distribution of the Seismic Works to the public.

7 Once the Alberta Decisions allowed Parties
8 to access and copy the Seismic Works for free, GSI no
9 longer had the customer-based license assessment works
10 too and its business was ruined.

11 The Alberta Decisions also forbid GSI from
12 interfering with or objecting to that access and
13 copying, eliminating GSI's ability to enforce its
14 strengths.

15 And regarding the third step of the test,
16 the WTO panel found that the ordinary meaning of not
17 unreasonably prejudiced, the legitimate interests of
18 the right holder must consider the degree of prejudice
19 suffered by the rights holder and whether that
20 prejudice unreasonably interferes with the economic
21 values of those rights. And in this case, the
22 compulsory license issued by the Alberta Decisions

1 unreasonably prejudices the rights of GSI in the
2 Seismic Works.

3 By having its intellectual property rights
4 curtailed, GSI is unable to make a return on its
5 investment in the Seismic Works, which is a very
6 reason for the standard copyright term of protection.
7 Canada Boards are now direct competitors of GSI,
8 except Canada and the Boards offered Seismic Works to
9 GSI's former customers or potential customers for
10 free, undercutting GSI completely in the competition.

11 The showing of GSI's business to subsidize
12 the work of offshore oil-and-gas companies by giving
13 them the Seismic Works for free is both excessive and
14 unreasonable. And the compulsory license issued by
15 the Alberta Decisions, therefore, does not meet any of
16 the steps set out in Article 1705 NAFTA; and, as a
17 result, Canada is liable for breach of Article 1110 of
18 NAFTA.

19 I will now briefly discuss the Claimant's
20 Performance Claim, pursuant to Article 1106(1)(f) of
21 NAFTA. And for ease of reference, this section of our
22 Opening Statement corresponds to Part 4(b) of the

1 Claimant's Memorial and Part 4(b) of the Claimant's
2 Rebuttal Memorial.

3 So the Claimants' Performance Requirement
4 Claim asserts that the Alberta Decisions breached
5 Article 1106(1)(f) NAFTA by enforcing a Performance
6 requirement by GSI to transfer its proprietary
7 knowledge in the Seismic Works to third parties in
8 Canada to develop Canada's offshore oil-and-gas
9 industry.

10 So Article 1106 of NAFTA provides the
11 following: "So no Party may impose or enforce any of
12 the following requirements, in connection with the
13 management, conduct, or operation of an investment, of
14 an investor of a Party, or of a non-Party in its
15 territory, to transfer technology, or other
16 proprietary knowledge to a person in its territory."

17 No NAFTA Tribunals have considered a claim
18 under Article 1106(1)(f); and, moreover, claims under
19 1106 itself are infrequent, with several Tribunals
20 noting that there is a lack of guidance on how to
21 address the Claim thereunder. But with that said,
22 academics have provided guidance on the interpretation

1 of Article 1106.

2 So authors Meg Kinnear, Andrea Bjorklund and
3 John Hannaford explain that the purpose of
4 Article 1106 is to prohibit performance requirements
5 because they are used to distort international trade
6 and investment flows. That is authority CLA-95 in the
7 proceedings.

8 In particular, the purpose of
9 Article 1106(1) (f) is to prevent Canada from imposing
10 requirements on foreign investors with respect to
11 technology, transfer, and dissemination, as such
12 requirements may violate international and
13 intellectual property laws. The assessment of
14 Claimant's Article 1106(1) (f) Claim first requires the
15 interpreting the scope of this Article and distilling
16 its elements.

17 These elements are the Alberta Decisions
18 imposed to enforce a requirement. The requirement was
19 in connection with the management, conduct, or
20 operation of GSI, and the requirement was to transfer
21 technology or other proprietary knowledge to a person
22 in Canada's territory.

1 So NAFTA does not define these terms, but we
2 have provided the dictionary definitions of these
3 terms in our pleadings, considering that Article 31(1)
4 of the Vienna Convention on the law of treaties
5 provides that NAFTA shall be interpreted in good faith
6 in accordance with the ordinary meaning to be given to
7 the terms of the Treaty in their context and in light
8 of its object and purpose.

9 So we refer you to Paragraphs 449 and
10 following of our Memorial for these different
11 definitions.

12 That being said, prior Decisions of NAFTA
13 Tribunals, such as in the Mobil case, have found that
14 the enforcement of any alleged performance requirement
15 must have a degree of compulsion or legal obligation.
16 And the Alberta Decisions clearly enforced a mandatory
17 requirement on GSI.

18 As we have seen, the Alberta Decisions
19 declare lawful desist and set out in the Regulatory
20 Regime, and expressly forbid GSI from mounting any
21 further legal challenges to it.

22 In other words, GSI was legally obligated to

1 comply with third parties copying their Seismic Works
2 contained in the submissions.

3 It is also clear that the requirement
4 enforced by the Alberta Decisions was for GSI to
5 transfer its proprietary knowledge in the Seismic
6 Works to persons in Canada to expand oil and gas
7 operation in the Canadian offshore.

8 So Article 1108 of NAFTA permitted Canada to
9 reserve or exempt certain measures from certain NAFTA
10 obligations, including the prohibition on performance
11 requirements in Article 1106. But Canada avoids
12 drawing attention to the exemptions under 1108 because
13 there are several specific exemptions regarding the
14 Canada Petroleum Resources Act that Canada negotiated
15 into NAFTA.

16 Importantly, Section 101 of the Canadian
17 Petroleum Resources Act, which provides the applicable
18 privilege period for the Seismic survey at issue, is
19 not one of them. So none of the exceptions of
20 Article 1106 apply and the reservation also of 1108
21 does not apply.

22 In summary, the Alberta Decisions breach

1 Article 1106(1) (f) of NAFTA by enforcing a requirement
2 for GSI to transfer its proprietary knowledge in the
3 Seismic Works to third parties to support the
4 development of the offshore Canadian oil-and-gas
5 industry.

6 Now I will briefly discuss the legal
7 principles applicable to damages. Article 1135(1) of
8 NAFTA provides that the Tribunal may award the
9 Claimants separately or in combination only monetary
10 damages and any applicable interest or monetary
11 damages and applicable interest in lieu of restitution
12 of property.

13 Article 1110(2) of NAFTA provides guidance
14 on the quantum of damages for a legal expropriation
15 stating that: "Compensation shall be equivalent to
16 Fair Market Value immediately before the expropriation
17 took place."

18 Tribunals have discretion to award the most
19 appropriate compensation for the damage incurred by
20 the Claimants in accordance with international law.
21 That discretion was articulated by the Tribunal in
22 S.D. Myers v. The Government of Canada.

1 The Claimants are entitled to be compensated
2 in order to wipe out all the consequences of the
3 illegal act and in an effort to restore the status quo
4 as much as possible, as quoted in S.D. Myers, which is
5 CLA-106 in the proceedings.

6 PricewaterhouseCoopers was engaged to
7 perform a valuation of the Claimants' losses in
8 Canadian dollars in a But-For Scenario, as of the date
9 of Canada's breaches of Articles 1110 and 1106(1)(f)
10 on November 30, 2017, and PwC additionally performed a
11 valuation of those losses on June 30, 2022, a date
12 closer of the time of the award. And during the
13 Hearing, PwC will speak to the revised damages that
14 they have quantified pursuant to their amended Report
15 filed on February 28.

16 And in the PowerPoint presentation, we have
17 reproduced PwC's revised valuation for ease of
18 reference.

19 And my colleague Ms. Lemmens will now make
20 Closing Remarks for the Tribunal. Thank you.

21 PRESIDENT WALLGREN-LINDHOLM: Thank you.

22 MS. LEMMENS: Thank you. I'll be brief

1 because I think we are running out of time, and it's
2 lunchtime. We have already said enough about how the
3 Alberta Decisions have destroyed GSI's business and
4 resulted in the substantial deprivation of the
5 investments of the Claimants.

6 The only question now, as I said in my
7 earlier submissions, Tribunal, is that it is a
8 question for you to decide how much compensation
9 Canada owes to the Claimants for their losses. We
10 close on the joint list of issues and our answers to
11 those questions.

12 So if we could just walk through those,
13 Ms. Lyseng.

14 So were the Claimants' Claims filed within
15 the three-year time Limitation Period provided in
16 Articles 1116(2) and 1117(2) of NAFTA? We say yes.
17 The Limitation Period began to run on November 30,
18 2017, when the Alberta Decisions became final. So
19 when this Claim was commenced in 2019, it was well
20 within the time period.

21 Do the claims originate from the Alberta
22 Court Decisions? We say yes. The Alberta Decisions

1 constitute the actionable breach and stopped GSI's
2 ability to enforce its copyright resulting in their
3 losses.

4 Are the Alberta Decisions an independent
5 actionable breach? We say yes. They are not
6 intertwined with the Regulatory Regime. It's very
7 clear that it took a court decision to determine that
8 two competing statutes would have to be resolved in a
9 particular way. No one could determine that ahead of
10 time.

11 When did the Claimants acquire actual or
12 constructive knowledge of the alleged breaches? We
13 say when the Alberta Decisions became final and no
14 longer appealable. That was on November 30, 2017.
15 There was no further chance that Canada would change
16 its law and solve the problem that the Claimants are
17 now stuck in with no compensation.

18 Did the Claimants comply with the waiver
19 requirement provided in Article 1121? That has some
20 sub questions. Did the Claimants act consistently
21 with the waiver requirement despite continuing
22 existing private claims or contractual claims against

1 private parties after the Notice of Arbitration? We
2 say yes, because GSI has no ongoing claims against
3 private parties with respect to the same measures as
4 against Canada.

5 As my colleague Ms. Bastille-Parent
6 explained, there were two abandoned proceedings
7 sitting on the court record that had not had
8 discontinuances filed. They were considered in their
9 dismissal as being res judicata by the Newfoundland
10 courts, due to the Alberta Decisions.

11 What was the status of the Claimants' Claims
12 against Canada in the Canadian Courts at the time of
13 filing of the Notice of Arbitration and is it
14 inconsistent with the waiver requirement? Our answer
15 is all claims against Canada, including all public
16 agencies, were discontinued before the filing of the
17 Notice of Arbitration in this proceeding, except for
18 those two actions that I mentioned that had been
19 abandoned as they were res judicata from the Alberta
20 Decisions.

21 When we turn to the Merits questions, at
22 expropriation, did the Alberta Court Decisions

1 expropriate the Claimants' investment in breach of
2 Article 1110? We say yes. The Alberta Decisions did
3 expropriate their investment in breach of Article 1110
4 of NAFTA.

5 Under what conditions can a judicial
6 decision constitute an illegal expropriation under
7 NAFTA? We have a further explanation, and my
8 colleague Mr. Lanctôt-Fortier had explained this in
9 more detail, that a denial of justice is not required
10 in the underlying court decision in order to
11 constitute an actionable breach under Article 1110 of
12 NAFTA.

13 The Alberta Decisions constituted an
14 expropriation that resulted in a substantial
15 deprivation of the Claimants' investments. They did
16 not satisfy one or more of the exceptions to
17 expropriation, and they were inconsistent with Chapter
18 Seventeen and were clearly incompatible with the rule
19 of international law.

20 It is not necessary for the Claimants to
21 show a denial of justify for there to be an
22 expropriation from a court decision.

1 Did the Alberta Court Decisions amount to a
2 taking of the Claimants' investment in breach of
3 Article 1110? We say yes, the Alberta Court Decisions
4 substantially deprived the Claimants of their
5 investments in GSI when they became unable to enforce
6 their intellectual property rights in the Seismic
7 Works.

8 What is the relevance of Chapter Seventeen
9 and Article 1110(7) which relates to intellectual
10 property to GSI's claims before the Tribunal today?
11 We say that Article 1110(7) of NAFTA confirms that
12 interference with intellectual property rights can
13 give rise to a violation of 1110 where that
14 interference is inconsistent with Chapter Seventeen.

15 Is GSI's claim that the Respondent
16 expropriated its trademark admissible? We say yes.
17 As evidenced by the loss of GSI's goodwill in its
18 business.

19 Turning to the performance requirements,
20 Article 1106 of NAFTA, did the Alberta Court Decisions
21 breach Article 1106? We say yes. The Alberta
22 Decisions breached Article 1106(1)(f) by enforcing a

1 performance requirement for GSI to transfer its
2 proprietary knowledge of the Seismic Works to third
3 parties in Canada to develop Canada's offshore
4 oil-and-gas industry.

5 Did the Alberta Court Decisions enforce a
6 requirement to transfer proprietary knowledge of GSI?
7 Absolutely they did. Pursuant to an interpretation of
8 Article 1106(1)(f) that accords with the Vienna
9 Convention on the Law of Treaties.

10 With respect to the disclosure of GSI's
11 proprietary knowledge, is Article 1106(1)(f) or
12 Article 1106(3) applicable? Article 1106(1)(f) is
13 applicable. Article 1106(3) does not apply. That's
14 the conditioning on an advantage. We say that does
15 not apply.

16 For damages, what damages did the Claimants
17 suffer as a result of the alleged NAFTA breaches? So
18 did the alleged NAFTA breaches cause the alleged
19 damages that we have claimed by the Claimants today?
20 We say yes. The damages suffered by the Claimants are
21 a direct result of the Alberta Decisions. One can
22 only think of what difference it would make if the

1 Alberta Decisions had had a different outcome where
2 copyright overrode the CPRA, and they would have
3 enforceable copyright today and they would be able to
4 claim on their copyright infringement and continue to
5 protect their Seismic Data. They are unable to do
6 that.

7 Are the claims for damages brought by the
8 individual Claimants on their own behalf admissible
9 under Article 1116? Yes. The individual Claimants'
10 damages, those being the shareholdings, the Loans, and
11 the remuneration, are all admissible under
12 Article 1116, even if Article 1116 of NAFTA itself
13 does not prohibit investors from claiming for indirect
14 or reflective loss.

15 In any event, the Claimants are not claiming
16 reflective losses, and they have put GSI's claim
17 forward under Article 1117, and in the alternative,
18 their own personal claims under Article 1116 when it
19 comes to the shareholdings.

20 What was Paul Einarsson's dominant and
21 effective nationality at relevant times, and does he
22 meet the requirement for being an investor of another

1 party for the purposes of Articles 1101 and 1116 of
2 NAFTA? Paul Einarsson's dominant and effective
3 nationality, we submit, is American. He meets the
4 requirements to be an investor of another party.

5 Those are all of our submissions for our
6 Opening Statement. Thank you for your time, Tribunal.

7 PRESIDENT WALLGREN-LINDHOLM: Thank you. I
8 understand you stayed within the set time. Thank you
9 very much.

10 I have a question, and that is, we are late
11 on the schedule for reasons not attributable to the
12 Parties. And my question is, shall we stick to
13 1 hour, 15 minutes, or would the Parties prefer to be
14 back in an hour?

15 MS. LEMMENS: I just note that there is some
16 additional time built into the schedule in the
17 following days. So, if you look at tomorrow, it
18 appears that we would end at about 5 p.m., as opposed
19 to the 5:30. And if you look at Wednesday, there was
20 a slight calculation error on the end of Wednesday.
21 So you'll see that the last thing is Nigel Bankes'
22 cross-examination, starting at 3:40, for 50 minutes,

1 and supposedly that would end at 5:30. But that is
2 actually an hour and 50 minutes.

3 So although we may have lost a little bit of
4 time. I don't think that we are in terrible shape if
5 we have to use some of that extra time in the coming
6 days.

7 PRESIDENT WALLGREN-LINDHOLM: Thank you.

8 Would you like to eat 60 minutes or
9 75 minutes?

10 MR. LUZ: If Madam Chair would permit
11 the -- the answer to the original question was, yes,
12 we would like the full amount of time for the hour,
13 15 minutes of lunch, yes.

14 PRESIDENT WALLGREN-LINDHOLM: Yes. Okay.
15 So then we have the blessing to it properly here at
16 this end also. Thank you.

17 (Whereupon, at 12:57 p.m., the Hearing was
18 adjourned until 2:15 p.m., the same day.)

19 AFTERNOON SESSION

20 PRESIDENT WALLGREN-LINDHOLM: So we will now
21 proceed to Canada's Opening Statement, but before
22 that, Claimants will introduce a newly-arrived person.

1 MS. LEMMENS: Thank you. Good afternoon,
2 Madam Chair, and Tribunal Members. We have joining us
3 now Chris Goldring who is a Director of GSI. He is on
4 the List of Participants.

5 PRESIDENT WALLGREN-LINDHOLM: Yes. Yes. I
6 remember that. Thank you.

7 So is there anything else before your
8 Opening Statement?

9 MR. LUZ: I think we are ready to go.

10 PRESIDENT WALLGREN-LINDHOLM: Good. Please
11 go.

12 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

13 MR. LUZ: Okay. Thank you, Madam Chair.

14 I'll just check with our tech -- yes -- just
15 to see that it was going to appear on the screen
16 before me.

17 So thank you, Madam Chair and Members of the
18 Tribunal. It is an honor to appear before the
19 Tribunal to represent the Government of Canada in this
20 important dispute under international law and NAFTA
21 Chapter Eleven, and the fact that this is a dispute
22 where the Tribunal must apply international law and

1 the provisions of the NAFTA Treaty must be kept at top
2 of mind.

3 This Tribunal is not a Court of Appeal which
4 has jurisdiction to review and pronounce upon the
5 correctness of a judgment rendered by a Canadian court
6 interpreting Canadian statutes, a judgment which was
7 already reviewed by an appellate court and declined
8 leave to appeal to the Supreme Court of Canada.

9 The Tribunal is also bound by the
10 jurisdictional constraints of the NAFTA, which
11 includes a strict Limitations Period, within which
12 claims against Government Measures must be brought, a
13 rule that cannot be evaded by muddying the waters on
14 what the Measures are the -- truly the source of the
15 breach and the damages alleged to be suffered by the
16 Claimant/Investor.

17 Canada is fully confident that the Tribunal
18 is cognizant of its role under international law and
19 adhering to its jurisdiction under the Treaty. And
20 Canada respectfully submits that, based on those
21 Standards, there can only be one outcome to this
22 Arbitration, and it is dismissal in its entirety.

1 Now, the Claimants' NAFTA Claim is
2 fundamentally flawed on many levels, and if I may be
3 blunt, it was doomed from the outset. Why? Because
4 the dispute at the heart of this case has been going
5 on between Canada and the Claimants for decades before
6 they belatedly launched this NAFTA Arbitration in
7 April 2019, and when I say "decades" that is not
8 hyperbole.

9 To start, Canada's Opening Statement today
10 I'm going to explain the long history of the dispute
11 between GSI and Canada because these factual details
12 establish what this NAFTA Claim really is all about.
13 It's Canada's Regulatory Regime and the long-standing
14 practice of the Offshore Petroleum Boards to release
15 nonconfidential Seismic Data materials to the public,
16 Measures which are all completely outside the
17 jurisdiction of this Tribunal.

18 Now, the Claimants have been complaining
19 about the Regulatory Regime and the practice of the
20 Boards to release copies of Seismic Data once the
21 privilege period has ended. They have been
22 complaining about it since GSI was incorporated in

1 1993. It was in that year that one of Claimants
2 Mr. Davey Einarsson, whose passing last year we
3 recognize with sympathy, and whose estate is
4 continuing this claim.

5 It was in 1993 that Mr. Einarsson started
6 investing in GSI Seismic Data business after acquiring
7 from Halliburton a library of offshore Seismic Data
8 that had been collected in the 1970s and 1980s from
9 Canada's east coast and far north.

10 But as the Tribunal will see later in my
11 presentation, a few months after that 1993 purchase,
12 GSI started threatening legal action against the
13 Newfoundland Petroleum Board because it was releasing
14 copies of Seismic Data materials that GSI alleged were
15 confidential and proprietary.

16 GSI threatened to sue the Newfoundland Board
17 again in 1998, this time arguing that the Seismic Data
18 material submitted to the Boards were not just
19 confidential and trade secrets but also subject to
20 copyright.

21 But despite these threats, the Newfoundland
22 Board did not stop its practice of releasing copies to

1 the public once the statutory confidentiality period
2 was over. To the contrary, the CNLOPB, the
3 Newfoundland Board has consistently maintained since
4 its creation in 1988 that it had the Legal Authority
5 to do so under the Canada-Newfoundland Accord Act.

6 And the same goes for the other two Offshore
7 Regulatory Boards, the Nova Scotia Board and the
8 National Energy Board, now known as the Canada Energy
9 Regulator.

10 Both the Nova Scotia Board and NEB also
11 maintained for decades that they had the Legal
12 Authority to release copies of nonconfidential Seismic
13 Data under the Canada-Nova Scotia Accord Acts and the
14 Canada Petroleum Resources Act respectively.

15 And the evidence shows beyond doubt that the
16 Claimants have known this since Day 1.

17 Now, GSI certainly did not like the Boards'
18 interpretation of the authority under the Regulatory
19 Regime and complained about it constantly. But
20 throughout the 1990s and 2000s, the Claimants chose to
21 avoid seeking injunctive or declaratory relief against
22 the Boards in order to resolve the question of whether

1 GSI's interpretation of the Copyright Act and the
2 Regulatory Regime was correct or not.

3 Instead, knowing the rules of the game, the
4 Claimants chose to continue investing in their Seismic
5 Data business carrying out two dozen new speculative,
6 or nonexclusive offshore surveys between 1997 and
7 2008, whose conditions of approval explicitly stated
8 that the submitted data and Reports would eventually
9 be released to the public.

10 Now, unfortunately for the Claimants and
11 many other companies at the time, the 2008 Global
12 Financial Crisis hit GSI very hard, and essentially
13 within a couple of years, GSI no longer had a
14 business, but because of extrinsic market forces and
15 its own scorched-earth litigation strategy, not
16 because of the Regulatory Regime or anything that the
17 Boards ever did, and certainly -- certainly not
18 because of the Alberta Court Decisions, which occurred
19 several years after GSI had already ceased to be a
20 going concern.

21 So I'm going to complete Canada's first part
22 of the presentation in the period around -- between

1 2011 and 2014 because it was at that time after about
2 20 years of threatening to do so, GSI finally launched
3 the claims directly against the Boards and the
4 Government of Canada alleging that the Regulatory
5 Regime was what expropriated the Copyrights and GSI's
6 business.

7 Now with that essential factual background,
8 my colleague, Ms. Sylvie Tabet, will take over, and
9 she's going to explain the legal ramifications of the
10 facts that I have described.

11 And the first insurmountable problem for the
12 Claimants is the NAFTA Strict Limitations Period,
13 which, as I said, prohibits claims against Government
14 Measures which took place more than three years prior
15 to the NAFTA Notice of Arbitration.

16 Indeed, the Claimants have already conceded
17 that they can't challenge the Regulatory Regime or any
18 actions of the Boards. But as Ms. Tabet will explain,
19 the Claimants' concession destroys the viability of
20 their entire case because it's obvious that the
21 gravamen of the claim and has -- is and always has
22 been the Regulatory Regime and the practice of the

1 Boards to release copies of Seismic Data.

2 So what the Claimants have done in their
3 NAFTA case is create a legal smokescreen in an effort
4 to extract hundreds of millions of dollars of damages
5 from the Government of Canada, arguing that it's the
6 Alberta Court Decisions themselves that expropriated
7 GSI's Seismic Data business.

8 But as Ms. Tabet is going to explain, it is
9 not only wholly without merit but it is completely
10 contradicted by the Claimants' own words. What the
11 Claimants are really trying to do is appeal the
12 substance of the Alberta Court Decisions and their
13 interpretation of Canadian law. And that's the second
14 insurmountable problem for the Claimants.

15 As Ms. Tabet will explain, under
16 international law and NAFTA Chapter Eleven, a domestic
17 court judgment that is not tainted by outrageous
18 irregularities so as to constitute a denial of justice
19 cannot be found to constitute an expropriation under
20 Article 1110. There is simply no violation of
21 international law here.

22 The Claimants received full due process and

1 a full hearing on a complicated legal question that
2 had not been litigated previously, and no one can
3 reasonably look at the Alberta Court Decisions and
4 describe them in any way that resembles a breach of
5 international law.

6 Now, in a few days the Tribunal is going to
7 hear from Professor Bankes and Professor Hutchison on
8 behalf of the Claimants, and they explained in their
9 Expert Reports the aspects of the Alberta Court
10 Decisions that they found problematic or they disagree
11 with.

12 The Tribunal is also going to hear from
13 Mr. Barry Sookman, who also explains how the Alberta
14 Courts arrived at their conclusions on a complicated
15 issue of First Instance.

16 Undoubtedly, Tribunal will find this
17 interesting and illuminating, but ultimately their
18 testimony does not matter because it is not the role
19 of this Tribunal to act as a Fourth Court of Appeal
20 and adjudicate whether the judges were correct in
21 their findings under Canadian law or to quibble with
22 the wording of the judgments. It is just not the

1 standard that this Tribunal has to apply.

2 Ms. Tabet will conclude her part of the
3 presentation talking about NAFTA Article 1106, and the
4 last part of Canada's presentation will address the
5 issues of damages.

6 My colleague, Ms. Elena Lapina, will start
7 with a very short explanation as to why the individual
8 Einarsson claims under NAFTA 1116 are inadmissible,
9 and then I will return to explain why, if there was to
10 be found a breach of the NAFTA, the Claimant must be
11 awarded zero damages because of a failure to
12 demonstrate causation between the breach and the
13 Damages claimed and for providing the Tribunal with a
14 patently unreasonable quantification of its damages.

15 So, Madam Chair, Members of the Tribunal,
16 let me go back a little bit because this is going to
17 show the Tribunal how the rules on the collection of
18 Seismic Data in the offshore have been in place and
19 known to the Claimants years before the NAFTA was even
20 into force.

21 Now, keep in mind, companies wanting to
22 collect Seismic Data from the Canadian offshore have

1 always been required to apply for an authorization,
2 and as a condition of getting that authorization, had
3 to submit certain reports, maps, and other data, to
4 Government regulators as a condition of being able to
5 gather that data and license it to oil companies to
6 make a profit.

7 It is important to keep in mind that the
8 Regulatory Regime has always been based on a balance
9 between industry needs and public interest in
10 promoting further exploration. The Canadian offshore
11 is public land, as Crown land as is described in
12 Canada. The seabed from where the data is gathered is
13 owned by Canada, not the Claimants or any other
14 private entity; hence, the ability of Canada's right
15 to be able to set the terms and conditions under which
16 companies may access and derive profit from its land.

17 These conditional approvals have been around
18 since the '70s.

19 We will just quickly go through a couple of
20 them. There's an example from a Permit from 1976 for
21 a Beaufort Sea Project done by the old GSI, or
22 Delaware GSI, in which the current GSI purchased in

1 1993.

2 Conditions in the Permit are pretty clear:
3 You must submit certain reports and all data acquired
4 from this project will be released from confidential
5 status five years after completion of the Project.

6 Here is another one from 1979 with the same
7 condition, that it will be released from confidential
8 status five years afterwards.

9 Canada was able to dig up many of the other
10 Permits that have the same kinds of conditions. You
11 can find them in Exhibits cited at Paragraph 86 of
12 Canada's Rejoinder.

13 But in 1982, the Canada Oil and Gas Act
14 formally enshrined a five-year statutory
15 confidentiality period for both exclusive and
16 nonexclusive Seismic Data. Just very quickly, the
17 difference between "exclusive" and "nonexclusive,"
18 exclusive is essentially on contract on behalf of an
19 oil company whereas nonexclusive is where a company
20 shoots and then seeks to license it to as many
21 licensees as it can get, and that is primarily the
22 source of the dispute today.

1 Now, you can see from the legislative
2 commentary back then as to what the intention was
3 after allowing an operator a reasonable period of time
4 within which to evaluate portrayed as data, it is made
5 freely available to other companies and to Government,
6 and university research geologists to generate new
7 exploration concepts and to stimulate a wide range of
8 company interest in acquiring new lands and continuing
9 exploration of the area in question.

10 And the legislation allows publication or
11 release following the periods described below,
12 five years.

13 That's how the Regulatory Regime worked back
14 then and still works today.

15 Take a look at this January 1984 publication
16 from COGLA, as my friend across got it exactly right,
17 the Canada Oil -- now I can't even say it. Canada Oil
18 and Gas Lands Administration. It is Exhibit 226.

19 This is 1984 where it says -- it contains a
20 listing of geophysical and geological Reports that
21 have been released in accordance with the provisions
22 of the Canada Oil and Gas Act. It says right there:

1 "Reproduction of microfilm data will be generally done
2 by a commercial firm who will bill the purchaser
3 directly."

4 So even in 1984 anything that was in this
5 publication you could get a copy of. And we will look
6 at the next page where you can see a long list of GSI
7 Projects that were already publicly available for
8 copying in 1984, and many of these Projects -- or I
9 think all of them -- are the ones that GSI would
10 eventually purchase from Halliburton in 1993.

11 And we know that in the 1980s Claimant Davey
12 Einarsson and a colleague from Delaware GSI, John
13 Clink, lobbied the Government strongly to try and
14 change that rule asking that it be held confidential
15 for a greatly extended period of time -- well, if not,
16 in perpetuity, greatly extended period of time such as
17 15 years our normal restriction with the Licensee in
18 other areas of the world and presumably it would have
19 little or no commercial value.

20 And the next year, February 1987, is a
21 letter from the Claimant Davey Einarsson expressing
22 disappointment that the five-year Confidentiality Rule

1 was not changed in the legislation. And that's
2 correct. The next year in 1986, the CPRA, again
3 enshrined a five-year confidentiality rule for Seismic
4 Materials.

5 Now, that rule, Section 101(7)(d)(2) of the
6 CPRA is the same rule that applies today. It hasn't
7 changed since 1986.

8 What did change is, in 1988, COGLA decided
9 to exercise its administrative discretion and keep
10 nonexclusive Seismic Data confidential for 15 years,
11 something that Mr. Bharat Dixit, formerly of the NEB
12 and CER, has testified about. That 1988 15-year
13 confidentiality rule has applied ever since.

14 Chris, you can go to the next slide.

15 It's just a quick summary of that
16 jurisdiction.

17 Five years of confidentiality has also been
18 the statutory default rule for the Nova Scotia
19 Offshore since 1987. You can see, in
20 Section 122(5)(d)(ii) of the Canada-Nova Scotia Accord
21 Act, the same rule, five years of confidentiality.

22 But, as Mr. Makrides of the Nova Scotia

1 Board has testified, in 1992, the Nova Scotia Board
2 decided to exercise its discretion and keep
3 nonexclusive Seismic Data for 10 years. And you can
4 see it in the guidelines, right here, where it says,
5 under "Confidentiality," the 10-year Rule. And then
6 the second line from the bottom: "Reports and data
7 are made available to the public at the termination of
8 relevant confidentiality periods."

9 If you go to the next slide, that's,
10 again -- that's been the rule ever since 1992.

11 Now, the other jurisdiction, Newfoundland,
12 same rule, 1987, Canada-Newfoundland Accord Acts,

13 Section 119(5)(d)(2), enshrined same rule,
14 five years statutory rule.

15 And we can look back to a 1988 publication
16 from the Board. If it's too difficult to read the
17 legislation, the Board basically provided the public
18 with an explanation of what this meant.

19 You can go back to it. Thank you, Chris.

20 That publication from 1988 contained a list
21 of geophysical reports, and data have been released by
22 the Offshore Petroleum Board pursuant to

1 Subsection 119(5) (d) of the Accord Act, which we just
2 looked at. And again, in that publication -- this is
3 1988 -- how may copies of the data be obtained?
4 "Reproduction of released materials may be arranged at
5 the expense of the requester through the
6 Canada-Newfoundland Offshore Petroleum Board." And in
7 that publication, again, a list of GSI's
8 nonconfidential programs that were available for
9 copying at the time.

10 This was not some -- so if you go to the
11 next slide, this was not some secret. Everybody knew
12 this is how you obtained copies of Seismic Data once
13 the privileged period or the confidentiality period
14 had expired. It was just an example of one that we
15 found from a letter from British Petroleum to the
16 Newfoundland Board asking for copies of data. Just
17 write to them and ask them.

18 Now, the five-year statutory rule stayed in
19 place until 1999. As Mr. Bennett from the CNLOPB
20 said, it was in that year that the Board decided to
21 extend the confidentiality period to 10 years.

22 Now, if you go to the next slide, there is

1 the summary of the Regulatory Regime that has been in
2 place for decades in which the Claimants knowingly
3 operated.

4 So let's get to 1993, when GSI purchased a
5 Seismic Data library from Halliburton. So again, the
6 rules of the game were not a secret. If we look in
7 1992, there was a letter from the CNLOPB to
8 Halliburton explaining to them the five-year
9 confidentiality period is pursuant to the Accord Acts,
10 and one of the Projects that Halliburton had shot in
11 the 1980s had now been listed in the August 1992
12 publication "Released Geophysical and Geological
13 Reports". And here is that August 1992 publication,
14 saying exactly the same thing as what we had seen
15 previously.

16 The Board felt that it had the authority to
17 release this material and it allowed copies to be
18 made. This was not a secret.

19 If we look in December 1992, here's a
20 publication from the National Energy Board at the
21 time. Same thing. Reproduction will be done by a
22 commercial firm who will bill the purchaser directly,

1 and, again, a long list of GSI programs that, in
2 December 1992, were available from the National Energy
3 Board right down the street.

4 So this brings us to 1993, when
5 Mr. Einarsson purchased that Seismic Data library.
6 And we know that he knew what was happening because,
7 in November 1993, GSI threatened to sue the
8 Newfoundland Board. And as you can see, there's a
9 letter from GSI's legal Counsel dated November 3,
10 1993, writing to demand that the CNOBP desist from
11 releasing any more of GSI's Seismic Data, "and if the
12 Board persists in releasing further data, GSI will
13 have no choice but to consider taking appropriate
14 legal steps to protect its interests, including legal
15 action against the Board for damages."

16 Now, we know by this letter that GSI was
17 actually consulting the Board's publications that I
18 had previously shown the Tribunal, the reference right
19 there in the letter. So they were obviously looking
20 at the publications and obviously knew that copies
21 were available, otherwise, why would they be writing
22 this letter? And they took the position that "we are

1 of the position that the Board has misconstrued its
2 authority to release geophysical data taken from the
3 Offshore Atlantic Area, and the subsections upon which
4 the CNOBP relies do not authorize blanket disclosure."
5 That is, of course, Section 119 of the Accord Acts
6 that we looked at before.

7 Now, I'm not going to go through this
8 letter. The Tribunal can read it for itself at one
9 point. But I do want to point out something, in
10 particular, on Page 7 of the letter, where the
11 argument was made that GSI said: "The person who
12 collected data at all times remains the Owner of this
13 information, and there is no statutory provision which
14 confers ownership upon the CNOBP or confers upon it a
15 power to expropriate this information. Consequently,
16 unless the CNOBP has an express statutory authority to
17 release geophysical data, any disclosure without
18 consent the Owners is a violation of their proprietary
19 rights in this information."

20 And the lawyers go on to say in their
21 analysis, explaining that the Board does not -- in
22 GSI's view, the Board does not have the authority to

1 release it, and doing so is a violation of their
2 Confidential Information. Their lawyers say that:
3 "GSI should be successful in applying for judicial
4 review under the Federal Court Act and should also be
5 successful in applying for any interlocutory
6 injunction prohibiting the CNOPB from releasing
7 further data."

8 So here we are, on the eve of the NAFTA
9 coming into force on January 1, 1994. And GSI has
10 purchased a Seismic Data library that it already knew
11 was available to the public for copying. And they're
12 threatening an injunction and judicial review against
13 the Board if it released any more of GSI Seismic Data.

14 What happened? The Board continued
15 throughout the '90s what it had been doing since 1988,
16 releasing Seismic Data to the public after the
17 expiration of a statutory confidentiality period.

18 GSI did not seek that interlocutory judgment
19 or judicial review, as mentioned here, but took the
20 conscious decision to continue investing in their
21 Seismic Data business, knowing the whole time the
22 rules of the game.

1 Now, Madam Chair, I'm just going to go very
2 briefly into confidential session. It shouldn't take
3 too, too, long. I don't think there is anyone that
4 needs to leave the room.

5 (Comments off microphone.)

6 MR. LUZ: Thank you. Again, apologize.
7 This is one of the ways we try and do it, so it will
8 be brief, and apologies for the short delay.

9 (End of Open Session. Confidential
10 information follows.)

11 CONFIDENTIAL SESSION

12 [REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

1 So again, throughout the '90s, the Boards
2 were very clear. Now, here is the Newfoundland
3 Board's January 1996 guidelines. These were
4 guidelines that all geophysical operators had to
5 consult in order to be able to carry out their seismic
6 projects in the offshore. It was very clear under the
7 heading "release of data," that, under the Accord
8 Acts, reports and data from most technical programs
9 ceased to be privileged five years following the
10 completion of the program. And, again, the
11 publication referred to a full listing of the Reports
12 that had been released at that time.

13 If we go to the next slide, you can see,
14 again, an updated March 1996 publication that has said
15 the same thing that we have already looked at. It's a
16 long list of GSI programs that were available for
17 copying to the public. Again, no interlocutory order
18 or judicial review in court against the Boards by GSI.

19 This is an important time period because, in
20 1997, that's when GSI decided to start investing in
21 new nonexclusive seismic surveys in the Canadian
22 offshore. Prior to this, it had been all based on

1 reprocessing and licensing data that it had purchased
2 from Halliburton, but they wanted to start new
3 projects.

4 So here's the first authorization in
5 July 1997 for a speculative 3D survey in the Jeanne
6 D'Arc Basin. You can see, right on the front page of
7 this approval, that: "We will remind you that the
8 financial report should include digital copies of shot
9 point location data and seismic traces. Details are
10 described in the guidelines, Section 5," which we had
11 just looked at previously. "The data from this survey
12 will be made publicly available five years following
13 completion of the fieldwork."

14 And, again, there's another part from the
15 attached approval from this exhibit, R-250, that shows
16 the requirement that, as a condition of approval, you
17 had to submit the data, and that same legislation
18 contains the statutory privilege period after which it
19 could be released to the public.

20 Those conditions, that you see here and were
21 repeated in all of the subsequent programs that GSI
22 received approval for, that's at the heart of the quid

1 pro quo of the Regulatory Regime. An operator like
2 GSI is allowed to gather Seismic Data from public land
3 on the condition that it submit that data and
4 that -- or some of that data, certain requisite data,
5 and that it can be released to the public after the
6 expiration of the confidentiality period, 10 or
7 15 years, depending on the jurisdiction. These
8 surveys are not cheap to carry out. We know that. So
9 GSI had to decide, in 1997, if it wanted to go ahead,
10 invest in this kind of project, knowing full well what
11 the Regulatory Regime required. They decided to
12 proceed with eyes wide open. Now, again, we know that
13 GSI consistently complained about this, particularly
14 in Newfoundland because, at the time, it was still a
15 five-year confidentiality period. But the Board was
16 resolute in explaining to them it had the authority to
17 release under -- data under the Accord Acts. And you
18 can see this in a letter that the Board wrote on
19 November 27, 1997.

20 Again, referring to the Accord Acts, the
21 Board said, in 1997: "The Board's current practice is
22 to limit release of this data to copies of paper

1 sections and the accompanying Reports. The Board does
2 not have the power to limit the release of such data
3 to oil companies only" -- which is what GSI had been
4 asking for. "Once the period of confidentiality has
5 expired, the Board has no choice but to allow the data
6 to fall within the entire public domain." So it
7 couldn't just be limited just to oil companies.

8 It's a pretty clear position on what the
9 Board thought its authority was and what it was going
10 to do, and, again, the next year, knowing this full
11 well, GSI applied for another project with the same
12 condition.

13 So that takes us to 1998, July. And GSI
14 again threatens legal action against the Board, the
15 CNOPB, but this time raising specifically the issue of
16 copyright. In this July 27, 1998, letter, which is
17 Exhibit R-531, tells the Board that GSI's position
18 that "all geophysical information with which we have
19 been filing on an ongoing basis with the CNOPB is
20 Confidential Information which, in addition, enjoys
21 copyright protection. By this letter, we are advising
22 the Board that all information filed by us with the

1 Board is not to be released."

2 Now, I'm not going to go through the 16-page
3 legal analysis, but let's just focus on what the GSI
4 said about copyright.

5 Go to the next slide.

6 GSI took the position that Seismic Data
7 would likely be considered -- GSI would constitute
8 material in which a copyright may subsist. And if it
9 can be established that GSI is the rightful author of
10 the compilation, GSI may be able to prove that the
11 Boards infringed upon its copyright. And it goes on
12 to say that, if the Boards release GSI's Seismic Data,
13 the infringer, the copyright infringer, in the case of
14 data released by the respective Boards, would be the
15 Board.

16 Now, GSI's lawyers, Code Hunter Wittmann,
17 ends with conclusions and recommendations similar to
18 the one that we saw from 1993: "GSI should be
19 successful in seeking an order directing the
20 Newfoundland Board and the Nova Scotia Board, CNOPB
21 and CNSOPB, to not disclose the confidential
22 geophysical information from the public."

1 But did the Boards change its position in
2 response to this latest legal threat? No. If you
3 look at the January '99 guidelines from the
4 Newfoundland Board, again, affirmed its authority
5 under the Accord Acts to release Seismic Data and,
6 again, a reference to the publicly available materials
7 for which it would be able to obtain copies.

8 And to put a final point on what the Board's
9 position was, June 18, 1999, the Board wrote directly
10 to the Claimant Davey Einarsson: "While the Board
11 understands your position, the Board does not agree
12 with the legal analysis offered on your behalf
13 respecting the release of the subject data provided by
14 GSI. The Board believes that the disclosure of
15 information obtained as a result of carrying on a work
16 or activity is authorized under our Accord Acts. I
17 refer in particular to Section 119" -- as we saw
18 before, and then Section 115 is the Provincial
19 Act -- The highlighted language says it pretty
20 clearly: "The Board intends to continue the practice
21 of making such information available to the public
22 following the expiry of the specified periods, except

1 for nonexclusive data which period has been extended
2 to 10 years. I trust this will clarify any confusion
3 respecting our position on this important matter."

4 Madam President, Members of the Tribunal,
5 this is in June 1999, just short of 20 years before
6 GSI filed its NAFTA Claim. There's just simply no way
7 for GSI to escape the reality that the position on
8 copyright, GSI's position on copyright and the Board's
9 position on its authority under the Regulatory Regime,
10 were officially at logger heads. The Nova Scotia
11 Board didn't change its practice either.

12 Again, if we just go on to the next slide,
13 and I'll go through this quickly.

14 The Nova Scotia Board had been -- had been
15 issuing guidelines that say exactly the same thing,
16 that any released information may be sent out for
17 reproduction at the request and expense of the user.

18 And if we look to the next slide, this is an
19 approval that was given to GSI in 2001, which again
20 said, explicitly, that it would be held confidential
21 for at least 10 years, hard copy of data, reports and
22 maps will be made available for public disclosure at

1 the termination of the relevant confidentiality
2 periods.

3 But instead of seeking an injunction or
4 declaratory relief, as GSI's lawyers had recommended,
5 GSI decided to keep investing.

6 Now, in the year 2000, GSI did decide to
7 launch an action in the Federal Court of Canada
8 seeking information on the names of the companies that
9 were actually borrowing or receiving copies of GSI's
10 Seismic Data. And GSI actually won that in 2003. And
11 it was actually referenced by the Claimants in their
12 Opening Statement this morning, the Federal Court of
13 Canada Decision saying that the Boards had to release
14 that information. And, in fact, the Boards
15 subsequently almost immediately after this Judgment
16 started providing GSI with the names of the Companies
17 that had acquired them.

18 But what the Claimants did not point out in
19 their Opening Statement when they cited to this
20 Judgment was the other part of the Federal Court of
21 Canada's Decision in 2003, where it noted that each of
22 the three Boards had adopted the practice of releasing

1 copies of the data deposited to third parties.

2 So here we have full knowledge. I mean, the
3 Court is already saying that everyone knows this, but
4 we know that it had been known prior to this. But now
5 here is the Court saying it.

6 But here is the key part. Paragraph 75 of
7 that Judgment, saying that on the expiration of the
8 five-year period, which is in Section 119 of the
9 Canada Accord Act, "it was entirely open to the
10 Canada-Newfoundland Board to make such information or
11 documentation available to a requester."

12 This is the Federal Court of Canada in 2003.
13 That's what the Board had been arguing all along. And
14 the Court vindicated that position. To be sure, the
15 question of copyright wasn't actually before the Court
16 in this particular Judgment, but it's another example
17 of how GSI's ongoing assertion of copyright and the
18 Regulatory Regime were on a head-on conflict more than
19 20 years ago. Still no injunction, no declaratory
20 relief, and no NAFTA Claim.

21 In 2007, GSI did start the litigation route.
22 Not directly against the Boards but against its own

1 customers, a strategy which would eventually
2 contribute to GSI's own demise. And that was in
3 April 2007, when GSI launched a claim against one of
4 its best customers EnCana.

5 Now, in addition to contractual breaches,
6 GSI claimed that EnCana had infringed its copyright in
7 the Beaufort Sea data which EnCana had obtained from
8 the National Energy Board. In its Statement of
9 Defense, EnCana contested that Seismic Data was
10 actually subject to copyright. But even if it was,
11 the Regulatory Regime made it clear that GSI would
12 have had the expectation that the Board was going
13 release the material.

14 So 2007 is when the Regulatory Regime versus
15 the Copyright Act officially hit the Courts. And this
16 was the case that eventually would become the
17 foundation of the Common Issues Trial that went on
18 later.

19 Now, GSI launched a spree of new lawsuits
20 against its other customers: Suncor in 2009, Husky,
21 2010, and many others. And the Claimants have
22 conceded that those lawsuits had a devastating impact

1 on its business, which -- a point I'll come back to
2 later on in Damages but -- the Claimants have conceded
3 it.

4 It wasn't until 2011 that GSI filed direct
5 claims of copyright infringement and expropriation
6 against the Boards and the Government of Canada.

7 Now, my colleague Sylvie Tabet is going to
8 be here shortly to explain the legal implications of
9 all of this. But in 2011 -- if we go to the next
10 slide, Chris. Thank you.

11 This is when GSI filed a direct claim
12 against the Newfoundland Board and the province of
13 Newfoundland and Labrador challenging the authority of
14 the Board to release Seismic Data and accusing it of
15 copyright violation, including lost sales.

16 So if we go to the next slide, let's just
17 compare what had been argued from 1993 and in their
18 claim in 2011 because really, they're very similar.
19 In 1993, GSI was saying that the Board had no power to
20 expropriate the information. And in the Statement of
21 Claim in 2011, again, seeking a claim against an
22 unlawful or wrongful appropriation by the Board and

1 the Province.

2 They also referred to a breach of
3 confidentiality in 1993, and made the same claim in
4 2011. Let's compare it to the 1998 letter from GSI's
5 Counsel Code Hunter Wittmann. That was the first time
6 that the lawyers had asserted a copyright and
7 copyright infringement by the Board. And here it is
8 again more than a decade later in the claim for an
9 infringement of copyright against the mandatory
10 disclosure.

11 Back in 1998, the lawyers had said these
12 were trade secrets of GSI's. In 2011, a conversion of
13 GSI's trade secrets in its Claim.

14 Now, again, these were a long series of
15 lawsuits between 2011 and 2014. In 2013, GSI amended
16 its Statement of Claim to ask for a Direct
17 Expropriation because of the Regulatory Regime. GSI
18 was alleging that it was the Regulatory Regime that
19 expropriated GSI's Seismic Data business. They made
20 the same argument against the National Energy Board
21 and the Government of Canada, 2012.

22 Again, they are just simply saying that it's

1 the Regulatory Regime that was an expropriation of GSI
2 Seismic Data business. And then sort of summing it
3 all up, there were about two dozen lawsuits and Canada
4 was and the Boards -- were defendants in many of them.
5 I have sort of lost track.

6 But the 2014 Statement of Claim, which is
7 Exhibit R-10, tells the Tribunal quite a bit because
8 that's a full Expropriation Claim where GSI is arguing
9 that it is, as a result of the legislation and the
10 wrongful acts of the Boards, that expropriated GSI's
11 Seismic Data business.

12 And Ms. Tabet is going to come and explain
13 this, but that Claim actually has all of GSI's Seismic
14 Data. The same Seismic Data that they are claiming
15 now that the Alberta Court Decisions expropriated.
16 But in 2014, they were arguing that it was the
17 Regulatory Regime that expropriated GSI. This is the
18 essence of the fault in the Claimants' case.

19 Now, Madam Chair, there is many other points
20 of rebuttal that I would like to make, but I do want
21 to let my colleague Ms. Tabet stand up, but there is
22 just one thing. I just wonder -- I'm just going to

1 refer the Tribunal to the Judgment that the Claimants
2 referred to. It's it is Exhibit C-205. It's a
3 Federal Court of Appeal Judgment where the Claimants
4 had said they tried to sue the Boards with respect to
5 their Seismic Data, but the Court ruled that it was
6 premature.

7 Canada addresses this in Paragraph 66 of our
8 Rejoinder because it really is a red herring. The
9 Claimants, as was explained correctly this morning,
10 sought judicial review of the NEB's -- of the approval
11 of a National Energy Board -- of a project that took
12 place in 2008 and would not be publicly available
13 until 2023. And the Court decided, well, it is
14 premature to rule on whether the statute allows that
15 to happen.

16 What about all the Seismic Data that had
17 been released up to that point? I mean, GSI had known
18 for two decades that Seismic Data was being released.
19 And they had been threatening the Boards with legal
20 action to prevent them from continuing to release it.

21 So that misguided legal attempt on data that
22 wasn't going to actually be public for another

1 15 years doesn't help the Claimants at all because
2 throughout this entire period, the Boards had been
3 releasing copies of the Seismic Data to the public
4 pursuant to its statutory authority. And the
5 Claimants knew it. And they continued to invest in
6 the Seismic Data business knowing the rules of the
7 game.

8 Now, with that, I'll turn over to Ms. Tabet,
9 and she's going to explain to you why this compels a
10 conclusion that the entire claim has to be dismissed.
11 Thank you.

12 MS. TABET: Thank you.

13 (Comments off microphone.)

14 MS. TABET: Madam President, Members of the
15 Tribunal, good afternoon.

16 In my presentation today, as Mr. Luz
17 indicated, I will first address Canada's objection to
18 the Tribunal's jurisdiction *ratione temporis*. And I
19 will pick up on Mr. Luz's presentation and explain
20 that, notwithstanding the Claimants' efforts at
21 repackaging their Claim for the purpose of this NAFTA
22 Arbitration, the NAFTA Claim is time-bar because the

1 essence of the dispute between the Claimants and
2 Canada is about the Regulatory Regime and about the
3 disclosures and copying of the Seismic Data under the
4 regime, and all of this dates back, as you've heard,
5 from the late 1990s.

6 And the second part of my presentation, I
7 will address the Merits. And I will explain that,
8 even if the Tribunal were to find that it has
9 jurisdiction, it must nevertheless dismiss the
10 allegations of breach of NAFTA Article 1110 and
11 Article 1106 through the action of Canada courts.

12 So turning to time bar, as you've heard this
13 morning, the Claimants have presented their Claims in
14 this NAFTA Arbitration as a challenge to the Alberta
15 Court Decisions. They identified the Challenged
16 Measure as being the Decision of the Alberta Court of
17 Queen's Bench on the Common Issues Trial. The
18 unsuccessful appeal to the Court of Appeal and the
19 denial of leave to the appeal to the Supreme Court of
20 Canada.

21 The Parties have referred to all of this as
22 the "Alberta Court Decision," so I will refer to it in

1 the same way in my presentation today.

2 You've heard Claimants' Counsel repeat again
3 this morning that they are not challenging the
4 Regulatory Regime, nor have they challenged any
5 individual instances of disclosure or specific actions
6 by the Boards as breaching NAFTA.

7 They haven't done so because they cannot
8 bring a claim against any of this. Such claims would
9 be time-barred. So their case relies solely on the
10 Alberta Court Decisions. On that basis, they argue
11 that the Tribunal has jurisdiction because the Alberta
12 Decisions are within the cutoff period. I will
13 explain why the Claimants' attempts must fail.

14 Before I do that, let me briefly review the
15 legal framework for the Tribunal's consideration of
16 the issue. So the applicable test for the time
17 limitation is found in Article 1116 and 1117 of NAFTA.
18 With respect to the applicable test, there is broad
19 agreement between the Parties here.

20 First, the Parties agree that breaches that
21 pre-date NAFTA are outside the Tribunal's
22 jurisdiction. The Regulatory Regime predates NAFTA;

1 and, therefore, any claim in that respect is also
2 outside the Tribunal's jurisdiction.

3 Second, there is also broad agreement
4 between the Parties regarding the legal test, as
5 articulated in Article 1116 and 17.

6 Third, the cutoff period for the three-year
7 time limitation in this case is also uncontested. A
8 breach that occurred prior to April 18, 2016, cannot
9 form the basis of the Tribunal's jurisdiction.

10 And, finally, there is also agreement that,
11 to serve as the basis of the Tribunal's jurisdiction,
12 the Alberta Court Decision must constitute an
13 independently actionable breach.

14 The Parties' disagreement lies in whether
15 the Court Decisions in this case constitute a distinct
16 measure that can breach NAFTA. Now, having laid out
17 the legal framework in what is in contention, I will
18 now explain that the Claimants' efforts at bringing
19 the Claim within the Tribunal's temporal jurisdiction
20 must fail. I will focus on three reasons:

21 The first one is that, notwithstanding any
22 efforts at repackaging the Claim, the essence of the

1 Claim is really about the Regulatory Regime, which
2 predates NAFTA and the three-year time limitation.

3 Secondly, a legal challenge before domestic
4 courts cannot toll the Limitation Period, and I will
5 explain that in a minute.

6 And, third, I will explain why the Alberta
7 Court Decisions are not an independent actionable
8 breach and cannot form the basis of the Tribunal's
9 jurisdiction.

10 On the first point, as Mr. Luz said, the
11 gravamen of the Claimants' Claim before this Tribunal
12 is really about the Regulatory Regime and disclosure
13 of the Boards of GSI's Seismic Data and contravention
14 of what GSI asserted as being a copyright.

15 Now, it is apparent from a review of the
16 pleadings in this Arbitration, including the Witness
17 Statements of Mr. Einarsson, that the Claimants are
18 rehashing arguments that they previously made before
19 the Boards and before Canadian Courts.

20 And Mr. Luz took you through some of these
21 earlier litigations, except that now they have
22 repackaged the Claims. And instead of arguing that

1 the Regulatory Regime was a confiscation of GSI's
2 copyrights, they now argue that it was the Court
3 Decision that was the confiscatory action.

4 I won't take you through all of the
5 litigation again. Mr. Luz has referred to it, and we
6 summarize it in our Counter-Memorial at Paragraph 119.
7 You will see many of the same allegations that are
8 before you have been made in the past.

9 The next slide provides a summary of some of
10 this evidence which shows that the dispute does not
11 really originate with the Alberta Court Decisions but,
12 rather, predates it. And there is a lot of
13 information on this slide.

14 I won't take you in detail through all of
15 this because Mr. Luz has already, to a large extent,
16 covered it. But just to highlight a few
17 points: Importantly, when the Claimants made their
18 investment in 1993, they were aware of the Regulatory
19 Regime and the limited confidentiality period of
20 five years.

21 And you will see when you read -- reread the
22 Alberta Court of Queen's Bench Decision, the Judge

1 recognizes that. And for the decades after that,
2 after 1993 after they made the investment, they
3 complained about the Regulatory Regime.

4 In their written submissions, they have
5 suggested that they could not have knowledge of the
6 Boards' disclosure practices because they were not
7 static, but the reasons they were not static was
8 because GSI kept lobbying the Government and the
9 Boards to extend the confidentiality period. And
10 ultimately the Boards did agree, as Mr. Luz explained,
11 and to administratively extend the period. But what
12 is in the legislation remains, and so when GSI
13 invested, they knew that the legislation provided for
14 a five-year confidentiality period and that the
15 Seismic Data could be released thereafter.

16 On the knowledge of copying and the Boards'
17 practices, Mr. Luz has also referred to that and
18 provided you with some references to the evidence on
19 the record. The fact that GSI could not know exactly
20 what material had been copied or by whom may be
21 relevant to time limitation for bringing copyright
22 claims, copyright infringement claims before the

1 domestic court or contract breach claims before the
2 domestic courts, but it is not really relevant to this
3 NAFTA Arbitration.

4 As you heard, they have asserted since 1998
5 that they had copyright and argued that the disclosure
6 and copying of the data was inconsistent with that
7 copyright. The Boards, as has been shown to you, have
8 repeatedly disagreed with GSI's legal position. So
9 all of this really demonstrates that by 1999, the
10 legal positions of GSI and the Boards regarding the
11 effect of the Regulatory Regime on GSI's copyright had
12 been laid out.

13 And in sum, this shows that the dispute
14 really had crystallized before the cutoff date. There
15 was a clear disagreement communicated between GSI and
16 the Boards regarding disclosure and the Regulatory
17 Regime. The Boards were aware of GSI's legal position
18 on copyright, and GSI was aware that, whether or not
19 there was copyright, the Board took the position that
20 it could release the data and allow copying after the
21 confidentiality period, of course.

22 This is the disagreement that eventually

1 resulted in the Alberta court actions in 2007. And
2 the fact that there was -- those court actions
3 materialized is evidence that the dispute had
4 crystallized back then. Nevertheless, GSI waited
5 until 2019 to bring its NAFTA Claim.

6 They have argued that their knowledge of the
7 breach should not start from the crystallization of
8 the dispute but it should start from when the Canadian
9 Courts disagreed with their position. So this brings
10 me to the second point relating to the effect of the
11 domestic challenge related to the Regulatory Regime on
12 the time limitation.

13 PRESIDENT WALLGREN-LINDHOLM: Excuse me,
14 Mr. Landau has a question.

15 ARBITRATOR LANDAU: Sorry. Excuse me for
16 interrupting. Just before you move on to the next
17 point, so Canada is putting forward an essence of the
18 claim approach. Is that based on any particular
19 authority that you rely upon for that? That's -

20 MS. TABET: yes.

21 ARBITRATOR LANDAU: Because of course the
22 issue that we have to grapple with is on the one hand,

1 Authorities, such as they are, such as Eli Lilly and
2 Glamis, which would suggest you just allow a Claimant
3 to formulate its claim and then you take the
4 consequences of that, or a different approach, which
5 is you don't do that. You look through it, and look
6 at the essence.

7 MS. TABET: Thank you, Arbitrator Landau, I
8 will get to this point in my third point specifically
9 to address the Authority in the Spence and Carrisoza
10 Case which go to the fact that you cannot just rely on
11 the measure identified by the Claimants.

12 I will just briefly first address the fact
13 that a domestic court action cannot toll the
14 Limitation Period.

15 On this point, I want to emphasize that
16 under the NAFTA scheme, NAFTA does not require
17 exhaustion of local remedies to bring a claim that the
18 Government expropriated an investment. Investors
19 don't have to bring the Claims before the domestic
20 courts. And in NAFTA, contrary to some other
21 investment treaties, there is no fork-in-the-road
22 provision. And by that, I mean that it is possible

1 under NAFTA for an investor to pursue domestic claims
2 and then bring a NAFTA Claim. Some other treaties
3 prevent that.

4 NAFTA allows it, but if an investor does
5 decide to bring a claim before domestic courts, it
6 is -- it remains bound by the three-year time
7 Limitation Period, so it still has to ensure that
8 whatever NAFTA Claim it brings meets the three-year
9 time limitation.

10 The common position -- next slide, please.
11 Thank you.

12 I want to emphasize that this is common
13 position between the three NAFTA Parties. And that
14 agreement between the Parties is very clear. I've
15 included in the slides some references to the U.S. and
16 Mexico 1128 Submission, but specifically the
17 three-year time Limitation Period cannot be
18 interrupted or prolonged by subsequent acts, and
19 specifically domestic court challenges of regulatory
20 or administrative measures cannot toll the three-year
21 time Limitation Period.

22 And that position has been repeated and

1 consistent throughout the last two decades. As such,
2 it is incumbent on the Tribunal to accord the
3 consistent interpretation of the three NAFTA Parties
4 great weight and, as recognized under Article 31(3) of
5 the Vienna Convention. We, in the recent case,
6 Westmoreland versus Canada, the Tribunal recognized
7 that such agreement between the Parties should be
8 accorded great weight.

9 Now, Canada does not rely only on the NAFTA
10 Parties' interpretation, but NAFTA Tribunals have also
11 accepted this, and we have provided some references to
12 Authorities, including the Apotex and Mondev Case, so
13 RLA-4, and CLA-54.

14 If you can please go to the next slide.

15 The Apotex is clear that a subsequent
16 litigation does not toll the Limitation Period.

17 Now, to get around this fact, the Claimants
18 have tried to portray the case as being about the
19 Alberta Court Decisions, and that contrary to the
20 Apotex decision, or even Mondev, here there is no
21 distinct and separate breach to consider. That's the
22 third point that I want to make here.

1 Again, the Parties have agreed that for the
2 Court to have jurisdiction, the Alberta Court
3 Decisions have to be considered independently
4 actionable.

5 Now, to answer the question that Mr. Landau
6 put, the Claimant has identified the Challenged
7 Measure as the Alberta Court Decision, but the
8 reason -- it is not sufficient for the Tribunal to
9 simply rely on that identification of the Measure. It
10 is true that in the first instance the Tribunal can
11 refer to that measure, but it needs to satisfy itself
12 that that is, in fact, the reality of the case or the
13 essence of the case.

14 And Canada has provided two Authorities:
15 The Spence case in RLA-10, but also I would like to
16 draw your attention to the Carrisoza case and the
17 approach that was adopted by the Tribunal in Carrisoza
18 specifically considering whether there was an
19 independent violation perpetrated through the legal
20 proceedings related to the 2014 Order, such as denial
21 of justice through the Order itself.

22 So Canada's submission is that, in the

1 present case, the Court Decision did not alter the
2 real cause of the dispute, which was the Board's
3 disclosure of GSI's Seismic Data under the Regulatory
4 Regime.

5 And if we move to the next slide, what was
6 instructive in the Carrisoza Decision is the fact that
7 the damages case as between the domestic court action,
8 the earlier measure and the 2014 order was the same.
9 And similarly here, there was overlap in the damages
10 claim between the domestic court actions and the
11 Damages Claimed in this Arbitration. So that is
12 further evidence that the real cause of the dispute is
13 the disclosure of Seismic Data.

14 Now, the Claimants have said that the Court
15 decisions are in and of themselves a breach,
16 separately and independently from the Regulatory
17 Regime. But for this to be true, the Tribunal would
18 have to accept that the Regulatory Regime and the
19 Boards' disclosures are not violation of NAFTA, but
20 that the Court Decision itself can be, and the
21 Claimants have not made that case. They have not
22 alleged a denial of justice or some other akin problem

1 with the Court's process, the judicial process. What
2 they are challenging is the usual authority of
3 domestic courts to interpret and apply domestic law.

4 Ms. Lemmens explained this morning the
5 origins of the Common Issues Trial and the two
6 questions that were being considered by the Trial
7 Judge. I won't go through this again in detail, but
8 this really highlights the nature of the exercise in
9 which the Courts were engaged. Those two questions
10 were: What is the effect of Regulatory Regime on
11 GSI's claims? And can copyright subsist in Seismic
12 material of the kind that are subject matter of GSI's
13 claims?

14 Again, this highlights the interpretive, the
15 nature of the exercise in which the Courts were
16 engaging.

17 So with respect to the first question, the
18 Judge's answer was that: "The CPRA, properly
19 interpreted, allows for disclosure without restriction
20 after a defined period of time."

21 "It is a complete and specific code that
22 applies to all oil-and-gas property, including Seismic

1 Data." And the Judge concluded that, as a matter of
2 statutory interpretation, the Regulatory Regime
3 prevailed over the Copyright Act to the extent of
4 conflict.

5 The second question the Trial Judge
6 considered was with respect to the copyright, and the
7 Judge found that copyright could subsist in Seismic
8 Data of the kinds that were the subject matter of
9 GSI's claim, and that finding was not appealed, as has
10 been mentioned by Claimants' Counsel. However, the
11 finding on the interpretation of the Regulatory Regime
12 in relation to the Copyright Act was appealed and
13 considered again on a standard of correctness by the
14 Court of Appeal.

15 The Court of Appeal agreed with the Trial
16 Court's interpretive approach and with the findings on
17 this point.

18 Now, you will hear from three Experts this
19 week, from Mr. Sookman, Prof. Hutchison, and
20 Prof. Bankes, about what the Alberta Court Decisions
21 were doing. All three Experts agree that the Trial
22 Judge was engaged in an exercise of statutory

1 interpretation.

2 To support their argument that the Court
3 decisions were independent from the Regulatory Regime,
4 the Claimants have put forward two arguments: They
5 suggested that the Court decision was novel,
6 unexpected, and that the Courts created a compulsory
7 license scheme. Neither has merit. The Courts were,
8 indeed, asked to consider questions that had not been
9 previously decided, but that does not change the
10 nature of the Decision as one of interpretation of the
11 legislation.

12 Question before this Tribunal is not whether
13 Judge Eidsvik reached the correct conclusion. That
14 was the role of the Court of Appeal, and the Court of
15 Appeal found no error.

16 With respect to the arguments that the
17 Courts created a compulsory license scheme, I want to
18 come back to the language from the Alberta Court of
19 Queen's Bench when I get to the Merits. But that was
20 not what Judge Eidsvik did. I think some citations
21 were put to you. They were taken out of context, and
22 frankly they were a bit misleading. I invite the

1 Tribunal to carefully reread the whole decision as a
2 whole, and I'll come back to this in a minute.

3 But what was clear is that the Judge was
4 interpreting existing law and the rights of the
5 Parties under the law, not creating a new compulsory
6 license scheme.

7 Now, the Claimants have also tried to
8 portray the Court's decision as crystallizing the
9 expropriation by finding that the Regulatory Regime
10 prevailed over the Copyright Act. This reference to a
11 crystallization of the breach by the Courts seems to
12 contradict the Claimants' argument that the Alberta
13 Court Decision are an independent breach, and that the
14 Court caused the expropriation. So I wanted to
15 highlight that.

16 And, in fact, in the Reply Submission by the
17 Claimants to the 1128 Submissions by the U.S. and
18 Mexico, the Claimants even go so far as to say that
19 they were attempting to prevent the breach by seizing
20 the Courts and that is what crystallized the
21 expropriation.

22 If anything, that is a -- that statement by

1 the Claimants is an admission that they could have
2 brought the NAFTA Claim earlier but instead chose to
3 go the route of domestic courts and that was the
4 Claimants' choice.

5 Now, one last point on time bar that I
6 wanted to address was the Claimants' attempt to muddy
7 the waters by arguing that they could not know the
8 result of the Alberta Court Decision and the resulting
9 damages.

10 Previous Tribunals have found that there is
11 no need to know the exact extent or quantification of
12 damages for the time limitation to run. It is
13 sufficient for the Claimant to know it has suffered
14 loss. And on that point, I refer the Tribunal to the
15 Decisions of the Tribunals in the Mondev and Grand
16 River Case that Canada has cited in its written
17 submissions.

18 And here the Claimants could have known that
19 the disclosure of the Seismic Data would cause them
20 damage from the start. In effect, the Claimants'
21 argument that they could not know the exact extent of
22 damages until the Court's Decision is no different

1 than arguing that the limitation period should be
2 extended until the challenges in domestic courts are
3 resolved. And, as I said earlier, NAFTA does not
4 permit that.

5 So, in conclusion, Canada submits that the
6 entire claim is time-barred, and, as a result, the
7 whole case must be rejected on jurisdictional grounds.

8 Now, we have a few minutes left, I think,
9 before the break, and I wonder if this might be a good
10 place to pause before I move to the arguments on
11 expropriation and on the Merits.

12 PRESIDENT WALLGREN-LINDHOLM: Very good. We
13 will meet back then at 3:40. Thank you.

14 (Brief recess.)

15 PRESIDENT WALLGREN-LINDHOLM: Welcome back.

16 We will continue Respondent's Opening
17 Statement.

18 Please proceed.

19 MS. TABET: Thank you, Madam President.

20 So before the break, I concluded my
21 submissions on time bar. I will now move on to
22 Canada's submissions on expropriation. And before I

1 proceed to explaining the legal test, I want to come
2 back to one point which I mentioned in discussing time
3 bar, and it's a point that really highlights that the
4 expropriation before -- the expropriation claim before
5 this Tribunal is completely fabricated.

6 You will recall that I highlighted -- and as
7 did Mr. Luz, that many of the Claims before the
8 Canadian Courts were Claims where GSI alleged that the
9 Regulatory Regime expropriated their investment and
10 their Copyright. That point was relevant to time bar
11 because it showed that the essence of the Claim was
12 the Regulatory Regime, but it is also relevant to the
13 Merits because it cannot be both.

14 The Regulatory Regime cannot have
15 expropriated their Claim, their investment, and the
16 investment is also later expropriated by the Court
17 Decisions. That is nonsensical.

18 So you have some of the references to these
19 earlier Claims related to expropriations summarized in
20 the slide before you. And in Canada's submission,
21 this should be sufficient to dismiss the Claim as
22 groundless.

1 Now, if the Tribunal decides to consider the
2 expropriation Claim based on the Alberta Court
3 Decision themselves -- so if the Tribunal
4 thinks -- concludes it has jurisdiction in the
5 limited -- in that limited way, then the first
6 question that the Tribunal must ask itself is: When
7 can a decision of a court amount to an expropriation,
8 if at all?

9 And this is a point of contention between
10 the Parties. Canada has explained in its written
11 submissions that international law does not recognize
12 a judicial expropriation except in very limited
13 circumstances. First, there has to be an independent
14 action by the Courts beyond simply interpreting
15 domestic law and the rights and obligations of the
16 Parties under the domestic law.

17 And, secondly, there has to be a denial of
18 justice. The Claimants have not alleged denial of
19 justice or anything close to it in its treatment
20 before the Canadian courts. Therefore, if the
21 Tribunal agrees with Canada's submission on this
22 point, it must dismiss the entire Article 1110 Claim.

1 Canada's position rests on well-established
2 recognition in international law that courts are
3 unlike actions by the Government and that they
4 are -- they have a special nature and they cannot
5 amount to an expropriation absent denial of justice.

6 I refer the Tribunal to the commentary of
7 esteemed Professors Paparinskis, Christopher
8 Greenwood, and Jan Paulsson, among others. Canada has
9 referred to these Authorities and discussed them
10 extensively in its written submissions. You can find
11 those references to Canada's -- in the Canada's
12 Counter-Memorial at Paragraphs 247 and 249.

13 The Claimants ignore these leading
14 Authorities, which I'm sure the Tribunal is very well
15 familiar with.

16 The Claimants also ignore well-established
17 findings of investment Tribunals that have considered
18 the issue of whether expropriation could result from
19 judicial decisions. It's not the first time that the
20 issue has been put to NAFTA Tribunals. And the
21 leading case in this respect is the Loewen Case which
22 I believe Mr. Lanctôt-Fortier referred to earlier.

1 That case considered allegations of breach
2 of NAFTA Article 1105, so Minimum Standard of
3 Treatment, and Article 1110 resulting from the Loewen
4 Group's treatment by the Mississippi Courts. And in
5 that case, what was at issue was a requirement that
6 was imposed by the Courts to file -- to post a bond to
7 appeal the Decision. And that led to the bankruptcy
8 of the Loewen Group.

9 Now, in that case it was really the
10 treatment of the Courts that was at issue, and the
11 overwhelming majority -- so the Loewen Tribunal
12 concluded that there was -- there had to be a denial
13 of justice and that, if it could not establish denial
14 of justice, there could be no Article 1110
15 expropriation Claim.

16 Now, the overwhelming majority of investment
17 awards also have followed the reasoning of the Loewen
18 Tribunal and found that a claim alleging an
19 expropriation in violation of Article 1110, when a
20 Court Decision is at issue, that can only succeed if
21 there's denial of justice.

22 I refer the Tribunal to Canada's

1 Counter-Memorial at Paragraphs 251-256. We discuss
2 all of these Authorities, as well as in the Rejoinder
3 at Paragraph 105-109, and the only case of these cases
4 that actually found expropriation was in
5 Lion v. Mexico, and there the Tribunal also concluded
6 that there was denial of justice by the Mexican
7 Courts.

8 In addition to the leading academic
9 authority and these investment awards that I've just
10 referred you to, I want to emphasize that this is also
11 common position between the NAFTA Parties, that,
12 absent denial of justice, when the Courts are acting
13 lawfully as neutral and independent arbitrators of
14 legal rights, there cannot be an expropriation. That
15 is the Agreement of the three NAFTA Parties and,
16 again, the Tribunal should accord that considerable
17 weight.

18 This morning the Claimants have referred to
19 the Eli Lilly Award to support their position, and let
20 me briefly address this. Mr. Luz and myself were
21 Counsel for Canada in that case, and what was being
22 challenged was the Court invalidation of a patent

1 based on the promise utility doctrine, which was a
2 judge-made doctrine. So it's very much unlike what is
3 at issue here where there's an underlying Regulatory
4 Measure that was being -- and legislative scheme that
5 was being interpreted by the Courts.

6 In Eli Lilly, the Tribunal found that it did
7 not need to decide, that there can be -- whether there
8 can be expropriation by a court in the absence of
9 denial of justice because it found on the facts that
10 the Claimants' allegations regarding the dramatic
11 change of law were unfounded, and that there
12 was -- they also concluded that there was no
13 arbitrariness in the Court's actions.

14 But importantly, in Eli Lilly, the Tribunal
15 acknowledged that the Court Decisions should be
16 accorded considerable deference except in exceptional
17 circumstances where there was a clear evidence of
18 egregious or shocking conduct. And in Eli Lilly, the
19 Tribunal rejected the Claim that there was an
20 expropriation by the Courts.

21 So the single case that the Claimants refer
22 to where there was a finding of judicial expropriation

1 absent a finding of denial of justice, is the Sistim
2 versus Kyrgyz Republic Case. The Sistim Award
3 contains virtually no discussion of international law,
4 and that case which was about an expropriation of a
5 Claimant's hotel, which had been affected by the Court
6 is very laconic when it comes to discussion of the
7 applicable Standard.

8 I should also say that, in that case if you
9 read the judgment and the subsequent Set-Aside
10 Application, the Decision by the Ontario Court in the
11 Set-Aside Application, it is very evident that the
12 Award was based on the fact that the Kyrgyz Courts
13 were -- they were domestically procedurally deficient
14 court proceedings and nothing of the sort is being
15 alleged in this case.

16 Now I want to move to the next point which
17 is about the nature of the Alberta Court Decision.

18 I discussed this a bit earlier to show that
19 it could not be a direct cause of action, but in their
20 expropriation Claims, the Claimants have argued there
21 was expropriation because the Copyrights were
22 confiscated and that that whole premise, that whole

1 argument is premised on a mischaracterization of the
2 Decision as having created new law and a compulsory
3 License scheme where none existed in the Regulatory
4 Regime. Those are incorrect factual allegations.

5 So I want to briefly address them before
6 going to the expropriation test.

7 To recall in the Trial Court's Decision, the
8 judge, after having concluded that copyright could
9 subsist in Seismic Data considered the effect of the
10 Regulatory Regime on copyright on Seismic Data. And,
11 as I mentioned, that was an exercise of statutory
12 interpretation.

13 Let me just quickly take you through
14 the -- the next slide, please -- the decision where
15 the Court -- that is really where the Court goes
16 through that statutory interpretation, and in doing so
17 the Court applies -- the judge applies
18 well-established principles of statutory
19 interpretation, namely the modern principle.

20 Those are -- that is the same principle that
21 you will hear from Mr. Sookman, Prof. Bankes, and
22 Prof. Hutchison. That is the applicable principle in

1 Canada. That's what the Court did. It went on to
2 identify the applicable statutory interpretation
3 principle and to apply it.

4 Look at Paragraphs 133-137 of the Decision.
5 The judge identifies Sullivan -- Ruth Sullivan and
6 Rizzo Shoes, the two leading Authorities in Canada
7 that are also cited by all three Experts before you.
8 And in the following paragraph, she goes on to apply
9 this principle and address the different arguments
10 raised by the Parties. Now the Claimants' Experts,
11 you will hear from them criticizing how the Court
12 approached this interpretation.

13 Prof. Bankes accepts that priority rules
14 should have been applied but does not agree with the
15 interpretation reached by the courts. Whereas
16 Prof. Hutchinson criticizes the application of
17 priority rules by the courts, and by that I'm
18 referring to the lex specialis principle, but he does
19 not take issue with the -- Judge Eidsvik's finding
20 that the Regulatory Regime is a complete answer to
21 GSI's copyright infringement Claim.

22 You have evidence on this before you, but

1 really none of this is relevant to the task of this
2 Tribunal. There is really no need to delve into an
3 academic debate about the proper application of the
4 modern principle of statutory interpretation in
5 Canada. As I have said in the past, this NAFTA
6 Tribunal is not a Court of Appeal. The Claimants
7 recognize that. Nevertheless, that seems to be what
8 they are asking you to do.

9 Even if the Courts were not correct in their
10 interpretation of Canadian law, it would not be a
11 change of law because the Claimants themselves admit
12 that the issues had not -- never previously been
13 decided. Mr. Sookman in his Reports explains this,
14 and in his First Report, you'll see that he
15 concludes -- he goes through and provides a framework
16 to understand the Court Decisions and the analysis
17 that was performed by the judge and says that the
18 Trial Court did not reverse or modify any previous
19 jurisprudence or established novel principles of law.

20 And he -- in his Second Report, he also says
21 that: "The Judgment never" -- sorry, never -- if we
22 can go back one more slide. Thank you. "Never

1 confers any rights on the Boards nor takes away any
2 rights from GSI. Rather, it explained that, to the
3 extent either of these occurred, they are consequences
4 of the Regulatory Regime, as it has always existed."

5 Now you have seen an extract from -- on the
6 slides that were presented by Claimants' Counsel this
7 morning, a reference to Judge Eidsvik's comment that
8 the Regulatory Regime created, in effect, compulsory
9 license. There was also a slide provided that
10 referred to some Statements that had been made by
11 Senator Hays regarding the confiscatory nature of the
12 Regulatory Regime.

13 Again, I encourage the Tribunal to read all
14 of the Judgment and not only the citations that were
15 put in the extracts that were put in front of you.
16 And there is a lengthy analysis by Judge Eidsvik on
17 the Regulatory Regime. She does not conclude that
18 there was a confiscation and/or that the Regulatory
19 Regime created a compulsory license.

20 The comment that is made by Judge Eidsvik
21 is, after having reached her conclusion that the
22 Regulatory Regime is a complete code and a complete

1 answer to copyright infringement, she considers other
2 arguments that were put to her and specifically the
3 Authorities that had been put to her on the implied
4 licensing arguments resulting from participation in
5 the Regulatory Regime.

6 And in that context, it's under the heading
7 "Compulsory License," but that is what she's
8 considering. And it is not -- you know, we can sit
9 here and reinterpret what Judge Eidsvik's findings
10 were, but that is not an operative finding in the
11 Decision. You have to read the entire Decision. That
12 was not the answer. If you look at the Order at the
13 end, that was not what she ordered, and, therefore,
14 this finding could not have been appealed as
15 Claimants' Counsel suggested this morning.

16 So, now that I've addressed these incorrect
17 assumptions that underpin the expropriation Claim, I
18 will now move on to the test that must be applied to
19 for a finding of expropriation, and there is a great
20 deal of agreement between the Parties basically under
21 NAFTA, which reflects customary international law, an
22 indirect expropriation can only occur if the actions

1 of the Parties have the effect equivalent to a direct
2 expropriation but without the transfer of title or
3 seizure of the investment.

4 Both Parties agreed that, for the Courts to
5 have expropriated GSI showing loss of value of their
6 investment is not sufficient. And Canada cited to
7 Generation Ukraine Award at RLA-84, where the Tribunal
8 stated: "The fact that an investment has become
9 worthless, obviously, does not mean that there was an
10 act of expropriation." And the same is true here and
11 I think has to be fully considered given the facts of
12 this case. I'll come back to that in a minute.

13 Now the Challenged Measure -- if the
14 Tribunal accepts to consider the Alberta Court
15 Decisions the Challenged Measure and the identified
16 property rights have to be considered in their
17 analysis of expropriation. Again, that means that the
18 Claimants -- the Tribunal must consider whether the
19 Court Decision substantially deprived the Claimants of
20 their investment in GSI, so the GSI as a business.

21 In other words, whether the Courts destroyed
22 all or virtually all of the economic value of GSI or

1 interfered with it to such a similar extent to support
2 a conclusion that the property had been taken from the
3 owner. This is a high bar, and the evidence before
4 this Tribunal does not support such a finding. At
5 most, the Alberta Court Decisions prevented GSI from
6 obtaining damages as a result of copyright
7 infringement Claims.

8 That potential loss is not tantamount to an
9 expropriation of their business. Importantly, the
10 fact that the value of GSI immediately before the
11 expropriation was nil, according to their own Expert,
12 Mr. Sharp, suggests that it was not the Court Decision
13 that caused the substantial deprivation of the
14 business.

15 In Canada's written submissions, we have
16 referred the Tribunal to Annex 14(b) of the
17 Canada-U.S. MCA -- or the U.S.-Canada MCA, as the
18 Americans like to refer to it. And we have referred
19 the Tribunal to this because it encapsulates the
20 international law test in Article 1110 of NAFTA.

21 And in fact, it reflects previously
22 consistent interpretations of the NAFTA Party on the

1 meaning of Article 1110. So it relates a summary of
2 previously-agreed position of the Parties on the test
3 under Article 1110.

4 The Claimants had disagreed that this is the
5 appropriate test, and I don't want to spend too much
6 time on this because the case law is clear on
7 expropriation. I want to make -- focus only on two
8 points that establish that the Court Decisions cannot
9 have caused the expropriation of GSI's business.

10 The first is that the Court Decisions did
11 not cause a substantial deprivation and the second is
12 that there was no reasonable expectation at the time
13 of the investment that copyright infringement claims
14 for Seismic Data disclosure would be allowed.

15 We've made a third point in our written
16 submissions. I won't elaborate on it today, and I
17 simply refer the Tribunal to the Counter-Memorial on
18 this point.

19 With respect to the first point, the first
20 element of the indirect expropriation test, with
21 respect to economic impact of the Measure, there can
22 be no substantial deprivation because the Court's

1 Decision only relate to the ability of GSI to bring
2 copyright infringement claim with respect to Seismic
3 Data that is disclosed after the confidentiality
4 period. So notwithstanding the Claimants' efforts to
5 equate this to a substantial deprivation of the
6 business, it cannot be the case. And let me explain
7 that.

8 The Claimants actually this morning have not
9 spent any time substantiating their allegation of
10 substantial deprivation because of the Court
11 Decisions. And if you look at the value of GSI as a
12 business, their business was the acquisition of
13 Seismic Data and the processing of that data, as we've
14 heard them say. They did not derive their -- they
15 were seeking to obtain Seismic Data and process it so
16 that they can license it to oil companies. We heard
17 that this morning. And they wanted to derive revenue
18 from this licensing. You've heard about vessels and
19 equipment needed to run their business. But GSI sold
20 those vessels and equipment in 2008, and really
21 stopped investing to acquire any new Seismic Data as
22 of that time. Nothing in the Court Decision affected

1 this. This was before the Court Decisions. There was
2 no taking of GSI's Seismic library. GSI retained the
3 Seismic Data which was at the heart of its business,
4 and GSI could have continued operating, acquiring new
5 data and licensing Seismic Data. None of that was
6 affected by the Court Decisions.

7 You will hear later this week from Doug
8 Uffen and Rob Hobbs, which -- they are two Industry
9 Experts that were presented by Canada, and they
10 discuss in their Expert Reports how does one determine
11 the value of Seismic Data.

12 And they explain that the value of Seismic
13 Data depreciates over time and that most of the value
14 is within the first five years of acquisition during
15 the period of confidentiality. You'll recall that the
16 period of confidentiality goes up to 10 or 15 years.
17 And during that period, that's when companies like GSI
18 make the majority of their sales and
19 licensing -- license the data.

20 Now, a valuation done by GSI by Mr. Boyd,
21 also on the record, shows that -- exactly the same
22 thing as what Mr. Uffen and Mr. Hobbs have said, that

1 there is depreciation of the Seismic Data, very
2 quickly, and the value is at its highest within the
3 first few years after the data acquisition. You have
4 the references on the slide, I won't bring you to the
5 documents because Mr. Boyd's is a confidential
6 document, I believe.

7 Because the Boards only disclosed some of
8 the submitted Seismic Data after the confidentiality
9 period of 10-15 years, this means that GSI's ability
10 to relicense its Seismic Data during the
11 confidentiality period was unaffected by the Alberta
12 Court Decisions. It's true that there may be still
13 some value that remains in Seismic Data after the end
14 of the confidentiality period, and that would depend
15 on various factors including whether there are more
16 recent surveys in the area, but, really, that does not
17 change the fact that most of the value of the data is
18 within the first few years.

19 In addition, Mr. Uffen explains, in his
20 Report, that's RER-3, at Paragraph 40, that whatever
21 could be obtained from the Board is not of the same
22 quality and is not the same thing as what oil

1 companies would license from GSI. That's also an
2 important point that has not been addressed by the
3 Claimant.

4 Now, I will not try to explain these
5 technical differences but, from a practical
6 perspective, what this means is that material accessed
7 from the Boards was useful, provided some information,
8 but it was of inferior quality, and that oil companies
9 may still have been interested and were interested in
10 licensing GSI data, at least in the early years before
11 GSI burned its bridges with its customers.

12 Importantly, none of the Field Data that
13 Ms. Lemmens referred to was ever disclosed by the
14 Boards. And, again, this is what -- GSI could
15 continue licensing this to oil companies. The fact
16 that GSI itself, at the beginning of its operation,
17 bought data from old GSI in 1994, that data had
18 already been disclosed. It was in the public domain.
19 The Boards were publishing that data, and it
20 illustrates this point. GSI bought the Field Data and
21 then reprocessed that data, and then it licensed that
22 reprocessed data.

1 So the Alberta Court Decisions only affected
2 access and copying after the confidentiality period,
3 when the value of the Seismic Data was a small portion
4 of the overall value.

5 On the issue of Secondary Submission, I just
6 briefly want to address this because you've heard
7 Ms. Lemmens speak to this this morning. To be clear,
8 the Alberta Court Decisions did not address the issue.
9 And you've heard Ms. Lemmens refer to the fact that
10 oil companies in some instances were filing data,
11 reprocessed data that they obtained from GSI with the
12 Boards. That may be the case, but that cannot be
13 attributable to Canada. And if it was a violation of
14 their License Agreement with GSI, it would be up to
15 GSI to pursue this with their contractual breaches
16 against them.

17 Now, the Claimants have argued that, after
18 the Alberta Court Decisions, GSI was no longer able to
19 license its Seismic Data, but the evidence shows that
20 it was not because of the Alberta Decisions. It is
21 because GSI stopped investing in acquiring new Seismic
22 Data as of 2008, about 10 years before the Alberta

1 Decisions.

2 And, also, as Mr. Luz alluded to, companies
3 that had been sued by GSI no longer wanted to do
4 business with them. Mr. Luz will come back to these
5 points later in the damages section and explain that
6 GSI's business was not a going concern by 2008, a long
7 time before the Alberta Court Decisions.

8 Now, the second point I want to address with
9 respect to expropriation is the legitimate
10 expectations, the investment-backed expectations of
11 GSI. At the time of the investment, there was no
12 reasonable expectation that GSI had copyright in
13 Seismic Data and that it could prevent disclosure in
14 copying of the Seismic Data before the confidentiality
15 period in the Regulatory Regime.

16 Again, GSI made their investment at a time
17 when the question of copyright in Seismic Data had not
18 been decided. I think this much seems to be agreed by
19 the Parties. As we saw in their own arguments
20 presented by their lawyers to the Board in 1998, they
21 were saying that copyright may subsist in Seismic Data
22 and they may be able to prove that GSI -- that the

1 Boards infringed GSI's copyright. It was much less
2 definitive. And, in fact, in the leave to appeal to
3 the Supreme Court, GSI admits that no courts had
4 previously recognized copyright in Seismic Data. And
5 then, at Paragraph 30 of that leave to appeal, GSI
6 says: "From the Decisions below, it is now the law in
7 Canada that copyright can subsist in Seismic Data."
8 It's only, therefore, as of the Alberta Court
9 Decision, that it is the law in Canada that copyright
10 can subsist in Seismic Data. That is what GSI itself
11 is admitting. At the very least, it was a legally
12 uncertain proposition, and they, nevertheless, decided
13 to make their investment.

14 When it comes to the effect of the Alberta
15 Decision, GSI cannot have it both ways. On the one
16 hand, it seems to treat the Decision with respect to
17 the copyright as being an affirmation of something
18 that has always been the law and that GSI always had a
19 right to copyright of its data, and, therefore -- it
20 can, therefore, object to copying before that
21 Decision. But, when it comes to the Decision on the
22 effect of the Regulatory Regime, GSI now takes the

1 position that that Decision does not affirm what has
2 always been the law, but institutes a new regime, it's
3 novel and creates new law. That cannot be.

4 Again, it's important for the Tribunal to
5 look at what was the situation at the time of the
6 Claimants' investment. Were there any rights that had
7 been clearly established, and Canada says it was not
8 the case. All that was clear is that GSI would have
9 to get authorization from the Government, would have
10 to submit Seismic Data to the regulators, and that the
11 Seismic Data could be disclosed no earlier than
12 five years after completion of the data acquisition
13 project.

14 GSI had no right to anything more. The
15 license to acquire Seismic Data was condition on
16 compliance with this Regulatory Regime. That was what
17 a reasonable investor would have considered in
18 deciding to invest, whether it could recoup its money
19 and be profitable within those five years of the
20 confidentiality period.

21 The fact that GSI hoped to extend the
22 confidentiality period or hoped to prevent disclosure

1 through litigation was not a reasonable
2 investment-backed expectation, to use the word of
3 CUSMA. There was no established right, and,
4 therefore, it cannot be the basis of an expropriation
5 claim.

6 Now, before I conclude on expropriation, I
7 want to address the -- take two minutes to address the
8 relevance of Chapter Seventeen, because the Claimants
9 have spent a lot of time on consistency with
10 Chapter Seventeen in their Opening Statement. Simply
11 put, Chapter Seventeen is not within the jurisdiction
12 of the Tribunal. The Tribunal only has jurisdiction
13 over breaches of NAFTA Chapter Eleven. It
14 cannot -- only NAFTA Parties can litigate breaches of
15 Chapter Seventeen. And the Claimants have referred to
16 a statement in the Azinian Tribunal's Decision, but,
17 frankly, that is not -- that statement does not
18 support -- cannot serve as a basis to expand the
19 Tribunal's jurisdiction and does not support the
20 proposition that breaches of other Treaty provisions
21 are within this Tribunal's jurisdiction.

22 Incidentally, because there was a reference

1 to consistency with Chapter Seventeen, something that
2 the U.S. could have litigated had it wished to do so.
3 But the Courts did not consider, in the U.S. -- the
4 issue of the Regulatory Regime actually ended up
5 before the U.S. Courts and -- as a result of claims by
6 GSI. And in the Decision in the TGS-NOPEC Case, the
7 U.S. Courts did not find that copyright was infringed
8 at all. In fact, if you look at that Decision, the
9 Courts found that copying after the confidentiality
10 period was a condition on participation in the
11 Regulatory Regime and that, as such, it amounted to an
12 implied license. So it did not reach the conclusion
13 that there was some kind of confiscation of the
14 copyright.

15 Now, let me take you to the text of
16 Article 1110(7), which was alluded to earlier this
17 morning. And as you can see, this provision does
18 indeed refer to Chapter Seventeen, but it is drafted
19 in a way that makes clear that Article 1110(7) is a
20 shield not a sword. In other words, Canada can invoke
21 consistency with Chapter Seventeen to defend an
22 expropriation claim, but it does not have to do so.

1 And the submissions from the U.S. and Mexico
2 in their 1128 Submissions confirm Canada's
3 interpretation on the relationship between the two.
4 Simply put, Chapter Seventeen is irrelevant if the
5 Claimants fail to establish expropriation. That's
6 where the Tribunal's analysis must start.

7 Even if the Tribunal were to consider
8 Chapter Seventeen on consistency, that would not be
9 determinative to the question of expropriation, so, in
10 Canada's submission, the Tribunal need not go there.
11 In fact, because the Regulatory Regime itself is not
12 being challenged, Canada has not presented arguments
13 regarding the consistency of the Regulatory Regime
14 with Chapter Seventeen. And as I have just explained,
15 the Court's Decision did not amount to an
16 expropriation of GSI, therefore, there's no need to
17 consider Chapter Seventeen.

18 A very brief final point. It was not
19 addressed this morning, but, for the record, Canada
20 reiterates that the claim regarding expropriation of
21 trademark is inadmissible and without merit.

22 Now, this concludes my presentation on

1 expropriation, and I will now turn to the allegation
2 that the Alberta Court Decisions constitute a
3 prohibited performance requirement contrary to
4 Article 1106 of NAFTA, unless the Tribunal has any
5 questions at this time on expropriation.

6 PRESIDENT WALLGREN-LINDHOLM: No, the
7 Tribunal has no questions at this point.

8 MS. TABET: We look forward to the
9 Tribunal's questions.

10 So on Article 1106, let me turn to the text
11 of the provision and Vienna Convention interpretation
12 of this provision. It really highlights the contrived
13 nature of the allegation that the Court Decisions were
14 a prohibited performance requirement.

15 Let me start with the meaning of the phrase
16 "to enforce a requirement," and, relying on a
17 dictionary definition, it's clear that these terms
18 have to be understood as an action to compel
19 performance or compliance with a demand. Here, the
20 Courts did not enforce anything. They interpreted
21 domestic law as a result of actions that were
22 initiated by GSI itself. I won't repeat my earlier

1 submissions on the nature of the Alberta Decisions,
2 but suffice to say that the Common Issues Trial was
3 the result of actions brought by GSI to the Courts
4 against the Boards and oil companies, not an
5 enforcement by the Boards against GSI because they did
6 not submit their Seismic Data.

7 Canada was not the Plaintiff in the Alberta
8 Decisions and it was not seeking enforcement of the
9 disclosure of Seismic Data.

10 Secondly, given that the Claimants are not
11 challenging the Regulatory Regime itself, they cannot
12 challenge the Court's application of the Regulatory
13 Regime. To the extent there was any requirement, that
14 requirement is found in the Regulatory Regime, which
15 the Claimants cannot and do not challenge as a
16 violation of NAFTA. So if the Regulatory Regime is
17 not a prohibited performance requirement, then the
18 alleged enforcement of the requirement cannot be a
19 breach.

20 Third, looking specifically at
21 Paragraph (f), which refers to transfer of proprietary
22 knowledge, it's also clear that the Court Decisions

1 did not result in a transfer of Confidential
2 Information. The Courts did not order that GSI's
3 confidential Seismic Data be transferred to anyone.
4 Once the confidentiality period was over, the
5 information was no longer confidential. It
6 was -- therefore, it was no longer proprietary. And
7 the Act provided that. Again, the Claimants are not
8 challenging the Act. So disclosing information that
9 is no longer confidential is not the same thing as a
10 transfer of proprietary information.

11 In the alternative, Canada submits that, not
12 only does 1106(1)(f) not support the conclusion, but
13 that the applicable provision is not 1106(1)(f), it's
14 1106(3). So let me take you to the next slides which
15 shows that there are two provisions in Article 1106.
16 One deals with enforcement of requirements and the
17 other with conditions for any condition with respect
18 to an advantage.

19 And if we go to the next slide, we've
20 provided a summary that shows that not all of the same
21 elements are found in 1106(1) and 1106(3) and,
22 particularly, the transfer of technology or

1 proprietary knowledge is prohibited if it's a
2 requirement, but it's not prohibited if it's a
3 condition on receipt of an advantage. And Canada's
4 submission is that the Regulatory Regime was -- if
5 anything, had to be considered under 1106(3) because
6 GSI had no right to access Canada's offshore to
7 conduct its seismic operation.

8 So obtaining access to Canada's Crown land
9 was a benefit that GSI was seeking in order to acquire
10 Seismic Data for its business.

11 In applying for the authorization to conduct
12 its seismic operation, GSI had to agree to the terms
13 of conditions as set out in the Regulatory Regime.
14 They were authorized to conduct these operations in
15 return for submissions of the data and for a
16 confidentiality period during which none of the
17 submitted material would be disclosed.

18 This is the quid pro quo that Mr. Luz
19 referred to. There was a substantial benefit to GSI
20 and, in return, GSI agreed to comply with the
21 Regulatory Regime. Well, it is true that GSI says it
22 never agreed to it, but it had to agree to it.

1 The Claimants have argued in their written
2 submissions that this was not a benefit or advantage,
3 and that benefit or advantage has to be understood as
4 limited to the term "subsidy," but that is not the
5 term that was used by the NAFTA Parties. If they
6 wanted to use the term "subsidy," they would have done
7 so.

8 So, in sum, the Alberta Decisions cannot
9 constitute a breach of Article 1106, and the Tribunal
10 must reject the Claims on the Merits.

11 This concludes my presentation on the
12 Merits, so I will now turn to Mr. Luz, who will
13 address damages.

14 MR. LUZ: Before we proceed,
15 can -- Geraldine, can you just confirm how much time
16 we have left?

17 SECRETARY FISCHER: You have 35 minutes
18 left.

19 MR. LUZ: Perfect. Thank you.

20 Madam Chair, before I return to the podium
21 to talk about damages, I'm going to turn the
22 microphone over to my colleague Ms. Elena Lapina, who

1 is going to just briefly address the Article 1116
2 individual claims. Go ahead.

3 MS. LAPINA: Does it work? Yes, thank you.

4 PRESIDENT WALLGREN-LINDHOLM: It works. And
5 we can see you.

6 MS. LAPINA: Thank you. Good afternoon,
7 Madam President, Members of the Tribunal. I will
8 briefly address today the standing of the Claimants to
9 bring what they refer to as their alternative Damages
10 Claim. I will explain why the Damages Claim brought
11 by the three Einarssons on their own behalf under
12 Article 1116 in their capacity as Shareholders,
13 employees, and lenders of GSI, constitutes reflective
14 loss and is impermissible under NAFTA. I will also
15 say a few words at the very end of my presentation
16 regarding Mr. Paul Einarsson's standing to bring his
17 individual 1116 claim in his capacity as a dual U.S.
18 and Canadian citizen.

19 I will be very brief on that second issue,
20 as it matters only if the Tribunal disagrees with
21 Canada's argument on reflective loss. Otherwise, the
22 issue is moot.

1 So NAFTA Chapter Eleven includes two
2 provisions which allow an investor of a party to bring
3 a claim against the other party for two discrete and
4 nonoverlapping types of injury. Article 1116 gives an
5 investor standing to bring a claim when the investor
6 has incurred loss or damage by reason or arising out
7 of a breach of NAFTA by a State. Article 1116 is to
8 be contrasted with Article 1117, which allows an
9 investor to bring a claim on behalf of an enterprise
10 for loss or damage incurred by that enterprise by
11 reason of/or arising out of that breach.

12 As Canada has explained in its
13 Counter-Memorial, the ordinary meaning of Article 1116
14 interpreted in the context of Article 1117 is clear.
15 Article 1116 grants an investor standing to recover
16 losses it has directly suffered, not losses suffered
17 by its enterprise.

18 The NAFTA Parties have consistently
19 interpreted that a claim for indirect injury to a
20 shareholding investor arising from a direct injury to
21 an enterprise or a reflective loss is not recoverable
22 under Article 1116. The NAFTA Parties' agreement in

1 this regard was recently reaffirmed by the
2 Non-Disputing Party submissions by Mexico and the
3 United States.

4 The distinction between Article 1116 and
5 Article 1117 is not a mere formality. As the NAFTA
6 Parties have made it clear, the distinction between
7 those provisions was drafted purposefully in light of
8 existing principles of customary international law
9 bearing claims by Shareholders for indirect losses.

10 Nothing in the text of the Article 1116 or
11 Chapter Eleven suggests that the Parties intended to
12 derogate from customary international law. NAFTA
13 Tribunals have also recognized this important
14 distinction. Recently, in Bilcon, the Tribunal
15 accepted the consistent practice of the NAFTA Parties
16 in this regard and confirmed that Article 1116 and
17 Article 1117 had to be interpreted to prevent claims
18 for reflective loss from being brought under
19 Article 1116.

20 Next slide, please.

21 The distinction between Article 1116 and
22 Article 1117 is reinforced by several other provisions

1 in the Chapter Eleven, key among which is Article 1135
2 which specifies that any award of damages for a claim
3 under Article 1117 is to be paid to the enterprise and
4 not to the investor. The purpose of this provision is
5 to ensure that, when an investor recovers damages on
6 behalf of the enterprise, the interest of others in
7 that enterprise such as creditors or minority
8 shareholders are respected. When determining when an
9 injury is direct or indirect, what matters is not how
10 the Claimant presents its claim but whether the right
11 that has been infringed belongs to the Shareholder or
12 to the corporation, and you can see the quote from
13 Barcelona Traction here.

14 The examples -- please, next slide.

15 The examples of direct injury to -- that
16 shareholder/investor could recover under Article 1116
17 include damages as a result of the loss of voting
18 rights, the loss of the right to receive dividends,
19 the loss of an ability to transfer share ownership, or
20 the loss of a right to acquire further shares.

21 This list is not exhaustive, yet what those
22 examples have in common is that they relate to damages

1 associated with the rights and entitlements of the
2 Shareholder. By contrast, under Article 1117, a claim
3 could be brought for damages resulting from the injury
4 to the enterprise itself including loss in the value
5 of an enterprise's assets, loss in the value of
6 corporation's shares due to the Measures affecting its
7 profitability, or lost profits if they can be proven
8 with sufficient certainty.

9 To better understand the difference between
10 the two types of Claims, let's take the example of
11 dividends: If a corporation is damaged by wrongful
12 Measures, it prevents it from earning revenue. And,
13 as a result, prevents it from having funds to
14 distribute dividends to its Shareholders. This is a
15 claim that has to be brought on behalf of the
16 corporation under Article 1117, not Article 1116.

17 If the Measure does not impact the ability
18 of the corporation to issue dividends but, rather,
19 prevents an investor from being able to receive those
20 dividends, this is a claim that can be brought by an
21 investor on its own behalf under Article 1116.

22 The same principle would apply to the

1 repayment of loans and payments of remuneration. If
2 the Measure affects the ability of the enterprise to
3 repay loans or repay the salaries, then a claim
4 properly falls under 1117.

5 But if the Measure interferes with the right
6 or the ability of the lenders or employees to receive
7 those amounts under the Contracts, then a claim
8 potentially could be brought under 1116 assuming they
9 can meet other jurisdictional requirements.

10 In their submissions, the Claimants affirm
11 that they are not claiming for reflective losses. Yet
12 if we look at Paragraph 251 of the Memorial, we see
13 that the Damages they are claiming under Article 1116
14 are a text book example of reflective loss.

15 First, the Claim loss is suffered due to the
16 total diminution in the value of the shares; second, a
17 loss is suffered as due to being unable to collect on
18 the loans; third, losses due to the respective
19 remuneration and reputations.

20 The Claimants do mention in Paragraph 251,
21 the loss of the rights conferred by those shares and
22 the right to the dividends. Yet, they do not

1 substantiate that claim, nor do they ever explain how
2 the Alberta Court Decisions could have interfered with
3 the right of Einarssons to receive dividends from GSI.

4 The Claimants are not really seeking Damages
5 resulting from the loss of the entitlement to receive
6 dividends from GSI; rather, they seek compensation for
7 the fact that GSI has no funds to distribute. And
8 that is reflective loss.

9 The Claimants -- next slide, please.

10 The Claimants themselves appear to
11 implicitly seek knowledge this in Paragraph 256 of
12 their Memorial when they say that the alleged breach
13 destroyed GSI's business and, in turn, impacted the
14 value of Einarsson's investment in GSI.

15 To conclude on this issue, the Tribunal
16 should rule that it lacks jurisdiction over the 1116
17 Claims brought by the three Einarssons and should
18 refuse awarding damages on this basis.

19 Please, next slide. Thank you.

20 Regarding the second issue, the dominant and
21 effective nationality of Mr. Paul Einarsson. As I
22 already mentioned, it only matters if the Tribunal

1 were to disagree with Canada's argument on reflective
2 loss, otherwise, the issue is moot.

3 For this reason, I'll be very short. Canada
4 has provided substantial evidence in its written
5 submissions in Paragraph 474 and 487 of the
6 Counter-Memorial and Paragraph 249, 250 of the
7 Rejoinder. This evidence demonstrates that Mr. Paul
8 Einarsson's dominant and effective nationality at the
9 time of alleged loss was Canadian. And Canada
10 explains that, as a result, his Damages Claim is
11 inadmissible under NAFTA under Article 1116.

12 Moreover, the Parties also to a large extent
13 agree as to the applicable legal principles and many
14 factual elements relevant to the determination of his
15 dominant and effective nationality are uncontested.
16 And for this reason, I'll -- I won't go into more
17 details. I would simply refer the Tribunal to
18 Canada's written submission.

19 Unless you have any questions, I will leave
20 the floor to my colleague Mr. Luz.

21 PRESIDENT WALLGREN-LINDHOLM: Thank you.

22 MR. LUZ: Thank you, Madam Chair, Members of

1 the Tribunal. I'll do my best to be succinct. It's
2 been a long day and we don't have that much time, but
3 I do think that there will be some issues that I want
4 to set the stage for.

5 But we intend to show through
6 cross-examination, as well as through the presentation
7 next week by Darrell Chodorow and Alexis Maniatis of
8 the Brattle Group, why the Claimants' approach to
9 Damages is so utterly flawed.

10 Simply put, the Claimants' analyses do not
11 measure Damages caused by the alleged breach, the
12 Alberta Court Decisions. To make matters worse, the
13 valuation presented by the Claimants is riddled with
14 errors that the Claimants and their Experts still fail
15 to identify in which Mr. Sharp confirmed cannot be
16 verified based on the lack of documentary evidence
17 provided by GSI.

18 And, in fact, while the Claimants have tried
19 with a last-minute effort to fix its flawed Damages
20 Assessment on Friday afternoon, Canada will
21 demonstrate that all that was really accomplished by
22 the Claimants was to further destroy the credibility

1 of its entire approach to Damages in this case.

2 Now, Tribunal cannot award the Claimants any
3 Damages for two overarching reasons: The first is
4 that the Damages they claim has no causal link to the
5 Alberta Court Decisions, which is the one and only
6 measure within the Tribunal's jurisdiction and; hence,
7 the only measure upon which Damages may be based.

8 The second reason why an award of zero
9 Damages, if there was a NAFTA breach, which of course
10 Canada respectfully submits there is not, but if there
11 was, zero damages is to be awarded because the model
12 that the Claimants present is disconnected, both from
13 the liability argument and from reality. The
14 Claimants' Damages case is wildly speculative and
15 unreasonable under any scenario.

16 So let me address causation first. Before I
17 do, I'm going to remind the Tribunal, again, something
18 that my colleague Ms. Tabet noted: That the Claimants
19 have characterized their Damages as a total loss of
20 GSI, the Company. They have not sought to quantify a
21 loss in value to any particular Seismic Data by
22 assessing how much the data would have been worth if

1 copying had been prohibited for the entire term that
2 is allowed under the Copyright Act, as opposed to how
3 much the 10- or 15-year confidentiality period
4 afforded by the Regulatory Regime during which time no
5 copying was allowed.

6 So there is no valuation of the delta
7 between the value of what they had and what they would
8 have had if the Alberta Court Decisions had gone their
9 way. That's not before this Tribunal.

10 Nor have the Claimants particularized what
11 they contend what GSI would have been able to obtain
12 through continued copyright infringement litigation.
13 So the first fundamental problem that the Claimants
14 approach to Damages has is that it rests on a flawed
15 But-For assumption that, if GSI had prevailed in the
16 Common Issues Trial, it would have won immense Damages
17 Awards against all of the Parties copying the Seismic
18 Works. That's how they classify it.

19 But that's not what the Claimants' Expert is
20 actually quantifying. In fact, Mr. Sharp concedes
21 that attempting to quantify the litigation value of
22 any of such Damages Awards would have been highly

1 speculative. And the assertion that GSI would have
2 won hundreds of millions of dollars in Damages is also
3 an untenable leap of logic, given the nature of the
4 Alberta Court Decisions.

5 Because if the Court had ruled in GSI's
6 favor, on the question of whether the Regulatory
7 Regime allowed for copying or not, that wouldn't have
8 ended the litigations. Instead, the Court would then
9 have had to go on to deal with all of the other
10 defenses that the Boards and the Government of Canada
11 and all the other Parties raised that could have ended
12 with the same result: No violation of the Copyright
13 Act; hence, no damages.

14 Now, we can see on this next slide that
15 Canada and the Boards raised multiple defenses that
16 were never dealt with by the Court, but they would
17 have had to have been assessed if the Common Issues
18 Trial had gone GSI's way on the second question
19 regarding the effect of the Regulatory Regime.

20 For example, you can see here -- this is one
21 of Canada's Statements of Defense where there are
22 multiple defenses that exist under the Copyright Act

1 for libraries, archives, museums, the Frontier
2 Information Office and so on -- well we will see it in
3 the next slide coming up that the National Energy
4 Board considers the Frontier Information Office where
5 you get this to be a - falling as a library within the
6 meaning of the Copyright Act.

7 There is limitations defense. But the one
8 that is highlighted in particular is that there was a
9 fair dealing defense under the Copyright Act; and,
10 therefore, there would be no violation of copyright.
11 That's important.

12 So if we look at the National Energy Board's
13 Statement of Defense, it also raised Limitations
14 Period, the library defense, and fair dealing, amongst
15 others. If we look at the next slide, the
16 Newfoundland Board also raised multiple defenses
17 including fair dealing under the Copyright Act.

18 Now, why is that important? It is because
19 we know that fair dealing under the Copyright Act, in
20 particular, might have been accepted as a defense to
21 GSI's copyright infringement claims. And we know that
22 from a judgment of the same court by the same judge

1 under Calwest.

2 In that Calwest Decision, you can see this,
3 that Judge Eidsvik said that, if she was wrong on the
4 Regulatory Regime Decision -- which at the time was
5 still an open question because it was being
6 appealed -- but if she was wrong, she said that the
7 defense of fair dealing under Section 29 of the
8 Copyright Act could have succeeded.

9 The Claimants completely ignore this in
10 their But-For causation. They skipped that step. So
11 in essence, the only damages that GSI actually
12 suffered from the Alberta Court Decisions was a lost
13 opportunity to keep litigating with no guarantee that
14 they would have been able to defeat a defense like
15 fair dealing or the others, and only a potential for
16 monetary damages if the defenses were unsuccessful.

17 So GSI can't credibly claim a causal link
18 between the alleged breach, the Alberta Court
19 Decisions, and the hundreds of millions of dollars
20 that it claims in this NAFTA Tribunal.

21 Instead, they have reimagined the world for
22 a decade before the Alberta Court Decisions and

1 fabricate sort of a fantasy version of GSI that they
2 say would have been a going concern at the time of the
3 alleged NAFTA breach in 2017. But that's the second
4 flaw. Because, even as the Claimants' own Expert
5 concedes, GSI was not a going concern immediately
6 before the Alberta Court Decisions and, in fact, for
7 many years prior to that.

8 The real reasons why GSI was not a going
9 concern at the time was because of its inability to
10 invest after the 2008 Global Financial Crisis, the
11 divestiture of its ship assets in 2011, and the
12 alienation of its customers by mass litigation
13 starting in 2007. None of those facts are disputed,
14 but the Claimants are bypassing the inconvenient truth
15 where they imagine GSI to have been immensely more
16 successful than it had ever been previously. And that
17 is just simply not an appropriate way to measure
18 Damages.

19 And in particular, what is impermissible and
20 unreasonable in the Claimants' Damages Claim is that a
21 huge portion of its Claim has no causal link
22 whatsoever to the Alberta Court Decisions because they

1 involve Damages that arise out of entirely separate
2 contractual Damage Claims.

3 In fact, the Claimants go out of their way
4 to argue that the Claims that they have continued on
5 are not related to the Alberta Court Decisions. So
6 let's go to NAFTA Article 1117(1)(b) because this is
7 where the Causation Rule is enshrined. So the Damages
8 have to be -- that the enterprise has incurred loss or
9 damage "by reason of or arising out of that breach,"
10 i.e., in this case the Alberta Court Decisions.

11 So in other words, the loss or Damage
12 claimed by GSI must be caused by the Alberta Court
13 Decision Judgment, specifically. But by their own
14 admission, so many of the claims - that the Damages
15 that are baked into the Damages analysis are arising
16 from allegedly unpaid invoices for exploration group
17 fees and transfer fees that have nothing to do with
18 the Alberta Court Decisions.

19 I'll just remind the Tribunal, if we look on
20 the next stage, the Alberta Court Decisions, the
21 Common Issues Trial, explicitly excluded contractual
22 claims. That is something that is uncontested. And

1 we know that because the Claimants have continued make
2 claims on those contractual breaches.

3 So while the Alberta Court Decision, the
4 alleged NAFTA breach, has nothing to do with their
5 license disputes, GSI nevertheless affirmed - and you
6 can see this from their Notice of Intent to Arbitrate
7 and one of the letters that came right prior to the
8 Notice of Arbitration, that it was -- that the
9 Claimants were going to claim those licensing fees
10 against the Government of Canada, even though they had
11 nothing to do with the Alberta Court Decisions. And
12 that's what the Claimants have done.

13 So the Claimants' position on this is
14 contradictory and misleading. Again, they argue
15 that -- and strongly they argue that they continued
16 private contractual claims against private parties
17 that do not relate to the Alberta Court Decisions. We
18 agree. Their license claims for exploration group
19 fees and transfer fees have no causal link to the
20 Alberta Court Decisions, which is, again, obvious
21 because they continue to litigate them and still do so
22 to this day.

1 And the Alberta Court Decisions had no
2 impact on their ability to continue those. And that's
3 why such contractual damages cannot be used in the
4 Claimants' Damages model. And, yet, there they are
5 baked into PwC's so-called revenue normalization
6 model -- revenue that GSI never had, that it can
7 continue to pursue, and are independent and distinct
8 and separate entirely from the alleged NAFTA breach.

9 And this is where the waiver issue comes in
10 because the Claimants can't have it both ways: Either
11 the contractual damages for License Fees have no
12 causal link to the Alberta Court Decisions and their
13 entire model fails for lack of causality, or the
14 Claimants do consider their loss of contractual
15 transfer and exploration group fees do arise out of
16 the Alberta Court Decisions, in which case the
17 continuation of those Claims after the Notice of
18 Arbitration is a violation of the waiver provision in
19 NAFTA Article 1121 and deprives the Tribunal of
20 jurisdiction. They can't have it both ways. It is
21 one or the other.

22 But in either case, the outcome is zero

1 damages.

2 Now, thus far -- let me just look at my time
3 to see how much longer -- I focused on the flawed
4 logic embedded in the Claimants' causal approach to
5 damages. But there are also objective facts that the
6 Claimants cannot ignore that GSI -- its demise was
7 caused by extrinsic factors that -- and its own
8 litigation strategy, which took place many years
9 before the Alberta Court Decisions.

10 And again, we just have to look again at the
11 Standard NAFTA Article 1110. This is the standard for
12 damages that limits the Tribunal's jurisdiction. It
13 has to be the Fair Market Value of the expropriated
14 investment immediately before it took place.

15 And again, it bears repeating that the
16 Regulatory Regime and the actions of the Boards can't
17 form part of this, but the insurmountable problem for
18 the Claimants is that immediately before the alleged
19 expropriation took place, the Alberta Court Decision,
20 is that GSI was not a going concern and had not been
21 for many, many years. And Mr. Sharp has already
22 admitted this. You can see in the next slide.

1 And again, we know that the 2008 Global
2 Financial Crisis was a serious impact, but, again, the
3 Claimants have also conceded that their litigation
4 strategy destroyed one by one the customer
5 relationships that GSI had.

6 If you go to the next slide, there is just
7 one, but we know that the Claimants have conceded
8 this.

9 And I'm just going to go -- one last thing
10 about the 2008 Financial Crisis. If we go to the next
11 slide. We know what happened at that time impacted
12 the entire Seismic Data library, and the
13 Claimant -- and the Tribunal will hear from -- and has
14 heard in written testimony from Mr. Robert Hobbs who
15 was the CEO of one of the world's largest Seismic
16 companies, TGS, at the time. That even the largest
17 and most diversified Seismic companies in 2008 were
18 very seriously hit in the revenue.

19 And, unfortunately, GSI was unable to
20 weather the storm, and that was really the cause of
21 why GSI by -- you know, 10 years later it was no
22 longer a going concern, as well as its litigation

1 strategy.

2 But the point is, the Tribunal cannot go
3 backwards in time to value GSI as a company that
4 existed years before the alleged NAFTA breach, and use
5 damages that arose out of the Regulatory Regime and
6 the actions of the Boards to value damages.

7 Can I just ask how much time I have left? I
8 don't want to go over time and I'm cognizant that it's
9 getting late in the day.

10 SECRETARY FISCHER: You have eight minutes
11 left.

12 MR. LUZ: I have eight minutes.

13 I think I'm going to skip a small part to be
14 able to get past that eight minutes, but I think I'll
15 be able to finish within there.

16 I'm just going to make a very -- I'm going
17 to skip something and, actually, it will save us from
18 having to go into confidential mode anyway. But one
19 thing that I do want to say is that the
20 Claimants -- the one asset that the Claimants still
21 had in 2017 was their Seismic Data library, but the
22 Claimants didn't even attempt to provide the Tribunal

1 with a valuation of that one asset as that -- in the
2 event of a NAFTA breach, what would be the value of
3 their company and their Seismic Data library.

4 The Claimants even had an uncontroversial
5 template on how to do that, and that was provided by
6 Doug Uffen, geophysicist, a licensed geophysicist with
7 40 years of experience in interpreting, inspecting,
8 and valuating Seismic Data. And we know that the
9 Claimants had done valuations of its own Seismic Data
10 library in the past. We're not going to get into that
11 now.

12 But the point is that, if you look at what
13 the Claimants' own valuations were for its Seismic
14 Data library, there is this massive disconnect between
15 what its own contemporaneous documents said its
16 Seismic Data library was worth 10 years ago and what
17 the Claimants are claiming as damages now. It is just
18 a massive disconnect between what the Claimants own
19 documents show and what they're claiming now. And
20 that just, again, reinforces the lack of credibility
21 that the Claimants' damages approach has.

22 Just on a final point that would have

1 affected the value of GSI's Seismic Data library that
2 has nothing to do with the Alberta Court Decisions.
3 It comes up in the following slide. It's just some
4 summaries that I won't go through because it's covered
5 in --

6 Chris, you can change -- no, skip that one.
7 Yeah. Thank you.

8 Something that would have to be taken into
9 account in any kind of a valuation of their Seismic
10 Data library is the market that existed between 2008
11 and 2017, the decade that led up to the alleged
12 expropriation. We know that by that time more than
13 50 percent of GSI's Seismic Data library was 40 or
14 50 years old, so there would be very little value to
15 much of it for reasons that had nothing to do with the
16 Alberta Court Decision, just simply the age of the
17 data. Of course, we have no idea what the
18 quality -- the state of that data is in currently.

19 But there were other factors, market
20 factors, and -- with respect to all of GSI's data in
21 the Beaufort Sea and in the Arctic, and we've got
22 examples here on this slide that there was just simply

1 no more market for it because there was a ban on
2 exploration in the Arctic. And one of the key
3 pipelines that would have come out of the Arctic to
4 transport the oil stopped and there was no more
5 projects. There was nowhere to get the oil out so the
6 oil companies were no longer interested; hence, no
7 longer needed to license Seismic Data.

8 Again, that's a market factor, extrinsic.
9 Nova Scotia, Labrador, those markets haven't been
10 active areas of explorations for many years. That
11 would impact the value of a Seismic Data library.

12 Newfoundland still fairly active in
13 exploration, but, as we see from the next slide, there
14 was a competitor issue. After 2011 there was a huge
15 influx of competition that came in to shoot Seismic
16 Data that probably rendered a lot of GSI's data
17 obsolete or overshoot. But that's not something the
18 Claimants have ever put before the Tribunal. It is
19 not something that they chose to do and; hence, the
20 outcome, again, is zero damages.

21 Madam Chair, Members of the Tribunal, I'm
22 just going to conclude right on this final point. The

1 Claimants criticized Canada for not putting forward an
2 alternative damages valuation, but it's not the burden
3 of Canada to prove their damages. The Claimants have
4 the burden of proof to establish their claim with
5 reasonable certainty, not speculation.

6 And what the Claimants have done is exactly
7 speculation. They have not fulfilled their duty of
8 the burden of proof, and in situations like that, the
9 Tribunal can, just as other Tribunals have done,
10 Biwater Gauff, Infinito Gold and Eco Oro, the Tribunal
11 can and should award zero damages.

12 That concludes Canada's Opening Statement
13 and appreciate the long day of listening to both the
14 Claimants and Canada's arguments.

15 (Comments off microphone.)

16 PRESIDENT WALLGREN-LINDHOLM: Thank you very
17 much. May I just check how we are doing on the Court
18 Reporter's time. How much time have we spent now?

19 (Comments off microphone.)

20 PRESIDENT WALLGREN-LINDHOLM: We have
21 15 minutes before we need to break.

22 Okay. Let's do this. First, Mr. Landau has

1 a question to both Parties. Let's take that first,
2 and then we will have to see if we need to break
3 before Mr. Einarsson's direct examination. But we
4 will see how long this takes first.

5 Mr. Landau, please.

6 ARBITRATOR LANDAU: Thank you very much.

7 QUESTIONS FROM THE TRIBUNAL

8 ARBITRATOR LANDAU: So this a question to
9 both Parties just to consider, something which I would
10 personally like some assistance on, and it's not
11 something which you obviously need to answer
12 straightaway, but to come back to when it's
13 convenient.

14 There is obviously a difference in approach
15 between each side in this case in terms of the
16 characterization of the claim, so the Claimants are
17 clear that they are only impugning the Alberta Court
18 Decisions and not the Regulatory Regime, and the
19 Respondent makes the point, as we have been through
20 before, about essence of the Claim and what it really
21 is.

22 If one assumes for the moment, just for the

1 sake of argument, that the Tribunal is just concerned
2 with the Court decisions and not concerned with the
3 hinterland, if I can put it that way, to those
4 decisions, what led up to them, what I'm unclear at
5 the moment about is when we're told that there is no
6 challenge to the Regulatory Regime, what does that
7 mean actually?

8 What does the Tribunal assume by virtue of
9 there not being any challenge to the Regulatory
10 Regime? So we know that there was a long history of
11 complaints made by various of the Claimants over time
12 about the Regulatory Regime. And complaints about the
13 adverse impact that it had, its nature, et cetera. If
14 there is no challenge to the Regulatory Regime, does
15 that mean we assume that the Regulatory Regime did
16 have those adverse impacts and that's not problematic?
17 Those adverse impacts are accepted? Do we assume that
18 somehow, they did not have those adverse impacts?

19 What is the factual basis that we proceed
20 upon in order to assess the Court decisions, if that's
21 clear? Because just saying, well, we are no longer
22 challenging the Regulatory Regime does not give us

1 any -- doesn't give me any clear indication as to what
2 that actually means in concrete terms.

3 I hope the question is clear. It sounded
4 less clear as I articulated it. So that can be
5 answered whenever you feel ready to.

6 MS. LEMMENS: I think I can give a pretty
7 quick answer now. We are only dealing with the
8 Alberta Decisions as an illegal expropriation. Yes.
9 There were complaints over the years because GSI
10 attempted to deal with disclosure, and then it dealt
11 with what it thought was copyright infringement, but
12 GSI has accepted the outcome of the Alberta Decisions.
13 It is Canada who wants to reargue the Alberta
14 decisions by bringing up -- I heard today twice "rules
15 of the game." That was their argument in the Common
16 Issues Trial. I'm having a Déjà vu moment over again.

17 But GSI says, okay, then that was my luck in
18 life. I brought the disagreement to Court; I got a
19 decision that says that one act overrides the other.
20 But what wasn't appropriate about that Decision is
21 that no compensation came with it. That's the issue
22 that we are here for now.

1 ARBITRATOR LANDAU: But the Regulatory
2 Regime, there were complaints beforehand about the
3 Regulatory Regime without there being any reference to
4 compensation at that point. There is no question
5 there. There may have been implicit in the objections
6 beforehand that if you're going to contravene my
7 copyright, then I need to be compensated. But then we
8 get to a point now where all of that is -- there is
9 no -- we're told, well, there is no issue being taken
10 about that.

11 MS. LEMMENS: I think that there is a
12 mischaracterization that is happening by Canada. So
13 they say, look, GSI's business was destroyed well
14 ahead of the Alberta Decisions. It started suing its
15 customers. This is a prime example of the issue.

16 When you are a company looking to enforce
17 your copyright against a party, that party is not
18 going to pay the invoice for the copy of the material
19 that they took. So you've got a book. Okay, I'm
20 going to take it away from Seismic Data. You have a
21 book and you sue somebody for copying and infringing
22 your book. They don't pay you for the copy of the

1 book. They say, no, I didn't infringe your copyright
2 for whatever defense reasons they have.

3 That whole time that you're litigating
4 against them, they don't pay you. But if you win at
5 the end of the court case, presumably if they have the
6 money to pay you -- that's another issue about
7 enforcement -- they pay you. You were owed that money
8 the whole time, all the way back to when you first
9 started suing them, and it happened.

10 Damages puts you in the place that you
11 should -- or you would have been in but for the
12 problem that you're suing on. And so when they say,
13 oh, well, they were suing all of their customers for
14 copyright infringement, if you think about it, had GSI
15 been successful in its copyright infringement Claims,
16 it would have been put back in the same spot. But
17 what Justice Eidsvik said in her Decision is GSI has
18 no ability to do anything about the copying that those
19 third parties did. It is actually allowed by the
20 Government, and there is no compensation for that
21 confiscation.

22 So that's the position that we've been left

1 in. It has gone up the levels of court that we can
2 get to in Canada, and that's a final decision now.
3 That's an illegal expropriation when there's no
4 compensation that came with it.

5 I don't know if that clarified or maybe
6 you'll have more questions for me tomorrow.

7 PRESIDENT WALLGREN-LINDHOLM: Thank you,
8 Ms. Lemmens.

9 What about --

10 (Comments off microphone.)

11 PRESIDENT WALLGREN-LINDHOLM: That's what I
12 was going to, yes. I didn't forget this time. No.

13 I wanted to ask Canada if you want to
14 address it now or if you would like to think about it
15 and address it later?

16 MS. TABET: I'll make a few brief comments
17 now, if the Tribunal permits, and then we may come to
18 it more at length later, but I have already touched
19 upon it in my presentations this morning -- or earlier
20 this afternoon.

21 In Canada's view, if you accept that the
22 regulatory -- the effect of the Regulatory Regime

1 is -- that the Regulatory Regime is not being
2 challenged, then all of the effects of the Regulatory
3 Regime are fair game and that you cannot consider
4 those as part of the expropriation, right? You have
5 to only look at the effect of the Court Decisions.

6 And I think maybe if we can pull up R-001,
7 which is the Alberta Court Decision, then the
8 question -- one of the questions for the Tribunal is
9 that the Tribunal would have to find that the Court
10 Decision was so obviously not interpreting the
11 Regulatory Regime but that it was, in fact, itself
12 conducting a taking or taking the property. That's
13 not what the Court was doing.

14 And let me just refer to Paragraph 176 of
15 the Decision. Judge Eidsvik goes into the legislative
16 history of the Regulatory Regime.

17 Can we have Paragraph 176?

18 And she refers to the whole clause-by-clause
19 and legislative history, and she refers to what
20 Senator Hays at the time was commenting on in
21 discussing the Regulatory Regime. And at that time
22 Senator Hays was talking about retroactive

1 confiscation, if you will, of the valuable asset. So
2 he was already making these same comments that you're
3 hearing today that the Court decision confiscated the
4 Seismic Data while Senator Hays was making those
5 comments about the Regulatory Regime.

6 And then if I can take you to Paragraph 322,
7 again, this was a paragraph that the Claimants cited
8 to this morning suggesting that the Court agree that
9 the regime was a confiscation. Well, in fact, the
10 Court was, again, referring to what Senator Hays had
11 said. Like that first part of the paragraph has been
12 omitted in the Slide before you, but it was a
13 reference to what Senator Hays had said, 30 years ago
14 at the time of Decision, that the Regulatory Regime
15 has confiscated Seismic Data.

16 So if you agree that the Regulatory Regime
17 cannot be taken into account in your assessment, you
18 have to also consider that the Court was really only
19 interpreting the effect of the Regulatory Regime. And
20 we'll come back to this issue more specifically, but I
21 wanted to leave you with that.

22 PRESIDENT WALLGREN-LINDHOLM: Thank you.

1 Now, I know that Mr. Gowdy has one or two
2 questions, and because we need to take a break, I
3 propose that you make your questions now and when we
4 come back after a short break, we will see if you want
5 to address it then or with after some further thought.
6 Will that be fine?

7 MS. LEMMENS: I'm only noting the time. It
8 is 5:12, at least on my computer. So I would just
9 like, during the break, to understand what we are
10 doing. Because if we come back in 15 minutes, it is
11 5:30. And if Mr. Einarsson is supposed to take the
12 stand and I'm not able to speak with him tonight, I'd
13 like to know that before a break, and I'd also like to
14 be able to tell him when he can anticipate to be able
15 to go eat dinner tonight.

16 So I'm just trying get a lay of the land for
17 what you're thinking for the rest of the day.

18 PRESIDENT WALLGREN-LINDHOLM: At present I'm
19 not thinking anything. I don't know what Mr. Gowdy is
20 going to ask, but why don't you put the questions now
21 and then we will see before we break. Okay?

22 MS. LEMMENS: Thank you.

1 PRESIDENT WALLGREN-LINDHOLM: Thank you.

2 ARBITRATOR GOWDY: Actually, I'm going to
3 make it really easy, I do not expect an answer
4 tonight. I was just hoping to get an answer sometime
5 over the next couple of weeks to two questions, but I
6 do not -- emphasize "not" -- need an answer tonight.
7 Just something to think about.

8 Number one, prior to the Alberta Court
9 Decision when, if at all, were Claimants on notice
10 that the Regulatory Regime and the copyright law were
11 not reconcilable? So that would be question number
12 one. Prior to that decision, when, if at all, were
13 Claimants on notice that those two provisions could
14 not be reconciled?

15 The second question -- and this is in
16 reference to a Respondent exhibit, denial of justice.
17 And then there's a disjunctive word "or" used,
18 fundamental defect and judicial proceedings. I think
19 I understand what a defect and a judicial proceeding
20 is, but I am looking for examples of a denial of
21 justice, with no expectation that it be answered any
22 time in the foreseeable future.

1 PRESIDENT WALLGREN-LINDHOLM: Thank you,
2 Mr. Gowdy.

3 Before we proceed to even an effort to
4 respond, I propose that we discuss the further
5 schedule of today.

6 So it is now 5:15, and the obvious question
7 is whether Mr. Einarsson takes the stand tonight or
8 only tomorrow.

9 MS. LEMMENS: On behalf of Claimants, I
10 would say tomorrow.

11 MR. LUZ: I'm glad we agree. I think it has
12 been a very long day, and it would -- yes, I think
13 tomorrow would be appropriate.

14 MS. LEMMENS: I realize there's a time zone
15 difference for some of the others in the room.

16 PRESIDENT WALLGREN-LINDHOLM: I will not
17 comment, but thank you.

18 So Mr. Einarsson, this means that you will
19 take the stand only tomorrow.

20 And what about the questions that Mr. Gowdy
21 now made? You want to sleep on them?

22 MS. LEMMENS: Yes. Well, one of them is a

1 question about legal precedence being the second
2 question, so I think that we would need to just review
3 in order to be able to provide a proper response to
4 that one.

5 For question number one, I think that is a
6 question that should actually be left because we are
7 going to hear from Mr. Einarsson tomorrow.

8 PRESIDENT WALLGREN-LINDHOLM: Okay. Thank
9 you.

10 Canada?

11 MR. LUZ: Yeah, I think we will address it
12 later on.

13 PRESIDENT WALLGREN-LINDHOLM: Okay. So
14 then, is there anything further from anyone? No.
15 Okay.

16 Then we shall meet again tomorrow at
17 9:30 a.m. Thank you for today. Thank you.

18 (Whereupon, at 5:15 p.m., the Hearing was
19 adjourned until 9:30 a.m. the following day.)

POST-HEARING REVISIONS

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter,
do hereby attest that the foregoing English-
speaking proceedings, after agreed-upon
revisions submitted by the Parties, were
revised and re-submitted to the Parties per
their instructions.

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.

[Signed]

Dawn K. Larson

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

AND

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW, AS ADOPTED IN 1976

- - - - -	x	
In the Matter of Arbitration	:	
Between:	:	
	:	
THEODORE DAVID EINARSSON,	:	
HAROLD PAUL EINARSSON,	:	
RUSSELL JOHN EINARSSON, AND	:	
GEOPHYSICAL SERVICE INCORPORATED,	:	
	:	ICSID Case No.
Claimants,	:	UNCT/20/6
	:	
and	:	
	:	
THE GOVERNMENT OF CANADA,	:	
	:	
Respondent.	:	
- - - - -	x	Volume 2

HEARING ON JURISDICTION, MERITS, AND LIABILITY

Tuesday, March 4, 2025

Calgary Marriott Downtown Hotel
110 9th Avenue SE
Calgary, AB, T2G 5A6
Canada

The Hearing in the above-entitled matter
came on at 9:46 a.m. before:

MS. CARITA WALLGREN-LINDHOLM, President

MR. TREY GOWDY, Co-Arbitrator

MR. TOBY LANDAU KC, Co-Arbitrator

ALSO PRESENT:

On Behal of ICSID:

MS. GERALDINE R. FISCHER
Secretariat to the Tribunal

Realtime Stenographers:

MS. DAWN K. LARSON
Registered Diplomat Reporter (RDR)
Certified Realtime Reporter (CRR)
Certified Realtime Captioner (CRC)
Larson Reporting, Inc.
2564 West 280 North Street
Hurricane, Utah 84737
United States of America

APPEARANCES:

Attending on behalf of the Claimants:

**MS. MATTI LEMMENS
MR. VINCENT LANCTÔT-FORTIER
MS. MARIANNE BASTILLE-PARENT
Stikeman Elliott LLP
Bankers Hall, 4200 3 St SW West 888
Suite 4200
Calgary, AB, T2P 5C5
Canada**

Party representatives:

MR. HAROLD PAUL EINARSSON

APPEARANCES: (Continued)**Attending on behalf of the Respondent:**

MR. MARK LUZ
MS. SYLVIE TABET
MS. JULIA DEUTSCH
MS. ELENA LAPINA
MS. CAMILLE BÉRUBÉ-LEPAGE (virtual)
Trade Law Bureau
Global Affairs Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada

MS. MOLLY RUMPKE
Core Legal Concepts

MS. DAPHNÉE CAMPEAU
Global Affairs Canada

MR. ALEXANDER BLACK (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada & ISC Legal Services,
Indigenous Rights and Relations Portfolio

MR. PETER WIGEN (virtual)
Canadian Heritage Legal Services

MR. MARK KLAVER (virtual)
Office Legal Services Sector

MR. FRANCO BELLO (virtual)
MS. KIM PHILLIPS (virtual)
MS. JESSICA MACINTOSH (virtual)
MS. JEAN-FRANÇOIS ROMAN (virtual)
Natural Resources Canada

APPEARANCES: (Continued)**Party Representatives:**

MR. SÉBASTIEN FOURNIER (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada

MR. SCOTT LITTLE (virtual)
MS. SUSANNA KAM (virtual)
MR. VINCENT BOULANGER (virtual)
Global Affairs Canada

MS. TARA SNELL (virtual)
MS. NATALIE GIASSA (virtual)
MS. PIERRE-LUC RACINE (virtual)
Innovation Science and Economic Development

MS. TIFFANY SANDERS (virtual)
MS. LYNETTE GIBBONS (virtual)
Canada Newfoundland & Labrador Offshore
Petroleum Board

Respondent's Party Representatives:

MR. MARKO VESELY
Canada Energy Regulator

MR. ALEX MILLER
Core Legal Concepts

MR. CHRIS REYNOLDS
Core Legal Concepts

Non-Disputing Parties:

MS. KRISTINA E. BEARD (virtual)
Office of International Claims and
Investment Disputes
U.S. Department of State

MR. ALAN BONFIGLIO RÍOS (virtual)
MS. PAMELA HERNÁNDEZ MENDOZA (virtual)
MR. ALDO GONZÁLEZ ARANDA (virtual)
Secretaría de Economía

C O N T E N T S**PAGE**

PRELIMINARY MATTERS.....270

WITNESSES:

HAROLD PAUL EINARSSON

Direct examination by Ms. Lemmens.....273

Cross-examination by Mr. Luz.....278

Redirect examination by Ms. Lemmens.....391

Questions from the Tribunal.....413

BHARAT DIXIT

Direct examination by Mr. Luz.....421

Cross-examination by Ms. Lemmens.....423

Redirect examination by Mr. Luz.....511

Questions from the Tribunal.....515

CONFIDENTIAL SESSIONS.....341-353, 384

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

2 PRESIDENT WALLGREN-LINDHOLM: Good morning
3 for the second day of the Hearing.

4 PRESIDENT WALLGREN-LINDHOLM: Mr. Einarsson,
5 you may be seated, please. Thank you.

6 This is the second day of our Hearing, and
7 we will go directly to the examination of Harold Paul
8 Einarsson. We decided to leave any household issues
9 to later on.

10 HAROLD PAUL EINARSSON, CLAIMANT'S WITNESS, CALLED

11 PRESIDENT WALLGREN-LINDHOLM: Mr. Einarsson,
12 you are a Party Representative and you have been
13 called to testify as a witness in this NAFTA
14 Arbitration. You have been called by Claimants. You
15 have given five Witness Statements, and I trust that
16 you know what these proceedings relate to?

17 (Interruption.)

18 THE WITNESS: I do.

19 PRESIDENT WALLGREN-LINDHOLM: Whether or not
20 you have given testimony before, I ask that you
21 address the Tribunal with any questions or concerns
22 that you may have in relation to procedure or if

1 there's anything that you do not understand.

2 THE WITNESS: Thank you.

3 PRESIDENT WALLGREN-LINDHOLM: I believe that
4 you know who everybody is by now.

5 THE WITNESS: I do.

6 PRESIDENT WALLGREN-LINDHOLM: So any
7 introductions would be superfluous. Different from a
8 State court, we do not administer oath in
9 international arbitration, but you still have an
10 obligation to speak the truth. Any failure to speak
11 the truth may have consequences. Your testimony will
12 be recorded and transcribed.

13 May I ask that you confirm for the record
14 that you will speak the truth?

15 THE WITNESS: I will speak the truth.

16 PRESIDENT WALLGREN-LINDHOLM: Claimants will
17 first conduct a short introduction and direct
18 examination, whereafter, opposing Counsel will
19 cross-examine you on matters relevant to this
20 Arbitration in your knowledge and experience, followed
21 by a right to redirect by Claimants and possible
22 recross.

1 I know that you have by now access to
2 documents that may be used for your testimony, both in
3 hard copy and digitally. At the close of the first
4 slot of your examination, we will address the question
5 of sequestration, but we will revert when we take a
6 break.

7 Are there any questions before I ask Counsel
8 for Claimant to introduce you?

9 THE WITNESS: No.

10 (Interruption.)

11 MS. LEMMENS: Madam Chair, I just wanted to
12 confirm that there are no other witnesses, the lay
13 witnesses, present via Zoom right now.

14 MR. LUZ: No.

15 MS. LEMMENS: Okay. Thank you.

16 PRESIDENT WALLGREN-LINDHOLM: And what I was
17 going to ask, if there were any newcomers today? Or
18 any newcomers or an associate that you wanted to
19 introduce? No newcomers.

20 MR. LUZ: Not that I'm aware of, Madam
21 Chair.

22 PRESIDENT WALLGREN-LINDHOLM: Thank you.

1 And no newcomers on Claimants' side?

2 MS. LEMMENS: Not that I'm aware of.

3 PRESIDENT WALLGREN-LINDHOLM: Then maybe
4 nobody is aware of any newcomers, so we will conclude
5 that, to the best of our understanding, there are no
6 newcomers. Thank you.

7 Then I will ask Ms. Lemmens to introduce the
8 witness. Thank you.

9 DIRECT EXAMINATION

10 BY MS. LEMMENS:

11 Q. Good morning, sir. Are you able to state
12 your full name for the record, please?

13 A. Harold Paul Einarsson.

14 Q. And, for the record, I'd like to review the
15 five Witness Statements that Madam Chair just raised
16 in her discussions with you just now. I'd like to go
17 over them. Before you, sir, in hard copy, you have a
18 Witness Statement of Harold Paul Einarsson that is
19 CWS-01?

20 A. Yes.

21 Q. And, sir, can you confirm that you provided
22 that Witness Statement in respect of a motion to

1 disqualify leading to a conflict of interest in this
2 matter?

3 A. Yes.

4 Q. Sir, you also have a Second Witness
5 Statement, CWS-2, of Harold Paul Einarsson before you.

6 Do you see that?

7 A. Yes.

8 Q. You provided that Witness Statement in April
9 of 2021. Do you see that, sir?

10 A. Yes.

11 Q. Can you confirm that you provided that
12 Witness Statement?

13 A. Yes, I did.

14 (Interruption.)

15 A. Yes, I did.

16 Q. Sir, you have a Third Witness Statement,
17 CWS-6 before you?

18 A. Yes.

19 Q. And can you confirm that you did, in fact,
20 provide that Witness Statement in these proceedings?

21 A. I did.

22 Q. And that was dated September 27, 2022; is

1 that right?

2 A. I'm not sure where the date is on this.

3 Yes. September 27, 2022.

4 Q. Thank you, sir. And your Fourth Witness
5 Statement at CWS-7, do you have that before you, sir?

6 A. I do.

7 Q. And did you, in fact, provide that Witness
8 Statement in these proceedings?

9 A. I did.

10 Q. That was in respect of a motion to compel
11 Canada to produce documents in these proceedings?

12 Do you recall that?

13 A. Yes, I do.

14 Q. Finally, your Fifth Witness Statement, sir,
15 it's CWS-12 in these proceedings.

16 Do you have that before you?

17 A. I do.

18 Q. And you, in fact, provided that Witness
19 Statement in these proceedings?

20 A. Yes, I did.

21 Q. And that was in May of 2024.

22 Do you recall that?

1 A. That's correct.

2 Q. Thank you, sir. For the Tribunal, could you
3 please provide a short background of yourself to
4 introduce yourself to the Panel?

5 A. Well, I grew up primarily in Dallas, Texas,
6 Plano, Texas. I worked in the banking industry; I
7 worked in the seismic industry. I have two children
8 that were born in Dallas and I live currently in
9 Las Vegas, and was very involved in the development of
10 the -- this Company in 1993 and then came on full-time
11 in 1997. I worked in the previous Delaware GSI
12 Company as did my father and my brother. And I think
13 that's it. Unless anybody -- have any more questions,
14 I think it's all in here.

15 Q. Thank you, sir. When you said this
16 "Company" can you just identify the Company?

17 A. Geophysical Service Incorporated, the
18 Canadian Company.

19 Q. Sir, you also mentioned your father and your
20 brother. Could you just identify them for the record?

21 A. My father, Theodore David Einarsson, I'm his
22 executor, and Russell John Einarsson is my younger

1 brother.

2 Q. And in these proceedings, sir, what is your
3 role?

4 A. Well, I'm representing the Company and the
5 Claimants.

6 Q. Thank you, sir.

7 MS. LEMMENS: I have no further questions
8 for direct. I think we've all read his Witness
9 Statements, so I'm happy to have you proceed with your
10 cross-examination. Thanks, Mr. Luz.

11 PRESIDENT WALLGREN-LINDHOLM: Thank you.

12 Mr. Luz, could I just ask first, yesterday
13 we had 30 minutes assigned for the first slot, but I
14 assume that now you could take an hour?

15 (Interruption.)

16 MR. LUZ: Yes, Madam Chair. I mean, we can
17 do an hour or, as Mr. Einarsson feels he needs a
18 break, or the Tribunal or anyone else needs a break
19 but --

20 PRESIDENT WALLGREN-LINDHOLM: Yes. I trust
21 that he will tell us if he needs. But I think that
22 it -- there is no -- yesterday, I think it was

1 30 minutes because the day was ending, but now you
2 could -- we could at least, as a working hypothesis
3 take an hour.

4 MR. LUZ: Yeah. And I'll take note sort of
5 where it is as to where I think might be the right
6 time --

7 PRESIDENT WALLGREN-LINDHOLM: Very good.

8 MR. LUZ: -- so if it's a little bit less or
9 a little bit more than an hour but again, depends on
10 how you're feeling at the moment.

11 PRESIDENT WALLGREN-LINDHOLM: Very good.
12 Thank you.

13 MR. LUZ: Thank you.

14 CROSS-EXAMINATION

15 BY MR. LUZ:

16 Q. Thank you. Good morning, Mr. Einarsson.

17 As Madam Chair said, the introductions are
18 superfluous, but my name is Mark Luz representing the
19 Government of Canada in this Arbitration.

20 I'm going to be asking you a series of
21 questions with respect to your Witness Statements
22 filed in this Arbitration. Principally the ones that

1 are labeled CWS-6, September 27, 2022, and CWS-12,
2 May 31, 2024, so if you've got those ones handy, I
3 think are the principal ones that we'll refer to
4 today.

5 I know you've testified before and so I'll
6 just go over some of the simple ground rules just for
7 this. You know, to the extent that you can answer my
8 question with a yes or no, that would be very helpful,
9 but for the record, so that it's clear in the
10 Transcript -- and -- you know, it is important to
11 provide a clear response.

12 Our time here is limited, so I would ask if
13 you'd try and be as succinct as you can in your
14 answers. And of course, as Madam Chair suggested,
15 that there's an opportunity for redirect by your
16 Counsel if there's things that you want to elaborate
17 on, but of course, I will give you the opportunity to
18 answer your questions. I just ask that you try and be
19 as succinct as you can.

20 A. Yes.

21 Q. Thank you.

22 There will be a couple of times -- and I

1 know it's somewhat tedious sometimes -- where we have
2 a document and we will read certain parts of it into
3 the record. I know it takes a little while. It might
4 be -- you know, if it's language from you, you might
5 be able to read it or I can read it in the record.
6 It's just important to have it in the Transcript, so
7 that may come up from time to time so that everyone
8 knows what exactly we're talking about.

9 And I'll also -- as I'm going through it,
10 I'll also refer to the exhibit number, the date of the
11 document, again, that's important for the record. The
12 documents are going to be shown on the screen as well.
13 We also provided a hard copy. You're welcome to look
14 through it. I'm going to, of course, give you the
15 opportunity to familiarize yourself with the document
16 because some of them you want to be able to read for
17 yourself as to what it is. And so if you need a
18 second to be able to look through it, then please do.

19 A. Thank you.

20 Q. Okay. Great.

21 So it was in 1997 that you and your family
22 moved to Calgary to support and grow GSI's Seismic

1 Data business in Canada; is that right?

2 A. Correct.

3 Q. Okay. And you said in your Witness
4 Statement that you purchased 50 percent of the Shares
5 of GSI from your uncle shortly -- shortly after you
6 joined GSI in 1997?

7 A. That's correct.

8 Q. And you say in your Witness Statements that
9 you and your father, Davey Einarsson, made decisions
10 about GSI together?

11 A. That's correct.

12 Q. And you discussed GSI's affairs with him
13 regularly?

14 A. Yes.

15 Q. And that goes back to 1997, when you first
16 joined GSI?

17 A. Even a little bit before, but certainly
18 after '97.

19 Q. Okay. When you joined GSI in 1997, did you
20 have a particular job title or position other than
21 being the 50-percent Shareholder?

22

4 Q. Okay.

5 A. And I don't recall the title.

6 Q. Okay. You mentioned an oil company?

7 A. Yes.

8 Q. What was that?

9 A. I believe it was Ardal Resources.

10 Q. Ardal Resources. And that was affiliated
11 with GSI or a separate company?

12 A. Separate company, and it was affiliated with
13 WesternGeco. It was a joint venture between us.

14 Q. Okay. And Ardal -- does that company still
15 exist or was that amalgamated with GSI at some point?

16 A. I don't recall what I did, what happened
17 with that company. I'm sorry.

18 Q. Okay. It's no problem. Okay.

19 When you joined GSI in '97, did you work
20 with other employees of the Company?

21 A. Yes, I did.

22 Q. Okay. Did you work with Doug Dowdell?

1 A. I did.

2 Q. Do you remember what his position was at
3 GSI?

4 A. Doug was responsible for kind of the
5 tape/copy transcription group and the warehouse that
6 we had that we assumed from the prior company. We
7 just took over the whole facility, including the
8 employees. And he later became in charge of the
9 equipment leasing for land seismic. We also had three
10 land seismic crews with all the equipment, and we were
11 the sole leasing entity of a manufacturer in Calgary
12 for land seismic systems, it was called ARAM. And we
13 would rent those out, we would also run two or three
14 crews of our own conducting land Seismic Data.

15 Q. Okay. Thank you.

16 Did you work with Sam Nader?

17 A. I did.

18 Q. And do you remember what his position was at
19 GSI?

20 A. Sam was in marketing, licensing of Seismic
21 Data.

22 Q. Okay. Were there any other sort of key

1 employees besides those two, yourself, your father,
2 that worked -- when you joined GSI in '97 that were --

3 A. There were some warehouse staff and data
4 transcription people that changed over time.

5 Q. Okay. And then you became the COO and
6 Chairman of GSI in 2002, I believe you said in your
7 Witness Statement?

8 A. That's correct.

9 Q. Okay. So when you joined GSI in '97 and
10 started learning about the offshore business in
11 Canada, did you familiarize yourself with the laws and
12 regulations governing the collection of Seismic Data
13 in the offshore?

14 A. Well, we -- yes. I started looking at all
15 of that.

16 Q. Okay. And did you become familiar with the
17 roles of the three offshore Petroleum Boards in
18 Newfoundland, Nova Scotia, and the then-called
19 National Energy Board?

20 A. Yes, I did.

21 Q. Okay. And did you familiarize yourself with
22 the process by which seismic companies would apply for

1 authorization to carry out seismic surveys in the
2 offshore?

3 A. I didn't pay attention to it very much at
4 the beginning, because we had an office in Windsor,
5 Nova Scotia, and they kind of handled that when we
6 first started acquiring data in 1997.

7 Q. Okay. And as you said, you didn't pay much
8 attention at the beginning, but did you become
9 familiar with the type of Seismic Data materials that
10 geophysical companies like GSI had to submit to the
11 Boards in order to conduct the surveys?

12 A. Yes.

13 Q. Okay. So I just want to ask you some
14 questions about the Boards' practice of releasing
15 copies to the data around the time that you joined GSI
16 in 1997. You can open up your cross-examination
17 binder. We're going to open up to Exhibit R-240 and
18 it's at Tab 1. You can open it up at the -- you can
19 go ahead and take your time. Just let me know when
20 you're ready to look at it.

21 A. I'm ready.

22 Q. So these are from the Newfoundland offshore

1 Petroleum Board. The document is called "Geophysical,
2 Geological, Environmental, and Geotechnical Program
3 Guidelines." And they're published in January 1996,
4 so the year before you moved to Calgary and joined
5 GSI.

6 Do you recall, when you joined, if you had
7 ever reviewed these guidelines as part of your
8 familiarization process?

9 A. At some point, I reviewed it. I don't
10 remember when.

11 Q. Okay. Someone else from GSI, you think,
12 would likely have reviewed the guidelines at that
13 time?

14 A. Well, we did one survey, I believe, in 1997,
15 so it was just a beginning for us.

16 Q. Okay. I'm just going to take you -- again,
17 I don't want to spend a lot of time on this, but let's
18 just go to the introduction, which is -- it's on
19 Page 7 of the PDF, and it's on Page 1 of the actual
20 document under the "Introduction."

21 A. Okay. I can see it.

22 Q. You already said that you became familiar

1 with the Newfoundland Offshore Petroleum Board. The
2 first sentence says: "The Newfoundland Offshore
3 Petroleum Board is the authority responsible for the
4 Administration of the Regulations pertaining to all
5 exploration for and production of hydrocarbons in the
6 Newfoundland offshore area, the approximate outline of
7 the areas under the Board's jurisdiction shown in
8 Figure 1. These guidelines have been prepared to help
9 operators who wish to conduct geophysical, geological,
10 and geotechnical or environmental program including
11 fieldwork within this area.

12 "They replace those issued by the Board in
13 March 1992 for geophysical and geological programs.
14 These guidelines are based on the Canada-Newfoundland
15 Atlantic Implementation Act, the Canada-Newfoundland
16 Atlantic Accord Implementation Act, and then it lists
17 a few other regulations. I don't think we have to go
18 through there."

19 Do you see that in the introduction?

20 A. I see it.

21 Q. Okay. So these guidelines were prepared to
22 help operators who wished to conduct the kinds of

1 surveys that GSI was starting to plan to do in the
2 Newfoundland offshore area; is that right?

3 A. I don't know how to answer that.

4 Q. Do you recall if -- would it have fallen
5 within your scope of responsibilities to review this
6 document, or that fell within your Nova Scotia office
7 or someone else at GSI?

8 A. Yeah, I think that was probably in our Nova
9 Scotia office.

10 Q. Okay.

11 A. I wasn't really dealing with this sort of
12 thing at that time. It caught my attention later.

13 Q. It caught your attention later?

14 A. We went through all of this in the Common
15 Issues Trial.

16 Q. Right.

17 I'm just going to skip ahead to Page 18,
18 which is PDF 24.

19 Do you have a full copy? For some reason,
20 I'm missing a page in here. Is a page missing in
21 your --

22 A. Mine stops at Page 14.

1 Q. It does. Mine does too. Okay. You know
2 what, it's a missing page, we can skip that part.

3 A. I can look at the screen here.

4 Q. At the screen, do you mind?

5 A. Sure. I can see it.

6 Q. Okay. Yeah. So this is -- again, I
7 apologize. For some reason, it's missing in here, but
8 this is on Page 18 of the document, which is PDF
9 Page 24. Can you open up that screen so we can see
10 it. Yeah. I'm just looking at the last sentence
11 there, where it says: "A full listing of geophysical
12 and geological reports and data released by the Board
13 may be found in the publication 'Released Geophysical
14 and Geological Reports-Newfoundland Offshore Area,'
15 copies of which may be obtained from the Board
16 office."

17 When you joined in 1997, do you recall
18 consulting this document?

19 A. I don't recall specifically, no. I'm sorry.

20 Q. Do you think anyone from GSI's office in
21 Nova Scotia would have been familiar with the Board's
22 publication of released Data Reports?

1 A. Well, I know we read it because we complied
2 with the submission requirements.

3 Q. Okay. We can put that away and just pull
4 up -- it's in Tab 2 -- R-516. You can go to your
5 binder, if you want. This is a March 1996
6 publication, "Released Geophysical and Geological
7 Reports, Newfoundland Offshore Area, March 1996."

8 Do you recall consulting this document after
9 you joined GSI?

10 A. I read these things at some point. I don't
11 recall exactly when.

12 Q. Okay. Let's just turn to Page 1 of the
13 document, or Page 3 of the PDF and I'll just read
14 under the introduction: "This publication is divided
15 into two parts. Part 1, white pages, contains a list
16 of geophysical and geological programs for which
17 reports and data have been released by the
18 Canada-Newfoundland Offshore Petroleum Board, C-NOPB,
19 pursuant to Subsection 119(5) (d) of the
20 Canada-Newfoundland Atlantic Accord Implementation
21 Act, and the Canada-Newfoundland Atlantic Accord
22 Newfoundland Act, the Acts, these subsections state

1 that geological or geophysical work performed on or in
2 relation to any portion of the offshore area may be
3 disclosed five years following the date of completion
4 of the work."

5 When you joined GSI in 1997, were you aware
6 that that was the rule, that the Board would disclose
7 Seismic Data reports after five years?

8 A. Well, I know that was the government's
9 position or the board's position, and they always use
10 these very nebulous words like "disclose," "display,"
11 or whatever. We didn't know what it meant. And that
12 was a very moving target for us, as you know. Well,
13 we went through all this again in the Common Issues
14 Trial.

15 Q. Right. Let's turn to Page 3 of the PDF or
16 Page 5 of the document. Take your time and take a
17 look at that. Sorry. It's Page 3 --

18 A. I'm missing a bunch of pages. So I'll look
19 here.

20 Q. I apologize.

21 A. That's fine. I'll look here.

22 Q. I'm just going to -- it's the column on the

1 right-hand side, where it says: "How is the
2 information in a program stored?"

3 Do you see that?

4 A. Yes.

5 Q. And, again, you can scroll down to the next
6 section, "where may the information be studied?"

7 Do you see that?

8 A. Yes.

9 Q. And then the next subsection says: "How may
10 copies of the data be obtained?"

11 Do you see that?

12 A. I see it.

13 Q. And it said: "Reproduction of released
14 materials may be arranged at the expense of the
15 requestor through the C-NOPB for programs submitted
16 since 1981. Mylar copies of the seismic lines are
17 generally available. Printing of these may be carried
18 out by a local firm which will bill the purchaser
19 directly. For pre-1981 data, duplication of
20 microfilm, again by a local firm, may be arranged.
21 Further details may be obtained from the C-NOPB
22 office."

1 Do you see that?

2 A. I see it.

3 Q. So this document is indicating that, as of
4 March 1996, copies of Seismic Data that are listed in
5 this publication were available for copying; is that
6 right?

7 A. I don't know. I got different information
8 in my access to information responses that -- I don't
9 know how many hundreds I did. Maybe 400. And our
10 earliest instances where we could see copies being
11 made were at various times, and I believe those are in
12 my Witness Statement. So I don't -- I read what's
13 there, but I don't think that was actually happening.
14 And we were told by the Boards that it wasn't
15 happening, as well.

16 Q. Okay. Do you know if anyone from the Nova
17 Scotia office of GSI went to the Boards to review the
18 released data and find out if copies were available
19 from the Boards?

20 A. I don't recall. I know we did a lot of
21 investigation at some point to try and figure out what
22 was going on, but I don't recall specifically. I'm

1 **sorry.**

2 **Q.** Would that investigation have involved
3 consulting the document that explains how copies can
4 be obtained from the Boards?

5 **A.** Well, that document didn't do anything for
6 us. What we were trying to understand was what
7 actually was happening.

8 **Q.** Okay.

9 **A.** So that's what I was trying to investigate.
10 And we got very conflicting information from time to
11 time.

12 **Q.** Okay. I'm just going to go -- I'm going to
13 pull up a couple of programs. It's on Page 28 of the
14 actual document or Page 32 of the PDF. Again, we'll
15 pull it up. It's a little hard to see, but if we can
16 focus in -- and, again, you have a hard copy if it's
17 helpful, but we're going to focus in on the second,
18 third, and fourth entries in this, if you can see it.

19 **Yeah.** So we can highlight right across.

20 **Yeah.** Great.

21 **So the first entry -- are you able to read**
22 **it? I know it's a little small on the screen.**

1 A. Yes, I can read it.

2 Q. So this says: "GSI," under the Column
3 "Program Number, 8624-G005-011P." It says, "Completed
4 Date, 03-07-86." There's a "Latitude" in another
5 column. There's "Kilometers" in another column. And
6 the column that says "Mylar?" there's a "Y," which I
7 assume means "Yes." And then there's an Operations
8 Report, "Regional Nonexclusive 3D, Jeanne D'Arc Basin
9 Air Guns."

10 Do you recognize that as one of the GSI
11 Seismic Programs that was purchased from Halliburton?

12 A. I do.

13 Q. So in March 1996, this publication indicates
14 that it was available for copying by the public, based
15 on what we just read in the previous section?

16 A. I honestly don't know how to answer that
17 because of all the conflicting information I received
18 from the Boards.

19 Q. Okay. I'm going to look at the entries
20 right below it, where it says: "Husky Oil,
21 8627-H006-04DA." Again, there's a completion date
22 that's also 03-07-86, and it continues on. And then

1 the contents are described as "interpretation of data
2 purchased from 8624-G005-1P, GSI, 1985/86."

3 Do you -- well, first of all, going to the
4 program number, do you know what "DA" means at the
5 end?

6 A. I don't.

7 Q. Okay. It means data acquisition, which you
8 can see, if you want to take a look at it. It's on
9 Page 3 of the document. It means data acquisition.

10 The contents describe this as interpretation
11 of data purchased from the GSI program immediately
12 above. Did you or anyone else from GSI go to
13 investigate as to whether or not that was one the
14 Secondary Submissions that you've described in your
15 Witness Statements?

16 A. We did, but I think it was around the 2010
17 timeframe when we obtained access to information
18 responses about this whole Secondary Submission scheme
19 involving our data, where our licensees were
20 converting that data for huge sums of money. And we
21 were pretty surprised. In fact, I notice you have one
22 not highlighted. There is actually three of them

1 there, Husky, Petro-Canada and Parex. They are all
2 the same.

3 Q. I was going to ask you about that, as well.

4 But you acknowledge that these Secondary
5 Submissions are publicly available for copying, as of
6 March 1996?

7 A. Well, if that's what the list says.

8 Q. Okay.

9 A. Maybe there is even a fourth one there. I
10 see the one below it "Husky Oil" saying "wellsite
11 survey."

12 Q. Okay.

13 A. We just weren't aware of this whole process.

14 Q. Okay. We can put that document away.

15 You already described that when you joined
16 GSI in 1997, GSI started to conduct more offshore
17 seismic surveys in the offshore; is that right?

18 A. Yes. I believe we did one in '97, and then
19 we started doing more in '98 and there forward.

20 Q. I'm going to pull up Exhibit R-250. It is
21 dated July 10, 1997. Well -- sorry. That is
22 the -- it was filed in the Common Issues Trial, so

1 that's the cover page. If you go to the next page,
2 this is the document. It's a letter dated July 10,
3 1997, from the C-NLOPB to your colleague Doug Dowdell;
4 is that right?

5 A. That's correct.

6 Q. And the subject is for the 1997 Speculative
7 3D Seismic Survey Jeanne D'Arc Basin?

8 A. Yes.

9 Q. Do you recall, is this the '97 program that
10 you were just talking about before?

11 A. Yes.

12 Q. Okay. We won't go through the whole
13 document but I'll just draw your attention to the last
14 paragraph, where it says: "We would like to remind
15 you that the Final Report should include digital
16 copies of the shot point location data and seismic
17 traces. Details are described in the Board's
18 'Geophysical, Geological, Environmental, and
19 Geotechnical Program Guidelines,' Section 5." And the
20 last sentence says, "The data from this survey will be
21 made publicly available five years following the
22 completion of fieldwork."

1 So, again, that reflects the guidelines that
2 we had looked at previously and the document that we
3 had just looked at, as well, that after five years the
4 data would be released to the public?

5 A. The letter speaks for itself.

6 Q. Okay. And did GSI carry out this program?

7 A. Yes, we did.

8 Q. In '97, were you aware that GSI had already
9 been complaining to the Boards that copies of its
10 Seismic Data were being released to third parties?

11 A. I was aware of the history from my father
12 that, you know, we kind of started with no disclosure,
13 disclosure by consent, and then viewing was going on.
14 And as far as we knew at this early stage, there was
15 viewing.

16 Q. Okay.

17 A. We weren't -- and our initial inquiries
18 indicated an odd one or two instances that we chased
19 down in every instance.

20 Q. Okay. I'm going to pull up R-269, which is
21 dated 17 November '97.

22 Take your time to scroll through the letter

1 and read it.

2 A. Keep moving.

3 Q. Okay. Sorry. Keep going, whoever is
4 controlling it.

5 A. Keep going.

6 Q. Keep going. It's in hard copy, as well,
7 Mr. Einarsson, if that's easier.

8 A. Oh, okay.

9 (Comments off microphone.)

10 A. And what was the date of this letter? And
11 who was it from?

12 Q. Sure. I'll read it into the record. It is
13 dated November 17, 1997. And it is from your
14 colleague Sam Nader, VP Marketing of GSI, and it is to
15 the Newfoundland Offshore Petroleum Board. And it's
16 copied to T.D. Einarsson, President, GSI Houston, as
17 well as Canadian Association of Petroleum Producers.

18 Do you see that?

19 A. Okay.

20 Q. Were you aware? Do you recall this letter
21 being sent to the Newfoundland Board?

22 A. Not this specific one, but it wouldn't

1 surprise me.

2 Q. Okay.

3 A. We kept reiterating our position.

4 Q. Sure. I'm just going to ask you some
5 questions about some of the details that are in here,
6 and you can tell me some of your impressions of it.

7 So, again, I'll read it into the record.

8 The second paragraph: "GSI takes significant risk and
9 is generally the major investor when acquiring these
10 surveys, although some surveys are partially
11 subscribed to by oil and gas explorers prior to being
12 acquired. GSI relies on oil companies licensing our
13 data to generate enough revenue to recoup our
14 investment and ultimately generate a profit on any
15 given survey. This is our only source of income.
16 Normally, we wish to have at least recovered our
17 initial investment within five years. This is not
18 always the case. Some surveys have required
19 10-15 years before our initial investment has been
20 recovered. Some surveys have always remained in a
21 loss position."

22 So just to ask you, generally, Mr. Nader

1 says that normally we wish to have at least recovered
2 our initial investment within five years. So that was
3 GSI's general Business Plan was they would seek within
4 five years to be able to make back their investment
5 and hopefully profit?

6 A. Anybody would want to do that. You want to
7 make it back in the year, first year, if you could.

8 Q. Right.

9 A. It would be nice.

10 Q. Okay. Let's go to the next paragraph and
11 just see -- I'll ask you, sort of, your understanding
12 of it, but: "The main criteria employed in deciding
13 whether or not we will shoot a speculative survey are:
14 Crown land, open areas, expected level of
15 participation, initial and ultimate, expected level of
16 payout and timing."

17 So let's go to the first bullet point,
18 "Crown land, open areas."

19 What do you understand that to mean?

20 A. Well, in order to do a seismic survey, it
21 has to be somewhere where an oil company can lease to
22 explore and drill. Otherwise, they are probably not

1 going to license from you. Although, there are big
2 exceptions to that when you tie certain structures and
3 certain wells, even if they are in off-limit areas,
4 sometimes that data is extremely valuable to show the
5 extent of a basin and so forth.

6 So it's not a true statement that I've seen
7 in this proceeding and elsewhere, where they say, "Oh,
8 this data is in off-limit areas and it's useless and
9 it has to value." That is absolutely wrong.

10 Q. Okay. I'm going to go back to this, and I
11 think you explained it, that it's -- "Crown land"
12 means it is Canadian-owned public land?

13 A. Well, we have done it in other parts of the
14 world. It is just that it's available for leasing by
15 an oil company is all we care about.

16 Q. Right.

17 A. Because they are not going to explore in an
18 area that they can't obtain a lease, so that they can
19 exclusively drill in that area.

20 Q. Understood. The second bullet point is
21 "expected level of participation, initial and
22 ultimate," and that's anticipating what oil companies

1 are going to want to actually license the data.

2 Is that sort of the summary, or what do you
3 think?

4 A. No. It is actually better than that. We,
5 in many cases, would get underwriting for a survey
6 ahead of time. So we would have a precommitment from
7 an oil company. They would say, we'll license this
8 data if you create it. And we normally -- sometimes
9 try to get two or three, and so it takes your risk
10 away.

11 Q. Right.

12 A. Yes. So that's what "initial participation"
13 means. And then "ultimate" is looking at is there an
14 opportunity to license it to Company C, D, and E
15 later, or is it likely that these companies will
16 obtain a partner. And then you obtain licensing
17 through obligatory equalization, which is in every
18 seismic company's license agreement.

19 Q. Right. And the last one, "expected level of
20 payout and timing," I think we already went through
21 that. You said, generally, the Business Plan is
22 five years, but you hope that you can make the money

1 back even within one year?

2 A. Well, of course. That would make something
3 more profitable and some were -- they were all over
4 the map. So it depended on the area and a number of
5 factors.

6 Q. Right. But that was GSI's general Business
7 Plan was to make back the profit in five years?

8 A. We tried to, yes.

9 Q. Okay. I'm going to go to the second
10 paragraph on the second page. It says: "By allowing
11 the release of speculative data, the C-NOPB is
12 allowing parasitic companies that have not contributed
13 financially or taken any risk to acquire a copy of
14 released Seismic Data from the C-NOPB at reproduction
15 cost only, scan the Seismic Data with little or no
16 added value, and then proceed to trade with the
17 Seismic Data as if owned. This practice is depriving
18 serious and legitimate investing companies of revenue
19 from their investment."

20 So this indicates that, as of the date of
21 this letter, November 17, 1997, GSI was aware that
22 there were companies that were scanning data available

1 from the C-NOPB; is that right?

2 A. I don't know, specifically, the C-NLOPB. We
3 would go to trade shows, like everybody in our
4 industry. There were three or four big ones a year.
5 And we'd see these giant booths for Lynx Information
6 Systems, KP data, other companies; and they would be
7 reselling other owners' data that was scanned and
8 vectorized. So "vectorized" meaning taking it from a
9 paper copy to a digital copy, which is much more
10 valuable, which didn't exist when all these
11 regulations and laws were written.

12 And they can put it on a workstation that
13 has extremely powerful tools to interpret and use the
14 data and manipulate it and obtain lots of information
15 out of it, even things like knowing whether it's gas
16 or water and things like that.

17 So that was a huge shift in our entire
18 industry and, as far as I know, all the data owners
19 were very concerned about this happening and seeing
20 these booths at these things. But we didn't know,
21 specifically, what their activities were and what they
22 were doing until, I think, much later when we got

1 these access to information responses in the
2 mid-2000s. Because, of course, nobody talks. When
3 they're stealing, they don't want to tell you.

4 Q. Right. But GSI was aware that this was
5 happening in 1997?

6 A. We had concerns about it, yes, because we
7 would see these booths at these trade shows.

8 Q. The next paragraph says: "We respectfully
9 request that released data be regulated by the C-NOPB
10 in collaboration with the legitimate owners of the
11 surveys, and not permit any reproduction or trading
12 with such data without written permission from the
13 companies that have invested time, effort, and money
14 to collect these surveys. In summary, GSI requests
15 that the released data be limited to copies of paper
16 sections and regulated for the use of oil companies
17 only."

18 Do you see that?

19 A. I do.

20 Q. Okay. Do you know what the Board's response
21 to that request was?

22 A. I don't.

1 Q. Let's pull up Exhibit R-270, which is dated
2 November 27, 1997. You can scroll down so that
3 Mr. Einarsson can see it. Again, it's in your binder
4 if you want to look at the hard copy.

5 Again, this is the C-NLOPB's response dated
6 November 27, 1997.

7 It said: "The Board's release of Seismic
8 Data is governed by the confidentiality period set out
9 in the Canada-Newfoundland Atlantic Accord
10 Implementation Act and the Canada-Newfoundland
11 Atlantic Accord Implementation Act.

12 "In your letter, you have requested that the
13 released data be limited to copies of paper sections
14 and that their release be limited to oil companies
15 only. Please, note that the Board's current practice
16 is to limit release of this data to copies of paper
17 sections and the accompanying reports.

18 The Board does not have the power to limit
19 the release of such data to oil companies only. Once
20 the period of confidentiality has expired, the Board
21 has no choice but to allow the data to fall within the
22 entire public domain."

1 Do you see that?

2 A. I do.

3 Q. Okay. So the Board was saying they are
4 going to continue the practice of releasing paper
5 copies to the public?

6 A. Well, I see that Sam is asking for something
7 that is not our company position. Our position is our
8 data is confidential and it shouldn't be disclosed at
9 all.

10 Q. Okay.

11 A. That other laws applied in Canada, which we
12 later found out did.

13 Q. Okay.

14 A. So the Boards were just winging it here and
15 going off on their own, apparently, in hindsight.

16 Q. Okay.

17 A. Yes. And they just kept parroting
18 back: "We have this Accord Act that gives us some
19 authority," while they're ignoring all the other laws
20 in Canada.

21 Q. I'll move on.

22 After being informed of the Board's

1 position, GSI conducted another survey the next year;
2 is that right?

3 A. Having nothing to do with accepting any of
4 this and so forth.

5 Q. Okay.

6 A. We are trying to run a business. We have to
7 pay people every two weeks. We have ships sitting
8 there. We have equipment. We have overhead. We have
9 rent to pay. We're a real business trying to struggle
10 under these murky rules that we didn't understand and
11 we couldn't get clarity on, despite trying hundreds of
12 times.

13 Q. Okay. I'll just pull up R-251 --

14 ARBITRATOR LANDAU: Can I just ask a quick
15 question? Sorry to interrupt.

16 MR. LUZ: Please.

17 ARBITRATOR LANDAU: Forgive me. Just
18 following through the chronology, we -- after this
19 letter, as far as the documents that we have
20 available, we don't have anything else until about
21 April 1998 in the chronological run.

22 So if this is left with the Board saying

1 they would welcome a meeting to further clarify the
2 matter, you may have no recollection or knowledge, but
3 are you able to help us as to what would have happened
4 after that or what did happen immediately?

5 You are being told by the Board about their
6 position, would there have been further engagement
7 with the Board before you proceeded to make further
8 investments?

9 THE WITNESS: The Board never met with us
10 directly. We would meet with representatives from the
11 Board from time to time, but I don't ever recall a
12 meeting where we could actually get with them. I got
13 much closer with the National Energy Board, and now
14 called the CER in Calgary here. And we did have quite
15 a few meetings also with the geologic survey.

16 ARBITRATOR LANDAU: We're just focusing on
17 this time period. We are now in November of 1997.
18 There's a gap in the contemporaneous documents now
19 until April '98. I'm just wondering what happened in
20 the meantime? But you may not know.

21 THE WITNESS: I don't know. There were a
22 lot of gaps. This was not uncommon. Around this time

1 the government started on a shared data repository
2 thing. And we had huge meetings with maybe 20
3 industry people and then representatives from all the
4 three Boards.

5 It happened around this timeframe, '98, '99
6 to maybe 2003, and we had meetings in Halifax. We had
7 meetings in different cities. And they were actually
8 trying to expand the disclosure of data. And there
9 was a lot of back and forth. There is a lot of
10 correspondence. I think it is in these Witness
11 Statements.

12 So we had a constant dialogue. We kept
13 trying to have a dialogue and to understand how they
14 thought they could do these things. And there was a
15 bit of a "ship passing in the night" because we said,
16 "What about all these laws?" And they would say, "Oh,
17 we've got these regulations."

18 ARBITRATOR LANDAU: Thank you.

19 ARBITRATOR GOWDY: Mr. Einarsson, could I
20 ask a quick question?

21 THE WITNESS: Yes, sir.

22 ARBITRATOR GOWDY: You suggested that this

1 response was in conflict with other Canadian laws, and
2 I'm wondering what other Canadian laws you think this
3 letter was in conflict with; if I understood your
4 response correctly?

5 THE WITNESS: Well, there's a great document
6 in my Witness Statement. I believe it is
7 Clause 84(s). It's where I talk about what the
8 Canadian government knew and so forth.

9 Anyway, there's a document in there from the
10 C-NLOPB, I believe. And they did a review. And they
11 said that common law -- the Access to Information Act,
12 and specifically Section 20, which says trade secret
13 data or will cause financial harm, you're allowed to
14 block an access to information request, block the
15 response, based on those Section 20 criteria. And
16 then copyright law.

17 And in that memo, it said that the C-NLOPB
18 was then aware that those three things, common law,
19 copyright, and the Access to Information Act,
20 Section 20, would block the disclosure of this data.
21 We never saw that until much later in this production
22 and so forth. But that was back in '98 they knew they

1 were doing this.

2 And what's happening here is this was all a
3 big finesse to try and finesse this thing and keep
4 repeating these rules and keep rehashing this
5 Regulatory Regime rules of the game that were never
6 fixed, ever. They were constantly changing the rules
7 and constantly pulling the rug out from under us, so
8 it was very difficult for us to understand what was
9 going on.

10 And I tried meeting -- there's evidence
11 where I sat down with the GSC. They actually sent me
12 a letter and said we'll honor your copyright. We're
13 not going to make copies without your permission. But
14 then they reneged on that behind the scenes, we found
15 out in subsequent access to information. So we were
16 led down the garden path here in many, many ways.

17 And then you can see what happened in this
18 court proceeding that we had with the common issues.
19 Our legal experts will dissect that for you, and you
20 can make what you want of that, but it was always,
21 heads, the government wins and, tails, we lose. That
22 was always the answer.

1 ARBITRATOR GOWDY: Thank you.

2 BY MR. LUZ:

3 Q. Thank you.

4 I'll just pick up from -- if you recall
5 where I had left off. I was going to pull up -- after
6 receiving the November 27, 1997, letter from the
7 Board, do you recall that GSI did another Seismic
8 survey the next year in 1998?

9 A. Well, yes.

10 Q. Okay.

11 A. We continued to do some surveys, yes.

12 Q. I'll pull up Exhibit R-251. It's a letter,
13 approval letter for -- it is dated June 14, 1998, and
14 it is an approval letter for 1998 2D Nonexclusive
15 Seismic Grand Banks.

16 And then we will just look at the last
17 paragraph. It says: "The final reporting
18 requirements for the program are as outlined in the
19 guidelines for geophysical and geological survey,
20 Section 5. This includes digital copies of the shot
21 point and final migrated Seismic Data. Data will be
22 released five years and six months following the

1 completion of the survey."

2 Do you see that?

3 A. I do.

4 Q. Okay. And GSI decided to go ahead with that
5 survey?

6 A. Not based upon reading that. That had
7 nothing to do with it.

8 Q. Okay. I want to ask you a few questions
9 about -- in your Second Witness Statement, CS-12, you
10 refer to a legal memo by GSI's lawyers, Code Hunter
11 Wittmann from July 1998.

12 Do you recall that?

13 A. I do.

14 Q. Okay. Great.

15 We're going to pull it up. It is Exhibit
16 R-531, and it's under cover of a letter dated July 27,
17 1998, from GSI, Doug Dowdell to the
18 Canada-Newfoundland Offshore Petroleum Board.

19 Do you remember Mr. Dowdell sending this
20 letter with the Code Hunter Wittmann memo attached?

21 A. I don't, but I'm -- I was aware of it, yes,
22 or at least after the fact.

1 Q. So I'm just going to read into the record
2 the cover page from GSI where it says: "Our position
3 is that all geophysical information which we have been
4 filing on an ongoing basis with the C-NOPB is
5 confidential information, which in addition, enjoys
6 copyright protection. By this letter, we are advising
7 the Board that all information filed by us with the
8 Board is not to be released. We are attaching for
9 your information a copy of a legal analysis prepared
10 by our lawyers, Messrs. Code Hunter Wittmann, which
11 sets out the legal rationale for our position."

12 Do you see that?

13 A. I do.

14 Q. Okay. And that's the legal memo that you
15 were referring to by GSI's lawyers?

16 A. Well, that's one of them. We were trying to
17 have a dialogue and sit down and sort this out, which
18 was always stymied somehow by the government.

19 Q. Okay. I'm not going to -- I know you're not
20 a lawyer, so I'm not going to ask you about the legal
21 analysis in here, but there is just one specific
22 provision in the memo that I want to go through. It

1 is on Page 6 of the PDF, which is Page 3 -- if you
2 want to look at the hard copy, that's fine. If not,
3 the electronic version is good.

4 It is Page 3 of the memo, Page 6 of the PDF
5 under the heading: "Position of the Boards in respect
6 of the information received."

7 Do you see that?

8 A. Yes.

9 Q. Okay. Again, I'm just going to have to read
10 it into the record just so that it's in there so
11 everyone knows what we are talking about. "For a
12 number of years, the C-NOPB and the C-NSOPB" -- the
13 Nova Scotia Board -- "have taken the position that any
14 information filed with them is governed solely by the
15 provisions of the CN-AAIA and the CN-SAIA." Which I
16 believe are the Accord Acts. "Specifically the Boards
17 refer to Sections 119 and 122 of the CN-AAIA and the
18 CN-SAIA respectively, which provide that geophysical
19 information, once received by the Board, will be
20 treated as privileged information and will not be
21 released by the Board for a period of five years from
22 the date of its receipt of filed information."

1 And then it refers to certain sections.

2 "The Boards' apparent view is that at the
3 expiry of that five-year period, all filed information
4 is then available for release to the general public.
5 GSI's concern is that the information is confidential
6 and copyrighted information from which it derives its
7 business revenue by virtue of licensing such
8 information to various third parties. The effect of
9 the respective Board's release of all filed
10 information is to release such confidential and
11 copyrighted information free of charge to third
12 parties without GSI being compensated for this
13 information."

14 You would agree that that's a pretty
15 accurate summary of the Board's position versus GSI's
16 position at the time in 1998? Is that right?

17 A. Well, I don't know, quite honestly, because
18 I'm not sure what the Board's real positions were.

19 Q. Okay.

20 A. This is some commentary from one of our
21 attorneys.

22 Q. Okay. Like I said, I wasn't going to ask

1 you for that. I just wanted your general impression.

2 It's the next paragraph that I wanted to ask
3 you about where it says: "GSI has recently been put
4 in the position in which it was unable to negotiate
5 for the full value of information filed with a Board
6 as the purchaser took the position that such
7 information was available at no cost to them from the
8 Board. In another instance, a known producer had
9 obtained data from the Board and was not prepared to
10 pay normal license fees for the data as a result."

11 Do you recall what -- which two companies
12 this is referring to?

13 A. See, this was before I was fully involved in
14 the company, which wasn't until about '99, 2000. I
15 was mostly dealing with financial kind of things at
16 the beginning and this oil company that we were
17 involved in, so I don't recall the specific company or
18 instance.

19 Q. Okay.

20 A. I'm sorry.

21 Q. That's fine.

22 But this is acknowledging that GSI had

1 experienced diminishment in its licensing fees because
2 of the Board's actions; is that right?

3 A. Well, I don't know. It looks like they are
4 giving two examples, but I don't know how they were
5 resolved or what occurred after this.

6 Q. Okay. Sure.

7 I'm going to pull up Exhibit R-236, which is
8 a letter from the C-NLOPB dated February 24, 1999, to
9 Mr. T.D. Einarsson, and this letter indicates that the
10 C-NLOPB has made a policy change regarding the
11 confidentiality period of data from nonexclusive
12 geological or geophysical work and indicates: "The
13 data will now be available for disclosure after the
14 expiration of 10 years following the date of
15 completion of the work."

16 And it concludes that: "This change is
17 applicable to all data that are currently considered
18 privileged."

19 Do you recall being made aware in February
20 '99 that the Board had extended the confidentiality
21 period for nonexclusive data to 10 years?

22 A. Yes. I know there were some changes from

1 time to time, yes.

2 Q. Okay. And that change would have benefited
3 GSI because it gave an extra five years within which
4 to be able to make its money back as we talked about
5 before. Before it was a five-year program, now it's
6 ten years to make your money back.

7 A. Well, we found that wasn't entirely true,
8 though. We had all these Secondary Submissions that I
9 told you we weren't aware of where our clients would
10 convert our licensed data and sell it to the
11 government, and then those better versions of data
12 often reprocessed, and who knows in what format,
13 because we didn't get any production here. And our
14 production was blocked in our -- I don't know how
15 many -- 50 Access to Information requests. Never once
16 did they give us the submissions, the data that was
17 actually provided.

18 So that's a blind spot for us, and -- but we
19 know there is data there because we had -- for
20 example, that Jeanne D'Arc survey that we saw earlier,
21 we had companies go and get all three or four or five
22 versions of submissions, not only from us but our

1 licensees, on a real consistent basis, and they would
2 go and get all of them, so that was the most pirated
3 survey in our whole thing.

4 So what would happen is they would submit
5 and it would be released after five years, because it
6 was deemed an exclusive survey under the oil company's
7 name, so this -- I'm not sure how much this benefited
8 us, if at all. And, in fact, a lot of the data we had
9 was from the '80s and '70s, so it really wouldn't have
10 done much anyway.

11 The problem was not having life of the
12 author plus 50 years. That was our problem.

13 Q. Okay. Just to go back, you were talking
14 about the survey that was listed in the March 1996
15 publication that we looked at earlier; is that right?

16 A. Yes. The Jeanne D'Arc 3D, it licenses for
17 about [REDACTED] a copy. And then when you have
18 somebody going and getting five different versions of
19 it, eight companies doing that, it's a huge loss.

20 Q. Okay. I'm going to pull up a letter dated
21 May 5, 1999. It's Exhibit R-272. It's a letter from
22 GSI to the Newfoundland Board, and the letter

1 says: "We request the Board please give us written
2 notification, preferably by fax, if any person or
3 company requests any geophysical data that was
4 collected through the time, resources, and efforts of
5 GSI."

6 Do you recall that?

7 A. I don't recall this specific one, but I know
8 we gave many notices like this.

9 Q. Okay. Do you recall -- let's pull up
10 Exhibit R-273, a letter dated May 13, 1999. It's from
11 the Board in response to the letter we just looked at
12 where it said: "The exploration department will
13 endeavor to notify you of any requests for such data
14 collected through GSI provided that the requesting
15 party does not object to us notifying GSI of their
16 request."

17 Do you recall that was the Board's response?

18 A. I don't recall this specific one.

19 Q. That's fine.

20 The next letter is R-271. It's the 1st of
21 June 1999. And I'll just read it. It is from GSI,
22 T.D. Davey Einarsson, and it is copied to Code Hunter

1 Wittmann, which is GSI's Counsel.

2 Do you recall?

3 Just take a look at the letter.

4 So I'll just read it into the record. "Your
5 letter is absolutely inconsistent with our detailed
6 legal position previously given to the Board. Our
7 position is simply that information filed with the
8 Board is our information. Your letter is also
9 inconsistent with the verbal commitment given to by
10 GSI by former Chairman Jim Strain some time ago. We,
11 therefore, do not accept your suggested procedure."

12 There's a second paragraph, which I don't
13 think is necessarily relevant. I'll read it anyway.
14 "Our recommendation dated December 11, 1998, copy
15 enclosed, where GSI agreed to handle delivery of data
16 to requestors, an appropriate solution and is
17 consistent with federal law. Your letter implies that
18 requests for data will be released by your exploration
19 department. GSI puts you on notice that release of
20 data by you is unauthorized and a release of GSI
21 confidential information and will cause financial harm
22 to GSI."

1 Do you see that?

2 A. Yes, I see it.

3 Q. And do you recall what the Board's response
4 to that letter was?

5 A. Well, they were generally consistent. They
6 never tried to solve the problem and come and sit down
7 and understand what's going on. They would always
8 just restate their position.

9 Q. Their position.

10 A. Whatever it was.

11 Q. Okay. I'll just --

12 A. But I don't recall a response. I'm sure you
13 have one.

14 Q. Okay. I do.

15 It is Exhibit R-274, and it's a letter from
16 the Newfoundland Board June 18, '99. And the letter
17 is to T.D. Davey Einarsson.

18 Take your time to -- you can read it. I'm
19 sorry that the copy is not great, but I think it's
20 legible. Just read it, and then I'll read the text.

21 A. This is a fascinating letter.

22 Q. Well, I'll just read it into the record.

1 "While the Board understands your position, the Board
2 does not agree with the legal analysis offered on your
3 behalf respecting the release of the subject data
4 provided by GSI. We have, for policy reasons,
5 nevertheless agreed to withhold such data for a period
6 of 10 years, as stated in my February 24, 1999, letter
7 sent to you.

8 "Subsequently in a letter dated May 13, '99,
9 from Neil DeSilva and in an attempt on our part to be
10 as accommodating as we could, we offered to notify GSI
11 of the parties requesting nonexclusive data provided
12 by GSI, providing that the requesting party does not
13 object to such notification. By your letter of
14 June 1, '99, you have not accepted our offer to
15 implement that procedure. Consequently, we will not
16 notify you of such requests."

17 Then I'll just read the last paragraph or
18 last two paragraphs: "The Board believes that the
19 disclosure of information obtained as a result of
20 carrying on a work or activities authorized under our
21 Accord Acts. I refer in particular to Section 119 and
22 Section 115 of the federal and provincial Accord Acts

1 respectively. The Board intends to continue the
2 practice of making such information available to the
3 public following the expiry of the specified periods,
4 except for nonexclusive seismic, which period has been
5 extended. To my knowledge, the Board has never
6 previously agreed to do otherwise.

7 "I trust this will clarify any confusion
8 respecting our positions on this important matter."

9 This is the Board disagreeing with GSI's
10 legal analysis that we had just looked at previously;
11 is that right?

12 A. And what's fascinating in my Witness
13 Statement --

14 Q. If you could just answer yes or no and then
15 go ahead.

16 MS. LEMMENS: Excuse me. He will answer the
17 question as he wants to. If you want to ask him a
18 further question, please go ahead. But you can't tell
19 the witness it's yes or no.

20 MR. LUZ: Okay.

21 THE WITNESS: What I find fascinating is in
22 my Witness Statement we have the memo, internal memo

1 of the C-NLOPB saying -- informing them that common
2 law, the Access to Information Act Section 20, and
3 copyright prohibits the disclosure of data. Yet this
4 letter is totally the opposite thing. I find that
5 fascinating.

6 Now we know all this in hindsight. It casts
7 a different light on these kind of letters.

8 BY MR. LUZ:

9 Q. But this is the Board's position conveyed to
10 GSI in June 18, 1999, that it disagrees with GSI's
11 legal analysis?

12 A. Externally, that's their position.
13 Internally, apparently it was different.

14 Q. Okay. Thank you.

15 MR. LUZ: That's been almost an hour. I
16 wonder if that's a good time for a break, or
17 Mr. Einarsson or if the Tribunal wants to continue on,
18 that's fine.

19 PRESIDENT WALLGREN-LINDHOLM: I believe this
20 is a good time to break. Thank you.

21 We will be back in -- we will be back a
22 quarter past 11:00.

1 THE WITNESS: Thank you.

2 PRESIDENT WALLGREN-LINDHOLM: Just a second.

3 Mr. Einarsson, I want to remind you that you remain
4 under testimony, so you cannot discuss your testimony
5 with anyone, and you cannot liaise with Counsel.

6 THE WITNESS: I understand. Thank you.

7 PRESIDENT WALLGREN-LINDHOLM: Thank you.

8 (Brief recess.)

9 PRESIDENT WALLGREN-LINDHOLM: Can we proceed
10 with the cross-examination of Mr. Einarsson?

11 Are you ready, Mr. Luz? Thank you.

12 MR. LUZ: Thank you, Madam Chair.

13 BY MR. LUZ:

14 Q. Welcome back, Mr. Einarsson.

15 A. Thank you.

16 Q. And I appreciate your patience for this.

17 Thank you.

18 You'd mentioned earlier that GSI started to
19 make access to information requests to the Boards in
20 order to obtain information about who specifically was
21 accessing GSI's data from the Boards.

22 And -- do you recall that?

1 A. Yes, I do.

2 Q. And that started around the year 2000?

3 A. I believe it was 1999. My dad and I had a
4 conversation. We were quite -- getting quite alarmed,
5 so I believe I did a request from one or two Boards
6 and then we did one to all three, and they just
7 refused to answer. We were trying to find out what
8 exactly was happening with our data, and that's when
9 we had to do the Compel Court Order in Calgary here to
10 force them to answer us.

11 Q. Okay. We will just pull up Exhibit C-194,
12 which is a letter dated September 20, 1999, from GSI
13 to the National Energy Board.

14 Is this one of the letters that you said you
15 recalled?

16 A. That may be it.

17 Q. This one says: "It is our understanding
18 that confidential information provided by our
19 organization to the Board has recently been released
20 to a number of third parties. Please provide to the
21 attention of the undersigned the names and addresses
22 of all third parties who have, within the last

1 36 months, requested and been granted access to
2 information concerning or provided by our organization
3 to the Board, together with details of the information
4 provided."

5 Do you see that?

6 A. I do.

7 Q. Okay. Do you recall the Board's response to
8 the request?

9 A. I recall the generalities of it. I think
10 that they were -- and this was a common theme over
11 many years of doing these requests. They would use
12 the Act to protect the recipients of our data. And
13 they didn't want us to give us the names or their
14 confidential information or what have you.

15 Similar to this Section 20 I had mentioned a
16 few minutes ago, which should protect our data from
17 being released because it is a trade secret and it is
18 financially harmful to us, but instead, it turned out
19 the Access to Information Act was flipped on its head,
20 and it was used to conceal information from us in many
21 instances.

22 Q. Okay. I think we can take a look at an

1 example that I think may be what you're referring to.

2 Let's pull up Exhibit R-650.

3 This is a letter from the National Energy
4 Board dated 21 March 2000 to you.

5 Do you recall receiving this letter?

6 And take your time to review it.

7 A. Yeah. This is part of the confusion for us.
8 They said they looked back -- available records going
9 back 42 months, and they couldn't find any records. I
10 believe that was this response.

11 Q. Okay. Let's -- before we get to it, I'll
12 just read the Second Paragraph: "As you are aware,
13 the information you provide to the Board for the
14 purposes of the Canada Oil and Gas Operations Act, or
15 the Canada Petroleum Resources Act, CPRA, is kept in
16 our Frontier Information Office, FIO, after it has
17 been released from privileged status pursuant to
18 Section 101 of the CPRA. A person who wishes to
19 consult any information in the FIO makes an
20 appointment to do so and attends at the FIO. Once in
21 the FIO, the person may consult and photocopy any
22 released information respecting oil and gas

1 Exploration and Production operations on Frontier
2 Lands. The Board does not record any specific
3 information viewed by a person conducting research at
4 the FIO, therefore, the Board does not have any record
5 of the persons who have had access to specific
6 information concerning or provided for by your
7 organization in the FIO."

8 Just in the middle of the paragraph where it
9 says -- it's referring to the CPRA Section 101 and
10 that information at the Frontier Information
11 Office: "The person may consult and photocopy any
12 released information respecting oil-and-gas
13 exploration and production operations on Frontier
14 Lands." So at this time the Board was saying that,
15 once released from confidential status, you could go
16 to the FIO to get, consult the data and photocopy it;
17 is that right?

18 A. I read what they are saying, but I mean, we
19 did get subsequent replies from them that showed
20 information being borrowed and showing the person's
21 name, showing the datasets that were taken out and so
22 forth. So subsequently we did get a lot of

1 information from them. So I found that this letter
2 was not accurate or true --

3 Q. Okay.

4 A. -- later on.

5 Q. Right. You, yourself, went to the FIO
6 shortly after this letter to see what was happening at
7 the Boards; is that right? Do you recall?

8 A. I know I've been there maybe once or twice,
9 but I don't recall the timeframe. I'm sorry.

10 Q. Oh, it's okay. Let's pull up Exhibit R-649.
11 And this is a Liability Agreement Borrowed Materials.

12 Do you recognize your name, your signature?

13 A. Yes, that's my handwriting. That's that oil
14 Company I mentioned to you, and that's GSI Survey
15 there, 8620G5.

16 Q. Okay. And it's dated November 3, 2000, and
17 it looks like there's a return date of
18 November 8, 2000. Do you recall what you were doing
19 with GSI's materials?

20 A. I don't know. It might have been for -- our
21 lawyers wanted to see it or something like that. I
22 actually do not recall.

1 Q. Okay. That's fine.

2 A. But -- yeah. That would have had to have
3 been the purpose.

4 Q. Okay. And you've mentioned later that you
5 went to court later to get the access -- to make
6 the -- to get the Boards to release the names under
7 the Access to Information Act of people that were
8 borrowing from the Boards.

9 Do you recall that?

10 A. Yes. Well -- and that was really strange,
11 too, because normally you don't just ask for names.
12 You get the records that have the names. And we never
13 did get the records until many years later, and that's
14 when we saw the copying. The spreadsheets that the
15 Boards created, which is very unusual to create
16 something in reply to an Access to Information Request
17 gave us no indication of copying or copyright
18 violations.

19 Q. Okay. Let's just go to Exhibit R-645. This
20 is an affidavit that you filed in the Federal Court of
21 Canada in this Access to Information Act litigation,
22 and I just want to look to Paragraph 3 where it

1 says: "As a condition of granting Licenses for the
2 conduct of Seismic exploration, the Respondent
3 National Energy Board requires of GSI and other
4 Licensees that they deposit a copy of the data
5 collected by them with the Board. The Board has
6 adopted the practice of releasing copies of the data
7 to third parties without GSI's consent."

8 Do you recall that?

9 A. Not specifically, but it looks like I did
10 that, yeah.

11 Q. Right. So that's what you -- as of the date
12 of this affidavit, which I should actually read into
13 the record. It's December 11, 2000, is the Registry
14 date of the Federal Court of Canada. Okay?

15 And just for the record, do you recall
16 filing similar affidavits with respect to the Nova
17 Scotia and Newfoundland Boards?

18 A. I honestly don't recall. There were too
19 many pieces of litigation that we were forced into.

20 Q. I totally understand. And this is in the
21 year 2000 so I understand that.

22 Just for the record, we will just them up

1 just to confirm. It is Exhibit R-646, and this is an
2 affidavit filed on the same date, December 11, 2000,
3 by you, Paul Einarsson, H. Paul Einarsson in the
4 action GSI v. The Nova Scotia Board, and the
5 Paragraph 3 says: "As a condition of granting
6 licenses for the conduct of seismic exploration for
7 the Respondent Canada-Nova Scotia Offshore Petroleum
8 Board requires of GSI and other Licensees that they
9 deposit a copy of the data collected by them with the
10 Board. The Board has adopted the practice of
11 releasing copies of the data to third parties without
12 GSI's consent."

13 So that was the practice that you understood
14 at the time was that of the Nova Scotia Board?

15 A. Well this is what they were telling us when
16 we did this NEB Access to Information Request, as you
17 saw, they said there were no responsive records. So
18 we don't know exactly what was happening.

19 Q. Sure.

20 A. They were saying things.

21 Q. Sure. We'll come to that eventually, but,
22 again just for the record, we'll open up R-647, which

1 is another affidavit filed -- I'm trying to see the
2 stamp date on this, 8th December 2000, and it's in the
3 matter of Geophysical Service Incorporated against the
4 Canada-Newfoundland Offshore Petroleum Board and
5 Information Commissioner of Canada, and again, we see
6 at the third paragraph the same statement: "As a
7 condition of granting licenses for the conduct of
8 seismic exploration, the Respondent
9 Canada-Newfoundland Offshore Petroleum Board requires
10 of GSI and other Licensees that they deposit a copy of
11 the data collected with them with the Board. The
12 Board has adopted the practice of releasing copies of
13 the data to third parties without GSI's consent."

14 So that was your understanding with respect
15 to the Newfoundland Board at the time?

16 A. Well, this is from my Counsel, so I guess
17 that was his understanding.

18 Q. Okay. But this is your signed affidavit; is
19 that right?

20 A. Yes. That's mine. Yeah.

21 Q. Okay. Okay. You say -- I'm going to ask
22 you some questions about the offshore Seismic Data

1 business in Canada around this time. You say
2 that -- I think you'd said in your Witness Statement
3 before that there are about 15 to 20 companies in the
4 Canada offshore Seismic Data industry?

5 A. Those are the only ones that effectively can
6 drill a well. There are some little ones, but they're
7 interest holders that -- or they try to get somebody
8 to farmin. But you are really talking about companies
9 that can actually afford to drill a \$200 million well
10 with a 5 percent chance of success. You have to be
11 big.

12 Q. Right. Right. And those are the companies
13 that would license data from --

14 (Overlapping speakers.)

15 A. It's a very small group.

16 Q. It's a small group. Okay.

17 MR. LUZ: I have a few questions about some
18 of the confidential documents, so I don't know if -- I
19 guess we have a public feed, so we will just cut off
20 the public feed so that -- just let me know when we're
21 ready to go.

22 PRESIDENT WALLGREN-LINDHOLM: Yes. To the

1 best of my understanding, there is nobody in the room
2 that needs to be cut off, so it's only the feed;
3 right? It's done?

4 (Comments off microphone.)

5 (End of open session. Confidential
6 information follows.)

7 CONFIDENTIAL SESSION

8 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[illegible]

1

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

OPEN SESSION RESUMED

Q. I'm just going to come back to the Access to Information Act litigation that we were talking about earlier that GSI had started in 2000.

A. Yes, I believe that's correct.

Do you recall -- this is the Judgment that we were talking about.

Q. Okay. Let's just quickly look at Paragraph 7. The last sentence of that paragraph

1 says: "Each of the three Boards has adopted the
2 practice, on request, of releasing copies of the data
3 deposited with it by the Applicant to third parties,
4 without consultation with or consent of the Applicant,
5 following the expiration of a period of time set by
6 law or by policy of the appropriate Board."

7 That reflects what you had said in the
8 affidavits from 2000 that we looked at earlier?

9 A. This was the position of the Boards. I
10 stated that.

11 Q. Right. I want to just take you - and again,
12 I know you're not a lawyer, so I'm not asking for
13 legal interpretations and so on, but I'm just going to
14 take you to Paragraph 75 of the Judgment, where it
15 said: "I'm satisfied that it is beyond doubt that the
16 Seismic Data provided by the Applicant to the
17 Canada-Newfoundland Board was information or
18 documentation provided for the purposes of Part II or
19 Part III and, thus, fell within the ambit of the
20 privilege provided by Subsection 119(2) of the Act.
21 I'm equally satisfied that, by virtue of
22 Paragraph 119(5) (d) and, in particular,

1 Subparagraph (ii) of Paragraph (d), that privilege
2 expired five years following the date of the
3 completion of the seismic work to which the
4 information or documentation related. Thus, on the
5 expiration of that five-year period, it was entirely
6 open to the Canada-Newfoundland Board to make such
7 information or documentation available to a
8 requestor."

9 That was inconsistent with GSI's position
10 taken to that point, was it not?

11 A. Yes.

12 Q. Okay.

13 A. It also had nothing to do with the case at
14 hand.

15 Q. Okay.

16 A. I don't know why it was in there.

17 Q. Okay.

18 A. It happened quite a bit.

19 Q. Right. But the Statement was of concern to
20 GSI?

21 A. Well, I don't know what to make of it. It
22 didn't mention the Copyright Act, so I don't know what

1 to do with that and I don't know how those laws relate
2 to the other laws.

3 Q. Sure.

4 A. In Canada.

5 Q. Okay. So as we said and acknowledged
6 before, after this Judgment, the Boards started
7 providing information about requests to the Boards
8 with details of who had made those requests. Is that
9 your recollection?

10 A. Can you restate that. I'm sorry.

11 Q. After this Judgment, the Boards started
12 disclosing the names of requestors in response to
13 GSI's Access to Information Requests.

14 A. Yeah, well, as I said, it was very unusual.
15 The Boards -- normally, when you do a Freedom of
16 Information Act or Access to Information Request, you
17 are requesting existing documents and records. So
18 what was very unusual here was the Boards created
19 spreadsheets with very limited information. They put
20 the names, the addresses, I believe the dataset of
21 GSI's that was involved, the date, and that was it.

22 Q. Okay.

1 A. There was no records. There were no
2 evidence of copying and so forth. So we saw these
3 names. We sent letters and notices and demands to
4 every single one, and we got a few answers back and we
5 took actions on those, and the others we kept
6 investigating.

7 Q. Okay.

8 A. So we kept doing Access to Information
9 Requests, and we find that, when you ask different
10 ways the same question, we got different answers. So
11 we learned about this process, that you have to ask it
12 five ways to maybe have a hope of getting the
13 information that you really need. So it wasn't until
14 many years later that we actually were getting the
15 records related to these, maybe five, eight years
16 later, ten years later.

17 Q. Okay.

18 A. So we didn't get an honest full response to
19 these, no.

20 Q. Let's pull up an example. It's R-526, which
21 is dated June 4, 2003. It's a letter from the
22 Newfoundland Offshore Petroleum Board to Curtis Dawe.

1 Was that GSI's legal Counsel at the time?

2 A. I don't remember that one.

3 Q. That's fine.

4 A. Sorry.

5 Q. That's okay. The letter says: "Enclosed
6 original of three-page document containing the names
7 and addresses of all third parties who, in the
8 154 months preceding the 1st of March 2000, requested
9 and were granted access to information concerning or
10 provided by the Applicant, GSI, to the Respondent,
11 C-NOPB." And then, if we turn the page, we can see
12 that list, the spreadsheet I think you were describing
13 previously, something like this.

14 A. Yes.

15 Q. Right.

16 A. This is one of the spreadsheets.

17 Q. Okay.

18 A. And like I said, it didn't give us a lot of
19 information.

20 Q. So it gave the date of the Request, the
21 program, the information requested and granted, the
22 name of the person, and the address; is that right?

1 A. Yes.

2 Q. Okay. Let's pull up R-651. This is a
3 letter dated 9 June 2003. I may actually not have the
4 entire document, but -- and it's from the NEB to GSI.
5 It says: "In compliance with the Order of Mr. Justice
6 Gibson dated April 25, 2003, the National Energy Board
7 herein discloses to GSI the names and addresses of
8 third parties who, within 180 months preceding
9 March 2, 2000, had requested and been granted access
10 to information concerning or provided by GSI to the
11 Board, together with the details of information
12 provided to the third party."

13 And then there was a "request date,"
14 "program," "name," referring to PanCanadian Petroleum;
15 is that right?

16 A. Yes, which became Encana. Ovintiv now.

17 Q. Okay. And then we'll just pull up
18 Exhibit R-652. This is from the Nova Scotia Board,
19 dated November 28, 2003, and it's addressed from the
20 Nova Scotia Board to you, and it contains some of the
21 information in response to GSI's Access to Information
22 Request.

1 A. Oh, can I see the whole thing? I notice NEB
2 only had one, one or two disclosures, which is
3 shocking.

4 Q. Right. Yeah.

5 A. That's how they responded to us.

6 Q. Okay. No, go ahead and take a look at the
7 whole document. You can scroll through.

8 A. So it's just one disclosure?

9 Q. There is one there. There's Kerr McGee.

10 A. Now do you see the problem I was explaining
11 earlier? NEB tells us one or two, and Nova Scotia
12 tells us one.

13 Q. Okay. If you keep scrolling through, you
14 can see.

15 A. Is there more?

16 Q. Yeah. There's more.

17 A. Well, it was pretty limited, if I recall.

18 Q. By this time, GSI had some of the
19 information about some of the companies that had been
20 accessing --

21 A. We had some and our Counsel sent --

22 (Overlapping speakers.)

1 MR. LUZ: I'm sorry.

2 BY MR. LUZ:

3 Q. By this time, GSI had some information about
4 companies that were accessing its data?

5 A. Yes. And the key word is "accessing," so we
6 didn't know if copying was occurring or publishing or
7 any of these things, and this is why all of these went
8 to my Counsel. They sent notice and demand letters
9 out, and, actually, one of the cases that answered us
10 was Calwest, which ended up in the Common Issues.
11 Everyone jumped onto the Calwest Case, and that turned
12 into a much bigger thing. 45 lawyers against my
13 three.

14 Q. Okay. Let's just look at, quickly, one of
15 the demand letters that you had talked about. It's
16 R-659, and it's dated November 2, 2003. And it's from
17 you to Lynx Canada, and it says: "We have been
18 advised that your company, Lynx Canada Information
19 Systems, has accessed our geophysical data program
20 Number 9424-G5-5P at the National Energy Board on
21 April 17, 2002, and March 25, 2003, and program
22 Number 838-9-8-14 on April 27, 2001, and program

1 Number 8624-G5-08P at the Canada-Nova Scotia Offshore
2 Petroleum Board on November 15, 1999."

3 "This information is confidential to GSI and
4 subject to GSI's claims of copyright. We hereby
5 demand that you return this and all Seismic Data
6 belonging to GSI immediately and advise us of any
7 copies you have made of the data and to whom they have
8 been distributed. Failure to do so may result in GSI
9 taking legal action against Lynx without further
10 notice except as required by the Alberta Rules of
11 Court."

12 So this was one of the letters that you had
13 talked about earlier where, once you found out from
14 the Access to Information Requests, you sent a demand
15 letter to the company?

16 A. This is the position of weakness we were in.
17 We were having to ask these guys if they made copies
18 or what they did with our data. Most of them didn't
19 respond.

20 Q. Okay.

21 A. And in the case of Lynx, they didn't
22 respond. But we had other information points about

1 Lynx, and we ended up suing them. But because of the
2 common issues, this is one of the companies that has a
3 ton of our data, and to this day, we had to pay them.
4 We had to pay millions of dollars to these companies
5 that have our data still.

6 Q. Okay.

7 A. They were rewarded by the Government of
8 Canada. They now have the Contract for the Offshore
9 Data Repository because Canada was fostering this
10 piracy business.

11 Q. Okay. I'm just going to skip ahead a couple
12 of years and ask a few questions about the prelude to
13 the litigation against Encana that started in 2007; if
14 you recall that?

15 A. Yes.

16 Q. If we can pull up Exhibit R-661. It's a
17 letter from GSI dated May 30, 2006.

18 Do you recall this letter?

19 Take your time to review it .

20 A. Oh, I recall it, and I recall the meetings.
21 And I recall every painful detail of dealing with this
22 company. We still have two lawsuits against them,

1 10 years-some later.

2 Q. Okay. I think it's the second sentence of
3 the letter -- well, I'll read the first
4 paragraph: "GSI has discovered that Encana has
5 accessed and is in possession of GSI's geophysical
6 data from the Beaufort Sea area, specifics of which
7 are attached as an appendix to this letter. GSI has
8 no specific knowledge of the source of this data other
9 than records evidencing this data being accessed by
10 Encana from the National Energy Board. GSI's records
11 do not show Encana having licensed this Seismic Data
12 respecting its possession or use."

13 So GSI knew that Encana had gotten the data
14 from the National Energy Board and presented an
15 invoice for it?

16 Is that what the purpose of this letter was?

17 A. Well, this one is a funny one. We go over
18 there. We had been providing Encana with maps of our
19 data in this area and showing them quality inspecting
20 our data at multiple meetings. And then we went over
21 there. And in their board room, they had a whole
22 bunch of boxes of all this stuff. And we see our logo

1 on it -- our trademark. And I could see it was paper
2 sections that were not from us. I could see the
3 Government ID number on them. So we knew they came
4 from the government.

5 At the time, we speculated National Energy
6 Board, but it actually was much worse than that.
7 Encana got into the piracy business. They did a Joint
8 Venture with KP Seismic, a scanning company. They
9 copied \$70 million of our data in the Artic. They
10 found a prospect, drilled two wells on it and sold
11 those wells, as well as our licensed data that we
12 licensed to Encana, plus data from Lynx, plus data
13 from KP Seismic that was scanned -- GSI data -- that
14 all ended up over at a company called MGM that bought
15 these wells.

16 We are in litigation on that still to this
17 day. And we have all the evidence.

18 Q. Okay.

19 A. It's an unbelievable story. And I think the
20 first lawsuit was dismissed for limitations or some
21 reason because of this slow trickle of information we
22 were getting from Canada. It's been a horrible thing,

1 and we never got any business from them again when we
2 caught them in all this -- this mess.

3 Q. Okay. And as you said, after GSI sued
4 Encana in 2007, they didn't license anything from GSI
5 again?

6 A. I don't think so, no. They are very
7 adversarial. And, again, this was caused by -- all
8 started with this government creating this competing
9 data against us and this whole piracy business.

10 It just interfered in our relationships.
11 And then inducing our customers to sell GSI data to
12 them, as if they owned it, in these Secondary
13 Submissions when they didn't own it.

14 They had no right to convert it. And it
15 goes to a lease, an oil-and-gas lease. Our data was
16 converted to offset cash commitments on these
17 oil-and-gas leases; and, yet, we don't get a royalty
18 on those leases. We get nothing from the oil that
19 comes out the ground. That is not accounted for in
20 this.

21 Q. Okay.

22 A. And then we are going to nitpick over little

1 pennies here and there. The extent of what's happened
2 to us, and what Canada has done is, I can't even
3 explain it to you. And we tried to explain it to
4 these bureaucrats, and they just forged ahead.

5 Q. Okay. We will, actually, come to some of
6 those exchanges.

7 Let's go ahead up to R-275. It's a letter
8 dated August 25, 2009. I was just checking on the
9 time.

10 Do you recall your conversations with
11 Newfoundland and Labrador that was happening around
12 this time in 2009?

13 A. I don't recall, specifically. I remember I
14 wrote -- I was trying to find anybody that would
15 listen.

16 Q. Okay. This letter from the Board to you
17 said: "We are not aware of any changes in legislation
18 or interpretation thereof, which would cause the Board
19 to change its current practices of allowing disclosure
20 of geophysical Seismic Data at the conclusion of the
21 'privilege' period described in the legislation or as
22 extended by Board policy."

1 That's one of the responses that you got, as
2 you were saying, in your exchanges with the Board?

3 A. Sure.

4 Q. Okay.

5 A. I got lots of responses.

6 Q. Pull up Exhibit R-276. It's a letter dated
7 June 9, 2010, from the Newfoundland Board to you.
8 Let's take a look. Just take your time to read the
9 letter, so you refresh your memory if you recall
10 getting it.

11 Just let me know when you're ready.

12 Okay. Sure.

13 A. It needs to go up. Thank you.

14 Q. No problem.

15 A. I've read it.

16 Q. It's a letter -- and again, I will
17 apologize. Bear with me as I read it into the record.
18 I'm just going to read the three middle paragraphs.
19 So Paragraphs 2, 3 and 4:

20 "As I indicated in my letter of August 25,
21 2009, the Canada-Newfoundland and Offshore Petroleum
22 Board stands by its long-standing interpretation of

1 the Canada-Newfoundland Accord Implementation Act,
2 permitting the disclosure of GSI data at the
3 conclusion of the privilege period.

4 "The Board's practice to release geophysical
5 data has been in place for years, and GSI has
6 continued to acquire Seismic Data in the Newfoundland
7 offshore area and submit it to the Board with full
8 knowledge of the Atlantic Accord Act provisions and
9 the Board's disclosure practices. GSI voluntarily
10 applied for geophysical program authorizations to
11 conduct speculative seismic operations in the
12 Newfoundland offshore area knowing that eventual
13 release of the acquired data would occur."

14 "We have considered the representations you
15 have put forward in various forums previously and
16 respectfully disagree with your position. As it is
17 obvious that our positions cannot be reconciled, I do
18 not feel there is any value in engaging in a
19 protracted debate on the relative merits of our
20 interpretation of various pieces of legislation."

21 So this was the Board saying that it
22 disagreed with GSI's position with respect to the

1 disclosure of Seismic Data; is that right?

2 A. The letter speaks for itself.

3 Q. Okay. I'm going to take you to some
4 correspondence that you had with the National Energy
5 Board around this time, as well.

6 Do you recall in 2008 that GSI applied to do
7 a seismic survey in the Labrador Sea?

8 A. I believe so.

9 Q. Okay. I'll pull up Exhibit 288. I'm sorry.
10 I apologize. Exhibit R-288.

11 Just take your time and look through it and
12 just say when you need to scroll down. Okay?

13 So this is the application that GSI did with
14 respect to a seismic survey in the North Labrador Sea
15 in 2008.

16 Now, I'll just get to the last paragraph
17 where it says: "This survey is classified as
18 nonexclusive and the information will be disclosed
19 pursuant to Section 101 of the Canada Petroleum
20 Resources Act. GSI must file a complete report to the
21 National Energy Board as outlined in the Canada Oil
22 and Gas Geophysical Operations Regulations one year

1 after project completion."

2 Do you see that?

3 A. Yes.

4 Q. And do you recall GSI going through with the
5 project and submitting the Report, as requested?

6 A. I don't know.

7 Q. Okay. I'll just quickly pull up
8 Exhibit R-298. This a letter from the National Energy
9 Board to Mr. Davey Einarsson dated January 26, 2010.
10 The subject matter is "Second Request Outstanding
11 Report for GSI 2D Marine Seismic Survey North Labrador
12 Sea 2008."

13 Do you recall why there was a Second Request
14 for this Outstanding Report for this survey?

15 A. No.

16 Q. Okay.

17 A. Of course, my staff are all being let go at
18 this time, as the effects of Canada's attacks on our
19 company were being felt. So I didn't have my full
20 staff like I had. It caused a lot of turmoil and
21 upheaval and then all the lawsuits.

22 We were spending our time on all kinds of

1 nonproductive things instead of creating value,
2 promoting Canada with new data, bringing new
3 players -- all this nonproductive effort. And it was
4 a big distraction, a huge burden on our company. I
5 can assure you.

6 Q. I can imagine.

7 Let's pull up Exhibit R-299, because I think
8 it reflects some of what you may have just said. It
9 is an email exchange between yourself and Bharat Dixit
10 of the National Energy Board. Just scroll down to the
11 last paragraph where it says "February 4, 2010." You
12 can just read it and refresh your memory.

13 A. Okay.

14 Q. So this is --

15 A. So my memory was good.

16 Q. Right. It was.

17 So this is in February 2010, where it
18 says: "GSI has been forced to reduce staff by more
19 than 90 percent, and there are no qualified staff to
20 prepare the Report due to the economy. And combined
21 with the fact that GSI is expending all our resources
22 on lawyers to address the two copyright violations the

1 NEB has facilitated in providing GSI's Seismic Data to
2 third parties, although we believe the NEB owes GSI a
3 duty of confidence."

4 Do you see that?

5 A. Yes.

6 Q. What was happening in the economy at this
7 time?

8 A. There was very little activity in the
9 oil-and-gas exploration area.

10 Q. Right. And that was having an impact on
11 GSI's business?

12 A. It had a small impact on us. The biggest
13 impact was all our lost license revenues, all the
14 massive legal fees, and the interference in our
15 relationships with our customers because of
16 this -- not only the submitted data, the secondary
17 submits, but also our clients getting the data from
18 government and scanning companies and other parties
19 caused a real problem. So it's no scorched-Earth
20 litigation strategy. It was we couldn't abandon the
21 copyright, and I didn't want to leave the key in the
22 door and walk away.

1 Q. Okay. I'll just go through a couple more
2 exchanges between GSI and the National Energy Board.
3 Exhibit C-206. It's dated April 22, 2010.

4 Do you recall this letter?

5 A. No.

6 Q. Okay.

7 A. It looks like a form letter that we used
8 every time.

9 Q. Right. The second paragraph says: "GSI
10 wishes to notify you of its position respecting the
11 status of the GSI information and the Board's legal
12 obligations in respect of this information."

13 It goes on to say: "GSI hereby notifies you
14 that the GSI information contains confidential
15 information and trade secrets of GSI and is subject to
16 copyright in favor of GSI"; is that right?

17 A. That's right.

18 Q. Right. So they are, again, reiterating
19 GSI's position. We will just go to the response of
20 the National Energy Board, which is C-207. And it's
21 the National Energy Board dated May 21, 2010,
22 addressed to you.

1 Do you recall this letter?

2 A. Not specifically, but I'm starting to recall
3 it more looking at it.

4 Q. Okay. If you want to go through
5 it -- again, there is a lot of information in here,
6 but I will just skip ahead to the conclusion for the
7 sake of time where it says: "For the reasons set out
8 above, the Board is not in a position to provide
9 confirmation to GSI that the subject nonexclusive
10 seismic information will be held confidential
11 indefinitely. Rather, in a manner consistent with the
12 Board's cover letter to GSI's authorization, the Board
13 will maintain the subject information confidential for
14 a 15-year period. Thereafter, the Board intends to
15 make the nonexclusive seismic information public via
16 the FIO."

17 So that was the Board's position with
18 respect to this new project this GSI was doing?

19 A. Yes.

20 Q. And then that led to another exchange,
21 Exhibit R-305, which is dated June 3, 2010. It is
22 from GSI's lawyers, Gowling's.

1 Do you recall this letter as well?

2 A. I do.

3 Q. Okay. Again, we don't have to go through it
4 all, but we can skip to the end where it cuts to the
5 chase where it says: "GSI maintains its request that
6 NEB cease and desist forthwith from making the GSI
7 information available to the public through lending
8 arrangements or otherwise, and from reproducing the
9 GSI reports for the purpose of making the GSI
10 information and GSI reports available to the public."

11 That was GSI's request again?

12 A. That's correct.

13 Q. Okay. And we'll just go to the response of
14 the National Energy Board, 22 July 2010, which is
15 Exhibit R-306.

16 Do you recall this response from the
17 National Energy Board?

18 A. Yeah. I believe this issue went to trial.

19 Q. Right. Okay. And it said: "The Board has
20 not been persuaded that a modification in its process
21 relating to the release of Seismic Data is warranted.
22 The Board's position has not changed from its May 21,

1 2010 correspondence."

2 "Through the May 10th meeting, held between
3 GSI and NEB staff, as well as the 21 May 2010
4 correspondence, the Board has attempted to assist GSI
5 in understanding its rationale for the release of
6 Seismic Data. The nature of this 3 June 2010
7 correspondence suggests, however, that there may be an
8 intention of litigation in relation to this matter.
9 Accordingly, the Board requests that any future
10 correspondence relating to the release of Seismic Data
11 should be 'lawyer to lawyer' with NEB legal Counsel."

12 So at this point the positions
13 were -- couldn't be reconciled and GSI later sued; is
14 that right?

15 A. Yes.

16 MR. LUZ: I don't have too much more to do.
17 I'm wondering if I could ask for an indication of how
18 much time I've used already. And I don't know when
19 lunch is scheduled for.

20 SECRETARY FISCHER: 2 hours and 5 minutes.

21 MR. LUZ: Okay. I don't have the schedule
22 in front of me. Is lunch scheduled? I don't think I

1 have too much longer, but I don't want to -- what time
2 is it now? Oh, I think I can finish.

3 PRESIDENT WALLGREN-LINDHOLM: What do you
4 think, Mr. Einarsson? Are you ready to go a bit if we
5 decide that we would go until lunch?

6 THE WITNESS: Yes.

7 PRESIDENT WALLGREN-LINDHOLM: Okay. We will
8 see here.

9 Okay.

10 MR. LUZ: Madam Chair, I think I can
11 probably finish, if not exactly within 15 minutes,
12 just a little bit longer if it would just afford the
13 opportunity for...

14 PRESIDENT WALLGREN-LINDHOLM: Is that fine
15 with you, Mr. Einarsson?

16 THE WITNESS: Yes.

17 MR. LUZ: My friend across has given the
18 thumbs up as well, so if that's okay.

19 PRESIDENT WALLGREN-LINDHOLM: I didn't
20 register the thumbs up, but I think we are good then.
21 Okay. Thank you.

22 BY MR. LUZ:

1 Q. Thank you, Mr. Einarsson. I know it's been
2 a long morning, so I appreciate your patience.

3 I'm going to just switch gears to some of
4 the -- some of what was happening in -- around this
5 time period. I'm just going to pull up Paragraph 99
6 of the Notice of Intent to submit a Claim to
7 Arbitration under NAFTA Chapter Eleven that was filed
8 by GSI in -- sorry. It's just the -- it's the Notice
9 of Intent to Arbitration in this case filed by GSI. I
10 know it was in 2018. October? October 10, 2018. I
11 apologize, it's -- that was a long time ago.

12 I'm just going to go to Paragraph 99 where
13 it said: "As a result of the regulatory requirements
14 to dry dock every five years, GSI was forced to put
15 both of its ships out of service for inspections,
16 disassembly and refit during late 2007 and 2008,
17 reducing revenues during the 2008 Financial Crisis,
18 and requiring over USD 20 million in upgrades and
19 additions to its ships and equipment. This set of
20 circumstances made it critical in 2008 and 2009 for
21 GSI to obtain as much work as possible through the
22 Canadian protection under the CTA," which stands for

1 the Coasting Trade Act.

2 Do you recall the circumstances of GSI
3 spending around \$20 million on upgrading its ships in
4 late 2007 and 2008?

5 A. I recall the criticism, oh, we're so stupid,
6 we did these ill-timed investments and we are bad
7 businessmen. These are regulatory requirements that
8 you pull these ships out of the water.

9 We were regulated by 24 different entities
10 to run our business. We ran it without one safety
11 incident for 10 years, which is a miracle in our
12 business. We were excellent operators. And we had to
13 pull those boats out of the water, and DNV requires
14 you -- for example, on your main engine, you have to
15 take the whole thing apart to inspect it. Well,
16 everybody does this. They rebuild it while you have
17 it apart.

18 So we did that. We also upgraded our reels
19 because the demand in the market was for longer offset
20 data. To image deeper, you have to have those
21 streamers further out because the sound hits at an
22 angle of incidence. So the deeper you go, the further

1 out you have to have a receiver. So we were trying to
2 capture more of the -- what people wanted.

3 So we did that work. And right at that time
4 when we needed that business, Canada went outside
5 of -- circumvented the Coasting Trade Act with its new
6 work that it did under the UN Law of the Sea. We had
7 done the prior survey. We gave them extra data. We
8 bent over backwards to do a good job for Canada, but
9 they were trying to put the thumb on us in every way
10 possible, and tried to make us lose money.

11 And in the next one they cheated us out of
12 work circumventing the Coasting Trade Act saying the
13 DFO was one of the contractors, when in the previous
14 survey DFO wasn't. So they found ways to keep that
15 business from us right at a critical time when we
16 needed that work. And after investing millions of
17 dollars in our ships.

18 Then they allowed a foreign ship to come in
19 chartered, that had equipment put on it. They
20 disqualified our ship for removable equipment, the
21 streamers. We said we could put it on our ship.
22 Instead, they chartered a ship that had removable

1 equipment put on it and used that. All the way from
2 the Mediterranean. It was unbelievable. They paid
3 three times what they would have paid us. But it was
4 to make sure that GSI got no revenue.

5 Then they flagged the ship Canadian to
6 circumvent our Coasting Trade Rights, and immediately
7 after the work was done, the ship unflagged. It was
8 unbelievable what Canada did.

9 And then they pull the act out from under us
10 and remove seismic ships from the Coasting Trade Act
11 but leave Canadian steamship lines with their little
12 sweetheart deal and their 3 percent tax that they pay
13 in Barbados. If you're not connected in Canada, you
14 don't get the good stuff. So this is what happened to
15 us right at this time.

16 It was very painful and it sucked a bunch of
17 my time trying to beg for help from the government and
18 they were just laughing. We -- I even have the emails
19 where they are joking, oh, anybody want to go to the
20 yard sale and buy stuff from GSI? I even offered to
21 sell my ships to Canada.

22 Q. Right. Okay.

[illegible]

[illegible]

The image consists entirely of a solid black field with no visible features, text, or patterns.

[illegible]

1 been really patient and I appreciate you going through
2 all of this with us today. I know you have been
3 through a lot. So thank you.

4 THE WITNESS: Thank you.

5 PRESIDENT WALLGREN-LINDHOLM: Thank you,
6 Mr. Einarsson.

7 So we will now break for lunch, but have you
8 concluded now your --

9 MR. LUZ: I have, Madam Chair.

10 PRESIDENT WALLGREN-LINDHOLM: -- cross-
11 examination.

12 MR. LUZ: Yes.

13 PRESIDENT WALLGREN-LINDHOLM: So we will go
14 for lunch and then there will be redirect, a small
15 redirect, and then we will see whether Respondent asks
16 for recross then after the redirect.

17 We have scheduled one hour and 15 minutes,
18 which means we are really actually right on schedule.
19 Wow.

20 So we shall meet back here at 2:00 p.m.

21 MS. TABET: Madam Chair, can we just confirm
22 that the witness continues to be sequestered.

1 PRESIDENT WALLGREN-LINDHOLM: Yes. I was
2 going to. Yes.

3 MS. TABET: Apologies.

4 PRESIDENT WALLGREN-LINDHOLM: No, no. I am
5 slow.

6 Yes. I will remind you of your
7 sequestration, Mr. Einarsson. Thank you very much.

8 THE WITNESS: Yes. Thank you.

9 (Whereupon, at 12:50 p.m., the Hearing was
10 adjourned until 2:00 p.m., the same day.)

11 AFTERNOON SESSION

12 PRESIDENT WALLGREN-LINDHOLM: Yes. Good
13 afternoon, and apologies for the slippage. We will
14 now proceed to redirect of Mr. Paul Einarsson.

15 Ms. Lemmens?

16 MS. LEMMENS: Thank you, Madam Chair.

17 REDIRECT EXAMINATION

18 BY MS. LEMMENS:

19 Q. Good afternoon, sir.

20 A. Good afternoon.

21 Q. Can you confirm for the record that you
22 remain under oath at this time?

1 A. I do.

2 Q. Thank you.

3 Sir, you were asked some questions this
4 morning about whether you were aware of disclosure and
5 copying of Seismic Data at various times.

6 Do you recall that?

7 A. Yes.

8 Q. There were many pieces of correspondence
9 that Mr. Luz showed you in which positions were being
10 taken by the Boards and by GSI.

11 Do you recall that?

12 A. Yes.

13 Q. In GSI's communications with the Boards or
14 the Government of Canada, what, if anything, did they
15 say to you about GSI's copyright in its Seismic Data?

16 A. I don't think they ever mentioned it or
17 responded back on that subject.

18 Q. And leading up to the Common Issues Trial,
19 what was your understanding about GSI's intellectual
20 property rights in its Seismic Data?

21 A. I thought Canada would honor things like
22 trademarks, copyright, confidentiality, all of those

1 things. I expected the same that you get in other
2 countries and places.

3 Q. Sir, you mentioned in one of your responses
4 to Mr. Luz's questions something about "rules of the
5 game."

6 Do you recall that?

7 A. Unfortunately, yes.

8 Q. When did you first hear that phrase?

9 A. It was, I believe, during the Common Issues
10 Trial and also during questioning and
11 cross-examination and things like that involved in
12 that, I believe. But it's been parroted over and
13 over.

14 Q. And sorry, just to clarify, you heard about
15 it in questionings and cross-exams in "that."

16 What is "that"?

17 A. I believe in that action.

18 Q. In the Common Issues?

19 A. Yes. I believe so, yep.

20 Q. Sir, when did you know whether GSI could
21 enforce GSI's copyright in its Seismic Data or not?

22 A. Well, we kind of knew, I guess, at the end

1 of the Common Issues. We were -- it says we had
2 copyright, but then in the next breath it said we
3 didn't, in a way.

4 Q. And just to clarify, is that the first time
5 that you knew?

6 A. That's the first time, yes, we knew from
7 Canada or a court. Yes.

8 Q. Sir, you were asked some questions by
9 Mr. Luz this morning about a specific exhibit. I'd
10 like to pull that up. It is R-273.

11 Do you recall looking at this letter, sir?

12 A. Yes.

13 Q. And do you recall being asked some questions
14 about providing GSI with notice about parties
15 requesting to access Seismic Data that is GSI's with
16 the Board there?

17 A. Could you say that again? I'm sorry.

18 Q. I just want to make sure that you're reading
19 it so that you know which letter that we're looking
20 at.

21 A. Yes.

22 Q. You also now have access to the keyboard and

1 the mouse for the documents because we are controlling
2 them?

3 A. Yes.

4 Q. So this letter from the C-NOPB in 1999 had
5 indicated that "the Exploration Department will
6 endeavor to notify you of any requests for such data
7 collected through GSI, provided the requesting party
8 does not object to us notifying GSI of the request."

9 What, if any, notice did GSI receive about
10 parties requesting GSI's Seismic Data from the C-NOPB?

11 A. I don't think they ever notified us, not
12 once.

13 Q. Sir, to your understanding, do you know what
14 is being referred to here about a "requesting party
15 not objecting to us notifying GSI of the request"?

16 A. No, I don't. I mean, it just seems like a
17 catch-all to not respond because I think they would
18 all object.

19 Q. Do you know why they were being asked about
20 whether they objected or not?

21 A. Well, it would be because they are accessing
22 our data or copying it or something, but also in the

1 Access to Information Act, we had a lot of responses
2 that were heavily redacted or not even provided to us
3 because the party objected using Section 20, the exact
4 section that I talked about that our lawyers said
5 would protect us. Instead, it was used to conceal
6 information from us about people using and accessing
7 and copying our data or whatever they were doing.

8 Q. Sir, there was a lot of information in that
9 answer. I just want to make sure that everybody
10 understands what you mean.

11 You had referred to Section 20 of the Access
12 to Information Act as both potentially protecting GSI
13 but simultaneously protecting companies that were
14 requesting access to your data.

15 Could you explain that a little bit more,
16 for clarity?

17 A. So in the Legal Opinion that we provided
18 Canada to be transparent and try to start a dialogue
19 from experts, legal experts in Canada at the time,
20 we -- they told us that the Access to Information Act,
21 I guess, was included in the Acts and it governed all
22 information submitted to the government, like ours.

1 And Section 20 basically has clauses in it
2 where the submitter of the information can object to
3 it being disclosed if it is a trade secret, if it will
4 cause financial harm -- and I can't quite, off the top
5 of my head, remember some of the others, but there's
6 three or four of them in there. And of course, we fit
7 under all of those.

8 And so that was also referenced in the
9 internal memo at the C-NLOPB in around 1998 where they
10 were talking internally that the Access to Information
11 Act, trademarks, and copyright would prohibit
12 disclosure what they were doing. And they knew this
13 internally. I didn't know it now -- but I didn't know
14 it back then, but I now know it now that we've seen
15 this.

16 Q. Sir, you were asked about a letter from -- I
17 believe it was Max Ruelokke. I'm not sure if I'm
18 saying the name correctly -- in 2010. It was R-276.

19 A. Oh. I'm sorry. Can I just add to that last
20 comment? When I pressed the Boards for using that
21 exemption on my responses to my requests trying to
22 find out what's going on with my data, they said these

1 objected because they would be financially harmed by
2 me going after them trying to protect my data. I
3 thought it was the most obscene argument, but that was
4 what the Boards told me on many occasions.

5 Q. Sir, turning back to the 2010 letter that we
6 have here, do you recall looking at this this morning?

7 A. Yes.

8 Q. And you were asked some questions about the
9 fact that the Newfoundland Board, the C-NLOPB, stated
10 its position in this 2010 letter.

11 Do you recall that?

12 A. Yes.

13 Q. How many times did GSI state its position in
14 response to letters such as these?

15 A. Hundreds, if not a thousand.

16 Q. What, if any, position was ever given by one
17 of the Boards with respect to copyright in the Seismic
18 Data?

19 A. The only positions I got were when Natural
20 Resources Canada signed one of our License Agreements
21 acknowledging it, when, for example, the Marc D'Orio
22 2010 letter said that the geologic survey, Natural

1 Resources Canada would honor our copyright and not
2 make copies, not publish, not do anything without our
3 consent; the Borrowed Materials Forms say copyright
4 might be applicable, that everyone was signing at the
5 NEB and other Boards; the copyright notice at the NEB,
6 and I can't think of any other time when copyright was
7 mentioned or that Canada spoke about it. It's not in
8 the Acts either. The two -- the Submission Act and
9 the Disclosure Act doesn't have published copyright.
10 It doesn't mention anything. So to say everything was
11 so clear, actually, nobody knew.

12 Q. Now, in this letter, the Board goes on to
13 say that GSI voluntarily applied for geophysical
14 program authorizations to conduct speculative seismic
15 operations in the Newfoundland offshore area, knowing
16 that eventual release of the acquired data would
17 occur. What, if any, notice was GSI putting on its
18 submissions of its own Seismic Data to indicate its
19 position about the law?

20 A. Well, we provided -- I mean, hundreds of
21 pieces of correspondence with our position. We also
22 provided the Boards with stickers to put on our

1 materials. And our materials, when we shipped it to
2 the Board, had copyright notices and warnings on the
3 materials. All of the paper sections, including some
4 of the ones you saw today -- and, unfortunately, some
5 of the ones that I saw in the expert reports that
6 Canada had, they have our proprietary notice on the
7 side. They also have our registered trademark being
8 used, confusing our customers, passing Canada's
9 competing data off as ours and -- by using that
10 trademark and then having all these proprietary
11 notices. It's like they weren't even there. They
12 just ignored them.

13 Q. Did Canada ever reject GSI's Seismic Data
14 for having those notices?

15 A. No. And they never commented when we sent
16 them big packets of stickers with letters asking them
17 to apply these to all of our data.

18 Q. Sir, you were also asked about a letter at
19 Exhibit R-526. I'd like to pull that up.

20 Do you recall looking at this letter, sir?
21 It's a letter from --

22 A. Yes.

1 Q. -- the C-NLOPB to Curtis Dawe, Barristers
2 and Solicitors on June 4, 2003?

3 A. Yes.

4 Q. You may recall that this letter was
5 enclosing a list of names of parties that had accessed
6 GSI's Seismic Data?

7 A. Yes.

8 Q. You were asked who is Curtis Dawe. Do you
9 have any recollection of who Curtis Dawe is?

10 A. I think it's a law firm, I just don't
11 remember actually being with that one. But we used
12 about five or six in Newfoundland, so we must have
13 been using that one at that time. I'm surprised it
14 didn't go to the Gowlings here in Calgary. I'm just
15 surprised.

16 Q. I'd like to show you Exhibit C-434, sir,
17 because it relates back to this question about Curtis
18 Dawe.

19 Do you see here a transcript of proceedings
20 from last year, in which Trevor Glen Bennett of the
21 C-NLOPB was being cross-examined by myself on behalf
22 of GSI?

1 A. Yes.

2 Q. I'd like to turn to Page 2. Do you see
3 reference there to Curtis Dawe?

4 A. Oh, that's interesting. Okay. Amy Crosbie.
5 Okay. Amy Crosbie was the lawyer that slowed down our
6 ability to discontinue those last two actions in
7 Newfoundland. Just days or a week after our Common
8 Issues Decision, these files had sat dormant, those
9 last two, and we hadn't done anything with them and
10 intended to discontinue them. And Amy Crosbie tried
11 to reinvigorate the cases, reactivate them, and they
12 were seeking a consent dismissal, and my advice at
13 that time was that they were trying to muddy up the
14 waters with our NAFTA or a potential further actions
15 that GSI could take by seeking this consent dismissal,
16 like we agreed to something, instead of just doing the
17 other way we were trying to do it. I can't remember.
18 But they fought us over it and delayed everything a
19 long time. So maybe they were adverse to us. So
20 maybe that letter was going to lawyers adverse to us,
21 not even to us.

22 Q. So, sir --

1 A. It's very odd, that letter.

2 Q. Amy Crosbie here was representing the
3 C-NLOPB.

4 Do you see that?

5 A. Yes.

6 Q. If we turn back to the letter that Mr. Luz
7 had shown to you earlier, do you now see that the
8 C-NLOPB was communicating with its own Counsel?

9 A. That's what it appears to be. So that's
10 very interesting.

11 Q. So do you have any information that this
12 list of parties actually was sent to GSI?

13 A. I know we received something, but I don't
14 think we received this. That's why I was just very
15 puzzled by that, yeah.

16 Q. Do you know why the C-NLOPB sent this letter
17 to its lawyers rather than responding to GSI's
18 requested information?

19 A. I don't.

20 Q. Sir, you were also asked some questions
21 about regulatory upgrades to GSI's seismic vessels in
22 the 2000s.

1 Do you recall that?

2 A. Yes.

3 Q. You had mentioned a statute, the Coasting
4 Trade Act. What was that Act to GSI?

5 A. Well, it was, quite honestly, not a very
6 important Act for us for many years. It helped
7 because we had a Canadian flag vessel. We invested
8 millions of dollars to make our ship compliant with
9 Canadian regulations.

10 For example, Canadian regulations for some
11 reason, the port holes have to be different sizes.
12 There is different regulations on the lighting for
13 helidecks. There is different regulations on the
14 firefighting equipment -- different from everywhere
15 else in the world, like, even the North Sea, which is
16 kind of the standard for our industry.

17 And so we had to make a lot of changes to
18 that vessel. It was a lot of investment. You also
19 have to have Canadian crew, which were very expensive,
20 and relative to what our competitors had.

21 And so the Coasting Trade Act gave us a
22 first right of refusal, essentially, on work in

1 Canada. If our ship was suitable and available, it
2 would get preference to the work, and the other ship
3 would be blocked. So it was a trying to maintain
4 Canadian capacity and shipping.

5 We were the only seismic vessel, and that's
6 why we were singled out for some of these changes that
7 I mentioned earlier where they flagged a foreign
8 vessel. They disqualified us for removable equipment
9 on a chartered vessel of a competitor.

10 So the Canadian Transportation Agency just
11 threw us under the bus right at the worst possible
12 time in 2009, '10, and '11 when we needed that work
13 because there was very little industry work at the
14 time. And it was all linked to this issue of the data
15 because they were just trying to starve us so we
16 couldn't defend ourselves. So we couldn't be here.

17 Q. So what part of the Canadian Government
18 administered the Coasting Trade Act; to your
19 knowledge?

20 A. Transport Canada, I believe.

21 Q. So not the Boards?

22 A. Not the Boards, but they stayed in close

1 communication. We saw lots of joint government
2 meetings about GSI, and they were all aware of the
3 data concerns that I had.

4 Q. I'd like to show you an exhibit, C-492, that
5 relates to this point that you've just made.

6 And you have control of the mouse, sir, if
7 you want to scroll. You should.

8 (Comments off microphone.)

9 A. Now it works. I turned it on.

10 Q. So, sir, we're looking at an email.

11 Do you see that?

12 A. Yes.

13 Q. And do you understand the context of what
14 this email is about?

15 A. Well, it looks like they are talking about
16 nonexclusive Seismic Data policy, but you've got NRCan
17 on here. I mean, people from NRCan. And they are
18 tying in this Coasting Trade issue. "Note: GSI is a
19 company that has been using the Coasting Trade Act to
20 challenge the use of foreign vessels." Well, that was
21 why the act was created is to create Canadian
22 capacity.

1 Q. So from GSI's perspective, what relation, if
2 any, does the Coasting Trade Act have to GSI's
3 concerns about the Boards disclosing GSI's Seismic
4 Data, the nonexclusive Seismic Data policy?

5 A. Well, it is part of our business, and it
6 attacks our business. This is why they were tying it.
7 And we saw this in multiple areas, not just this one.
8 They canceled our business number for six or nine
9 months and then were demanding us to pay taxes. And
10 we said where? We had all kinds of harassment.

11 Q. And so, sir, I just want to understand,
12 we've got a Coasting Trade Act issue and a Seismic
13 Data Disclosure Policy issue, and so do you know if
14 there is any legal relationship between the two, other
15 than it was impacting GSI's business?

16 A. No. The only relationship was financial and
17 it was GSI. But it was worse than that. The
18 Government of Newfoundland, through Nalcor, invested
19 \$30 million with a TGS Joint Venture. And then the
20 Premier bragged about how Newfoundland was so
21 brilliant, they got all their money back in three
22 months, at a conference.

1 All of us in the industry were just shocked.
2 You don't make all your money back in three months in
3 the seismic business. So it was a very fishy deal.

4 Then TGS had a deal with NRCan, similar, on
5 a joint -- on a project where money flowed from TGS to
6 NRCan directly, Jacob Verhoff. We had the contract,
7 but then all my access information requests on both
8 those areas were blocked.

9 Q. Sir, this morning you were also asked about
10 some of your license agreements. I won't mention the
11 name of the counterparties, so we don't have to go
12 into confidentiality mode here for the Hearing. But I
13 think you'll recall that you were asked about a clause
14 in one of your license agreements this morning
15 regarding "data being disclosed to any governmental
16 agency, board, or tribunal, only if and to the extent
17 in the opinion of licensees' legal counsel, such
18 disclosure is required by law, regulation, or
19 regulatory guideline."

20 Do you recall that?

21 A. Yes.

22 Q. What is your understanding of whether a

1 licensee was required by law to submit their licensed
2 GSI Seismic Data to the Boards for allowable
3 expenditures?

4 A. Well, this is another area that is a soft
5 spot for me. Our understanding is that this is
6 voluntary. It is normally used with exclusive data.

7 So an oil company has a lease. They obtain
8 some exclusive data. They hire a company like ours.
9 They pay us the full price, plus our profit. And then
10 they can submit the data to the Board and get credits
11 towards their cash obligations. So they are
12 converting that data.

13 But it makes sense for an oil company
14 because in Canada they don't do cash bids. In Canada
15 you say, "Oh, I'm going to do 100 million of work on
16 that lease." So, logically, it's kind of Canada is
17 entitled to those work products because that's what
18 the Company is bidding.

19 In the case of nonexclusive seismic, that is
20 not the case. We have licensed this data to a
21 company. They don't have ownership rights. We have
22 50 clauses in our license agreement prohibiting

1 disclosure, conversion, sharing. It's a single-use
2 license.

3 And then to have these guys go and submit it
4 to Canada and get -- there has been millions of
5 dollars paid to our licensees for our data towards
6 leases, and we get nothing from those leases. So that
7 whole thing is crazy.

8 And in this action, I was shocked. Canada
9 says what we have been saying all along: "This is
10 voluntary. It's elective. The company selects what
11 expenses they want to submit for work credits." But,
12 yet, in one of my huge cases that I had with massive
13 damages, the judge rules, "Oh, no, this is part of the
14 Regulatory Regime. It is required. It is mandatory.
15 Too bad, GSI. You lose."

16 Now, we are shut off on that whole -- they
17 have driven a freight train through my license
18 agreement. There is no way you can protect anything
19 in this country. So that whole area on all of my
20 license agreements has been flattened now, as well as
21 many others.

22 Q. I'd like to take a look at that court

1 decision, sir. It is at Exhibit R-444. We see here a
2 Decision of the Court of Queen's Bench of Alberta from
3 Justice Eidsvik again, and I'm just going to -- if we
4 could just look at the date of the Decision for a
5 moment. 2017.

6 Do you recall this case?

7 A. Yes.

8 Q. If we could scroll down to about
9 Paragraph 77, I believe. And so here we see an
10 analysis of the question: "Was Encana's submission of
11 an application and a report required by Canadian law?"

12 Do you see that, sir?

13 A. Yes.

14 Q. And if I could have you read for the benefit
15 of the Tribunal, Paragraph 79, please, out loud.

16 A. "In my view, for the reasons that follow, to
17 the extent that an application had any Seismic Data in
18 it (which I doubt, but need to determine)" -- they
19 do -- it is required in the list from the -- in that
20 geologic thing. It's a required submission. "Encana
21 was allowed to use the data in this way under its
22 grant of a license agreement since the data was being

1 used for its 'own business operations.'"

2 Incredibly, even though it is submitted to
3 the Board that then gives it to everybody.

4 "Further, such submission was 'required by
5 Canadian law'" -- using those words that we have in
6 our license agreement --"to obtain the credits against
7 the deposit it made with the government for
8 exploration licenses."

9 It is completely the opposite of what is the
10 reality.

11 Q. So just to clarify, is it voluntary or is it
12 required by Canadian law, according to Canadian law
13 from the Courts?

14 A. Well, now, it is required. So they have to
15 submit reprocessed data, other versions, and this is
16 what is then being put under an oil company name as if
17 it's exclusive, breaking the rules that Canada
18 requires, and then releasing it within five years
19 because exclusive is released in a shorter timeframe.

20 That's why I said this 10-year, 15-year
21 timeframe, I don't know what that does because of this
22 issue. It is just a whack-a-mole. You can't keep up

1 with it.

2 Q. Thank you, sir.

3 MS. LEMMENS: Those are all my questions on
4 redirect.

5 THE WITNESS: Thank you.

6 PRESIDENT WALLGREN-LINDHOLM: Thank you,
7 Mr. Einarsson.

8 Is there a request for recross?

9 MR. LUZ: No, Madam Chair, we don't have
10 anything to ask.

11 PRESIDENT WALLGREN-LINDHOLM: Thank you very
12 much.

13 ARBITRATOR LANDAU: No questions.

14 PRESIDENT WALLGREN-LINDHOLM: I had one
15 clarification, and it might be that it is for Counsel
16 to address. Just a second. I had it here. It is at
17 14:13:47. Just a second.

18 QUESTIONS FROM THE TRIBUNAL

19 PRESIDENT WALLGREN-LINDHOLM: Yes. It is at
20 Line 6/18 at 14:13:47 in the Transcript.

21 Mr. Einarsson states as follows: "And so that was
22 also referenced in the internal memo in the C-NOPB in

1 around 1998 where they were talking internally." And
2 what my question is, is there a reference for this?
3 Where is it in the record -- or is it in the record?

4 MS. LEMMENS: We might just have to take
5 that away. I don't have an exact answer about what
6 exhibit that might be. But I think it also might be
7 the subject of some questions that I have for an
8 upcoming witness, so we may be able to resolve it.

9 PRESIDENT WALLGREN-LINDHOLM: My only point
10 was that, if it's a reference to something that is in
11 the record, it would be more useful to have the
12 reference.

13 MS. LEMMENS: Very good. We will endeavor
14 to do that. I don't know that Canada would have that
15 reference because it is in Paul Einarsson's Witness
16 Statements, so I think that's on us for homework.

17 PRESIDENT WALLGREN-LINDHOLM: Okay. Thank
18 you.

19 Now, Mr. Einarsson. We have concluded your
20 testimony. Yes?

21 THE WITNESS: I'm sorry. I had a couple of
22 small corrections to my Witness Statement. Is

1 it -- and we never got to that. Should I be doing
2 that now before I leave.

3 MS. LEMMENS: Yeah, they were typos, I
4 think, more than anything.

5 THE WITNESS: There were some typos, they
6 are pretty minor, but...

7 PRESIDENT WALLGREN-LINDHOLM: Let me ask
8 what --

9 MS. LEMMENS: I don't think that they are
10 actually substantive, but...

11 THE WITNESS: Okay.

12 PRESIDENT WALLGREN-LINDHOLM: Are there any
13 objections? For good order.

14 MR. LUZ: We have no objections if they are
15 just minor corrections to the Witness Statement. No
16 problem.

17 PRESIDENT WALLGREN-LINDHOLM: Okay. Why
18 don't we take those corrections.

19 THE WITNESS: Okay. They're very little,
20 they're minor.

21 PRESIDENT WALLGREN-LINDHOLM: Also.

22 THE WITNESS: CWS-12, Clause 166(a), it says

1 "all." It should say "a portion."

2 PRESIDENT WALLGREN-LINDHOLM: Okay.

3 THE WITNESS: So that was data that Encana
4 gave to a company called MGM, which I spoke about
5 earlier.

6 CWS-6, Clause 159, there's just some bad
7 English there. It says "mes" and "me." It should be
8 "my." Pretty minor.

9 Thank you very much.

10 PRESIDENT WALLGREN-LINDHOLM: Thank you very
11 much. You are now excused, Mr. Einarsson, and you can
12 take a seat there along family.

13 THE WITNESS: Thank you very much.

14 PRESIDENT WALLGREN-LINDHOLM: Thank you.

15 (Witness steps down.)

16 PRESIDENT WALLGREN-LINDHOLM: So should we
17 now proceed to the testimony of Bharat Dixit, or would
18 you like a quick break before?

19 MR. LUZ: Perhaps, we just take a quick
20 break because we're going to have to collect Mr. Dixit
21 from outside and get him settled and so on, so it will
22 just be a --

1 PRESIDENT WALLGREN-LINDHOLM: Collection
2 allowed. Thank you.

3 MR. LUZ: Thank you.

4 (Brief recess.)

5 BHARAT DIXIT, RESPONDENT'S WITNESS, CALLED

6 PRESIDENT WALLGREN-LINDHOLM: Good
7 afternoon, Mr. Dixit.

8 (Comments off microphone.)

9 THE WITNESS: Yes, good afternoon.

10 (Comments off microphone.)

11 PRESIDENT WALLGREN-LINDHOLM: Yes,
12 Mr. Bharat Dixit. Good afternoon. You have been
13 called to testify in these proceedings by the
14 Respondent, Canada, and I trust that you know what
15 these proceedings are about. I will introduce
16 everybody in a minute.

17 THE WITNESS: Yes, I do.

18 PRESIDENT WALLGREN-LINDHOLM: Yes, you do.

19 And you have given two Witness Statements?

20 THE WITNESS: Yes, I have.

21 PRESIDENT WALLGREN-LINDHOLM: Thank you.
22 And whether or not, Mr. Dixit, you have given

1 testimony before, I ask that you address the Tribunal
2 with any questions or concerns that you may have in
3 relation to the procedure. If there is something you
4 do not understand, for example.

5 THE WITNESS: Certainly. Thank you.

6 PRESIDENT WALLGREN-LINDHOLM: So let me
7 introduce the parties first. You will be familiar
8 with the Counsel for Canada?

9 THE WITNESS: Yes.

10 PRESIDENT WALLGREN-LINDHOLM: Yes. And on
11 the other side are Claimants, the Einarssons and GSI,
12 and lead Counsel Ms. Lemmens sits the second down the
13 row, and she's smiling now. And that's her team, and
14 then the Einarsson family.

15 To my right is Trey Gowdy who is an
16 arbitrator from the United States. To my left is Toby
17 Landau KC from England and Singapore. To my far right
18 is Geraldine Fischer from ICSID, who is the Tribunal's
19 Secretary, and the busy lady at the end is the court
20 reporter, Dawn Larson. Okay?

21 THE WITNESS: Nice to meet you all. Thank
22 you.

1 PRESIDENT WALLGREN-LINDHOLM: Thank you.
2 Different from a State court, we do not administer
3 oath in international arbitration, but I wish to tell
4 you that you still have an obligation to speak the
5 truth, and that any failure to speak the truth may
6 have consequences.

7 Your testimony may be recorded and
8 transcribed, so may I ask that you confirm for the
9 record that you will speak the truth?

10 THE WITNESS: Yes, I will.

11 PRESIDENT WALLGREN-LINDHOLM: Thank you.

12 And before I go any further, my
13 co-arbitrator or the arbitral secretary reminded me
14 that I forgot to introduce myself, which I shall do
15 now.

16 My name is Carita Wallgren-Lindholm and I'm
17 presiding in this Arbitration Tribunal. The
18 Respondent will first conduct a short direct
19 examination with you, whereafter opposing Counsel will
20 cross-examine you, and then there might be redirect
21 and maybe recross.

22 And I trust that you have access to

1 documents?

2 MS. LEMMENS: He will certainly have access
3 to all of the documents that we intend to show him
4 during the cross-examination. And he - we've
5 confirmed that the mouse and the keyboard function so
6 that he can scroll through the documents himself as
7 well.

8 PRESIDENT WALLGREN-LINDHOLM: And the
9 scrolling function is there so that you can assess the
10 full extent of the document and not only the part that
11 you are asked to examine and have a view on.

12 THE WITNESS: Understood.

13 PRESIDENT WALLGREN-LINDHOLM: And then if we
14 take a break, I will then address the question of
15 sequestration, and I will revert then at that point if
16 your testimony will have a break in between.

17 So do you have any questions before I ask
18 Respondent to introduce you properly?

19 THE WITNESS: None at this time.

20 PRESIDENT WALLGREN-LINDHOLM: Thank you very
21 much, Mr. Dixit.

22 Mr. Luz?

1 MR. LUZ: Thank you, Madam Chair.

2 DIRECT EXAMINATION

3 BY MR. LUZ:

4 Q. Good afternoon, Mr. Dixit.

5 A. Good afternoon, Mark.

6 Q. You filed two Witness Statements in this
7 Arbitration, the first being January 16, 2023, and the
8 second being the Rejoinder Witness Statement
9 November 1, 2024; is that correct?

10 A. It is dated the 30th of October, but close
11 enough.

12 Q. Do you have both of them in front of you?

13 A. I do.

14 Q. Great. Before the Counsel for GSI and
15 Claimants start the cross-examination, could you tell
16 the Tribunal -- introduce yourself to the Tribunal and
17 tell them who you are, your background, and your
18 connection with the National Energy Board, now the
19 Canada Energy Regulator?

20 A. Certainly. Where do I begin? I need to
21 make this brief. I studied, did my graduate and
22 undergraduate work in Montreal, and I joined the

1 National Energy Board in November/
2 December 1997 -- sorry, 1992, after having worked for
3 a shipping company and an oil and gas company.

4 I joined the National Energy Board as a
5 senior oceanographer and then moved through various
6 management positions, Director of Regulatory
7 Development, Human Resources, Audits, and then finally
8 a team called Exploration and Production which dealt
9 with regulatory oversight of oil-and-gas exploration
10 and production activities in what I call "Canada
11 Lands," lands that the Federal Government has
12 jurisdiction over.

13 In 2005, I became the Director of that team.
14 In those days we used to call ourselves "team
15 leaders," and I was designated as a Chief Conservation
16 Officer. The Board, the NEB, delegated to me certain
17 powers within the Canada Oil and Gas Operations Act
18 which gave me ability to review -- to receive, to
19 review, make decisions and do follow up on approved
20 activities as well as oversight of the Frontier
21 Information Office, which is a room within the library
22 of the National Energy Board.

1 I became Technical Leader for Exploration
2 and Production. I'm going to guess probably 2011, and
3 I continued in that position until I retired in
4 July 2022. I am now retired and have not had any
5 dealings with the National Energy Board or now the
6 Canada Energy Regulator since then.

7 Is that sufficient or did you want me to
8 augment anything?

9 Q. No, I think that was sufficient. Thank you,
10 Mr. Dixit.

11 MR. LUZ: I don't have any other questions,
12 so please go ahead with the cross-examination.

13 CROSS-EXAMINATION

14 BY MS. LEMMENS:

15 Q. Thank you. Good afternoon, sir.

16 A. Good afternoon.

17 Q. I understand that you were responsible for
18 the Frontier Information Office at the NEB and now the
19 CER; is that right?

20 A. Correct.

21 Q. What is the Frontier Information Office, or
22 the FIO is sometimes the acronym that I see?

1 A. Yeah. We are very fond of acronyms
2 everywhere. The Frontier Information Office is
3 currently a room within the CER library approximately
4 25 meters square that houses microfiche and paper
5 copies of documents received pursuant to
6 authorizations granted by the CER and, before that,
7 the NEB, and, before that, the Canada Oil and Gas
8 Lands Administration and other Regulators. So it's a
9 room within the library.

10 Q. Thank you, sir.

11 And when were you responsible for the FIO?

12 A. Between 2005 and 2010, if my memory is
13 correct.

14 Do you need it more precise or is that
15 sufficient?

16 Q. No. I was just trying to understand a
17 ballpark of the timeframe. Thank you, sir.

18 A. Yeah. Yeah. I didn't know how precise one
19 needs to be.

20 Q. What were your responsibilities with the
21 FIO?

22 A. Primarily as oversight to make sure that

1 people wishing to access information available in that
2 facility were satisfied and that information in that
3 facility was -- that information that had passed the
4 privilege period as outlined in the Canada Petroleum
5 Resources Act, Section 101.

6 Q. And sometimes we refer to that with an
7 acronym too; right? It's the CPRA?

8 A. One of my favorite acronyms, and it's not a
9 radio station in Ottawa.

10 Q. Sir, did you have input on policies and
11 practices of the FIO as part of your oversight?

12 A. Policies to some extent, but practices, yes.

13 Q. What do you mean "policies to some extent"?

14 A. The National Energy Board has been
15 established since 1959, so it has its own rules and
16 protocols. So what my responsibility was to work
17 within those as it pertains to information and
18 documentation that I mentioned earlier provided to us
19 under the COGOA, the Canada Oil and Gas Operations
20 Act.

21 Q. So just to be clear, you had some input on
22 the policies related to the disclosure of Seismic

1 Data?

2 A. Information on the -- the disclosure of
3 information on seismic information is provided under
4 the provisions of the CPRA, Section 101.

5 Q. Your answer there, sir, are you indicating
6 that you just followed the legislation and did not
7 have input?

8 A. The NEB is an administrator of COGOA and
9 CPRA, and, as such, we interpret those Acts and -- and
10 do what is permitted for us to do under those two
11 Acts. And, in particular, as it pertains to the
12 disclosure of information, we are bound by the -- that
13 statute and section.

14 Q. When you say that you were "interpreting the
15 Acts," were you part of interpreting the Acts?

16 A. Not by myself. I mean, clearly, I had
17 support from our Counsel and practices from the past.

18 Q. You're not a lawyer, are you?

19 A. I am not a lawyer.

20 Q. When you say that --

21 A. I don't know if that's a good thing or not,
22 but I'm not a lawyer.

1 Q. There's too many lawyers in the room, so
2 that's probably a good thing.

3 Sir, so you said that you had assistance
4 from Counsel. I don't want to know any of the advice,
5 but I just want to clarify that "Counsel" you mean
6 legal Counsel, a lawyer?

7 A. Correct.

8 Q. And you had some advice with respect to how
9 to interpret the CPRA and the disclosure of Seismic
10 Data?

11 A. I'm sorry. Could you repeat that for me?

12 Q. You had some advice about how to interpret
13 Section 101 of the CPRA?

14 Without telling me what the advice is.

15 A. Yes.

16 Q. You held the role of Chief Conservation
17 Officer under the Canada Oil and Gas Operations Act
18 until 2009, or COGOA?

19 A. Yes.

20 Q. When did you start holding that role?

21 A. My recollection is from July 1, 2005, till
22 November/December 2010. Can I refer to my Statements

1 to just verify that?

2 Q. Of course, you can, but I think that it
3 wasn't clear to me when you started, which is why I'm
4 asking the question. You can go ahead and look at it,
5 of course.

6 A. I just don't want to misstate my tenure.

7 Q. It's Paragraph 3 where I see you
8 say: "Until late 2009, I was the designated Chief
9 Conservation Officer under the COGOA," but I don't
10 have a start time.

11 A. Right. I'm wondering whether it's in my
12 other Statement or not. No, it isn't, and my
13 recollection is June or July 2005.

14 Q. In 2009, when you stopped holding that role,
15 did you transition to a different role, or what
16 happened there?

17 A. Yes. I ceased to be the Chief Conservation
18 Officer but continued to be the Director of the
19 Exploration Production Team for a short time and after
20 which I became the Technical Leader for Exploration
21 Production.

22 Q. You're talking about a few different roles.

1 So you no longer had oversight of the FIO after 2010?

2 A. Correct.

3 Q. And you no longer had the Chief Conservation
4 Officer role under COGOA after 2009?

5 A. Correct.

6 Q. So by the time that we got to the Common
7 Issues Trial in 2015, you did not hold those roles
8 anymore?

9 A. Correct. I did not.

10 Q. You were presented on behalf of the NEB at
11 the Common Issues Trial; is that right?

12 A. Yes.

13 Q. Who was the individual with the oversight of
14 the FIO at that time?

15 A. Well, which date please?

16 Q. In late 2015, during the Common Issues
17 Trial.

18 A. I have to reflect back a little bit. Just
19 bear with me for a second. It was either Kyle Sherwin
20 or Patrick Smythe. I'm not 100 percent sure as to who
21 was the Director of the Team at that time.

22 Q. Neither of them was presented in the Common

1 Issues Trial as a witness on behalf of the NEB; isn't
2 that right?

3 A. I don't know. I certainly was presented as
4 one.

5 Q. Are you aware of any other witnesses from
6 the NEB being presented at the Common Issues Trial?

7 A. I don't recall.

8 Q. So the Chief Conservation Officer under the
9 COGOA, what is that role?

10 A. There are two -- well, I guess there is the
11 statutory definitions of what the responsibilities of
12 the Chief Conservation Officer are, and they are
13 spelled out in the COGOA. I don't recall what
14 section. I can look it up, if that's necessary.

15 Now I forgot the rest of your question.

16 Q. I was just asking what your role was as
17 Chief Conservation Officer under COGOA.

18 A. As -- the principle part was to make
19 regulatory decisions on applications that came before
20 the Board. COGOA applications that came before the
21 Board.

22 Q. You reviewed and approved applications for

1 oil-and-gas exploration work, including authorizations
2 for geophysical operations?

3 A. That is correct. That's one of the works
4 that I had the power delegated to me.

5 Q. And for many people in the room that aren't
6 in the Seismic Data industry, are we to understand
7 that those are permits or authorizations for
8 conducting seismic surveys in the offshore areas or
9 the Frontier areas of Canada?

10 A. Yes. COGOA says that, amongst other things,
11 that, in order to do any oil-and-gas-related work or
12 activity, they need an operating license and they need
13 an authorization. To do geophysical work, they need a
14 geophysical operations authorization.

15 Q. You were in charge of reviewing and
16 approving those applications under COGOA until 2009?

17 A. Yes, during my tenure, yes.

18 Q. COGOA is a separate statute from the CPRA;
19 correct?

20 A. They are two companion regulations -- Acts,
21 yes.

22 Q. Did you also hold the title of Chief Safety

1 Officer under COGOA?

2 A. I did not.

3 Q. You understand that there is a Chief Safety
4 Officer under COGOA?

5 A. I am aware of that, yes.

6 Q. The purpose of COGOA is safety, protection
7 of the environment, accountability in accordance with
8 the "polluter pays" principle.

9 Do you understand that?

10 A. Yes, and conservation of resources.

11 Q. That is the Act under which the geophysical
12 operations permits are made?

13 A. That is the Act under which authorizations
14 for geophysical activities are given, yes.

15 Q. Not the CPRA?

16 A. CPRA addresses a different aspect of the
17 related oil-and-gas activities in Canada lands.

18 They're companion regulations -- Acts.

19 Q. But you understand that the geophysical
20 permits are granted under COGOA and not CPRA; correct?

21 A. I am aware of that, yes.

22 Q. You're retired now; right?

1 A. Yes.

2 Q. You retired in 2022?

3 A. Yes.

4 Q. Prior to your retirement in 2022, you had a
5 long career in oil-and-gas exploration and production
6 in Canada. Is that a fair statement?

7 A. Yes.

8 Q. Did you interpret Seismic Data over the
9 years?

10 A. I did not.

11 Q. Would you agree with me that Seismic Data is
12 a critical component of exploration for hydrocarbons?

13 A. It is.

14 Q. Seismic data is treated by both the seismic
15 companies and oil-and-gas companies as a valuable
16 commodity in the oil-and-gas industry?

17 A. I accept what you say.

18 Q. Were you ever involved in creating Seismic
19 Data?

20 A. No.

21 Q. Do you know what is involved in creating
22 Seismic Data?

1 A. Somewhat. Not details, but an overview,
2 yes.

3 Q. Would you agree with me that Seismic Data
4 takes significant time to create?

5 A. Yes. It takes time to undertake an
6 operation, yes. It depends on the scale and the
7 nature of the work.

8 Q. And do you understand that Seismic Data can
9 be reprocessed into different versions of the same
10 seismic survey?

11 A. I'm not conversant with those activities.

12 Q. Sorry. Do you not understand what I'm
13 saying?

14 A. No. I said I don't know what's involved in
15 processing of seismic information.

16 Q. Okay. So when I talk about reprocessing,
17 you don't know what I mean?

18 A. No. I've never done that myself, and I have
19 no involvement in it.

20 Q. And just so I understand, you do have a
21 Ph.D. in physics; correct?

22 A. Yes, I do.

1 Q. Did you study in the geophysical area?

2 A. My postgraduate work was in physical
3 oceanography, so physical, yes. But seismic, no.

4 Q. Okay. You had previously worked in the
5 industry before joining the NEB; correct?

6 A. By "industry," you mean an oil-and-gas
7 company, or just anything other than government?

8 Q. Fair enough.

9 Anything other than government, but I think
10 you were involved in the oil-and-gas industry before
11 you were at the NEB in 1992.

12 A. Yes. I worked for an oil-and-gas
13 exploration and production company, and then I
14 provided contractual services to the same industry.

15 Q. Were you ever involved in licensing Seismic
16 Data in any of your roles before you joined the
17 government?

18 A. No. The licensing is done by the Regulator,
19 not by an operator.

20 Q. When I refer to "licensing" in that
21 question, what I'm asking you is, did you ever license
22 Seismic Data from a seismic company?

1 A. The company I did work for may have. I
2 certainly didn't.

3 Q. Okay. I wasn't referring to permits, just
4 so I make myself clear.

5 A. I think you -- were you referring to making
6 applications?

7 Q. No. I'm referring to licensing. So you
8 know how you license a piece of software, like
9 Microsoft Word on your computer?

10 Do you understand what I'm saying?

11 A. Yes. Yes.

12 Q. Were you involved in licensing of Seismic
13 Data before you entered your roles with the government
14 in 1992?

15 A. I did not.

16 Q. Okay. Do you know anything about licensing
17 Seismic Data?

18 A. I do not.

19 Q. Sir, after you exited your university years,
20 you worked at a shipping company after the Bedford
21 Institute; is that right?

22 A. Bedford Institute of Oceanography, yes.

1 Q. Okay. And so the Bedford Institute is an
2 institute that is operated by the Canadian Government?

3 A. Correct. And I think the Department of
4 Fisheries and Oceans.

5 Q. And also Natural Resources Canada; correct?

6 A. I don't know. I think Bedford was a part of
7 DFO -- sorry, Fisheries and Oceans. I don't recall
8 what role Natural Resources Canada may have had at
9 the Bedford. I certainly didn't have any involvement
10 with that aspect.

11 Q. At your time at the Bedford Institute, it
12 was just related to oceanography then?

13 A. Yes. It was a cruise in the Gulf of St.
14 Lawrence -- a boat transit.

15 Q. I don't know if you're saying "crews," as in
16 c-r-e-w-s or c-r-u-i-s-e.

17 A. The latter. It's the -- I don't know what
18 else to call it. Maybe a mission or experiment.

19 Q. Thank you, sir.

20 When you were working at the shipping
21 company after the Bedford Institute, you worked for
22 that company and it was in a consortium with two major

1 oil-and-gas exploration companies?

2 A. Correct.

3 Q. Who were those companies?

4 A. One of them was Petro-Canada at that time,
5 and the other one was Dome Petroleum.

6 Q. So Petro-Canada is now Suncor; is that
7 right?

8 A. That is correct.

9 Q. And -- sorry, what was the second one?

10 A. Dome Petroleum, which is, I think, now part
11 of BP.

12 Q. And then after that, you joined a major
13 oil-and-gas company exploring and producing oil and
14 gas in the Canadian Beaufort Sea; is that right?

15 A. Yes.

16 Q. Is there any reason why you didn't mention
17 the names of the companies in your Witness Statement?

18 A. I didn't think it was germane.

19 Q. What company was it?

20 A. Gulf.

21 Q. And what company is that now?

22 A. I don't know. I'm tempted to say

1 ConocoPhillips, but I don't know for sure.

2 Q. You're aware that GSI has been in litigation
3 with the companies that you have just mentioned?

4 A. I do not recall.

5 Q. Did you do geophysical work for that
6 company, Gulf?

7 A. I have not done any geophysical work.

8 Q. Okay. Did you ever come across GSI Seismic
9 Data in your work in the Beaufort Sea?

10 A. I did not.

11 Q. Were you aware that GSI had Seismic Data in
12 the Beaufort Sea?

13 A. I did not know that.

14 Q. Were you aware that GSI was an active
15 seismic company in the Beaufort Sea?

16 A. I learned that whilst I was with the NEB,
17 not before.

18 Q. When did you learn that?

19 A. During my tenure as the team leader for
20 Exploration Production Team.

21 Q. You also had a consulting company that
22 provided services to the oil-and-gas industry

1 including drilling contractors exploring for oil and
2 gas in the Beaufort Sea from 1986-1992; is that right?

3 A. Correct.

4 Q. What companies did you work for during that
5 consulting period that you had for six years?

6 A. Primarily a company called BeauDril, which
7 is a drilling contractor, and Amoco, which is an
8 oil-and-gas company in the U.S. Beaufort Sea.

9 Q. Okay. So just mainly those two?

10 A. Yes.

11 Q. Okay. Did you visit the FIO as part of your
12 work before you actually worked at the NEB?

13 A. No, I did not.

14 Q. When did you start to become familiar with
15 the FIO?

16 A. Probably in the 2004-2005 timeframe is when
17 I first became aware of what the FIO was.

18 Q. So you were not aware of any parties
19 accessing the FIO then before that either, if you
20 hadn't heard of it?

21 A. No. Yes, I didn't know who was accessing
22 the FIO prior to that. No, I did not.

1 Q. Did you know if there was such a thing as
2 accessing the FIO before you had heard of the FIO?

3 A. No.

4 Q. Do you know what vectorizing or
5 re-vectorizing Seismic Data means?

6 A. No, I do not.

7 Q. Do you know that Seismic Data is typically
8 loaded into a specialized workstation in order to be
9 able to use it?

10 A. I know that now.

11 Q. When did you learn that?

12 A. I would say in the 2000s, maybe 2005, '06
13 timeframe.

14 Q. Okay. So when you became responsible for
15 the FIO?

16 A. Yes.

17 Q. In the course of that work, you started to
18 learn about vectorizing and workstations; or you don't
19 know about vectorizing still?

20 A. I still don't know anything. And the nature
21 of my work and my studies didn't go into geophysical
22 work. So I had no reason, besides curiosity, but

1 whilst I became the Director of the team and the Chief
2 Conservation Officer, I was more conscious of what
3 these things were.

4 Q. The workstations?

5 A. The responsibilities under COGOA and CPRA,
6 yes.

7 Q. Sorry. You became more aware of
8 responsibilities under COGOA and CPRA. Does that mean
9 that you understood vectorizing or workstations?

10 A. No. Just to be clear, I didn't understand
11 it then. I don't understand it now.

12 Q. Okay. So what exactly were you becoming
13 more clear on when you were operating under COGOA and
14 CPRA then?

15 A. What the Acts allowed, didn't allow, what
16 activities they authorized, that kind of stuff.

17 Q. But you didn't necessarily educate yourself
18 about what the seismic industry was doing outside of
19 those Acts?

20 A. I did not. We had geologists and
21 geophysicists as part of the team, and it was their
22 domain. I didn't need to learn everything about

1 everything that was within the ambit of my team.

2 Q. Sir, do you know why the FIO makes Seismic
3 Data available?

4 A. My understanding is that the government is
5 interested in putting information, making information
6 available, so parties who are interested in exploring
7 and production of hydrocarbons, oil and gas, can have
8 a better understanding of where it is they will be
9 planning and conducting activities.

10 Q. Those activities that they would be
11 conducting are exploring for oil and gas offshore?

12 A. And onshore, yes.

13 Q. In this particular case, I think we are
14 talking about offshore, but that's okay. I
15 understand.

16 A. It is not clear to me because both the Acts
17 that I mentioned before apply to both on and offshore
18 areas.

19 Q. Sir, do you understand that that was part of
20 the Canadian Government's attempt to promote offshore
21 oil-and-gas development?

22 A. I wouldn't know. As part of the staff of

1 the National Energy Board and subsequently the CER,
2 our role was to administer those two Acts. We were
3 not in promoting any activities.

4 Q. You're aware that the Canadian Government
5 has collected billions in royalties off of the
6 offshore oil-and-gas production?

7 A. I'm not sure that is correct. They may have
8 obtained monies from production of the provinces in
9 the eastern part of Canada. I don't have any dealings
10 with them. In the areas where the NEB has had
11 jurisdiction, except for one extended flow test, there
12 has been no offshore oil-and-gas production.

13 Q. We'll come back to the Arctic moratorium in
14 a moment, sir.

15 A. Certainly.

16 Q. So before there was the NEB -- Well, now we
17 have the CER, and before that was the NEB, and before
18 that was the Canada Oil and Gas Land Administration.

19 Do you recall that?

20 A. Yes, I do. And for those who are fond of
21 acronyms, they are affectionately called COGLA.

22 Q. Right, sir. I have that in any notes too.

1 But you were not at COGLA?

2 A. That's correct.

3 Q. So COGLA administered geophysical operations
4 in Canada from 1981 to 1991; is that right?

5 A. That is correct.

6 Q. Who regulated geophysical operations before
7 1981?

8 A. In areas north of an administrative line,
9 principally the 60th degree latitude, it was, I think
10 at that time Department of Indian Affairs and Northern
11 Development, INAC, or words to that effect. And south
12 of that was Natural Resources Canada, I think. That's
13 my understanding.

14 Q. It wasn't necessarily done by a board of the
15 government. It seemed to be done by departments or
16 ministries directly; isn't that right?

17 A. Yes.

18 Q. Sir, you reference at -- in your First
19 Witness Statement, sir, Paragraph 20. So that's
20 RWS-01 at Paragraph 20. You reference some
21 correspondence between Delaware, or "Old GSI," I
22 think, as you call it, and the Minister of Energy,

1 Mines and Resources, Marcel Masse in 1987.

2 Do you see that?

3 A. Yes, I do.

4 Q. So just to be clear, you did not work for
5 the Government of Canada in 1987?

6 A. I did not. I did not start working for the
7 Government of Canada, the National Energy Board, until
8 1992.

9 Q. Right. So you weren't actually part of this
10 correspondence; correct?

11 A. Correct.

12 Q. You just simply provided your own
13 observations about it?

14 A. Just give me a second. In Paragraph 20 of
15 my First Statement RWS-01, I make reference to it, the
16 communications between Minister Masse and Mr. Clink of
17 GSI.

18 Q. Right. And it's a description that you made
19 about that correspondence. But the correspondence
20 speaks for itself; doesn't it?

21 A. Yes, it does.

22 Q. Sir, when there was the change from COGLA to

1 the NEB, did the NEB simply take over everything that
2 the Frontier Information Office had from COGLA and put
3 it in the NEB office?

4 How did that work?

5 A. I don't know the mechanics because I was not
6 part of the Crown at that time. My understanding is
7 that when Parliament dissolved COGLA, staff went
8 either to the Department of Indian and Northern
9 Affairs -- whatever it was called -- INAC, and
10 Department of Natural Resources and to the National
11 Energy Board. They went to three different places.
12 Individuals may have done individual career moves,
13 but, generally, that's how staff was distributed.

14 And the content of information and
15 documentation was sent to the National Energy Board
16 for areas for which the Board had jurisdiction.

17 Q. And so the data that COGLA had, it included
18 data with respect to offshore Nova Scotia and offshore
19 Newfoundland before the Boards were created for those
20 jurisdictions; isn't that right?

21 A. My recollection is that COGLA was dissolved
22 in 1991. And I'm going by memory, so just bear with

1 me.

2 The Canada-Newfoundland and Labrador
3 Offshore Petroleum Board -- at that time, of course,
4 it didn't have the word "Labrador" in it, was in 1985.
5 And the Canada-Nova Scotia Offshore Petroleum Board,
6 I'm going to say 1990, but I'm not 100 percent sure of
7 that.

8 Q. You are correct. It is 1990 for C-NSOPB.
9 The C-NOPB was established in 1986.

10 A. Off by a year.

11 Q. There you go. But the Seismic Data that the
12 NEB had while you were there, it included data over
13 the jurisdictions of Nova Scotia and offshore as
14 well -- sorry, Newfoundland, as well; correct?

15 A. There was information from COGOA-related
16 activities for those two offshore areas, yes, and -- I
17 just want to make sure that people understand or are
18 mindful that it is the Canada-Newfoundland and
19 Labrador Offshore Petroleum Board. It's a joint
20 board. It's not Newfoundland and Labrador Offshore
21 Petroleum Board. It's not Nova Scotia offshore
22 Petroleum Board. It's Canada-Nova Scotia. So Canada

1 is part of it and the federal copies of those were in
2 the NEB's possession. They were not in the FIO.

3 Q. Sorry. What do you mean that they were not
4 in the FIO? There is Seismic Data elsewhere in the
5 NEB?

6 A. My recollection is at the time of
7 dissolution of COGLA, the C-NLOPB, the
8 Canada-Newfoundland Labrador Offshore Petroleum Board,
9 wished any of their data to be accessed through their
10 own offices. And, as such, we packed them up and put
11 them in storage. They were put in storage. I didn't
12 do it because it was done before my tenure, yeah.

13 Q. So the C-NOPB gets established in 1986, and
14 they want to have copies of the Seismic Data relating
15 to their jurisdiction; right?

16 A. I'm sorry. Repeat that for me, please.

17 Q. The C-NOPB gets established in 1986, and
18 that Board wants to have copies of the Seismic Data
19 over its own area in Newfoundland?

20 A. Okay.

21 Q. Is that right?

22 A. I don't know. I'm sure they wanted it, yes.

1 I don't know.

2 Q. You don't know whether they got copies of
3 the data from --

4 A. I believe they did because they have offices
5 through which information can be accessed in
6 St. John's.

7 Q. Right. So the data wasn't put in storage?

8 A. No. Go ahead. I'm sorry. Please, go
9 ahead.

10 Q. So the data was not put in storage; right?

11 A. The data from the Newfoundland offshore area
12 that the NEB received was put in storage. The data
13 that was received by the C-NOPB at that time, they did
14 whatever it is that they did with it.

15 Q. How did they get it?

16 A. From transfer from COGLA to the C-NOPB.

17 Q. So the legislation that created the C-NOPB
18 came around just before 1986 when the C-NOPB was
19 established; right?

20 A. Yes. Yeah.

21 Q. So all the Seismic Data relating to
22 Newfoundland and Labrador that predates 1986 goes to

1 the C-NOPB; is that right?

2 A. Offshore information. The onshore part, if
3 there was any, that would be in the Newfoundland
4 Department of Energy, or whatever the equivalent is.

5 Q. So you would agree with me that COGLA
6 transferred control of the Seismic Data records
7 relating to offshore Newfoundland to the C-NOPB
8 sometime around 1986 when it is established?

9 A. I believe that to be correct, although I
10 don't have any personal knowledge about what was
11 transferred and what was not.

12 Q. And you don't have any information that
13 Delaware GSI was asked for permission for its Seismic
14 Data to be transferred to a different government
15 agency that involved a different province?

16 A. I'm not aware of any of that.

17 Q. Let's talk about the C-NSOPB because it was
18 established in 1990, but I think it is quite similar
19 in the sense that COGLA's Seismic Data relating to
20 offshore Nova Scotia was transferred to the C-NSOPB
21 sometime around the time that C-NSOPB was established
22 in 1990; is that right?

1 A. Sounds right.

2 Q. And all the Seismic Data that was
3 transferred was from a prior time from 1990, so it
4 would have been created in the 1970s, the 1980s, and
5 then all of that gets transferred over to the C-NSOPB;
6 is that right?

7 A. That sounds right.

8 Q. And you're not aware of Delaware GSI being
9 asked for permission for its Seismic Data to be
10 administered under a different board?

11 A. I'm not understanding the question. And by
12 extension, the previous one that related to the
13 Newfoundland.

14 So just clarify that for me, please. What
15 is it that you're asking so I can be as responsive as
16 I can.

17 Q. Well, as you said, the C-NLOPB and the
18 C-NSOPB are joint regulatory boards between the
19 Government of Canada and those two provinces; is that
20 right?

21 A. Correct.

22 Q. And so, previously the provinces were not

1 part of the COGLA administration; correct?

2 A. Yes.

3 Q. So now we have two boards getting Seismic
4 Data that was already created, the C-NLOPB and the
5 C-NSOPB get that Seismic Data and they can do whatever
6 they want in their own regulation of that Seismic
7 Data; is that right?

8 A. I don't think that that's correct. They are
9 equally bound by their statutes, the enabling
10 statutes, the Accord Implementation Acts, as the NEB
11 is with COGOA and CPRA. And -- yeah. So in terms of
12 requiring information, in terms of keeping information
13 and in terms of disclosing information, there are
14 constraints of -- on when they can do that.

15 Q. But those are --

16 A. They can't do whatever they want whenever
17 they want.

18 Q. But those are different acts than the CPRA;
19 correct?

20 A. They are independent acts, and there are
21 mirror federal provincial acts in the provinces in
22 which these offshore areas are, but they mirror COGOA

1 and CPRA.

2 Q. Sir, I don't think that is correct.

3 You're aware that there are Accord Acts at
4 the Federal Canada level and Accord Acts at the
5 provincial level, and they are not the CPRA; right?

6 A. They don't -- they are not copies of CPRA.
7 They bring together elements of COGOA and CPRA in the
8 Accord Implementation Acts. But they are -- yeah, the
9 COGOA is the cede act.

10 Q. And so, you would agree with me, I think,
11 that that mirror legislation did not come into effect
12 until shortly before 1986 with respect to the C-NLOPB
13 and 1990 with respect to C-NSOPB; isn't that right?

14 A. That's right. Sounds right.

15 Q. And those acts are not the CPRA?

16 A. No. They are not. They are different acts.

17 Q. So we now have Seismic Data that is created
18 before the time that those boards existed being
19 administered under different government boards with
20 different provinces now involved under different acts;
21 is that right?

22 A. Okay. I'm not sure where that is leading,

1 but, yes.

2 Q. Thank you.

3 In your Witness Statement, your first one,
4 you had referred to a 1984 COGLA publication,
5 "catalog" is what you called it -- regarding released
6 geophysical reports.

7 Do you recall that?

8 A. Yes.

9 Q. That catalog is not a legal document, it's
10 not a statute or a regulation; right?

11 A. It's an informational document.

12 Q. Right. And I think when you say it's an
13 informational document, you would agree with me that
14 it's not a statute or a regulation here in Canada?

15 A. My interpretation of what statutes are, are
16 acts passed by Parliament and regulations are
17 subsidiary to acts.

18 Q. But do you understand that the catalog is
19 not a law in Canada?

20 A. Yes. It's not a law.

21 Q. Thank you.

22 A. Only acts and regulations are laws.

1 Q. Good. Close to being a lawyer.

2 So did you review the 1984 catalog to see if
3 it ever mentions copyright?

4 A. I don't recall paying particular attention
5 and seeking out the word "copyright" in that
6 publication.

7 Q. I think we can pull it up here for you. And
8 here we're looking at R-283. No, I don't think this
9 is it. Sorry. My apologies. It is going to be
10 R-226. Thanks.

11 Sir, you recall this is the catalog?

12 A. Yes. Oh, sorry. Yes.

13 Q. Now, you weren't at COGLA, so you were not
14 part of the creation of this catalog; right?

15 A. Correct.

16 Q. So it's a bit of a lengthier document,
17 but --

18 A. Yes, go ahead.

19 Q. -- it's a searchable document, I -- as I
20 understand it.

21 Have you ever checked it for copyright? You
22 said no.

1 Would you like to see if it refers to
2 "copyright" at all?

3 A. Certainly. Go ahead.

4 Q. Do you want us to perform that task for you?

5 A. You're probably more proficient than I am.

6 Q. Only if we spell "copyright" correctly.

7 And, sir, you see that there is no matches
8 being found on that document for the word "copyright"?

9 A. Yes.

10 Q. And did you ever search this catalog
11 document, sir, for reference to the Berne Convention?

12 A. I did not.

13 Q. Do you know what the Berne Convention is?

14 A. I do not.

15 Would you tell me?

16 Q. I can tell you certainly, although that's a
17 little unconventional for cross-examination. The
18 Berne Convention is --

19 A. I would like -- there is some reason why you
20 brought it up, so I would like to understand where I
21 can be helpful and be responsive.

22 Q. Thank you, Mr. Dixit.

1 Just quickly, the Berne Convention is the
2 international convention for the protection of
3 copyright.

4 A. All right. Thank you.

5 Q. And, sir, you don't have any information
6 that GSI was -- or Delaware GSI at the time in 1984
7 was provided a copy of this catalog? Is that fair?

8 A. I do not know if they were sent a copy of
9 that directly. It was publicly available at COGLA's
10 offices.

11 Q. Right. So it sat at COGLA's office, and
12 some iteration of it later sat at NEB's office; is
13 that right?

14 A. I'm not sure I understand the word
15 "iteration." It is probably the same document that
16 sat in the FIO.

17 Q. When it became the NEB?

18 A. I think NEB issued its own versions. We
19 didn't do anything to the COGLA version.

20 Q. It wasn't a catalog that was mailed out to
21 everyone in the industry; isn't that right?

22 A. I do not know that. It may have been. I

1 wasn't part of that aspect, but it was in our library,
2 and it's publicly accessible.

3 Q. Do you have any records to indicate that GSI
4 Delaware's Seismic Data was being accessed from the
5 FIO in 1984?

6 A. I'm sorry. Repeat that for me, please.

7 Q. Do you have any records to show that
8 Delaware GSI's Seismic Data was being accessed from
9 the FIO in 1984?

10 A. In 1984? I don't know what was accessed in
11 1984.

12 Q. So you don't have any records to that
13 effect?

14 A. I don't.

15 Q. When you worked at the NEB, did you have any
16 records, or is this an issue of your retirement or --

17 A. No. I'm just saying that I didn't know what
18 was going on in 1984 in COGLA. I wasn't part of
19 COGLA.

20 Q. And the NEB didn't inherent any records that
21 indicated that GSI Delaware's data was being accessed
22 through the 1980s?

1 A. They may have. I'm not recalling what may
2 have been received from COGLA.

3 Q. You didn't see any such records; isn't that
4 right?

5 A. I didn't see it. No. I didn't look for it.
6 I didn't see it.

7 Q. And so, when the data was transferred from
8 COGLA to the C-NLOPB and C-NSOPB for those
9 jurisdictions, sir, did COGLA then retain a copy of
10 that same data?

11 A. COGLA ceased to be in 1991, so there is
12 nothing -- nobody there to retain anything.

13 Q. I understand that, but COGLA obviously
14 existed at the time that the transfer of the Seismic
15 Data went to those boards, and I'm asking whether
16 COGLA continued to hold the same records, which you
17 worked at the NEB, and you would have seen what was
18 inherited from COGLA at the NEB when you started
19 working there in 1992?

20 A. COGLA transferred to the NEB federal copies
21 those records. I didn't look for every document that
22 was received from COGLA.

1 Q. So does the NEB or the CER continue to
2 maintain offshore Newfoundland and Nova Scotia Seismic
3 Data?

4 A. I do not know.

5 PRESIDENT WALLGREN-LINDHOLM: Ms. Lemmens,
6 I'm sorry. We would need to break in five minutes for
7 the court reporter, so when you come to a suitable
8 instance, may I ask you to take a break. Okay. Thank
9 you.

10 MS. LEMMENS: Thank you.

11 BY MS. LEMMENS:

12 Q. And, sir, as you said, you were no at COGLA
13 when it dissolved; right?

14 A. Correct.

15 Q. And so you don't have any information that
16 any of the seismic companies that created that Seismic
17 Data consented to any transfer of their data to those
18 other boards?

19 A. I simply don't know.

20 Q. Thank you.

21 MS. LEMMENS: This would be an okay time to
22 break. Thank you, Madam Chair.

1 PRESIDENT WALLGREN-LINDHOLM: Thank you,
2 Ms. Lemmens.

3 Mr. Dixit, we will now break for 15 minutes,
4 and I remind you that you are sequestered. Do you
5 know what that means?

6 THE WITNESS: I do.

7 PRESIDENT WALLGREN-LINDHOLM: Yes. So you
8 should not speak to anybody about your Witness
9 Statement or your testimony and not liaise with
10 Counsel, please.

11 THE WITNESS: Understood.

12 PRESIDENT WALLGREN-LINDHOLM: Thank you.
13 And 15 minutes, which means that we will be back 5
14 past 4:00.

15 THE WITNESS: Understood.

16 PRESIDENT WALLGREN-LINDHOLM: Thank you.

17 (Brief recess.)

18 PRESIDENT WALLGREN-LINDHOLM: So are we
19 ready to continue cross-examination? Ms. Lemmens?
20 You are ready?

21 MS. LEMMENS: Yes, of course. Thank you,
22 Madam Chair.

1 PRESIDENT WALLGREN-LINDHOLM: Thank you.

2 BY MS. LEMMENS:

3 Q. Mr. Dixit, before the break, I think you had
4 indicated that you had a limited knowledge of
5 copyright, but can I confirm that?

6 A. Yes.

7 Q. And so, I just want to run through a few
8 questions for you.

9 Do you know how the Copyright Act works?

10 A. I do not.

11 Q. Did you know that Seismic Data is copyright
12 before the Common Issues Trial Decision?

13 A. I don't recall.

14 Q. You don't recall whether you knew that
15 Seismic Data was copyright or not?

16 A. Before the Common Trial?

17 Q. Yes.

18 A. I did not know that.

19 Q. You did not know that it was copyright?

20 A. Yes.

21 Q. And so therefore you also did not know
22 whether copying of Seismic Data was allowed under the

1 Copyright Act or not?

2 A. Would you repeat that for me, please?

3 Q. Therefore, you also did not know whether
4 copying was allowed under the Copyright Act?

5 A. I'm not a lawyer, so I can't speak to
6 copyrights and what it entails and what it doesn't
7 entail. What I can speak about is practices that we
8 undertook in the Frontier Information Office.

9 Q. And those practices included using signage
10 posted at the Frontier Information Office regarding
11 intellectual property laws in Canada; is that right?

12 A. There were signages, yes.

13 Q. Were those signs used because it was unknown
14 whether Seismic Data was covered by intellectual
15 property protections?

16 A. It was done with abundance of caution. It
17 was done because copyrighted-related issues were being
18 brought up circa 2000.

19 Q. Is that the whole of your answer?

20 A. I'm not sure whether there is more.

21 Q. Okay. So you say it was out of an
22 "abundance of caution." So did the NEB know whether

1 copyright existed in Seismic Data before the Common
2 Issues Trial Decision?

3 A. If I recall the signs, it says "may contain"
4 copyright information, and to -- as I said, for the
5 case of abundance of caution, we put up a sign saying
6 that people need to be aware that there may be
7 copyright materials in the FIO.

8 Q. And the "may be" copyright materials is
9 because it was unknown; isn't that right?

10 A. Our interpretation was that under the CPRA,
11 Section 101, information that was provided to the
12 Board could be disclosed -- is to be disclosed
13 following the expiry of the privilege period. So we
14 made that information available, and we put in that
15 sign as a cautionary step.

16 Q. When you say "caution," what was the caution
17 about?

18 A. It may contain copyright material like any
19 library contains information that could be
20 copyrighted.

21 Q. In other words, it was unknown by the FIO
22 whether Seismic Data was copyright or not; isn't that

1 right?

2 A. No. I don't think so. My interpretation is
3 CPRA required the Regulator to make information
4 available after the expiry of the privilege period as
5 stated in CPRA 101.

6 Q. When you say "available," are you saying
7 copying?

8 A. "Available" means "there."

9 Q. "There."

10 A. In the FIO for people to read, review, take
11 away, make copies in the FIO of material that is
12 there. It is disclosed.

13 Q. Are you aware that -- have you read the
14 Common Issues Decision from Justice Eidsvik?

15 A. I may have read parts of it. I didn't read
16 it all, and even if I read it all, I don't have sharp
17 recollection of what the salient points were.

18 Q. So you participated in the Common Issues
19 Trial, but you didn't read the Decision?

20 A. I didn't say that. I said I don't recall
21 what it had said when the thing came out. I think
22 it's about 10 years ago.

1 Q. It was almost 10 years ago.

2 A. Yeah.

3 Q. Sir, do you know that the Common Issues
4 Decision determined that copyright can subsist in
5 Seismic Data?

6 A. Now that you mention it, that is -- yeah, I
7 recall reading that.

8 Q. And so, the signage that went up indicating
9 that there was potentially copyright in the Seismic
10 Data, you say that that was cautionary, but if you
11 didn't think that copyright subsisted in Seismic Data,
12 why was there a need for the signage at all?

13 A. The FIO contains information. I haven't
14 gone through it all, and I don't know what, if any,
15 copyright material may be there. We did that
16 as -- with abundance of caution, and we put in the
17 word "may," which means that, you know, it could or it
18 could not.

19 Q. Sir, I'd like to show you an exhibit. It is
20 Exhibit C-549.

21 A. Can I blow it up?

22 Q. It should come up on your screen.

1 A. I can but I have to squint.

2 (Comments off microphone.)

3 Q. Oh, you are also welcome to Zoom in. You'd
4 need to use the plus sign at the top of the PDF reader
5 there.

6 Sir, this is a National Energy Board sign
7 that is located in the FIO.

8 Are you familiar with this signage?

9 A. Yes, I am.

10 Q. And it says that: "The Frontier Information
11 Office Library contains material that may be subject
12 to copyright owned by" -- now I can't read it because
13 it is too zoomed in -- "owned by those providing the
14 material. The Copyright Law of Canada governs the
15 making of photocopies or other reproductions of
16 copyright material. Copying may be an infringement of
17 the Copyright Law. The Frontier Information Office is
18 not responsible for, nor does it authorize either
19 implicitly or explicitly any infringement of this
20 law."

21 Do you see that?

22 A. Yes, I do.

1 Q. And you're familiar --

2 A. I'm sorry. I do.

3 Q. And you're familiar with this signage, sir?

4 A. Yes, I am.

5 Q. And so why was the sign up if you didn't

6 think that Seismic Data was copyright?

7 A. I'm not sure what more I can say. We did

8 that with abundance of caution, and it says -- it says

9 it "may" contain. So we did that with that in mind.

10 Q. Well, "may" in this case would indicate that

11 it was unknown whether copyright subsisted in the

12 material; isn't that right?

13 A. No. It says that we haven't gone through

14 the material to ascertain what is and what may not be

15 copyright.

16 Q. Did you ever undergo that process?

17 A. I don't remember.

18 Q. What would that process entail, in your

19 mind?

20 A. Perhaps going through every document to see

21 what, if any, copyright material was there.

22 Q. How would you determine whether it was

1 copyright or not?

2 A. I don't know. Somebody would have to guide
3 me in that.

4 Q. Sir, I'd like to show you another exhibit.
5 It is C-552.

6 A. All right.

7 Q. Do you see a photo your screen?

8 A. I do.

9 Q. Is this familiar to you, this space in the
10 photo?

11 A. It is.

12 Q. This is the FIO, isn't it?

13 A. It is.

14 Q. And so what are we looking at here in the
15 photo?

16 A. It's shelving containing microfiche.

17 Q. And that microfiche is Seismic Data; is that
18 right?

19 A. It could be. Or rephrase that -- it may be.

20 Q. What else is in there?

21 A. It's whatever information that has passed
22 privilege that was submitted to the Regulator under

1 COGOA.

2 Q. And so, is there anything else that was
3 submitted that you think was covered by copyright?

4 A. I don't know.

5 Q. So what process would you undertake to
6 determine whether these records here are copyright or
7 not?

8 A. I don't know. I've not gone through the
9 exercise, so I don't know.

10 Q. I'd like to show you another exhibit, sir.
11 It's Exhibit C-548.

12 And this one is a little bit harder to read
13 from this photo. I think the integrity of the photo
14 may have been a little bit compromised when we turned
15 it into a PDF. But are you familiar with this
16 document, sir?

17 A. Yes, I am.

18 Q. We're looking at the Frontier Information
19 Office log in which a party can come into the FIO and
20 indicate that they had come in and looked at
21 materials; is that right?

22 A. Correct.

1 Q. And at the bottom of the document -- sorry.

2 Scratch that.

3 There's a series of these forms on this
4 clipboard with this pen available at the FIO; correct?

5 A. Yes.

6 Q. On this document, near the bottom, it
7 indicates that: "The Frontier Information Office
8 Library contains material that may be subject to
9 copyright owned by those providing the material. The
10 Copyright Law of Canada governs the making of
11 photocopies or other reproductions of copyrighted
12 material. Copying may be an infringement of the
13 Copyright Law. The Frontier Information Office is not
14 responsible for any infringement of this law made by
15 the users of these machines."

16 Do you see that?

17 A. Yes.

18 Q. And the machines that are being referred to
19 there are a scanner, a photocopier, and a computer
20 that has internet access; is that right?

21 A. My recollection is that there's a microfiche
22 reader and a computer. I don't recall a scanner.

1 There may be, but I don't recall one.

2 Q. Okay. And so these forms were used by users
3 of the FIO coming to look at materials, and they
4 required the signatures of those users on the form.

5 Do you see that at the top?

6 A. Yes, I do.

7 Q. Why did the FIO require a signature from the
8 users of the FIO to agree to this statement?

9 A. With abundance of caution.

10 Q. And so, it was collecting signatures of
11 users of the material to have them agree that
12 copyright may subsist in this data and that the
13 Frontier Information Office is not responsible for any
14 infringement of the copyright laws made by them; is
15 that right?

16 A. In addition to signatures, not just
17 signature by itself. It has who is it that is
18 accessing, and this is a way of us being aware of who
19 comes in, who books time and uses the FIO.

20 Q. But you would agree with me the FIO does not
21 actually track all the users of the FIO materials;
22 isn't that right?

1 A. In order to access the FIO, one needs to
2 make an appointment, and an appointment is given only
3 to one user at a time, and this is the document they
4 sign and identify themselves when they are using the
5 FIO.

6 Q. Sorry. My question was a little bit
7 different than that.

8 The FIO does not track all of the users that
9 come in to the FIO and what they actually look at in
10 the FIO; isn't that right?

11 A. That is correct. We don't know what they
12 look at. They book a time in the room, and they can
13 access what they wish. We don't look over their
14 shoulder. We don't ask them to provide a list of
15 everything that they have looked at.

16 Q. Sir, I understand that you're retired, but
17 do you know that the FIO maintains this liability
18 agreement and this signage even today?

19 A. I don't know. I was in -- full disclosure,
20 I was in the library today actually to access another
21 part of the NEB for a completely different matter. I
22 didn't go into the FIO so I don't know whether it's

1 there or not.

2 Q. Up until the time that you retired, the
3 signage and the liability agreement was maintained at
4 the FIO?

5 A. That's my understanding, yes.

6 Q. Did the wording of the signage and these
7 liability agreements change over time?

8 A. Somewhat, yes.

9 Q. Did they change because the NEB and the CER
10 simply wanted to be seen as not taking a position
11 about whether copyright applied to the materials or
12 not?

13 A. It was because of increased interest in
14 copyright matters circa 2000, I think, if I remember
15 correctly, with abundance of caution, and we did not
16 take a position on copyright.

17 Q. Sorry. Could you just say that a little bit
18 louder or did you catch that? Thank you.

19 THE WITNESS: We're good?

20 REALTIME STENOGRAPHER: Yes, sir. Thank
21 you.

22 THE WITNESS: Thank you.

1 BY MS. LEMMENS:

2 Q. So when the FIO does not keep a record of
3 what a user is looking at in the FIO, it doesn't know
4 how many times a seismic survey is accessed by users
5 in the FIO; isn't that right?

6 A. Correct.

7 Q. And the FIO also does not know how many
8 times a seismic survey in the FIO might be copied?

9 A. By "copied," I'm interpreting means printed
10 off the fiche or from a CD; is that correct, or not?

11 Q. Yep. Yeah. Just another copy of it.

12 A. We don't keep track of what is copied.

13 Q. And so you don't know how many times a
14 seismic survey is copied then; correct?

15 A. Correct. Or what information is copied.
16 It's not just seismic information that's in the FIO.
17 It has other information that is submitted to the
18 Regulator pursuant to COGOA.

19 Q. Sir, did you say that there was a computer
20 in the FIO?

21 A. I believe it's a standalone computer, yes.

22 Q. And it has access to the internet?

1 A. I don't believe so. That's what I meant by
2 "standalone." It's not connected to any network.

3 Q. When was the computer installed in the FIO?

4 A. I don't remember. I'm going to guess that
5 it was circa 2005, 2008 timeframe.

6 Q. And that's because obviously technology had
7 changed over time.

8 A. It was getting increasingly difficult for us
9 to maintain the fiche reader. Servicing was hard,
10 parts were hard. And in 2008, we started asking
11 people to submit copies to us in CDs instead of paper
12 and Mylar and stuff like that.

13 Q. Sir, I just wanted to show you another
14 exhibit here. It's C-550.

15 Does this look familiar to you?

16 A. It does.

17 Q. Okay. And so is this a picture in the FIO
18 then?

19 A. It is.

20 Q. Okay. And we're looking at a microfiche
21 reader and a printer?

22 A. Correct. And a desk and a chair.

1 Q. Thank you.

2 A. And somebody's purse.

3 Q. Thank you. Mine.

4 Anyway, so I just wanted to clarify that
5 there is, in fact, a printer in there that users can
6 use to print off some of the materials and make
7 copies?

8 A. I believe I said that before, yes. There is
9 a printer and there is documentation to that effect.

10 Q. So when the FIO does not inquire about what
11 people are looking at in the FIO, then I take it also
12 that the FIO does not inquire as to the purpose of
13 anyone visiting the FIO; is that right?

14 A. That is correct.

15 Q. The main purpose is to determine whether
16 areas in the offshore or the Frontier areas of Canada
17 have resource-development potential; is that fair?

18 A. It is a purpose. A variety of people
19 access -- can access the FIO, have accessed the FIO.
20 Many people are in the oil-and-gas business, so they
21 probably are looking for that, but it's not
22 necessarily the only reason that they come there.

1 Q. And so, in other words, it doesn't have to
2 be about promoting the offshore oil-and-gas
3 development in Canada; is that right?

4 A. The NEB does not promote oil-and-gas
5 development.

6 Q. You're aware that the CPRA's purpose is to
7 promote offshore oil-and-gas development in Canada?

8 A. The NEB does not promote. It is a
9 Regulator. It authorizes and makes sure that there's
10 compliance with the acts and regulations and
11 authorization conditions.

12 Q. My question was a little bit different,
13 though, sir. On the second time around it was, do you
14 know that the CPRA, the purpose of that Act is to
15 promote offshore oil-and-gas development?

16 A. I'll have to look at the Act to affirm that.

17 Q. You would agree with me, sir, that the NEB
18 had no control over what third parties were doing with
19 the borrowed seismic materials when they took them out
20 of the FIO; right?

21 A. Yes.

22 Q. That includes that the NEB does not control

1 any third parties creating SEG-Y format Seismic Data
2 from any revectorization of the data available at the
3 NEB?

4 A. We don't know what they're doing, so they
5 could be doing whatever it is that you said they might
6 be doing.

7 Q. Right. And you don't know what
8 "revectorization" is?

9 A. No, I do not.

10 Q. Do you know what SEG-Y is?

11 A. It's a standard. I don't know much more
12 beyond that.

13 Q. A standard format of Seismic Data? Is that
14 what you're trying to say?

15 A. A data format. I don't know whether it's
16 specific to seismic only. I suppose it is. I think
17 the S-E-G part of SEG-Y stands for "Society
18 of -- something -- geologist," but I don't know.

19 Q. Given that the NEB didn't know or control
20 what third parties were doing with Seismic Data from
21 the FIO, then they also didn't provide any notice to
22 seismic companies about what third parties were doing

1 with the seismic materials from the FIO; isn't that
2 right?

3 A. Correct. We made available to the public
4 information in the FIO that had passed the privilege
5 period as identified in CPRA.

6 Q. Sir, I told you we would get back to the
7 Arctic moratorium at some point in time. I'd like to
8 do that now.

9 A. Now is the time?

10 Q. Yes. And so there is currently an Arctic
11 moratorium on offshore oil-and-gas development in
12 Canada; is that right?

13 A. I don't know if the word "moratorium" is the
14 one word used when then-U.S. President Obama and Prime
15 Minister Trudeau agreed to things. There was an end
16 to new licensing in the end of 2016. If that means
17 "moratorium," then that's an interpretation. I don't
18 recall the word "moratorium." It may be there, but I
19 just don't recall it.

20 Q. Thank you. I agree with you that it's a
21 matter of interpretation.

22 So -- and I just want to make clear so that

1 everybody is aware, you mentioned President Obama and
2 Prime Minister Justin Trudeau, that's because there
3 was a joint agreement with respect to that Arctic area
4 that is close to Alaska and the Yukon and Northwest
5 Territories?

6 A. It referred to the Arctic offshore, that's
7 offshore Alaska, Yukon, and the Northwest Territories.

8 Q. And as you said, it came into effect in
9 2016; right?

10 A. Late 2016, if I remember correctly.

11 Q. That stop on issuing licenses in that area
12 is to be reviewed every five years?

13 A. Correct.

14 Q. There's a committee set up to conduct the
15 review every five years to examine whether to proceed
16 with further development in that area; is that right?

17 A. Correct.

18 Q. Canada or the NEB and the FIO still
19 discloses Seismic Data in that area; is that right?

20 A. There's no prohibition on making people
21 access -- letting people access information that has
22 passed the privilege period.

1 Q. Right. And so, therefore, there's no
2 distinguishing between areas that you might not be
3 issuing licenses to produce hydrocarbons for. You
4 still give out the seismic materials in respect of
5 those areas?

6 A. Maybe a couple of things. The NEB and now
7 the CER does not issue licenses. It issues
8 authorizations to enable people to undertake certain
9 oil-and-gas activities. It doesn't give them any
10 rights. Those are issued -- the rights issuance is
11 done by government departments, not the NEB. There
12 was a second part, but I can't remember.

13 Q. You're still disclosing the seismic
14 materials because you're not distinguishing whether
15 licenses are being issued in that area or not.

16 I didn't talk about who was issuing it.

17 A. I interpreted that to mean the NEB, but NEB
18 does not issue any rights, licenses, or permits. And,
19 to repeat, the information that's passed privilege is
20 available in the FIO.

21 Q. Are you aware -- I know you're retired, but
22 are you aware that President Trump has rescinded one

1 of former President Obama's Executive Orders for that
2 particular area and that agreement that we were
3 talking about in the Arctic?

4 A. I wish to tune out all this noise.

5 Q. So I don't know if that means you're aware
6 or if you don't mean that.

7 A. I've heard a number of things that are
8 attributed to U.S. President Trump. I don't pay any
9 attention to that.

10 Okay. So you don't know that he's taken
11 more interest in Arctic areas, including in Greenland,
12 for minerals?

13 A. There's a lot of stuff in the news. I'm not
14 fixated by it.

15 Q. The next five-year review is up in 2026 on
16 Canada's side; is that right?

17 A. If the arithmetic is correct, every
18 five years, then, yes.

19 Q. By the time that we get to that review in
20 2026, it's entirely possible that new licenses will
21 start being issued in the Arctic; correct?

22 A. That would be up to the Federal Government

1 to decide.

2 Q. Of course. But it is possible that they
3 decide to start issuing licenses again in the Arctic?

4 A. They may start to do that. I'm just trying
5 to recall what the Cabinet Order regarding issuance of
6 authorizations is. Licensing themselves does not
7 permit, enable, allow an operator to do oil-and-gas
8 exploration and production activities without an
9 operating license and an authorization under
10 COGOA 5 -- Section 5.

11 Q. Sorry. It seems that maybe you're getting a
12 bit more technical than I had asked the question.

13 A. I'm just trying to be careful because
14 Madam Chair had cautioned me that I need to speak the
15 truth, so I'm trying to be as accurate as I can.

16 Q. Fair enough. And I want you to do that.
17 But I guess what I'm saying is, it's entirely possible
18 that -- after the 2026 committee review on the Arctic
19 development that, in fact, hydrocarbon development
20 proceeds after that review?

21 A. That's speculative. I don't want to go into
22 that area.

1 Q. You don't know of any reason why that's not
2 possible?

3 A. I don't know a reason why it's not possible.
4 I don't know how probable it is or anything like that.

5 Q. In your Witness Statements, you referred to
6 a sampling of correspondence between GSI and the NEB
7 over the past, I think, 26 years. And GSI
8 consistently was taking the position that its seismic
9 materials were copyright, didn't it?

10 A. And we consistently maintained that the
11 governing statutes are the CPRA and COGOA.

12 Q. Sir, I'd like to show you an exhibit that
13 was attached to your Witness Statement. It's
14 Exhibit C-413. And it's a letter dated June 4, 2010,
15 from Natural Resources Canada.

16 Do you see that, sir?

17 A. I do. Sorry, I do.

18 Q. Thank you. I know this is attached to your
19 Witness Statement, and you were not at Natural
20 Resources Canada; correct?

21 A. Correct.

22 Q. No witnesses were put forward in this

1 Arbitration from Natural Resources Canada; isn't that
2 right?

3 A. I wouldn't know. I didn't check who the
4 witnesses were, but I'm taking your word for it.

5 Q. It wasn't a trick question.

6 There is no one from Natural Resources
7 Canada put forward as a witness in this Arbitration.

8 A. All right.

9 Q. So I think that's probably why this letter
10 ended up in your Witness Statement, sir. Marc D'Orio
11 wrote this letter, if we just scroll down.

12 Do you see that?

13 A. Yeah. Yes.

14 Q. He was the Director General of the Office of
15 Energy Research & Development for Natural Resources
16 Canada.

17 Do you see that?

18 A. Yeah. I know Marc.

19 Q. You know Marc. Good. Do you know why he
20 wasn't called as a witness in this Arbitration?

21 A. I do not.

22 Q. And the Natural Resources Canada, that's the

1 department of Canada that oversees the natural
2 resources in Canada, like minerals and oil and gas;
3 right?

4 A. The name implies that, yes.

5 MR. LUZ: I'm sorry. Matti, can I interrupt
6 for a second.

7 Can you point out where in Mr. Dixit's
8 Witness Statement this document is?

9 MS. LEMMENS: I understood it to be -- I
10 don't have it in my current notes, but just give me a
11 minute.

12 MR. LUZ: I'm not sure it is.

13 MS. LEMMENS: I thought he had provided some
14 commentary on it. If I have that incorrect, maybe I
15 mixed it up with another witness, I apologize.

16 BY MS. LEMMENS:

17 Q. Are you familiar with this letter, sir?

18 A. I am not. I'm trying to recall where it may
19 have been in my documents. I reviewed them in the
20 last week or so. I don't recall it. That doesn't
21 mean it's not there. I just don't recall it.

22 MR. LUZ: I think for the record, we should

1 note that it is not in Mr. Dixit's Witness Statement.

2 MS. LEMMENS: I don't know that. I
3 apologize if I got that wrong. It might be in one of
4 your other Witness Statements.

5 MR. LUZ: I believe it's in Mr. Einarsson's
6 Witness Statements, but for Mr. Dixit, I don't think
7 it is. You can search, but we don't have a record of
8 it.

9 MS. LEMMENS: Okay. Then I will leave the
10 questions alone because he's not familiar with the
11 document.

12 BY MS. LEMMENS:

13 Q. Are you aware of whether the Geological
14 Survey of Canada ever sought the NEB's advice about
15 whether seismic materials available at FIO are
16 copyright?

17 A. I don't recall any of that.

18 Q. At the end of your initial Witness
19 Statement, sir, there is a map at Annex 3.

20 A. Yes.

21 Q. And this map is intended to show GSI seismic
22 material in offshore areas of Canada and non-GSI

1 seismic material in the offshore areas of Canada; is
2 that right?

3 A. Yes.

4 Q. Did you create this map?

5 A. The office did. The NEB did. I didn't,
6 personally, do it.

7 Q. Oh. Do you know how to create a map like
8 this?

9 A. I do not.

10 Q. So who created this map?

11 A. Somebody who is more familiar with creating
12 maps like this.

13 Q. Do you know who created it?

14 A. I do not.

15 Q. Do you know why it was created?

16 A. To illustrate where Seismic Data that the
17 FIO has.

18 Q. And so who provided this map to you?

19 A. Staff within the NEB.

20 Q. Who was that?

21 A. I don't know. I think I said that.

22 Q. Sorry. But I'm just trying to understand,

1 how did you obtain this map?

2 A. I must have asked for it.

3 Q. You asked for this map for your Witness
4 Statement?

5 A. I asked for a map that showed where seismic
6 lines were.

7 Q. And you asked who?

8 A. I don't remember.

9 Q. So you got this map for your Witness
10 Statement, and you don't know who gave it to you or
11 who created it or who you talked to to obtain it?

12 A. I don't recall.

13 Q. So did you verify whether it was accurate or
14 not?

15 A. I didn't validate it, personally, no.

16 Q. Do you know whether it's accurate?

17 A. I believe it is, but I don't know. I don't
18 know if it's not.

19 Q. So given that you don't know how to create
20 the map and you don't know who created the map, do you
21 understand what it's supposed to represent?

22 A. Isn't that what the legend is for?

1 Q. Did you ask for that legend?

2 A. Yes.

3 Q. Who did you ask?

4 A. Yes. A map that would show GSI's lines and
5 non-GSI lines that was with the NEB. I don't remember
6 who I asked.

7 Q. Do you have any records of whether you asked
8 somebody for that?

9 A. I do not.

10 Q. Did you call someone?

11 A. I may have. I don't know.

12 MR. LUZ: I think the question has been
13 asked and answered.

14 MS. LEMMENS: I don't know that it's been
15 answered, but maybe it's been asked.

16 THE WITNESS: You certainly have asked
17 several times. You know, I don't remember who I
18 asked. It was in 2023, the Statement. I don't know
19 who I asked.

20 BY MS. LEMMENS:

21 Q. On the map we see data in the Arctic
22 Beaufort Sea area, and we also see data on the

1 Newfoundland and Nova Scotia areas.

2 Do you see that?

3 A. Yes, I do.

4 Q. So is that all data that is housed within
5 the CER?

6 A. I believe it is.

7 Q. So in other words, the CER continues to
8 maintain offshore Seismic Data in the Nova Scotia and
9 Newfoundland Labrador areas?

10 A. I think we talked about this earlier where
11 the NEB, at that time, was the recipient of the
12 federal copies of information that was provided to
13 COGLA for oil-and-gas exploration production
14 activities.

15 Q. Right. So in other words, there were copies
16 made of COGLA's data when it got transferred to the
17 C-NSOPB and the C-NLOPB in order for those offices to
18 also have seismic materials covering those areas;
19 isn't that right?

20 A. I don't know. I don't know what information
21 was asked to be submitted to the Regulator, COGLA at
22 that time, whether it was one or more copies. It may

1 be they were asked to provide more than one copy: One
2 federal, which is what is archived in the NEB's
3 offices; and another one that was in the provincial
4 domain that went to the Offshore Petroleum Boards.

5 Q. Did you speak to Doug Uffen in requesting
6 this map?

7 A. I don't recall who is Doug Uffen is?

8 Q. Okay.

9 A. Who is he?

10 Q. He's an Expert in this proceeding.

11 A. I don't remember speaking to any Doug Uffen
12 regarding this map.

13 Q. Did you offer to have this map created, or
14 were you asked by someone to have a map created?

15 A. I'm sorry. Would you repeat that for me,
16 please?

17 Q. Did you offer to have this map created, or
18 did you -- were you asked to have this map created?

19 A. My recollection is I asked for the map to be
20 created.

21 Q. Did you speak to Mr. Makrides and
22 Mr. Bennett about their Witness Statements?

1 A. I have not.

2 Q. Are you aware that your Witness Statements
3 follow a very similar format and have similar maps at
4 the end of them?

5 A. I don't remember reading or seeing either of
6 those two people's Witness Statements to this
7 Tribunal.

8 Q. Did you discuss preparing your Witness
9 Statements together?

10 A. I did not. I retired in 2022 and I haven't
11 spoken to Carl since then.

12 Q. And Mr. Bennett?

13 A. Nor him. I just know Carl better than
14 Mr. Bennett.

15 Q. Understood. And you mean Mr. Carl Makrides?

16 A. I do mean Mr. Carl Makrides, Chief
17 Conservation Officer at the C-NSOPB.

18 Q. As the Chief Conservation Officer for a
19 period of time, you were familiar with the requirement
20 to maintain Seismic Data within Canada and not remove
21 or destroy it without asking for your permission?

22 A. I believe that is the requirement in the

1 Canada Oil and Gas Geophysical Operations Regulation.

2 Q. And so do you know whether any companies
3 have abandoned the storage of some of their Seismic
4 Data?

5 A. I do not.

6 Q. And do you know, then -- probably not, but
7 I'll ask the question -- do you know whether any
8 companies that have abandoned Seismic Data still have
9 their data with the Boards; and, therefore, it shows
10 up on your map?

11 A. I do not.

12 Q. Do you know whether any of the data on this
13 map has been destroyed?

14 A. I do not.

15 Q. In the mid-2000s, the NEB considered a plan
16 to make nonexclusive data available online in a
17 digital format alongside the C-NSOPB where
18 Mr. Makrides works; is that right?

19 A. If you were referring to a joint data
20 repository, there were talks about that. I don't
21 think it ever came to be.

22 Q. I understand it hasn't come to be. But I'd

1 like to talk about the possibility that was being
2 discussed in the mid-2000s.

3 So you would agree with me that there was a
4 discussion by the NEB about a shared data repository
5 for Seismic Data; correct?

6 A. I don't recall being at any such meeting.
7 If it was, it was exploratory in which such a concept
8 was discussed. I don't believe anything came out of
9 it.

10 Q. Sir, and so perhaps you were not at the
11 discussions. Do you recall someone named Rudy
12 Klaubert who was at the NEB?

13 A. Rudy Klaubert was at the NEB. I don't know
14 when he retired. He probably retired before I became
15 Director, before I became the Chief Conservation
16 Officer. So there would have been prior to 2005.

17 Q. And he participated in the discussions with
18 the other Boards regarding the shared data repository
19 for Seismic Data; isn't that right?

20 A. He may have. I don't know.

21 Q. The shared data repository was intended to
22 host field and SEG-Y Data; correct?

1 A. If you say so. As I said, I don't know the
2 content of that meeting.

3 Q. The shared data repository was going to
4 apply retroactively to all of the Seismic Data that
5 the NEB and the other Boards had; is that right?

6 A. You know, I don't understand the question.
7 We, the NEB, are not in receipt of any Field Data or
8 any SEG-Y data. And so I'm not in a position to say
9 what -- how we could archive that because we don't
10 have it.

11 Q. Do you know whether the other Boards have
12 SEG-Y and Field Data?

13 A. I don't know. Yeah.

14 Q. Why did that plan not proceed?

15 A. I don't know.

16 Q. Do you think that the NEB had the discretion
17 to proceed with such a plan?

18 A. We never explored it further than that one
19 meeting that I remember it in my documentation that I
20 looked at last week.

21 Q. Sir, at your Second Witness Statement at
22 Paragraph 10, you discuss a set of Meeting Minutes for

1 a meeting that you were not present at. It is at
2 Exhibit C-483. Let's pull that one up.

3 And so here we see the Meeting Minutes of a
4 joint Government/Industry Frontier Geophysical
5 Committee dated June 24, 1999.

6 Do you see that?

7 A. I do.

8 Q. You're familiar with this document?

9 A. I looked at it in the last week, yes.

10 Q. And so, we are just looking at the attendees
11 here, and, it looks like, Rudy Klaubert of the
12 National Energy Board was there?

13 A. Yes, he was, plus three others.

14 Q. Laura Richards and Terry Baker also the
15 National Energy Board?

16 A. And Bonnie Grey, Dr. Grey.

17 Q. Sorry. Am I missing that? Oh, Bonnie Grey.
18 I see it now.

19 And if we scroll down, just to make sure
20 that we have seen all of the attendees, you're not one
21 of the attendees?

22 A. No, I'm not.

1 Q. So you don't exactly know what was discussed
2 then at this meeting other than what is contained in
3 this document; is that right?

4 A. That's correct. It's dated 1999, and I had
5 not been involved in that aspect of the Board's work.

6 Q. Okay. And so when you go on to describe it
7 in your Witness Statement, because you were not there,
8 we should rely on the words in the document?

9 A. All right.

10 Q. You see that no one from GSI was invited to
11 this meeting?

12 A. Okay.

13 Q. Do you agree with me?

14 A. I don't see their name, so...

15 Q. Okay. And are you aware --

16 A. Let me rephrase that. They weren't in
17 attendance. I don't know whether they were invited or
18 not.

19 Q. But they were not in attendance?

20 A. Their names are not on there.

21 Q. And, sir, I'm just going to scroll down a
22 little bit to this document.

1 Sir, you'll see here at the bottom of the
2 screen that there was a further discussion on the
3 issue of scanning companies and copyright violations.
4 "NEB explained its position that there is no transfer
5 of ownership of data from operators to the government
6 when data is submitted. The data is also not placed
7 in the public domain when the Regulators release the
8 information from privilege status under the
9 legislation. Ownership of the data rests with the
10 operators and they must enforce that ownership if they
11 feel their data is being misappropriated."

12 Do you see that?

13 A. I do see that statement.

14 Q. And that's an accurate statement from the
15 NEB at that time or do you just have no information
16 about that?

17 A. I have no information about that. My
18 observation is, since we are not receiving Field Data
19 or -- we -- we -- I don't have anything else. We
20 don't have -- we don't get the data so we don't -- I
21 didn't deal with any ownership matters.

22 Q. Sorry. Are you saying that the NEB doesn't

1 have any Seismic Data?

2 A. We don't have any Field Data or SEG-Y
3 information. So --

4 Q. I don't see a reference to that.

5 A. That's my interpretation. When this says
6 that the operators -- when data is submitted, "data"
7 I'm interpreting it to mean "Field Data" or some more
8 detailed --

9 Q. I don't think it says that actually.

10 A. No, it doesn't say that. That's my
11 interpretation, I said.

12 Q. Okay. But you weren't there?

13 A. I was not there.

14 Q. And just below that, you see that there's a
15 section on "data repository"?

16 A. There is a section, yes.

17 Q. And so, there the C-NOPB was speaking about
18 its initiative on the creation of an East Coast
19 Offshore Data Repository?

20 A. Yes.

21 Q. And industry was expressing concerns about
22 that.

1 Do you see that?

2 A. Yes.

3 Q. And you note also that, in the second
4 paragraph there, "The NEB requested that it also be
5 involved since it is a Regulator in the area as well,"
6 the Gulf of the St. Lawrence. So, in fact, the NEB
7 was involved in that shared data repository
8 discussion, yes?

9 A. Appears to be, but I don't know.

10 Q. Just bear with me for a moment. I'm just
11 reviewing the last parts of my notes.

12 Sir, do you know what "exclusive" versus
13 "nonexclusive" data is?

14 A. In a broad sense, yes.

15 Q. What is exclusive data?

16 A. Exclusive data is something that a company
17 acquires for its sole use only, whereas speculative or
18 nonexclusive is information that is collected by a
19 company that markets it to a number of potential
20 users.

21 Q. And so, Canada doesn't actually ask for any
22 proof of data ownership when Seismic Data is submitted

1 to the NEB; right?

2 A. Correct.

3 Q. The NEB had applied different
4 confidentiality periods for exclusive versus
5 nonexclusive Seismic Data; right?

6 A. The CPRA stipulates a period of privilege,
7 and there's an administrative period after that for
8 nonexclusive geophysical information.

9 Q. And so it has different confidentiality
10 periods for exclusive versus nonexclusive?

11 A. Yeah. As I said, either there's a statutory
12 part and there's an administrative part.

13 Q. But given the NEB takes no steps to
14 determine whether the seismic is exclusive or
15 nonexclusive, how does Canada determine which
16 confidentiality period to apply to the Seismic Data?

17 A. Because the status of the operation is at
18 the stage of the authorization. So the authorization
19 says whether it is exclusive or nonexclusive.

20 Q. So when you were approving authorizations,
21 you were saying whether it was exclusive or
22 nonexclusive, how the ownership would be for that

1 data?

2 A. The applicant would declare whether it was
3 exclusive or not exclusive. We didn't do any
4 sleuthing to determine whether it was one or the
5 other. They declared, the applicant declared.

6 Q. And you also indicated in your Witness
7 Statement that you weren't involved in the allowable
8 expenditure credit applications; is that right?

9 A. That is correct. That is not something that
10 the NEB does. It is by the rights issuer.

11 Q. But do you understand that those allowable
12 expenditure credits are worth significant sums to the
13 companies that are awarded those credits?

14 A. Against commitments that they have made,
15 yes.

16 Q. Right. And those can amount to millions of
17 dollars?

18 A. It depends, yes.

19 Q. When the allowable expenditure credit
20 applications are made and Seismic Data is submitted
21 with them, the Seismic Data goes to the NEB's FIO; is
22 that right?

1 A. After the expiry of the privilege period.

2 Q. So what privilege --

3 A. Let me just rephrase it.

4 Information that is submitted to us pursuant
5 to the Canada Oil and Gas Geophysical Operations
6 Regulations, Section 38, is what we receive, and after
7 the expiry of the privilege period, that information
8 goes to the FIO.

9 Q. So the Seismic Data that is submitted with
10 an allowable expenditure credit is treated in the same
11 manner as Seismic Data that is submitted under a
12 geophysical authorization?

13 A. Each authorization is its own application,
14 and we treat it as such.

15 Q. Sorry, but the allowable expenditure
16 applications are different from the authorizations,
17 aren't they?

18 A. The expenditure applications are sent to the
19 departments that have rights issuance
20 responsibilities, not us.

21 Q. Right. So the allowable expenditure credit
22 applications do not go to, let's say, you while you

1 were the Chief Conservation Officer under COGOA;
2 correct?

3 A. Correct.

4 Q. But a geophysical authorization does go to
5 you for approval?

6 A. Correct.

7 Q. And, yet, the Seismic Data that is submitted
8 with both of those types of authorization and
9 applications are treated in the same manner by the
10 NEB.

11 Is that what you're saying?

12 A. I'm trying to understand what "in the same
13 manner" means. Statutorily, CPRA does not make a
14 distinction between "exclusive" and "nonexclusive," so
15 it affords a period of five years for privilege for
16 geophysical information. Administratively we add
17 another 10 years for nonexclusive geophysical
18 information.

19 Q. And the NEB also doesn't differentiate
20 between Seismic Data that is submitted as part of an
21 allowable expenditure credit application versus
22 geophysical information that is submitted in

1 accordance with the geophysical authorization. Is
2 that right?

3 A. I'm not sure I'm getting what you are --

4 Q. Are you aware that Seismic Data is submitted
5 as part of an allowable expenditure credit
6 application?

7 A. Since we do not receive that, I don't know
8 what is contained in that allowable application, that
9 allowable expenditure application.

10 Q. Okay. And nobody from NRCan or CIRNAC has
11 been called to testify, the parties that actually
12 reviewed these allowable expenditure credit
13 applications?

14 A. I don't know who is asked to come in front
15 of this Tribunal, except myself.

16 Q. And just to be clear, NRCan or CIRNAC are
17 the ones that actually deal with the allowable
18 expenditure credit applications; is that right?

19 A. That is correct. For their respective
20 administrative areas.

21 Q. Sir, in your First Witness Statement you
22 suggested that the NEB responded to GSI's Access to

1 Information Act requests reasonably.

2 Do you accept that GSI was successful in
3 challenging various deficient responses from the NEB?

4 A. I think that's a harsh characterization. We
5 responded to the Access to Information Application as
6 it was received. We got additional clarification. We
7 interpreted the Access to Information Act, and we
8 provided information that was requested.

9 Q. Do you recall that there was, in fact, a
10 federal court decision in 2003 that compelled the NEB
11 to provide the names of parties that were accessing
12 GSI's Seismic Data at the NEB?

13 A. Yes.

14 Q. And prior to that, the NEB had, in fact,
15 refused to provide that information. It had to be
16 compelled to do that?

17 A. The NEB interpreted Section 20 of the Access
18 to Information Act the way it did because it felt that
19 disclosure of some names were contrary to the
20 provisions of subsection (1). That view was upheld by
21 the Information Commissioner, and then subsequently
22 overturned by a tribunal.

1 Q. And so you do accept that GSI successfully
2 challenged some of the deficient responses by the NEB
3 under the Access to Information Acts?

4 A. That's what courts do. They decide.

5 Q. Thank you.

6 MS. LEMMENS: Would it be possible to just
7 liaise with my team for five minutes?

8 THE WITNESS: I can step out.

9 MS. LEMMENS: It's okay, sir.

10 PRESIDENT WALLGREN-LINDHOLM: Yes. That's
11 okay. I think the team will step out. Yeah?

12 MS. LEMMENS: Yes.

13 PRESIDENT WALLGREN-LINDHOLM: Yeah.
14 Five minutes is fine.

15 MS. LEMMENS: Thank you.

16 (Pause.)

17 PRESIDENT WALLGREN-LINDHOLM: So will there
18 be further questions?

19 MS. LEMMENS: No, but thank you for the
20 indulgence to allow me to liaise with my team.

21 PRESIDENT WALLGREN-LINDHOLM: Thank you.

22 And then will there be redirect?

1 MR. LUZ: A brief one, if the Tribunal will
2 tolerate a little bit longer before --

3 PRESIDENT WALLGREN-LINDHOLM: I think you
4 have a right to redirect, so please go ahead.

5 MR. LUZ: Thank you. It won't be long.

6 REDIRECT EXAMINATION

7 BY MR. LUZ:

8 Q. Mr. Dixit, can you see me around the
9 computer screen?

10 A. I can.

11 Q. Thank you. Paragraphs 44-46 of your First
12 Witness Statement, you discussed various
13 correspondence that you had with Mr. Einarsson in
14 2010.

15 A. Just give me a second to get to those
16 paragraphs.

17 Q. Sure.

18 A. 44 to --

19 Q. 44 to 46.

20 A. Yes.

21 Q. Okay. I'm just going to take you to two of
22 the exhibits, two of the letter, your -- two of your

1 correspondence with Mr. Einarsson from 2010 regarding
2 the Board's position on the release of nonexclusive
3 Seismic Data.

4 Can we pull up Exhibit C-207.

5 PRESIDENT WALLGREN-LINDHOLM: Can you see?

6 THE WITNESS: I need to go into occlusion so
7 that I won't -- to see this.

8 BY MR. LUZ:

9 Q. Sure. If you can pull this up and you can
10 review just to refresh your memory. It's a letter
11 dated May 21, 2010, from you to Mr. Einarsson?

12 MS. LEMMENS: I'm not sure where this is
13 going, but I didn't ask him about this.

14 Does this arise from my cross-examination?

15 MR. LUZ: You were asking about the Board's
16 position on copyright.

17 MS. LEMMENS: Oh, okay.

18 MR. LUZ: Yes.

19 MS. LEMMENS: That's where you're drawing
20 that from?

21 MR. LUZ: Yes.

22 MS. LEMMENS: Okay.

1 (Comments off microphone.)

2 BY MR. LUZ:

3 Q. Okay.

4 Well, let's -- do you recall this letter?

5 A. I do.

6 Q. We will just scroll -- we'll just go to

7 Page 2 under the heading "Intellectual Property

8 Rights."

9 A. Yes, I see that.

10 Q. Okay. And then the first sentence of the

11 second paragraph under the heading "Intellectual

12 Property Rights"?

13 A. I see that.

14 Q. Says: "The Board acknowledges that GSI's

15 information may be subject to copyright. In any

16 event, the Board notes that the disclosure of the

17 information after the expiration of the 15-year term

18 is consistent with Canadian copyright laws and, in

19 particular, the Supreme Court of Canada's direction in

20 CCH Canadian Ltd. v. Law Society of Upper Canada"?

21 A. Yes.

22 Q. Do you recall that that was the Board's

1 position in response to GSI's inquiries on the issue?

2 A. Yes.

3 Q. Okay. You had one other set of
4 correspondence with Mr. Einarsson that just refers to
5 this letter. We'll just pull it up. It is C-209. It
6 is dated August 12, 2010?

7 A. Yes.

8 Q. Just take a look at the letter and see if
9 you recall it.

10 A. I do.

11 Q. And in the second paragraph it says: "It is
12 requested that GSI direct additional questions
13 relating to the filing and release of Seismic Data to
14 Karen Beattie, Legal Counsel for the NEB"?

15 A. Correct.

16 Q. And then in the second -- in the last
17 paragraph: "In terms of the request for confirmation
18 set out in 27 July 2010 correspondence, we have not
19 been persuaded that a modification in the Board's
20 process relating to the filing or release of Seismic
21 Data is warranted. Our position has not changed from
22 the 21 May 2010 correspondence," which we just

1 reviewed?

2 A. Correct.

3 Q. "As such, we are not in a position to
4 provide confirmation that confidentiality over GSI's
5 Seismic Data will be maintained for an indefinite
6 period of time."

7 A. Correct.

8 Q. Do you recall that being the Board's
9 position at the time?

10 A. Yes.

11 Q. Thank you, Mr. Dixit.

12 MR. LUZ: I don't have any other questions.

13 PRESIDENT WALLGREN-LINDHOLM: Thank you,
14 Mr. Luz.

15 Mr. Trey Gowdy, co-Arbitrator, has a couple
16 of questions. Please go ahead.

17 QUESTIONS FROM THE TRIBUNAL

18 ARBITRATOR GOWDY: All right. Thank you,
19 Madam President.

20 Dr. Dixit, let me, if I can, impose upon
21 you -- if we can pull up RWS-01, which I think is
22 your -- maybe your Third Witness Statement, but it's

1 the one that I'm most interested in. I don't have the
2 capacity to pull it up, but if someone does, that
3 would be great, so you could take a look at it.

4 THE WITNESS: Which paragraph?

5 ARBITRATOR GOWDY: Paragraph 34.

6 THE WITNESS: Yes, sir.

7 ARBITRATOR GOWDY: So I count some iteration
8 of the word "borrow" three times in the first two
9 sentences.

10 What do you mean by "borrow"?

11 THE WITNESS: It means to take from the FIO
12 documents.

13 ARBITRATOR GOWDY: So it would --a synonym
14 would be "to take," "a taking."

15 THE WITNESS: Correct.

16 ARBITRATOR GOWDY: Okay. Let me go down
17 kind of to the middle of that. At some point, the
18 language changed on your disclaimer, for want of a
19 better explanation. I'll read it to you. As you've
20 said, the NEB added language in 2006 which stated
21 parenthetically or in quotes: "I am aware that the
22 information and data contained in these materials may

1 be protected under the intellectual property laws of
2 Canada and may only be used in a manner consistent
3 with those laws."

4 Why was that language added?

5 THE WITNESS: With abundance of caution,
6 because we weren't sure what was confidential and what
7 was not, and so we wanted to have the users be aware
8 that they may have information that is copyright, but
9 we can't warrant and we haven't checked, and we don't
10 have a position one way or another.

11 ARBITRATOR GOWDY: But would that caution
12 have existed prior to 2006, or whenever you made the
13 change?

14 THE WITNESS: The change was made because
15 there was increased interest in copyright that was
16 being brought up in correspondence and other
17 discussions.

18 ARBITRATOR GOWDY: Interest from whom or by
19 whom?

20 THE WITNESS: As I recall, GSI was one of
21 the people who had talked about copyright, and it had
22 come up in another discussion circa 2000.

1 ARBITRATOR GOWDY: And so the purpose of
2 adding that language -- I don't want to put words in
3 your mouth, because it's your testimony and your
4 Statement. The purpose of adding that language would
5 have been to do what?

6 THE WITNESS: Just make the users of the FIO
7 be aware that there may be copyright information there
8 and, with abundance of caution, we're putting that
9 sign up and that disclosure.

10 ARBITRATOR GOWDY: And if there had
11 been -- now, it says "Intellectual Property Law." You
12 used the word "copyright," so I'll use the same word
13 you used.

14 If the information had been copyrighted, how
15 would it have been treated differently?

16 THE WITNESS: It's like a library, so, you
17 know, if I borrow a book from the Calgary Public
18 Library, it may or may not have copyrighted stuff in
19 there, and it's up to the borrower to be aware and
20 abide by those requirements. The library doesn't
21 pursue whether the copyright was violated or not.

22 ARBITRATOR GOWDY: I do like the library

1 analogy, except I don't know that the library requires
2 you to submit information to it.

3 THE WITNESS: The FIO does not require
4 information to be submitted to it. It is submitted to
5 the Regulator, and the FIO, the library, which is
6 housed in CADB's library, it is the mechanism by which
7 we're making it accessible to the users.

8 ARBITRATOR GOWDY: Okay. I probably asked
9 my question unartfully, so forgive me for that.

10 Was GSI required to produce information to
11 the Government of Canada?

12 THE WITNESS: Pursuant to its authorization
13 and the Regulations that applied to it.

14 ARBITRATOR GOWDY: All right. And what
15 obligation would the Government of Canada have to
16 protect copyrighted material beyond this disclaimer?

17 THE WITNESS: Our interpretation was that
18 the CPRA, the Canada Petroleum Resources Act, governs
19 when that information that is provided to us can be
20 disclosed.

21 ARBITRATOR GOWDY: All right. Let me go to
22 the -- so you say "abundance of caution to alert

1 borrowers to their responsibility"?

2 THE WITNESS: Correct.

3 ARBITRATOR GOWDY: Do you have a position on
4 whether the holder of the material had any
5 responsibility to safeguard or enforce copyright laws
6 or just the borrower?

7 THE WITNESS: Just the borrower. We
8 don't -- we didn't have a position on the copyright.

9 ARBITRATOR GOWDY: And why would that be?

10 THE WITNESS: Because we believed that the
11 operative statute was the CPRA in terms of disclosure
12 of information.

13 ARBITRATOR GOWDY: Did you ever approach
14 your legal counsel -- I may mispronounce her name,
15 either Batey (phonetic) or Beatty?

16 THE WITNESS: Beatty.

17 ARBITRATOR GOWDY: Okay. Did you ever have
18 a conversation with her? I'm not asking you the
19 content of that conversation, but did you ever have a
20 conversation with her about reconciling copyright law
21 with requirements to provide information to your board
22 or agency?

1 THE WITNESS: I did not.

2 ARBITRATOR GOWDY: Okay. That's all I have.

3 Thank you.

4 THE WITNESS: Thank you.

5 PRESIDENT WALLGREN-LINDHOLM: Thank you. I

6 would have a small question and then I would have a

7 clarification. Bear with me, I know it's late in the

8 day.

9 When you talk about "privilege" and then you

10 talk about "confidentiality," are you using these

11 words interchangeably?

12 THE WITNESS: When I use the word

13 "privilege," it is in reference to the words that I

14 used in the CPRA itself. In common use, we would use

15 the word "confidential."

16 PRESIDENT WALLGREN-LINDHOLM: So the word

17 "privilege" is in the law?

18 THE WITNESS: It's in Section 101 of CPRA,

19 yes.

20 PRESIDENT WALLGREN-LINDHOLM: I just looked

21 at it and I didn't see the word but maybe. Okay.

22 THE WITNESS: Yeah. It's there.

1 PRESIDENT WALLGREN-LINDHOLM: That is
2 actually not my question, I can find out. But my
3 question was about information management at the
4 Agency -- at FIO -- how you manage information? And I
5 believe you said at one point that after the privilege
6 period had passed, it came to the shelves; right?

7 THE WITNESS: Correct.

8 PRESIDENT WALLGREN-LINDHOLM: So it
9 was -- who managed it's putting it on the shelf? Did
10 you receive it from somewhere.

11 THE WITNESS: No. It was staff within my
12 team.

13 PRESIDENT WALLGREN-LINDHOLM: So you decided
14 when either the five-year privilege or then your
15 administrative added which amounted to 15, when that
16 time had lapsed? And it would be free at the agency
17 to be borrowed?

18 THE WITNESS: Correct. So when an
19 application is made, the applicant declares whether
20 it's an exclusive or nonexclusive. And one year after
21 the program is finished is when the clock starts. And
22 at the expiry of the appropriate period, we make sure

1 that that's the case, and that that information is
2 then moved to the FIO for people to be able to access
3 it.

4 PRESIDENT WALLGREN-LINDHOLM: Yes. So then
5 somebody in your team will decide if, you know, its
6 five years or 15 when applicable?

7 THE WITNESS: Correct.

8 PRESIDENT WALLGREN-LINDHOLM: Okay. So then
9 let me go to my clarification. I don't know, you
10 don't have access to the Transcript, presumably?

11 THE WITNESS: Of today's --

12 PRESIDENT WALLGREN-LINDHOLM: Yeah. No.

13 THE WITNESS: No.

14 PRESIDENT WALLGREN-LINDHOLM: But I will
15 still say where I'm asking for the clarification for
16 the benefit of Counsel. So it is -- it is 15:39:36.
17 And I believe -- I didn't hear what you said, and I
18 believe the Court Reporter also did not.

19 So therefore, I was interested to hear what
20 you believe you said there. And I will read it to
21 you, and then maybe you can fill in the blanks.

22 THE WITNESS: Certainly.

1 PRESIDENT WALLGREN-LINDHOLM: Just a second.

2 I'm getting there. Bear with me. 15:39:36. Yes.

3 There was a discussion about the Accord Acts
4 at the Federal Canada level, and Accord Acts at the
5 Provincial level. And the question was from
6 Ms. Lemmens, "And they are not the CPRA; right?"

7 THE WITNESS: Correct.

8 PRESIDENT WALLGREN-LINDHOLM: Yes. And then
9 your answer is: "They are not copies of CPRA. They
10 bring together elements of COGOA and CPRA in the
11 Accord Implementation Acts."

12 THE WITNESS: Correct.

13 PRESIDENT WALLGREN-LINDHOLM: And then you
14 say -- this is where I need you to fill in the blanks.
15 You said, "Yeah, the COGOA is the Seed Act."

16 THE WITNESS: Correct.

17 PRESIDENT WALLGREN-LINDHOLM: And "Cede
18 Act." How do you spell that? C-e-d-e?

19 THE WITNESS: No, "S-e-e-d."

20 PRESIDENT WALLGREN-LINDHOLM: Oh, the "Seed"
21 Act. Okay. No wonder I didn't understand. Okay. I
22 am sorry if I bothered you in vain. Now I know what

1 it says. Thank you very much.

2 THE WITNESS: Yeah. The intent was that
3 that's the nucleus.

4 PRESIDENT WALLGREN-LINDHOLM: I understand.
5 I understand the word "seed" now that I -- I
6 understand what you said. Very good.

7 THE WITNESS: Thank you.

8 PRESIDENT WALLGREN-LINDHOLM: Well, then, I
9 think that I will say thank you for coming, and you
10 are released now. Your testimony is concluded.

11 THE WITNESS: Thank you. Thank you.

12 PRESIDENT WALLGREN-LINDHOLM: Thank you very
13 much.

14 THE WITNESS: Goodbye.

15 (Witness steps down.)

16 PRESIDENT WALLGREN-LINDHOLM: We have one
17 small household matter, but while I, again, try to
18 pull up what we were going to tell you, I leave to
19 Claimants first the possibility to ask if there's
20 anything that you would like to raise in terms of
21 household matters?

22 MS. LEMMENS: As long as we're addressing

1 what's happening with the -- I'll call them the
2 Valuation Experts.

3 PRESIDENT WALLGREN-LINDHOLM: Yeah.

4 MS. LEMMENS: The Damages Experts now. I
5 think that's all we want to make sure.

6 PRESIDENT WALLGREN-LINDHOLM: That's what
7 we're going to address.

8 Respondent? No.

9 So I will say what we have.

10 Now, for everyone's benefit, I discussed
11 this with Counsel off record here earlier, and I
12 recall the discussion we had Monday morning where
13 Respondent did not oppose the introduction of the
14 corrected/amended Expert Report but said that
15 Respondent might wish to give a submission and/or ask
16 the Expert to do an amended Report of its own after
17 the conclusion of this Hearing, but did not, thus far,
18 make a request to this effect.

19 And what we say now, I start sort of at the
20 end, I say that we will address that as and when that
21 request is made, but I understood that you wanted to
22 see the rollout of the cross-examination of the

1 Experts prior to making that request.

2 So that we put to the side.

3 Then there was another request, and the
4 request you made was one of timing, and you said that
5 you would like your Expert to have an additional
6 15-20 minutes extra time for its own direct part, for
7 its own presentation. And I believe then Claimant
8 said that they might also wish to have some time to
9 explain the changes. And I note, and we have seen
10 that of course, there is already explanation in the
11 corrected/amended Expert Report.

12 So now I come to the conclusion namely, we
13 grant Canada another 15 minutes for its Expert and
14 5 minutes extra to Claimants. And that concludes what
15 we had to say now.

16 MR. LUZ: Thank you, Madam Chair.

17 Just because this was something that we were
18 discussing offline and we were asked if we were going
19 to have an additional Report ahead of time, we are
20 not. I think the only thing is that Brattle might
21 just adjust the numbers in their presentation in
22 response to Mr. Sharp. So it's not going to be

1 anything new, it is just going to be a sort of
2 responding to what has been submitted. So it's not a
3 new Report or anything like that, but just that's the
4 extent.

5 PRESIDENT WALLGREN-LINDHOLM: Sorry. I
6 don't mean to cut you off, but the one that will be
7 presented when the Experts are heard?

8 MR. LUZ: Yes. Yes, Madam Chair, that's
9 all.

10 PRESIDENT WALLGREN-LINDHOLM: I see.

11 MR. LUZ: But there won't be any additional
12 Report or anything like that.

13 PRESIDENT WALLGREN-LINDHOLM: Okay.

14 MS. LEMMENS: If I could know those numbers
15 before the direct, that would be better. I don't
16 think it's -- just like we didn't think it was fair
17 for PwC to take the stand and in its direct provide
18 different numbers, and we provided the amended Report
19 as a result, I'm not saying it needs to be tonight,
20 but I would like to see just whatever new numbers it
21 is prior to the weekend.

22 MR. LUZ: We'll discuss that. I think we

1 are just responding to -- I think Brattle will just
2 respond to what is in Mr. Sharp's Report. I don't
3 think there's going to be. It's just a response to
4 what it is and it will be in the presentation. I
5 think that's really all it's going to be.

6 PRESIDENT WALLGREN-LINDHOLM: May I suggest
7 that Counsel discuss this offline?

8 MR. LUZ: Sure.

9 PRESIDENT WALLGREN-LINDHOLM: And then
10 tomorrow you may wish to share with us your
11 conclusion, joint conclusion preferably.

12 And I will then close the second day and we
13 shall see you tomorrow at 9:30.

14 MR. LUZ: Thank you.

15 PRESIDENT WALLGREN-LINDHOLM: Thank you very
16 much.

17 (Whereupon, at 5:35 p.m., the Hearing was
18 adjourned until 9:30 a.m. the following day.)

POST-HEARING REVISIONS

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby attest that the foregoing English-speaking proceedings, after agreed-upon revisions submitted by the Parties, were revised and re-submitted to the Parties per their instructions.

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.

[Signed]

Dawn K. Larson

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

AND

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW, AS ADOPTED IN 1976

- - - - -	x	
In the Matter of Arbitration	:	
Between:	:	
	:	
THEODORE DAVID EINARSSON,	:	
HAROLD PAUL EINARSSON,	:	
RUSSELL JOHN EINARSSON, AND	:	
GEOPHYSICAL SERVICE INCORPORATED,	:	
	:	ICSID Case No.
Claimants,	:	UNCT/20/6
	:	
and	:	
	:	
THE GOVERNMENT OF CANADA,	:	
	:	
Respondent.	:	
- - - - -	x	Volume 3

HEARING ON JURISDICTION, MERITS, AND LIABILITY

Wednesday, March 5, 2025

Calgary Marriott Downtown Hotel
110 9th Avenue SE
Calgary, AB, T2G 5A6
Canada

The Hearing in the above-entitled matter
came on at 9:35 a.m. before:

MS. CARITA WALLGREN-LINDHOLM, President

MR. TREY GOWDY, Co-Arbitrator

MR. TOBY LANDAU KC, Co-Arbitrator

ALSO PRESENT:

On Behal of ICSID:

MS. GERALDINE R. FISCHER
Secretariat to the Tribunal

Realtime Stenographer:

MS. DAWN K. LARSON
Registered Diplomat Reporter (RDR)
Certified Realtime Reporter (CRR)
Certified Realtime Captioner (CRC)
Larson Reporting, Inc.
2564 West 280 North Street
Hurricane, Utah 84737
United States of America
+1 720 298 2480
DawnStenosTheWorld@gmail.com
DawnStenosTheWorld.com

APPEARANCES:

Attending on behalf of the Claimants:

**MS. MATTI LEMMENS
MR. VINCENT LANCTÔT-FORTIER
MS. MARIANNE BASTILLE-PARENT
Stikeman Elliott LLP
Bankers Hall, 4200 3 St SW West 888
Suite 14200
Calgary, AB, T2P 5C5**

Party representatives:

MR. HAROLD PAUL EINARSSON

APPEARANCES: (Continued)**Attending on behalf of the Respondent:**

MR. MARK LUZ
MS. SYLVIE TABET
MS. JULIA DEUTSCH
MS. ELENA LAPINA
MS. CAMILLE BÉRUBÉ-LEPAGE (virtual)
Trade Law Bureau
Global Affairs Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario KIA OG2
Canada

MS. MOLLY RUMPKE
Core Legal Concepts

MS. DAPHNÉE CAMPEAU
Global Affairs Canada

MR. ALEXANDER BLACK (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada & ISC Legal Services,
Indigenous Rights and Relations Portfolio

MR. PETER WIGEN (virtual)
Canadian Heritage Legal Services

MR. MARK KLAVER (virtual)
Office Legal Services Sector

MR. FRANCO BELLO (virtual)
MS. KIM PHILLIPS (virtual)
MS. JESSICA MACINTOSH (virtual)
MS. JEAN-FRANCOIS ROMAN (virtual)
Natural Resources Canada

APPEARANCES: (Continued)**Party Representatives:**

MR. SÉBASTIEN FOURNIER (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada

MR. SCOTT LITTLE (virtual)
MS. SUSANNA KAM (virtual)
MR. VINCENT BOULANGER (virtual)
Global Affairs Canada

MS. TARA SNELL (virtual)
MS. NATALIE GIASSA (virtual)
MS. PIERRE-LUC RACINE (virtual)
Innovation Science and Economic Development

MS. TIFFANY SANDERS (virtual)
MS. LYNETTE GIBBONS (virtual)
Canada Newfoundland & Labrador Offshore
Petroleum Board

Respondent's Party Representatives:

MR. MARKO VESELY
Canada Energy Regulator

MR. ALEX MILLER
Core Legal Concepts

MR. CHRIS REYNOLDS
Core Legal Concepts

Non-Disputing Parties:

MS. KRISTINA E. BEARD (virtual)
Office of International Claims and
Investment Disputes
U.S. Department of State

MR. ALAN BONFIGLIO RÍOS (virtual)
MS. PAMELA HERNÁNDEZ MENDOZA (virtual)
MR. ALDO GONZÁLEZ ARANDA (virtual)
Secretaría de Economía

C O N T E N T S

PAGE

PRELIMINARY MATTERS.....	537

WITNESSES:

CARL MAKRIDES

Direct examination by Mr. Luz.....	545
Cross-examination by Ms. Lemmens.....	548
Redirect examination by Mr. Luz.....	618
Questions from the Tribunal.....	631
Recross-exam. by Ms. Lemmens.....	643
Further redirect exam. by Mr. Luz.....	647

TREVOR BENNETT

Direct examination by Mr. Luz.....	657
Cross-examination by Ms. Lemmens.....	659
Redirect examination by Mr. Luz.....	712
Questions from the Tribunal.....	720

NIGEL BANKES

Direct presentation.....	728
Cross-examination by Ms. Deutsch.....	748
Questions from the Tribunal.....	746, 776
Recross-exam. by Ms. Lemmens.....	787

P R O C E E D I N G S

PRESIDENT WALLGREN-LINDHOLM: Good morning, everyone. Our third day of Hearing. It's the 5th of March, and before we bring in the Witness, I would like to ask the Parties if there are any household matters.

Claimants?

MS. LEMMENS: Good morning, Madam Chair and Members of the Tribunal. We did liaise with Canada as directed or suggested, I'm not sure which one.

PRESIDENT WALLGREN-LINDHOLM: Either

MS. LEMMENS: And we have not necessarily reached an agreement just yet about what is happening with the presentation of the Brattle Expert evidence. I only received a response this morning right before we came in, so I just haven't had time to formulate another response back.

PRESIDENT WALLGREN-LINDHOLM: I understand. Well, thanks for the update. I don't think we are in an extreme hurry on that information, and then so I say thank you.

And then I'll turn to Respondent. Anything

1 in particular before we take in the witness?

2 MR. LUZ: Nothing from Canada, Madam Chair.

3 PRESIDENT WALLGREN-LINDHOLM: I just have
4 one thing, and I will ask Mr. Makrides that he's in a
5 safe place and all these things. But have the
6 Parties -- between themselves, are you happy and he's
7 instructed as to where he should be and what he should
8 have in front of him? I don't know if anybody is
9 controlling that, but I'd like to talk to you before I
10 talk to him.

11 MR. LUZ: Yes, Madam Chair. We told
12 Mr. Makrides that he should be in a safe place by
13 himself without anyone around and that he has clean
14 copies of his Witness Statements, and that's it. No
15 notes. I think that's everything we instructed him
16 on.

17 I know he's nervous about the Zoom link and
18 the connection and so on, but -- and I should say, we
19 appreciate the accommodation of the Claimants to do
20 the cross-examination virtually so that he didn't have
21 to interrupt a very long-planned trip and say the same
22 thing to Mr. Bennett, who I understand has a

1 grandchild that is being born very soon, and so he
2 didn't necessarily want to miss it from flying from
3 Newfoundland to here. So I appreciate it.

4 Thank you, Madam.

5 PRESIDENT WALLGREN-LINDHOLM: Thank you.

6 And Claimants? That is --

7 MS. LEMMENS: That is acceptable. I just
8 was wondering where the witnesses are located, if they
9 can just identify that when they come on the screen.

10 PRESIDENT WALLGREN-LINDHOLM: I shall ask
11 him. I understand he's in New Orleans,
12 the -- Mr. Makrides is in New Orleans, I presume.

13 MR. LUZ: That was the last I heard --

14 PRESIDENT WALLGREN-LINDHOLM: Yeah.

15 MR. LUZ: -- but I now believe Mr. Bennett
16 is in St. John's, but I think he is.

17 PRESIDENT WALLGREN-LINDHOLM: Yeah. Well,
18 maybe we'll ask him if he's the moving kind. Okay.
19 So we'll see.

20 (Interruption.)

21 PRESIDENT WALLGREN-LINDHOLM: Yes. Good
22 morning. Very good morning. Can you - I can keep

1 talking if that's preferable.

2 (Interruption.)

3 PRESIDENT WALLGREN-LINDHOLM: We shall now
4 ask Mr. Carl Makrides to be entered into this room
5 from the waiting room, and please give me a sign or
6 thumbs up or something when that has occurred, unless
7 we first see him here on the screen.

8 CARL MAKRIDES, RESPONDENT'S WITNESS, CALLED

9 PRESIDENT WALLGREN-LINDHOLM: Good morning,
10 Mr. Makrides.

11 THE WITNESS: Good morning.

12 PRESIDENT WALLGREN-LINDHOLM: Good morning.

13 Before I speak further, what do you see on
14 your screen?

15 THE WITNESS: I can see the meeting room
16 with a number of people.

17 PRESIDENT WALLGREN-LINDHOLM: Okay. So you
18 can see the whole room. Very good because then I can
19 conduct the proper introduction.

20 May I first ask you, Mr. Makrides, where you
21 are? You are in a confined room, I understand?

22 THE WITNESS: Yes. I'm in a hotel room in

1 New Orleans, that's correct.

2 PRESIDENT WALLGREN-LINDHOLM: Very good.

3 And I understand that the Counsel from Canada

4 instructed you to be alone, to have a clean desk.

5 We're not going to inspect it, but we trust it's clean

6 and it has your Witness Statements and no notes.

7 Now --

8 THE WITNESS: A copy of my Witness

9 Statements. That's correct.

10 PRESIDENT WALLGREN-LINDHOLM: Yes. I don't

11 think we need to inspect it. I trust that it is as

12 Counsel instructed. So I will then proceed to the

13 introduction to your testimony.

14 Mr. Makrides, you have given two Witness

15 Statements before the commencement of this Hearing,

16 and Counsel for Canada will go through them with you,

17 and I understand and trust that you know what these

18 proceedings are about, and I don't need to explain to

19 you the nature thereof. Can you confirm that?

20 THE WITNESS: Yes, that's correct.

21 PRESIDENT WALLGREN-LINDHOLM: In all events,

22 whether or not you have experience of testifying

1 before Arbitral Tribunals, I ask that if you have any
2 questions or concerns, please address the Tribunal
3 with them.

4 So I cannot quickly think how you see us,
5 the angles, but I will point to my -- here where I
6 point that's Counsel for Claimant, the Einarssons and
7 GSI, and the Party that has called you to testify,
8 Canada, sits on that side. You might have seen a hand
9 raised.

10 THE WITNESS: Yes, I did.

11 PRESIDENT WALLGREN-LINDHOLM: This is the
12 Arbitral Tribunal. And to my right is Mr. Trey Gowdy
13 from the U.S., co-arbitrator; to my left is Mr. Toby
14 Landau KC, from England and Singapore. I am Carita
15 Wallgren-Lindholm, I'm a Finnish national and I'm
16 presiding.

17 To my far-right is the Secretary of the
18 Tribunal, Ms. Geraldine Fischer, from Washington,
19 D.C., representing ICSID, and behind her is the Court
20 Reporter.

21 I also wanted to say that, different from a
22 State court, we do not administer oath in

1 international arbitration, but you still have an
2 obligation to speak the truth.

3 And any failure to speak the truth may have
4 consequences. You will be recorded and transcribed.

5 May I ask that you confirm for the record
6 that you will speak the truth?

7 THE WITNESS: Yes, I will speak the truth.

8 PRESIDENT WALLGREN-LINDHOLM: I am sure that
9 the Counsel for Canada has explained what will happen
10 here today, but I will still say you will have a short
11 direct examination by Canada, whereafter, you are
12 being cross-examined by Claimants on matters relevant
13 to this Arbitration in your knowledge and experience,
14 and then potentially to one or two more rounds. Do
15 you have access to Documents that will be shown?

16 THE WITNESS: I have some digital copies on
17 my laptop here.

18 PRESIDENT WALLGREN-LINDHOLM: Yes.

19 THE WITNESS: But I don't have any hard
20 copies, only digital copies.

21 PRESIDENT WALLGREN-LINDHOLM: Okay. But you
22 can follow, because I'm sure that Counsel will show

1 you documents and may ask about them. I'm looking now
2 at Counsel for Claimants.

3 MS. LEMMENS: Yes, that's correct. We could
4 test it out at this moment, if you want to, if we
5 could just connect.

6 PRESIDENT WALLGREN-LINDHOLM: Maybe we
7 could -- yes.

8 MS. LEMMENS: Sir, are you able to see that
9 on your screen?

10 THE WITNESS: I don't see anything right
11 now -- I do now, yes. I just see the documents here
12 that just came up. Yeah.

13 MS. LEMMENS: So that, I think, is just your
14 Witness Statement there. One of them.

15 THE WITNESS: Yeah, I can see it there,
16 yeah.

17 PRESIDENT WALLGREN-LINDHOLM: Yes, and
18 Mr. Makrides, if -- in case there are breaks in your
19 testimony, we will break and have a pause, then I
20 already now tell you that, in such case, when we
21 break, you should not communicate with anybody about
22 your witness testimony during the break, nor liaise

1 with Counsel.

2 (Overlapping speakers.)

3 PRESIDENT WALLGREN-LINDHOLM: Yes. Thank
4 you. That's -- sorry? You were saying something,
5 sir?

6 THE WITNESS: No, I wasn't. Sorry.

7 PRESIDENT WALLGREN-LINDHOLM: No. Okay. So
8 unless you have further questions, I will turn to
9 Counsel for Respondent to conduct the introduction.
10 Thank you.

11 (Overlapping speakers.)

12 THE WITNESS: I have no questions. Thank
13 you.

14 PRESIDENT WALLGREN-LINDHOLM: Thank you.

15 So will that be you, Mr. Luz? Yes.

16 MR. LUZ: Yes, thank you, Madam Chair.

17 DIRECT EXAMINATION

18 BY MR. LUZ:

19 Q. Good morning, Mr. Makrides.

20 I'm not sure which direction to look, we
21 have some screens where I can see your face, and so
22 please don't take my lack of eye contact as anything

1 other than we don't know exactly where to look.

2 Do you have -- well, Madam Chair already
3 confirmed it, but I just want to state for the record
4 and confirm that you have the two Witness Statements
5 that you filed in this Arbitration. The first one on
6 January 14, 2023, and November 1, 2024?

7 A. That's correct.

8 Q. Okay. Could you introduce yourself to the
9 Tribunal and tell them your background and how you're
10 representing the Canada-Nova Scotia Offshore Petroleum
11 Board?

12 THE WITNESS: Yeah, sure. My name is Carl
13 Makrides. I've been an employee of the Canada-Nova
14 Scotia Offshore Petroleum Board since 1992, prior to
15 that I worked for a few years with COGLA, the previous
16 Federal Regulator. I've held a number of positions at
17 the Board, starting with a Geological Technologist in
18 '92 through to a Geologist Petrophysicist role for
19 about 18 years.

20 And then in 2013 I moved into the role of
21 Director, Resources and Rights. I guess in that
22 capacity I was responsible for managing a team of

1 geoscientists and engineers, responsible for the
2 management --

3 (Inaudible Zoom audio.)

4 (Interruption.)

5 PRESIDENT WALLGREN-LINDHOLM: Mr. Makrides,
6 I'm sorry. I think that I shall need to ask you to
7 slow down just a little bit for the Court Reporter.
8 Thank you very much.

9 (Overlapping speakers.)

10 THE WITNESS: I'm sorry. Apologize.

11 Yeah, would you like me to start again?

12 (Interruption.)

13 THE WITNESS: Sure. So from 2013 I was
14 responsible for managing a team of geoscientists and
15 engineers responsible for resource conservation,
16 offshore Nova Scotia, and I was also the Chief
17 Conservation Officer of the Board beginning in 2013.

18 And I just -- I should also advise the
19 Tribunal that I retired in 2023 from those positions.
20 So I have been retired since June of 2023.

21 BY MR. LUZ:

22 Q. Thank you, Mr. Makrides. I don't have any

1 other questions, but just as Madam Chair mentioned,
2 throughout your testimony, if you could speak as
3 slowly as you can so that -- because we have a court
4 transcriber, and if you speak too quickly, we won't be
5 able to get it. And just also make sure that your
6 microphone stays connected so the audio is okay.

7 A. Okay. Understood.

8 MR. LUZ: Okay. Thank you. I don't have
9 any other questions. Go ahead.

10 CROSS-EXAMINATION

11 BY MS. LEMMENS:

12 Q. Good morning, sir, I'm Matti Lemmens. I am
13 Counsel to the Claimants in this matter. We've not
14 met before, so I wanted to introduce myself to you.
15 And I hope that you won't actually speak as slowly as
16 you can, because otherwise we'll be here all day.

17 Sir, I understand that you used to work at
18 COGLA and you held the role as a geological
19 technologist there; is that right?

20 A. That's correct.

21 Q. When did you start working at COGLA?

22 A. I was a summer student for a number of

1 years, but I -- full-time in 1988.

2 Q. And that was after your degree that you
3 received at Dalhousie?

4 A. Correct.

5 Q. That's my alma mater as well, so great
6 school.

7 A. Yes. Great school. You're right.

8 Q. I understand you're a Professional
9 Geoscientist in Nova Scotia; is that right?

10 A. I was until I stepped down from that role
11 last year after I retired.

12 Q. Oh, I see. But you held the professional
13 designation of a Geoscientist with the Association
14 there in Nova Scotia until your retirement?

15 A. Correct.

16 Q. And so, what is a geological technologist?

17 A. Basically it's just a fancy word for a
18 technician, nothing more than that really. I
19 was -- back then we were responsible -- I mean, I can
20 describe the duties if you wish, if -- but it was
21 really just administrative duties, packing samples
22 from offshore drilling, this sorts of stuff, yeah.

1 Q. Did you interpret Seismic Data in that role?

2 A. I did not.

3 Q. Did you interpret Seismic Data at any -- in
4 any of your roles with the Government Boards?

5 A. I did not. No. I'm a geologist, not a
6 geophysicist.

7 Q. Okay. Because I -- you are designated as a
8 geoscientist, I thought you might also be able to
9 interpret Seismic Data, but I guess that is not part
10 of your skill set?

11 A. Yes. My skill set was specifically well log
12 analysis so I was what they called a petrophysicist.
13 So that was really my -- so I was, if you like, my
14 field of practice was in geoscience, which is a broad
15 title, was petrophysics and geology, not geophysics.

16 Q. And the roles that you had at COGLA and the
17 C-NSOPB, did those include oversight over the Seismic
18 Data held at those Boards?

19 A. During my time at the Board, no, those were
20 the duties of my predecessor, Steve Bigelow, so my
21 responsibility was to manage a team of geoscientists.
22 There was a separate gentleman responsible for that

1 Information Services Team. I was not responsible for
2 that in my capacity as Director.

3 Q. And is Steve Bigelow still with the C-NSOPB
4 at this time?

5 A. No. He retired before me.

6 Q. When did he retire?

7 A. Let's see. Probably about two or
8 three years prior to me, I would say early 2020s,
9 maybe late 2018, 2019. I don't recall the exact year.

10 Q. But he is still around? He hasn't passed
11 away or anything?

12 A. He is still alive. Yes.

13 Q. Okay. Just curious because he wasn't called
14 as a witness in this proceeding, so I just wanted to
15 know.

16 So, I take it, then because you had a
17 petrophysical sort of skill set, you weren't ever
18 involved in acquiring Seismic Data?

19 A. That's correct.

20 Q. And you went straight to COGLA right after
21 Dalhousie University?

22 A. Yes, I did.

1 Q. Okay. So you didn't have any other work
2 experience outside of being with the Boards?

3 A. No.

4 Q. So do you know that Seismic Data takes a
5 significant effort to create?

6 A. Over my -- yes, I do. Over my time at the
7 Board, of course, you know, I worked closely with
8 geophysicists. I managed geophysicists. So I -- yes,
9 I've acquired a thing or two over my -- over
10 the years, yes, some knowledge.

11 Q. Okay. And do you understand that Seismic
12 Data can be reprocessed into different versions?

13 A. Yes, I do.

14 Q. Were you involved in any policy decisions
15 while at COGLA?

16 A. No.

17 Q. Were you involved in any policy decisions
18 while you were at -- while you were at the C-NSOPB?

19 A. I guess it's all how you define "involved."
20 I was a sort of administrative support role when I was
21 a geologist, petrophysicist, I was in an
22 administrative support role for Steve Bigelow and Mike

1 McFee, General Counsel and Director of Resources. So
2 I had involvement in sort of supporting those two
3 gentlemen, but I was not a policymaker. I was not a
4 decision-maker. I was a member of the staff. Was not
5 a member of the management team at that time.

6 Q. Okay. So you might have had some input,
7 but, generally speaking, your role was to take
8 direction on policy?

9 A. Correct.

10 Q. Understood.

11 You would agree with me that the Nova Scotia
12 Government has collected significant royalties from
13 its offshore oil-and-gas production in the past?

14 A. Yes, that's true.

15 Q. That was part of the reason that oil-and-gas
16 exploration and development was promoted at a time in
17 the Province?

18 A. Yes.

19 Q. I want to get into a little bit more about
20 your Witness Statement, sir. In your First Witness
21 Statement, you commented on a proceeding against the
22 C-NSOPB in Federal Court by GSI in 2014. It's at

1 Paragraph 4 of your Witness Statement, if you want to
2 refer to it. You indicated that you provided two
3 affidavits in that Federal Court proceeding regarding
4 GSI; is that right?

5 A. That's correct.

6 Q. And in the footnote there, relating to that
7 paragraph, you describe the proceeding as
8 follows: "GSI sought an injunction against the
9 C-NSOPB to prevent it from disclosing certain of GSI's
10 Seismic Data material."

11 Do you see that?

12 A. Yes, I do.

13 Q. Did you draft your Witness Statement, or did
14 someone provide you with a draft of your Witness
15 Statement?

16 A. I didn't write every word. I worked closely
17 with our Global Affairs legal team to put it together,
18 but I reviewed it carefully, and it's accurate, to the
19 best of my knowledge.

20 (Interruption.)

21 A. Yes, and it's accurate to the best of my
22 knowledge.

1 BY MS. LEMMENS:

2 Q. Was that description of that legal case your
3 description or Counsel's description?

4 A. Sorry. Can you just repeat the sentence
5 again, please.

6 Q. It's in the footnote there: "GSI sought an
7 injunction against the C-NSOPB to prevent it from
8 disclosing certain of GSI's Seismic Data material."

9 A. Yes. That might have been prepared by the
10 Global Affairs lawyers. To the best of my knowledge,
11 yeah.

12 Q. Okay. And then you go on in that footnote
13 to say: "The Federal Court of Canada rejected GSI's
14 request."

15 Do you see that?

16 A. Yes, I do.

17 Q. And would it also be the case that, perhaps,
18 Counsel had assisted you with preparing that
19 description?

20 A. That footnote was likely prepared by the
21 Global Affairs Team, yes.

22 Q. And you're not trained as a lawyer; is that

1 right?

2 A. I'm not.

3 Q. Okay. Did you know that Justice Eidsvik
4 actually considered that 2014 Federal Court Case in
5 the Alberta Decisions? You might know it as the
6 "Common Issues Decision" or trial?

7 A. I'm not familiar with all the details of
8 that, that case, yeah.

9 Q. Did you review the Common Issues Decision?

10 A. Not in any detail.

11 Q. Do you know what the outcome is?

12 A. I guess the outcome was that the
13 copyright -- Board against the copyright that GSI was
14 claiming was not granted, and that the Board could
15 continue to disclose the data. That's my nonlegal
16 interpretation.

17 Q. Understood. Obviously, the Decision speaks
18 for itself. I just wanted to have an understanding of
19 what you believed it to be.

20 So then I guess you're not aware that this
21 Decision that you mention here, this Federal Court
22 proceeding, was actually considered by Justice Eidsvik

1 and set aside because she didn't see it as persuasive.

2 You don't know that?

3 A. I guess I wasn't aware of that, of that
4 nuance, no.

5 Q. Okay. I'm just wondering why you mentioned
6 it in your Witness Statement. Do you know?

7 A. I guess it was considered to be relevant, I
8 guess.

9 Q. Was that your consideration, as to whether
10 it was relevant or somebody maybe told you that?

11 MR. LUZ: Madam Chair, I think I have
12 to -- well, there's two things. One, I think Counsel
13 for Claimant misspoke by saying that the -- this
14 Decision was set aside. So that, I don't think, is
15 accurate.

16 And second of all, I think Mr. Makrides has
17 already said that he put this in as context for the
18 affidavits that he filed in those proceedings.

19 MS. LEMMENS: I don't think I was trying to
20 misspeak. I'm speaking to someone that's not a
21 lawyer, so I wasn't meaning the legal sense of "set
22 aside." I mean, she considered it and said it wasn't

1 really persuasive. But I think I did say that she
2 found it nonpersuasive.

3 MR. LUZ: I just wanted to correct -- I know
4 you're speaking to a nonlawyer, but, for the lawyers
5 in the room, the suggestion of "set aside" is not
6 entirely accurate, just for the record.

7 BY MS. LEMMENS:

8 Q. Well, why don't we take a look at the Common
9 Issues Decision, just to clear it all up.

10 Let's look at Exhibit C-340.

11 A. Would you bring that up? Okay. Thank you.

12 Q. Yeah. Thank you.

13 And so if we turn to Paragraph 106 of that
14 Decision, we'll see that, right there, the Judge cited
15 the Geophysical Service Inc. and Canada-Nova Scotia
16 Offshore Petroleum Board case, the 2014 Federal Court
17 case that you referenced in your footnote there, sir.

18 Do you see that?

19 A. Yes, I do.

20 Q. And then she goes on -- Justice Eidsvik is
21 the judge. She goes on to discuss the Board case
22 thereafter. And if we scroll down there, sir, you'll

1 see, at Paragraph 111, Justice Eidsvik in the Common
2 Issues Decision says: "The obiter comments in the
3 Board case about the copyright on limited evidence in
4 an injunction application do little to support the
5 Defendant's case here." She didn't really find it
6 persuasive.

7 Do you understand that?

8 A. Yes, I understand, I guess, the language
9 that I'm reading, yes.

10 Q. You go on to note in your First Witness
11 Statement that the C-NSOPB did not accept GSI's
12 position regarding any conditions that it wanted to
13 place on disclosing Seismic Materials after the
14 confidentiality period expired?

15 A. Yes, that's correct.

16 Q. And you would agree with me that GSI
17 continued to assert that it believed that it had
18 copyright in its Seismic Data nevertheless?

19 A. Yes.

20 Q. You acknowledge that Seismic Data has
21 copyright in it or can have copyright in it?

22 A. I don't believe that was the outcome of the

1 Decision.

2 Q. Okay. So you don't understand the Common
3 Issues Decision to have that outcome, sir?

4 A. Well, my understanding of it -- as I say,
5 I'm not an expert -- is that the copyright -- the
6 Board -- I guess, regardless of the copyright, the
7 Boards retain the right to disclose data at the end of
8 the confidentiality period.

9 Q. But, sort of moving out of the Board
10 context, do you understand that copyright subsists in
11 Seismic Data?

12 A. I don't believe that was the outcome of the
13 case.

14 Q. Okay.

15 A. Based on my knowledge.

16 Q. Okay. And was that a direction that you
17 were given?

18 A. Well, I think we've -- I wouldn't say it was
19 a direction. I was involved in that case with Outside
20 Counsel back at the time, and I believe that was what
21 we heard from our Outside Counsel at the time, not the
22 Global Affairs Team.

1 Q. Okay. And I don't want to get into
2 privileged matters, so I won't ask you about that
3 discussion.

4 What is your understanding of what copyright
5 is?

6 A. Oh, I don't know that I'm qualified to
7 answer that question. I think -- that's certainly not
8 my area of expertise. I think, regardless of what it
9 is or isn't, I guess my comment would be that the
10 Board retains the ability to disclose the data at the
11 end of the period. So the copyright issue, to some
12 extent, is not relevant to that, I guess, as far as
13 legislation is concerned.

14 Q. And what legislation are you referring to
15 there, sir?

16 A. The Accord Acts.

17 Q. Okay. And the Accord Acts are mirror pieces
18 of legislation -- mirror being, one at the Canada
19 level and one at the Nova Scotia level; correct?

20 A. That's correct.

21 Q. And I'm just going to test your knowledge a
22 little bit more about the Common Issues and copyright,

1 and, perhaps, you don't have the answer, but did you
2 know that the Common Issues Decision determined that
3 there was a conflict between the Copyright Act and the
4 Regulatory Regime which includes those mirror pieces
5 of legislation that we just referred to?

6 A. I was not aware of that.

7 Q. Okay. And I also think I know the answer,
8 but I better ask you, sir, did you know that there was
9 a conflict between the Copyright Act and the mirror
10 legislation before the Common Issues Decision was
11 made?

12 (Interruption.)

13 MS. LEMMENS: Sorry. I can't hear you, sir.

14 REALTIME STENOGRAPHER: Excuse me, sir,
15 you're breaking up a little bit. If you could start
16 your answer over.

17 THE WITNESS: Yes. Yes.

18 REALTIME STENOGRAPHER: Can you hear me
19 okay? This is the Court Reporter, Dawn Larson. Can
20 you start your answer over again please, sir. We
21 could not hear you.

22 (Interruption.)

1 PRESIDENT WALLGREN-LINDHOLM: I can hear
2 Mr. Makrides just a little bit. Could you continue
3 speaking a bit because you are breaking up.

4 THE WITNESS: Okay. Yeah. I'm not sure if
5 it's happening on my end or your end, but I also lost
6 a bit of the question as well.

7 PRESIDENT WALLGREN-LINDHOLM: You lost a bit
8 of the question?

9 THE WITNESS: Yes, if you could repeat the
10 question because it broke up on my side as well.

11 PRESIDENT WALLGREN-LINDHOLM: Okay.
12 Ms. Lemmens will try again.

13 BY MS. LEMMENS:

14 Q. So, sir, I had just finished asking you,
15 before the question that I'm about to ask you, as to
16 whether you knew that the Common Issues determined
17 that there was a conflict between the Copyright Act
18 and the mirror legislation, the Accord Acts. And I
19 think you had said that you were not aware of that or
20 something along those lines.

21 A. That's correct.

22 Q. And then I wanted to ask you the question

1 of, did you know that there was a conflict between the
2 Copyright Act and the Accord Acts before the Common
3 Issues Decision?

4 A. I was not aware of that.

5 Q. The C-NSOPB did not tell GSI that it did not
6 have copyright in its Seismic Data; isn't that right?

7 A. A lot of those communications happened
8 before I joined the management team, so, to the best
9 of my knowledge, the Board maintained that it had the
10 authority to disclose data and didn't pass comment on
11 copyright.

12 Q. That's my understanding as well, that it
13 didn't pass comment on copyright.

14 In your First Witness Statement, you had
15 referenced some 1992 guidelines for geophysical
16 reports.

17 A. That's correct.

18 Q. And you're aware that a substantial amount
19 of GSI Seismic Data in the offshore Nova Scotia area
20 was actually created prior to 1992. Do you know that?

21 A. Yeah. The pre-Board data
22 collection -- yeah, that's right.

1 Q. So those guidelines are dated well after
2 much of GSI's Seismic Data in that area, in that
3 jurisdiction; is that right?

4 A. For the pre-GSI surveys, that's correct,
5 yes -- sorry, pardon me, pre-C-NSOPB services, that's
6 correct, yes, pre-1990.

7 Q. Sir, I know you're not a lawyer, but do you
8 understand that guidelines are not statutes or
9 regulations?

10 Do you know that?

11 A. Yes, I do.

12 Q. Okay.

13 Sir, in your First Witness Statement, you
14 provided your opinion at Paragraph 49.

15 A. Okay. I have it here.

16 Q. And so -- not the first sentence but the
17 second sentence there, you say: "However, it is my
18 opinion that the Regulatory Regime for the C-NS
19 Offshore Area after the creation of C-NSOPB was
20 straightforward."

21 Do you see that?

22 A. Yes, I do.

1 Q. But you realize that you are not being
2 tendered as an expert in this proceeding.

3 Do you understand that?

4 A. Yes.

5 Q. Okay. Did somebody ask you for your opinion
6 in your Witness Statement, or did you write that?

7 A. I think this language is something that we
8 worked on with the Global Affairs Team together, yes.

9 Q. Okay. But we've established that you're not
10 an expert in this proceeding, so I just wanted to make
11 that clear.

12 The C-NSOPB regime or the Accord Acts, they
13 don't refer to copyright; is that right?

14 A. To the best of my knowledge, they don't
15 refer to copyright, but -- like I say, I don't know
16 every sentence in the Accord Act.

17 Q. Fair. But you're pretty familiar with the
18 Accord Acts. You operated under that regime for many
19 years?

20 A. I'm familiar with the sections that were
21 relevant to my duties, I'll say that, which is
22 resource management and conservation, and activity

1 authorization approval, yeah.

2 Q. And so the sections that were relevant to
3 your duties relate to the disclosure of Seismic Data?

4 A. In part, I guess, yeah. Also relate to the
5 management and conservation of petroleum resources,
6 you know, approval of wells, drilling activities,
7 things of that sort.

8 Q. Right. But you're familiar with the
9 sections under which the Nova Scotia Board discloses
10 Seismic Data; is that right?

11 A. Section 122, if that's what you're referring
12 to, yes.

13 Q. And that part of the Accord Acts doesn't say
14 anything about publishing; is that right?

15 A. No, it does not.

16 Q. It doesn't mention reproducing?

17 A. It does not.

18 Q. And it doesn't mention "copying"?

19 A. It does not mention "copying," but it does
20 mention "disclosure."

21 Q. Right. So would you agree with me that it
22 would have been straightforward to reference

1 "copyright" or, "reproduce," or "publish," or

2 "copying" in that Act?

3 A. Yeah. I can't speak to the intent of the
4 drafters. I think it was written back in the '80s, so
5 I will say that's something I couldn't really speak
6 to.

7 Q. I'm just testing you a little bit on your
8 opinion here, sir, because you said it was
9 straightforward.

10 A. I guess, if you're asking me could
11 additional clarity have been added, I think probably
12 that is true.

13 Q. Thank you.

14 So the C-NSOPB was established in 1990?

15 A. Correct.

16 Q. And you would agree with me that the C-NSOPB
17 hosts Seismic Data that covers the offshore Nova
18 Scotia area; right?

19 A. Correct.

20 Q. And so, for the data, the Seismic Data that
21 predated the establishment of the C-NSOPB in 1990,
22 that came from GOGLA?

1 A. Yes.

2 Q. And so the C-NSOPB, it obtained copies of
3 the Seismic Data from COGLA, or do you know what
4 happened? You worked at COGLA at the time, so I'm
5 thinking you might know.

6 A. I was a technician, so, yeah. What happened
7 at the time is the Board took over responsibility
8 for -- the Nova Scotia Board took over responsibility
9 for all the well materials and samples that had been
10 collected by previous Regulators, and that was
11 basically a sign to the new Regulator, which was the
12 Canada Nova Scotia Offshore Petroleum Board, and they
13 did something similar with the Newfoundland Offshore a
14 few years earlier.

15 Q. And you're not aware of any Seismic Data
16 owners being asked for their consent for that transfer
17 or "assignment," you called it?

18 A. I was not involved in that. If they were
19 notified, no, I'm not aware.

20 Q. In the early 2000s, maybe even the late
21 1990s, sir, the C-NSOPB considered some sort of Shared
22 Data Repository.

1 Do you know what I'm talking about?

2 A. Yes, I do.

3 Q. And what was the Shared Data Repository?

4 A. The Shared Data Repository, I guess it never
5 actually materialized as envisioned, but the intent
6 was that it would be a jointly-operated and managed
7 digital facility for all of East Coast Atlantic
8 Canadian data that would be managed jointly by
9 industry, governments, and the Boards, and also
10 jointly managed and funded by those groups.

11 Q. And that was going to be a -- I think you
12 described it as a single centralized digital data
13 center for all petroleum data collected offshore of
14 Nova Scotia and Newfoundland?

15 A. Correct. That was the vision.

16 Q. And so, that was to make it available
17 online? Is that the idea?

18 A. Correct. Correct.

19 Q. And ultimately -- I know you say that the
20 plan did not go ahead, but there is some form of
21 online Data Management Centre now, isn't there?

22 A. There is. Yeah. That began in 2007 as a

1 standalone, C-NSOPB only facility that's 100 percent
2 funded by the Government and run only by the Board.
3 So it's a much more scaled-down, and it does not have
4 the management role of industry in there or the
5 operational role of industry as the SDR which was
6 envisioned to have.

7 Q. And that's because industry didn't want to
8 participate in that repository; is that right?

9 A. I think there was -- yeah, there were a
10 number of factors. That file was active for 15,
11 20 years, so I probably would need about two or
12 three hours to explain it.

13 I think the simple version is that, yeah,
14 the Boards decided to proceed with the scaled-down
15 system just to simplify the process, I think.

16 Q. And so the data that's hosted on the Data
17 Management Centre since 2007, that is data that was
18 submitted to the C-NSOPB -- maybe to COGLA -- before
19 the C-NSOPB was established; is that right?

20 A. It only includes exclusive Seismic Data.
21 There is no nonexclusive data in the DMC. And it
22 would have been data that the Board would have

1 collected from industry and then converted to a PDF
2 format, and those images are made available on the
3 DMC.

4 (Interruption.)

5 A. They're made available online in PDF image
6 format, not in SEG-Y format.

7 Q. Sir, do you know what "revectorization" is?

8 A. I do.

9 Q. And are you aware that you can take a
10 digital image of Seismic Data and revectorize it?

11 A. You can. The quality, I guess, is up for
12 discussion, but, yes, that technology does exist.

13 Q. And so, it would be possible for a user of
14 the Data Management Centre to, in fact, revectorize
15 the images and use the data?

16 A. It would be -- yes, theoretically, that is
17 possible, but, as I said, it only includes exclusive
18 Seismic Data, so there's no GSI, for example, data in
19 the DMC.

20 Q. I wasn't asking about GSI Seismic Data. We
21 can get to the questions about why it is that
22 nonexclusive Seismic Data is not part of the Data

1 Management Centre.

2 Why is that?

3 A. A bit of a long story, as well.

4 So there were a number of discussions --

5 (Inaudible Zoom audio.)

6 REALTIME STENOGRAPHER: Sorry. I'm not
7 hearing anything.

8 Q. We can't hear you, sir.

9 A. Oh, sorry. Can you hear me now?

10 Q. Yes. I think you were talking about the
11 IAGC, but we didn't catch any of it.

12 PRESIDENT WALLGREN-LINDHOLM: We lost you
13 after the word "discussions," "there were many
14 discussions." And then we lost you.

15 THE WITNESS: Yeah. Sorry. There seems to
16 be some intermittent freezing happening. I'm not sure
17 if it's on my side or your side. I apologize if it's
18 on my side.

19 Yeah, can you hear me now?

20 BY MS. LEMMENS:

21 Q. Yes.

22 A. Yeah. So there were a number of discussions

1 by Board staff. And at that time I was one of the
2 staff supporting our legal team and Mike McPhee and
3 Steve Bigelow with the International Association of
4 Geophysical Contractors and some of the Canadian
5 Association of Geophysical Contractors, as well, to
6 basically work out, I guess, some of the key issues
7 that would allow the Board to move forward with the
8 digital disclosure policy for nonexclusive data.

9 A lot of those key issues were being worked,
10 right up until -- intermittently. When I say they
11 worked, they were worked on intermittently for a
12 number of years. Then in 2013, I think when the legal
13 actions commenced by GSI, I think we started in 2013,
14 if I'm not mistaken, the Board, I think, at that time
15 made a decision to suspend the decision on
16 nonexclusive data.

17 Q. I see. So in fact, GSI's efforts to stop
18 the inclusion of nonexclusive Seismic Data actually
19 resulted in that?

20 A. I wouldn't say it was GSI. It was -- all of
21 the industry at that time was, you know, there were a
22 number of issues that were being worked by the -- like

1 I say, by the C-NSOPB team and the IAGC team. And it
2 was those discussions sort of went back and forth for
3 a number of years. And there was some progress being
4 made, but there was no, I guess, resolution, if you
5 like, or no final agreement. And the Board decided to
6 just suspend the decision in 2013, until the outcome
7 of the court cases.

8 Q. And is this one of the court cases that's
9 delaying that at this time?

10 A. It's been -- I left two years ago, so I
11 can't say. And I can't speak for them anymore. But
12 you would have to ask them that question.

13 Q. You'd have to ask the C-NSOPB; is what
14 you're saying?

15 A. Right. Current staff, yes.

16 Q. And you say that there was a lot of industry
17 that was concerned about it, and it was -- some of
18 that was being communicated through the IAGC or
19 International Association of Geophysical Contractors.
20 That was through Chip Gill; is that right?

21 A. That's right. I think he was President at
22 the time, yes.

1 Q. Yes, he was President at the time.

2 And so industry was concerned about its
3 nonexclusive Seismic Data appearing in the Shared Data
4 Repository and ultimately, I guess, this Data
5 Management Centre; is that right?

6 A. There were a number of issues, I guess,
7 anything from the duration of the confidentiality
8 period to the format of disclosure. It wasn't as
9 simple as just that. It was kind of a laundry list of
10 things that we were working on. Probably the key
11 issues would be the duration and also the format of
12 disclosure, yeah.

13 Q. And just so I understand what the concern
14 was, is that industry wanted to have a longer period
15 of confidentiality; is that right?

16 A. That's generally correct, yes.

17 Q. Industry also didn't want Seismic Data to
18 appear in particular formats online; is that right?

19 A. That's correct.

20 Q. And that's because industry was concerned
21 that that would mean that their data was able to be
22 copied quite freely.

1 Is that fair?

2 A. It depends on the format. I guess there was
3 one at one point there was discussion that, could you
4 include SEG-Y Data, you know, with proper controls in
5 place? So these discussions went on for many years,
6 and it was a broad range of topics that were
7 discussed, but, yes, the format and the disclosure
8 duration, I guess, would be the key issues.

9 Q. And so that plan has been parked because of
10 various court cases, so far as you're aware when you
11 retired. But did the C-NSOPB believe that it had the
12 discretion to proceed with that plan then?

13 A. Sorry. Could you repeat the question.
14 There was a temporary freeze there.

15 Q. Okay. So I don't know if I'll formulate it
16 exactly the same way, but, sir, the plan did not
17 proceed, as you said, due to some of the ongoing court
18 cases, at least that's your knowledge when you
19 retired. But did the C-NSOPB believe that it had the
20 discretion to proceed with such a plan?

21 A. I think the Board -- like I said I can't
22 speak for the last two years, but I think the Board

1 agreed to set aside a decision on nonexclusive
2 disclosure until all, I guess, all these court actions
3 had been resolved. So I guess their view was that,
4 let's wait and see the outcome of these legal actions
5 before we make a decision.

6 Q. Okay. So the C-NSOPB was uncertain as to
7 whether it could proceed with such a plan?

8 A. I think I would say that we were -- further
9 discussion was needed, I guess, is probably how it was
10 left. And then once the court cases were resolved,
11 maybe there was a view that they would provide some
12 clarity.

13 Q. I see. So certainty would come once the
14 court cases were resolved and the C-NSOPB could
15 determine whether to proceed with the plan or not?

16 A. I think we were -- that's right. We were
17 looking -- if we sort of made a decision or if the
18 Board made a decision, while these court cases were
19 happening, it would sort of be getting in the middle
20 of something that was still being sort of worked, if
21 you like.

22 Q. Understood. So I just wanted to clarify one

1 point because we were talking about the exclusive data
2 that is hosted at the Data Management Centre by the
3 C-NSOPB. That includes all Seismic Data that
4 is -- that has ever been submitted to COGLA or the
5 C-NSOPB; is that right?

6 A. I can't speak to every single data set in
7 there because that department was not my
8 responsibility, but I believe it includes all released
9 exclusive data that the Board would have had in its
10 possession, in PDF image format.

11 Q. When you say "released" you're referring to
12 the sort of Privilege Period expiring in the Accord
13 Act and then the data is released or disclosed?

14 A. Correct. Nonconfidential after the
15 Privilege Period has expired, yes.

16 Q. But is there some data that is included in
17 the DMC that is pre the time that the C-NSOPB was
18 established, so pre-1990?

19 A. There is.

20 Q. Okay. So it was a retroactive sort of
21 Application of the DMC to all of the released data
22 that is exclusive?

1 A. That's correct. All data that was assigned
2 to the Board, I guess, including all the historical
3 data, if you like, was included in that, yes.

4 Q. Okay?

5 A. That's exclusive, yes.

6 Q. So the C-NSOPB, in the course of this sort
7 of discussion that was happening in the 2000s about a
8 Shared Data Repository and ultimately the Data
9 Management Centre, you had mentioned that they were
10 discussing including SEG-Y Format Data; is that right?

11 A. They were at the time.

12 Q. And so, the idea was that the C-NSOPB was
13 wanting to include SEG-Y Data Format for whatever the
14 released data was that was going to be included in the
15 Shared Data Repository.

16 Is that what I should understand?

17 A. The Shared Data Repository concept, if
18 that's what you are referring to, was kind of modeled
19 after the Norwegian Diskless System. That's really
20 where the, if you like, the idea came from was that
21 joint industry government regulatory partnership.

22 In that system you can get access to

1 SEG-Y Data. So that was sort of seen to be the world
2 class standard, if you like, for best in class, I
3 guess, if you like, subject to appropriate disclosure
4 provisions that would have been, you know, put in
5 place. But that was the model for it, yes. So the
6 SEG-Y disclosure, I guess, was contemplated at the
7 time.

8 Q. I see. So it was intended that SEG-Y would
9 be part of the Shared Data Repository when the plan
10 was being made? I know that ultimately didn't happen,
11 but I just want to understand.

12 A. That was the intent at the time.

13 Q. Do you believe that the C-NSOPB's Chief
14 Conservation Officer has the authority to require an
15 operator to submit Seismic Data in SEG-Y Format?

16 A. Yes, I do. The CCO has the authority to
17 request data in any format.

18 Q. That would include SEG-Y Format then?

19 A. Correct.

20 Q. But it doesn't say "SEG-Y Format," in fact,
21 in the Accord Acts or the Regulations?

22 A. The Regulations speak to, I think under

1 Section 26, the format can be anything that the CCO
2 determines.

3 Q. I think you referenced it in your Witness
4 Statement as the C-NS Federal Geophysical Regulations
5 that Sections 25(1) and (9) allow that the final
6 Report must contain prescribed information "in the
7 form, manner, and quantity approved by the Chief
8 Conservation Officer."

9 A. Right. So there's a bit of -- perhaps a bit
10 of a clarification that I can offer, if you'll indulge
11 me?

12 Q. A clarification about that section or...?

13 A. I guess about the different streams of
14 reporting. So that's -- Section 25(1) is one stream
15 of reporting when a survey is first required. But
16 there is also provisions under Section 26(3) for the
17 CCO to request data at any time in any form and
18 manner. So that's a separate section.

19 Q. Oh I see. So 25 is about the initial
20 submission, and then 26 is about asking for different
21 formats potentially at a later date?

22 A. It doesn't necessarily have to be a

1 different format. It can be any format. It can be
2 hard copy data, it can be any format that is deemed
3 required.

4 Q. Right. But you believe that that also
5 includes the ability to ask for a SEG-Y Format?

6 A. Correct.

7 Q. And the C-NSOPB has, in fact, demanded GSI
8 to submit digital forms of Seismic Data before; hasn't
9 it?

10 A. It has.

11 Q. That was through Steve Bigelow, as you
12 mentioned, the Chief Conservation Officer at a
13 different time before you at the C-NSOPB?

14 A. That's correct.

15 Q. That was in 2008?

16 A. Yes. And maybe -- sometime in the
17 mid-2000s, yes.

18 Q. And, of course, when those demands were
19 made, he was asking for GSI to submit digital forms of
20 Seismic Data for Seismic Data that had already been
21 submitted. And so this was sort of one of those
22 secondary requests that you were mentioning?

1 A. This was not -- not to be I guess confused
2 with the Secondary Submission, which I think is
3 what's --

4 Q. I understand.

5 A. Yeah. So this was a request for SEG-Y Data,
6 the --

7 (Interruption.)

8 A. -- the previous submissions had been hard
9 copy data only.

10 Q. That SEG-Y Data, sir, was to be used for
11 different studies that the C-NSOPB was doing?

12 A. For geoscience studies and to support a Call
13 for Bids, yes.

14 Q. And when you say "to support a Call for
15 Bids" that means to basically tell industry, "Look, we
16 are going to allow you to go and obtain Exploration
17 Licenses or Significant Discovery Licenses or
18 Exploration Licenses in a specific area"; is that
19 right?

20 A. I guess they are all under the umbrella of
21 geoscience studies. Some of those geoscience studies
22 were included in Call for Bids that help companies

1 understand the geology of an area. And some of those
2 studies are just published to do, for example,
3 assessments of the oil-and-gas potential of an area.
4 So they are done for different purposes.

5 Q. And so those studies, though, are used to
6 investigate and ultimately determine whether there are
7 certain areas to promote for offshore oil-and-gas
8 development, or to offer for oil-and-gas development?

9 A. Yes. They help to inform the Board about
10 areas that could be included in future Calls for Bid
11 licensing rounds, yes.

12 Q. And the areas of interest would, of course,
13 be ones that actually have potential hydrocarbon
14 development opportunities?

15 A. I think the Board staff, like any
16 geoscientist, would make an interpretation of the data
17 to understand what areas they have feel have the
18 greatest potential, or greater potential.

19 Q. Right. You're not going to be doing a Call
20 for Bids for an area that does not actually have any
21 significant hydrocarbon potential; isn't that right?

22 A. I think we would probably avoid those areas,

1 that's correct.

2 Q. And so are the results of those studies
3 disclosed to the industry then?

4 A. Yes. They are published on the Board's
5 website.

6 Q. And so ultimately GSI's SEG-Y Data was
7 demanded of it in the mid-2000s by your predecessor
8 Steve Bigelow and were used for some of these studies?

9 A. Yes, in part. Among many other surveys,
10 yeah.

11 Q. Sir, what is the Play Fairway Analysis?

12 Are you familiar with that?

13 A. I am. The Play Fairway Analysis was a
14 regional geology study conducted by the Province of
15 Nova Scotia to basically understand, I guess, the
16 geology and resource potential of the entire Nova
17 Scotia offshore. That was there for investment
18 traction purposes, I guess, that would be the overall
19 objective.

20 Q. And when you say "investment traction
21 purposes," I think those were your words, what you're
22 saying is that you were trying to see if the industry

1 would be interested in developing hydrocarbons
2 offshore Nova Scotia?

3 A. We were not. The Province of Nova Scotia
4 was, yeah.

5 Q. I see. So you're separating the C-NSOPB
6 from the Province of Nova Scotia?

7 A. I am because they are separate
8 organizations, yes.

9 Q. I understand.

10 A. Yeah.

11 Q. And so the Play Fairway Analysis, it
12 included some SEG-Y Data; isn't that right?

13 A. They -- well, they used a lot of data from
14 different sources, yes.

15 Q. When you say "they," you mean the Government
16 of Nova Scotia?

17 A. Right. Yeah. Government of Nova Scotia and
18 any external Contractors they may have involved in the
19 study, yeah.

20 Q. Was it a third party that was commissioned
21 to prepare the Play Fairway Analysis? Was that RPS?

22 A. It was RPS and Visa. That's correct.

1 Q. And what are those entities?

2 A. They are consulting companies, effectively,
3 yeah.

4 Q. And did the C-NSOPB provide Seismic Data to
5 the Government of Nova Scotia and its consulting
6 companies to create the Play Fairway Analysis?

7 A. The C-NSOPB provided data to the Provincial
8 Minister of Natural Resources and Renewable, as per
9 the legislation Section 19.

10 Q. Right. So there was some Seismic Data that
11 was provided by the C-NSOPB for this Play Fairway
12 Analysis?

13 A. We provided the data to the Provincial
14 Minister under Section 19. Once we provided it to the
15 Minister, it falls to his discretion what he does with
16 it. It is beyond our control.

17 MR. LUZ: Madam, I don't mean to interrupt.
18 I just wanted to take note that none of this
19 information is in Mr. Makrides' Witness Statements.
20 So if there is something that you could refer him to,
21 either an exhibit or the appropriate place in his
22 Witness Statement, I think it would be helpful.

1 MS. LEMMENS: I think it is highly relevant.
2 He is obviously aware of the Play Fairway Analysis,
3 and I was only given witnesses from the Boards. So
4 I'm doing what I can with the witnesses that were
5 tendered by Canada.

6 MR. LUZ: To the extent you can
7 cross-examine him on what is in his Witness Statement,
8 that's fine. If you have something else to refer to
9 that might be within the scope of his knowledge, I
10 think, otherwise, it just becomes -- I don't know
11 where you are referring to any of this from.

12 MS. LEMMENS: Well, I think he's saying that
13 he was, in part, responsible for the Seismic Data at
14 the C-NSOPB. And I'm asking questions about what the
15 C-NSOPB was demanding in terms of data and what it was
16 providing to other Parties. I think this is well
17 within the bounds of this person's evidence.

18 MR. LUZ: Because you are asking about
19 things that happened in the mid-2000s, I think, if you
20 have exhibits or something to refer him to because
21 it's not in his Witness Statement. So I think if you
22 ask him something about that is on the record, that's

1 fine.

2 MS. LEMMENS: I didn't see him say that he
3 didn't recall what I was talking about. So I'm not
4 sure what the objection is.

5 PRESIDENT WALLGREN-LINDHOLM: Let's have a
6 look at Section 12.10 of PO1, which is repeated under
7 Paragraph 31 of PO11. And this is, again, the
8 Parties' Agreement text that we have confirmed, and it
9 says: "That cross-examination can be conducted on
10 matters relevant in this Arbitration in the Witness'
11 knowledge or experience."

12 Now, I haven't consulted my co-arbitrators,
13 but I read that to be a bit broader scope than
14 strictly the Witness Statements submitted.

15 MR. LUZ: Agreed.

16 PRESIDENT WALLGREN-LINDHOLM: Okay.
17 Apparently --

18 (Tribunal conferring.)

19 PRESIDENT WALLGREN-LINDHOLM: Yes. I think
20 that my co-arbitrators agree with me that this is
21 broader than the Witness Statements because the text
22 says that, if it's relevant to the Arbitration.

1 (Comments off microphone.)

2 PRESIDENT WALLGREN-LINDHOLM: I would like
3 to say that, for an abundance of clarity -- excuse us,
4 Mr. Makrides, that we have to debate here in your
5 presence.

6 THE WITNESS: That's fine.

7 PRESIDENT WALLGREN-LINDHOLM: But the
8 language that is incorporated and that I quoted says
9 clearly that, if there is relevance, knowledge, and
10 experience, which takes the allowed scope beyond the
11 Witness Statements as we read it. Thank you.

12 MS. LEMMENS: Don't worry. Those were my
13 last questions about the Play Fairway Analysis anyway.

14 BY MS. LEMMENS:

15 Q. So at Paragraph 24 of your Witness
16 Statement, you refer to the terms of the geophysical
17 work program authorizations.

18 Do you see that, sir?

19 A. Just bear with me. Yes, I do see it.

20 Q. And you quote each of the -- we are calling
21 them GWAs, Geophysical Work Authorizations for GSI
22 Seismic Programs after the C-NSOPB was created there.

1 Do you see that?

2 A. Yes, I do.

3 Q. You note "Term 1," and you underlined it,
4 and it says: "Compliance with the reporting
5 requirements as outlined in the publication
6 'Geophysical and Geological Programs in the Nova
7 Scotia Offshore Area Guidelines for Work Program,
8 Authorizations and Reports.'"

9 Do you see that, sir?

10 A. Yes, I do.

11 Q. Then you also noted "Term 2." And you have
12 it there not underlined. It says: "Submission of
13 digital seismic shotpoint location data within one
14 year of completion of the program."

15 Do you see that?

16 A. Yes, I do.

17 Q. So neither of those terms refers to
18 "disclosure."

19 Is that what you see?

20 A. That's correct.

21 Q. Neither of those terms refers to
22 "copyright."

1 Is that what you see?

2 A. Yes, that's correct.

3 Q. The first term is limited to "compliance
4 with reporting requirements in the guidelines."

5 Do you see that?

6 A. Yes, I do.

7 Q. It does not mention "disclosure
8 requirements."

9 A. Not in that specific section, but the
10 guidelines themselves do refer to that, as did four of
11 the work Approval Letters that came with the
12 authorizations.

13 Q. But as you can see, it only says "compliance
14 with reporting requirements in the guidelines."

15 A. That's what it says on the authorization
16 form, yes.

17 Q. The cover letter for these authorizations
18 are not the authorizations themselves; right? They
19 are just the cover letters?

20 A. They are the letters, but they do
21 form -- they do state the conditions of approval.

22 Q. Oh, the conditions for approval aren't

1 actually within the authorization themselves?

2 A. They are also noted in the letters.

3 Q. Right. But the cover letter is not the
4 thing that has the force of law. It's the
5 authorization document itself that provides the right
6 to conduct the geophysical work; correct?

7 A. I guess I couldn't comment on the legalities
8 of what is -- what has the force of law and what
9 doesn't.

10 Q. Fair enough. You're not a lawyer. I
11 understand.

12 In your Second Witness Statement, you had
13 referred to a C-NSOPB March 1998 catalog of available
14 data, Seismic Data. It's at Paragraph 6 of your
15 Witness Statement.

16 A. Yeah, I see it there.

17 Q. I think you refer to it as a "publication."

18 A. Yes.

19 Q. You do not have any information that GSI was
20 provided a copy of that publication; is that right?

21 A. I do not.

22 Q. Turning back to your First Witness

1 Statement, sir, you had mentioned a Liability
2 Agreement - Borrowed Materials.

3 Do you recall that?

4 A. Yes.

5 Q. And those Liability Agreements for Borrowed
6 Materials indicate that the materials "may be
7 protected under the intellectual property laws of
8 Canada and will only use these materials in a manner
9 consistent with those laws"?

10 A. Yes. That's what's included there.

11 Q. Was that liability agreement for Borrowing
12 Materials implemented by the C-NSOPB, or was it
13 implemented by COGLA and adopted by the C-NSOPB?

14 A. At the time I wasn't involved in the
15 management team, but I believe that was put together
16 by our Board's legal team sort of in the early 2000,
17 late '90s time frame. So I think that was a
18 Board-developed, if you like, document.

19 Q. And the intent behind the liability form was
20 to protect the Board from liability for copyright
21 infringement?

22 A. Again, I can't speak for the General Counsel

1 at the time, Mike McPhee, but I think the intent was
2 to advise, you know, borrowers that the information
3 may be protected, but the Board didn't take a position
4 on whether it was or was not.

5 Q. And that's because of that uncertainty that
6 you had mentioned earlier about sort of knowing
7 whether in fact copying was allowed or not being
8 allowed?

9 A. Again, I didn't want to speak for Mike.
10 This was Mike's document, so I can't speak to his
11 degree of certainty, I guess.

12 Q. I'm trying to understand what you understood
13 about this liability form and why it was being used by
14 the C-NSOPB.

15 Was infringement of intellectual property
16 laws of Canada a concern that the Board had at the
17 time when it was using the Agreements?

18 A. Like I say, I wasn't involved in this form
19 and its sort of utilization, but I believe Mike was
20 just trying to make borrowers aware that this could be
21 information which may be protected.

22 Q. And you were never given any direction or

1 instructions about these agreements. Is that what I
2 understand?

3 A. That's correct. Yeah. I wasn't involved in
4 the loaning out of materials. That wasn't part of my
5 duties.

6 Q. Sir, do I understand it correctly that the
7 C-NSOPB does not disclose any Seismic Data that
8 extends across the Georges Bank Prohibition Area?

9 A. That is correct.

10 Q. Okay. And that's because there is a ban on
11 oil and gas activity in the Georges Bank Prohibition
12 Area since 1988?

13 A. That's correct.

14 Q. So, in other words, why bother disclosing
15 Seismic Data there if there is no oil-and-gas activity
16 in that area. Is that what I'm to understand?

17 A. There is a policy moratorium by governments
18 across the Georges Bank that prevents oil-and-gas
19 activities, so I guess the view that was taken was not
20 to disclose the data. But again, those were Decisions
21 that were not made by me. I was not involved in those
22 Decisions.

1 Q. Understood, sir. But I just wanted to
2 clarify that it appears that if there's a ban on
3 oil-and-gas activity in an area, that the C-NSOPB does
4 not disclose Seismic Data in that area because there
5 is no reason to?

6 A. Well, that's what was done for the Georges
7 Bank area, anyway.

8 Q. Is that different for other areas?

9 A. I think it is probably a case-by-case
10 decision based on Government policies at the time.

11 Q. And so does the C-NSOPB ask users of the
12 Data Management Centre, the DMC, about what areas they
13 are looking at and whether they are in areas that are
14 banned or not banned?

15 A. No. The system is meant really to be a
16 self-serve system. Once you log in and get username
17 and the password, you log in and you can search for
18 data. And if it's available, then can you access it.

19 Q. Okay. So since, I think you said it was
20 installed in about -- or implemented in about 2007,
21 the Data Management Centre, users are able to go and
22 use it and access Seismic Data without a record as to

1 what data they looked at or who was looking at it. Is
2 that correct?

3 A. Well -- that's beyond my expertise. The
4 guts of what the system can and can't do and when
5 tracking is provided would be handled by our
6 information services team. It is not, again, my area
7 of responsibility.

8 Q. So are you aware of whether there is any
9 recording of that type of information, or is it just
10 simply not known?

11 A. I couldn't speak to that.

12 Q. Who could speak to that?

13 A. You would probably need to speak to the
14 information services team at the C-NSOPB. They could
15 speak to that.

16 Q. And who would be the person that is
17 responsible for that?

18 A. That would be, Troy MacDonald is the
19 Director of that team.

20 Q. Sorry, could you say his first name again?

21 A. Troy MacDonald.

22 Q. Troy MacDonald. And has Troy MacDonald been

1 with that team since the time that the DMC was
2 implemented in 2007?

3 A. I believe so. Yeah. He's been there a long
4 time.

5 Q. Okay. And he is still at the C-NSOPB, so
6 far as you know?

7 A. He is.

8 Q. Okay. And so is it your understanding that
9 the reason for disclosing Seismic Data is to promote
10 offshore oil-and-gas exploration and development?

11 A. I think the disclosing data of any type is
12 for -- in accordance with the Accord, is to try to
13 achieve early development of Offshore Petroleum
14 Resources for the benefit of Canada and the Province
15 of Nova Scotia. That's what the Accord itself says.

16 Q. Do you -- or did you, because you have
17 retired. Did you consider that your discretion as the
18 Chief Conservation Officer of the C-NSOPB to be
19 constrained in any way to only disclosing Seismic Data
20 for the purpose of the early development of the
21 offshore resources?

22 A. I'm not sure I understand the question.

1 Q. Well, did you, as Chief Conservation
2 Officer, when you were that, consider the purpose of
3 disclosing Seismic Data or did you simply just
4 disclose Seismic Data regardless of what people were
5 using it for?

6 A. As I said, the disclosure policies were set
7 by the time I took the role, so I don't think those
8 decisions and discussions had already been sort of
9 established by the time I took the role in 2013 as
10 Director.

11 Prior to 2013, I would have really had no
12 involvement in it whatsoever. I was just a member of
13 the staff. So I don't know that I specifically
14 contemplated, since I became Director in 2013, about,
15 you know, what the Board was doing, if you like,
16 because those policies had already been set.

17 Q. I see. So, in other words, the policies
18 were already set by the time that you took that role?

19 A. Correct.

20 Q. Sir, I'm mindful that you are in a different
21 time zone, so I can see on the hotel clock behind you
22 that it's 11:49. If it's all right with you, and if

1 it's all right with the Tribunal, I'd like to use
2 maybe 15 to 20 more minutes, but I realize that that
3 might be just a little bit longer than the hour and a
4 half that we would typically use in a segment.

5 PRESIDENT WALLGREN-LINDHOLM: But your
6 question was that it's longer than the hour and a half
7 than you would typically use.

8 Yes. I understand. It is okay for the
9 Court Reporter, and therefore, it is okay with us too.
10 Thank you.

11 MS. LEMMENS: And, Mr. Makrides, it's okay
12 for you?

13 THE WITNESS: Yeah, that's fine.

14 MS. LEMMENS: Okay. Thank you. For
15 indulging me.

16 PRESIDENT WALLGREN-LINDHOLM: Thank you.

17 BY MS. LEMMENS:

18 Q. So I wanted to talk a little bit about
19 Secondary Submissions. You raised them earlier.

20 So you are familiar with what a Secondary
21 Submission might be; is that right?

22 A. We don't call them that, but I understand

1 how it's being described, yes.

2 Q. And so, in other words it's a submission of
3 Seismic Data to the Board by a different party than
4 the one that had created it under the Geophysical Work
5 Authorization.

6 A. That's correct. The Company has licensed
7 data and either reprocessed it or just interpreted it,
8 it then is required to submit copies, if they wish to
9 achieve the allowable expenditure credit.

10 Q. And so -- oh, sorry. I didn't mean to
11 interrupt.

12 A. Yeah, sorry. I say achieve, but I should
13 have said obtain the allowable expenditure credit.
14 Yeah.

15 Q. Right.

16 PRESIDENT WALLGREN-LINDHOLM: If they wish
17 to obtain, Mr. Makrides, could you say slower the
18 final words there.

19 THE WITNESS: If they wish to obtain the
20 allowable expenditure credit.

21 BY MS. LEMMENS:

22 Q. So, in other words, a licensee of Seismic

1 Data can apply for an allowable work expenditure
2 credit to use against their work commitment being
3 further exploration or significant discovery or
4 production licenses.

5 Is that what I'm to understand?

6 A. Yes. That's correct.

7 Q. When the C-NSOPB receives one of these
8 submissions, does it file that Seismic Data under the
9 name of the party that created the data, or does it
10 file it under the name of the party that is submitting
11 it or applying for the Work Expenditure Credit?

12 A. Yeah, like I say, I'm not involved in
13 those -- the assignment of those -- what we call
14 "program numbers," but I believe it is filed under the
15 company that made the Application for the allowable
16 expenditure.

17 Q. When you say -- sorry.

18 A. Sorry. And then it is given, I think, a DA
19 representation on the end to indicate that it is a
20 Data Acquisition project, so it's given a bit of a
21 separate designator on the end.

22 Q. And some of the programs that get

1 used -- program codes that get used for data that is
2 submitted in this manner might end in a "27", or does
3 the C-NSOPB still use that sort of coding system? I
4 know the NEB and the C-NOPB do.

5 A. It is different. For us we use currently
6 the NS-24 code for seismic programs. So it would
7 be -- for example, the case of the GSI program would
8 be NS-24, G5, which is a code for GSI, and then the
9 sequential number of the program, whether it was 1P,
10 2P, 3P, and so on.

11 So if it was submitted by, say,
12 Shell -- let's use Shell as an example -- it would
13 then have an NS-24, Shell's company code, and then,
14 say, a "1DA" on the end, for example, the "DA"
15 implying Data Acquisition.

16 Q. And are you -- or were you involved in any
17 of the Access to Information Act requests and
18 responses for the C-NSOPB?

19 A. I guess it all depends what you mean by
20 "involved." I guess there was a time when those were
21 sent to all staff so that we could search our
22 computers and our hard drives, what have you, for any

1 records.

2 And then I think in the early 2010s, there
3 was a new centralized records management system
4 established by Information Services Group, and they
5 were able to do central searching of all of our
6 systems and computers at that point.

7 Q. So if GSI submitted an Access to Information
8 Act request requesting data or information about its
9 Seismic Data with the C-NSOPB, would the Secondary
10 Submissions be included with that, if it was GSI data?

11 A. Yeah. I guess I'm not clear exactly what
12 you're asking me. Any correspondence related to those
13 submissions, yeah, would probably be retrieved through
14 that ATIP if you like.

15 Q. Well, if GSI had requested information about
16 GSI-submitted data with that code G5, it would only
17 get access to information about its G5 Seismic Data, I
18 think is what you said; is that right?

19 A. Yeah. Any correspondence or related records
20 that have that, that's right.

21 Q. But let's say -- and I'm sorry that we're
22 picking on poor Shell Oil, just as an example, but if

1 Shell Oil had licensed GSI's data and submitted it, it
2 would go under a code for Shell Oil, and then GSI
3 might not get access to that Seismic Data or the
4 correspondence about it; is that right?

5 A. Like I say, I'm not involved in assigning
6 those program numbers, so I wouldn't want to speak for
7 the information services team exactly how they -- they
8 may do some cross-referencing, but I can't speak to
9 how they cross-reference programs.

10 So to use your example, if it was Shell that
11 licensed it, would they cross-reference GSI to make it
12 retrievable? And I think sometimes they probably did
13 do that, but I -- whether they did it every time, I
14 couldn't say.

15 Q. And C-NSOPB doesn't check when it receives
16 any Seismic Data with the Canadian Intellectual
17 Property Office as to whether somebody's registered
18 copyright in that Seismic Data? Is that right?

19 A. That is not part of our role, I guess,
20 that's correct.

21 Q. What is "exclusive data" in terms of, you
22 know, comparing it to "nonexclusive data"?

1 A. I guess the simple definition would be its
2 data acquired for the purpose of exploring an area, as
3 opposed to nonexclusive acquired for the purpose of
4 sale.

5 Q. Okay. I don't know what you mean by
6 "nonexclusive data for the purpose of sale." Sale of
7 what?

8 A. To sell the data to make, you know -- or
9 license the data, sorry. When I said "sale," I should
10 have said "license the data."

11 Q. Okay. So nonexclusive data is for the
12 purposes of licensing it to other oil-and-gas
13 companies to use for exploration. Is that right?

14 A. Yeah. Generally, yes.

15 Q. And "exclusive data" would be for an
16 oil-and-gas company to use it to actually explore, and
17 they are not sharing it with anybody else because they
18 don't want anybody to be exploring in the area that
19 they are looking at?

20 A. Correct. They do it at their discretion, I
21 guess, if they want to share it with their partners,
22 yeah.

1 Q. Fair. So the C-NSOPB, does it treat Seismic
2 Data differently if it's exclusive versus
3 nonexclusive?

4 A. They do treat it differently in the sense of
5 the confidentiality period is different.

6 Q. And how does the C-NSOPB determine whether
7 data is exclusive or nonexclusive?

8 A. It is determined at the time the Company
9 makes the Application to the program.

10 Q. So it is a self-disclosure by the company
11 that is submitting the data?

12 A. On the Application form the Company is
13 required to indicate if the data will be exclusive or
14 nonexclusive. That's right.

15 Q. But the C-NSOPB doesn't check anything to
16 determine if that's correct or not, whether it's
17 exclusive or nonexclusive?

18 A. Well, normally the Companies would come in
19 ahead of time and have discussions with the Regulator
20 in advance of their application process, and there
21 would be usually a number of extensive discussions
22 about what they are doing, where they are planning to

1 do it, what the purpose of the survey is and so on.

2 So that would be -- it isn't just what is
3 checked on the form. There would be a lot of
4 discussions. It is part of the approval process,
5 yeah.

6 Q. Is all of the Seismic Data submitted for
7 allowable expenditure credit applications treated as
8 exclusive?

9 A. I guess it depends. I mean, a company -- if
10 you're referring to the Privilege Period or how
11 it's -- I'm not sure exactly what you are referring
12 to.

13 Q. Well, I'm wondering how it gets cataloged at
14 the C-NSOPB, and yes, you are guessing ahead to my
15 next question about the Privilege Period.

16 A. Yeah. I mean, I think -- again, like I say,
17 it is not done by myself, not part of my area of
18 responsibility, but I believe the way the information
19 services team does it is they would assign it a
20 Privilege Period based on the category of the data.
21 That's right. Category of the original data.

22 Q. But does the allowable expenditure credit

1 application always get categorized as exclusive? Do
2 you know?

3 A. Not necessarily. No.

4 Q. And so, is there something on the form for
5 the party to indicate whether it's nonexclusive or
6 exclusive?

7 A. I think -- I believe, again, this is not
8 something that I personally do, but I believe they
9 do -- they look at -- they do look at the original
10 program number of the survey, so they know what
11 category the original survey was.

12 Q. Oh, I see. So they go back to the original?

13 A. The Company is required to reference the
14 original survey, I think, in the program, or should
15 reference it.

16 Q. But then when it gets submitted to the
17 C-NSOPB, it gets assigned a new code, or how does that
18 work?

19 A. Correct.

20 Q. I see.

21 A. Yeah. They give it a different code.
22 That's right.

1 Q. Okay. I actually managed to get through
2 that in less time than I had anticipated. I have a
3 few more questions after the break, but I don't think
4 much.

5 MS. LEMMENS: Mr. Makrides, is it possible
6 for us to take a 15-minute break at this time? And
7 I'll let Madam Chair speak to that.

8 THE WITNESS: Yeah, fine with me.

9 PRESIDENT WALLGREN-LINDHOLM: Yes. We will
10 now take a 15-minute break.

11 Mr. Makrides, so I don't know how
12 technically, if you're put back into the waiting room.
13 Yes. Apparently so. And then we will come back in
14 15 minutes. That is, at local time, at 11:15. Your
15 time I cannot say, but I think you can figure that
16 out.

17 THE WITNESS: Yes.

18 PRESIDENT WALLGREN-LINDHOLM: And I'll
19 remind you of your sequestration. So please do not
20 discuss your testimony with anybody during this
21 15-minute break. Thank you.

22 THE WITNESS: Okay. Understood.

1 (Brief recess.)

2 PRESIDENT WALLGREN-LINDHOLM: May I ask now
3 that we take in Mr. Makrides. Okay.

4 Welcome back, Mr. Makrides. Can you hear me
5 well now?

6 THE WITNESS: Yes, I can.

7 PRESIDENT WALLGREN-LINDHOLM: Okay. Good.
8 Apologies for being four minutes late.

9 We will now continue the cross-examination,
10 and it's Ms. Lemmens now that will continue.

11 MS. LEMMENS: Thank you, Madam Chair,
12 Members of the Tribunal.

13 BY MS. LEMMENS:

14 Q. And, Mr. Makrides, you can confirm that
15 you're still under oath then --

16 A. Yes, I am.

17 Q. Or, sorry. You're not under oath in this
18 proceeding. I forgot about that. I'm so used to
19 being in court, but you will continue to tell the
20 truth.

21 A. Yes.

22 Q. Thank you.

1 There are several maps in your First Witness
2 Statement.

3 Do you recall that?

4 A. Yes.

5 Q. Do you -- did you create them?

6 A. They were created by our technician in our
7 department at the time, yeah.

8 Q. Who was that?

9 A. Brian Altheim.

10 Q. And did you ask him to create them?

11 A. I did, yes.

12 Q. Did you do anything to check its accuracy?

13 A. No, I relied on Brian to do that.

14 Q. Did you provide any guidance to Brian, other
15 than asking him to create the maps that show GSI or
16 non-GSI Seismic Data in the Nova Scotia Offshore Area?

17 A. I just asked him to make sure the maps were
18 legible and could be clearly read.

19 Q. Okay. Thank you.

20 Do you know whether any of the Seismic Data
21 that is in the maps has been discarded or destroyed
22 since -- by the owners of the Seismic Data?

1 A. I do not know what the owners have done with
2 it, no.

3 Q. And at Annex 5 of your First Witness
4 Statement, you have a map of GSI's 3D Seismic Data in
5 the Nova Scotia Offshore Region.

6 Do you see that?

7 A. Yes, I do see it. Yes.

8 Q. And it doesn't appear to overlap with
9 others' 3D Seismic Data in that -- in those areas; is
10 that right?

11 A. In those two areas, that's correct.

12 Q. And then at Annex 6 of your First Witness
13 Statement, sir, you have a map of Seismic Survey that
14 the C-NSOPB has in its possession from Operators.

15 Do you see that, sir?

16 A. Yes.

17 Q. And we've got a few things on here. We've
18 got GSI 3D surveys, and then 3D surveys by other
19 operators, GSI 2D surveys, and 2D surveys by other
20 operators in the legend there?

21 A. Correct.

22 Q. And did you direct Brian to differentiate

1 that?

2 A. Yes.

3 Q. How did he determine what was GSI Data and
4 non-GSI Data?

5 A. Everything is filed in our system by a
6 company Code, so that's anything with the G5 company
7 Code would be GSI data.

8 Q. But if GSI's licensees submitted Seismic
9 Data and the data was assigned a new company
10 Code because the submitter was different, then it
11 would show up as data that was a non-GSI survey in
12 this map; is that right?

13 A. These are the operator, I guess, is how we
14 would file it in this case. So the Operator, meaning
15 the original company that received the authorization
16 to conduct the survey. So that's how it would have
17 been filed in the system.

18 Q. So any reprocessing of Seismic Data would
19 also be filed under the original Operator?

20 A. It could be filed -- it could be filed that
21 way or it could be filed under the new program number
22 that was assigned.

1 Q. The new program number that was assigned to
2 the operator that submitted it?

3 A. Correct.

4 Q. So, in other words, it could be a not-GSI
5 submission?

6 A. Correct.

7 Q. And so, when we look at this map, we're to
8 understand that GSI's surveys are indicated by red
9 lines and yellow boxes; is that right?

10 A. That's right.

11 Q. And so we already looked at yellow boxes in
12 one of the prior maps in your Witness Statement, and
13 they don't appear to overlap. But there is some
14 overlap with the red on the gray, which is "other
15 Operators."

16 Is that what you're seeing?

17 A. That's correct.

18 Q. Okay. I know sometimes it is hard to follow
19 along on some of these maps, but we'll see here that
20 there are some red lines that have no overlap with
21 gray lines; is that right?

22 A. Yeah. There are a few, yes.

1 Q. And where the red is overlapping with the
2 gray lines, have you done anything to check whether
3 that is the same Seismic Data, just reprocessed?

4 A. No, I personally have not done anything to
5 check that.

6 Q. Thank you, sir.

7 MS. LEMMENS: Those are my questions.

8 PRESIDENT WALLGREN-LINDHOLM: Thank you,
9 Ms. Lemmens.

10 We will now proceed to redirect, if any.

11 MR. LUZ: I do Madam Chair, just
12 a -- shouldn't take too long.

13 PRESIDENT WALLGREN-LINDHOLM: Thank you.

14 REDIRECT EXAMINATION

15 BY MR. LUZ:

16 Q. Mr. Makrides, can you hear me?

17 A. Yes, I can.

18 Q. Okay. Great.

19 Ms. Lemmens asked you questions about
20 guidelines, the guidelines of the Board, and you
21 referred to the 1992 guidelines.

22 Do you recall those?

1 A. Yes.

2 MR. LUZ: Can we pull up Exhibit R-199 so
3 that Mr. Makrides can take a look at them? Go to the
4 second page, please.

5 BY MR. LUZ:

6 Q. Mr. Makrides, are these the 1992 C-NSOPB
7 guidelines that you were referring to?

8 A. Yes, they are.

9 Q. Okay. Can we go to -- it is probably Page 3
10 of the PDF right under "introduction" and highlight
11 the first paragraph and expand it so that -- yeah?
12 Thank you. Let's just take a look at that, just to
13 refresh your memory.

14 A. Yes, I see it.

15 Q. And so the C-NSOPB said: "The guidelines
16 were produced from the Nova Scotia Offshore
17 Petroleum Geophysical Regulation -- I should say, from
18 the draft Nova Scotia Offshore Petroleum Geophysical
19 Regulations in order to clarify and standardize
20 program authorization and reporting requirements for
21 geological and geophysical exploratory work and seabed
22 surveys conducted offshore Nova Scotia."

1 Do you see that?

2 A. Yes.

3 Q. And did those Nova Scotia Offshore Petroleum
4 Geophysical Regulations later come into force?

5 A. They did.

6 Q. They did. Can we move down to -- it will be
7 Section 9? Unfortunately my computer crashed, and I
8 do not have it electronically, but it will be the
9 second-last page of the document under the heading
10 "9 Confidentiality."

11 Is this the section that you were referring
12 to that the guidelines incorporated?

13 A. Yes.

14 Q. And we'll just pull up the second line, the
15 second paragraph where it says: "Nonexclusive or
16 speculative geophysical data, Reports, and maps will
17 be kept confidential for at least 10 years from the
18 completion of the fieldwork."

19 Is that -- that was the policy in 1992, and
20 is that still the policy today at the C-NSOPB?

21 A. Yes.

22 Q. If we go to the second-last paragraph, it

1 says: "Reports and data are made available to the
2 public at the termination of relevant confidentiality
3 periods."

4 At your time at the Board, how was
5 Reports -- and since 1992 in these guidelines, how
6 were Reports and data made available to the public at
7 the end of the relevant confidentiality periods?

8 A. Well, up until 2007, it was all in hard copy
9 format, or reproducible film, Mylar, and then after
10 2007, exclusive data was made available
11 through -- images of exclusive data were made
12 available through our Data Management Centre. But the
13 disclosure format for nonexclusive data never changed.

14 Q. So it's still paper and Mylar?

15 A. Correct.

16 Q. Ms. Lemmens then referred you to -- I think
17 it was Paragraph 24 of your Witness Statement where
18 there was a quote from one of the authorizations, the
19 geophysical work authorizations.

20 Can we pull up Exhibit R-203?

21 Do you recognize this document? Take your
22 time to take a look at it.

1 A. Yeah. I believe it is one of the
2 authorization letters that I referred to, yeah.

3 Q. And it's dated October 4, 2000, from the
4 C-NSOPB to GSI. If we go to the second page and the
5 second-last bullet point, it says: "Final Reports,
6 maps, and data for nonexclusive geophysical programs
7 will be disclosed to the public after 10 years from
8 termination date of the geophysical operation."

9 That's reflective of the 1992 guidelines
10 that we just looked at?

11 A. Correct.

12 MS. LEMMENS: I'm just going to note that
13 some of these questions are starting to get into the
14 leading category. Thanks.

15 BY MR. LUZ:

16 Q. If we can get to the third page under
17 "Authorization," you'll see under Number 1 it
18 says: "Compliance with the reporting requirements as
19 outlined in the publication 'Geophysical and
20 Geological Programs in the Nova Scotia Offshore Area
21 Guidelines for Work Program Authorizations and
22 Reports.' "

1 Mr. Makrides, what document is that?

2 A. That's the 1992 guidelines that was referred
3 to in the -- in my Witness Statement.

4 Q. Okay. Thank you.

5 Ms. Lemmens also mentioned to you a
6 publication by the C-NSOPB dated March 1998 called
7 "Information on Well Data, Geological Data,
8 Geophysical Data, and Land Rights."

9 Do you recall that?

10 A. Yes.

11 Q. It's Exhibit R-532.

12 Can you pull that up, please?

13 Is this the document that she was referring
14 to?

15 A. Yes.

16 Q. And Ms. Lemmens asked you if you knew
17 whether GSI had been provided this document.

18 Do you remember that question?

19 A. Yes.

20 Q. And your answer was?

21 A. I wasn't aware if they had been provided.

22 Q. Is this document available from the Board?

1 A. It's available on the Board's website, or it
2 was at the time.

3 Q. Okay. Can we go to page -- it will be
4 Page 4 of the document, under the heading, "Disclosure
5 of Technical Data"? It says: "Sections 122 and 121
6 respectively of the federal and provincial legislation
7 deal with confidentiality and disclosure of
8 information provided for purposes of the legislation."

9 Can you explain the Board's understanding of
10 what Section 122 of the Accord Act meant for
11 disclosure of Seismic Data?

12 A. Section 122 refers to Seismic Data being
13 disclosable or releasable by the Board after a
14 five-year confidentiality period.

15 Q. And the statutory rule of five years, was
16 that confidentiality period extended by the Board?

17 A. Yes. Sorry.

18 MS. LEMMENS: Objection. Please stop
19 leading the Witness. Thank you.

20 THE WITNESS: Sorry. Go ahead.

21 MR. LUZ: Can he answer the question? I
22 realize it was --

1 MS. LEMMENS: I think you should probably
2 rephrase it.

3 BY MR. LUZ:

4 Q. What did the Board do with respect to the
5 five-year confidentiality period?

6 A. In the 1992 Guidelines, there was -- a
7 five-year confidentiality period was applied to
8 exclusive data, and a ten-year confidentiality period
9 was applied to nonexclusive data.

10 Q. Let's just go to the next page. Actually,
11 we can put the document away.

12 Ms. Lemmens asked you some questions about
13 how codes were made for -- and you referred to data
14 acquisition. How would someone be able to make
15 inquiries with respect to what is available for public
16 disclosure from the Board?

17 A. Well, I guess they could either contact our
18 Data Management Centre staff and just simply ask for
19 that information, or they could review a publication
20 on the Board's website that's recently been
21 updated -- or been updated, I think, in the
22 mid-2010s - that lists all the programs that

1 have -- all release programs, including those with a
2 DA code, would be the other way to do it.

3 Q. Ms. Lemmens asked you questions with respect
4 to the Board's position on copyright.

5 Do you recall that?

6 A. Yes.

7 Q. Do you recall what the Board's position was
8 with respect to its authority to release Seismic Data?

9 A. The Board always maintained that it had the
10 ability or the authority to disclose seismic and well
11 data at the conclusion of the confidentiality period.

12 Q. And did the Board communicate that to GSI?

13 A. It was communicated through a number of
14 Geophysical Work Authorization Approval Letters and
15 also on the authorization form. Reference was made to
16 the guidelines where that information is included.

17 Q. Do you recall correspondence between GSI and
18 the Board, other than those work authorizations?

19 A. There were a number of letters and emails, I
20 think, mostly letters between Chief Executives, over
21 the years, and GSI, where that information was also
22 communicated.

1 Q. Do you recall in your Witness Statement if
2 you relied on any of those -- or cited any of those
3 communications?

4 A. Yeah. I believe some of them are cited
5 between Jim Dickey --

6 (Interruption.)

7 Q. Could you repeat the name?

8 A. Between Jim Dickey, who was the Chief
9 Executive Officer at the time, and also Stuart Pinks,
10 who was later the Chief Executive Officer.

11 Q. Stuart Pinks? P-i-n-k-s.

12 A. Pinks with an "s." Yeah.

13 Q. Okay. If we can pull up Exhibit R-221,
14 which is cited in Paragraph 44 of your First Witness
15 Statement.

16 Can you -- do you recall this email
17 exchange?

18 A. Yeah. It was referenced in my Witness
19 Statement.

20 Q. Okay. It's a long email chain, but I won't
21 go through all of it, but if we could just go to
22 Page 2, there's an email from Mr. Paul Einarsson dated

1 August 12, 2009, and it's to Stuart Pinks. That's who
2 you referred to before?

3 A. Yes.

4 Q. And it's copied to Steve Bigelow, Diana
5 Dalton, and Michael McPhee.

6 Can you identify who those people are?

7 A. Steve Bigelow would have been the Director
8 of Resources and Rights at the time, Diane Dalton was
9 a chair of our Board, and Mike McFee was our General
10 Counsel at the time.

11 Q. Okay. Can you look at the second paragraph
12 that starts with "again" and blow it up and then -- so
13 it says: "Again, I respectfully request two actions
14 being implemented immediately. One, digital data
15 submitted by GSI due to the false representation made
16 by the C-NSOPB shall be secured, and GSI shall be
17 informed if any other third parties had access to this
18 digital information."

19 "Two, until the Board reviews the improper
20 application of the Access to Information Act and
21 violations of the copyright laws of Canada, due to the
22 current and past C-NSOPB policies, it seems reasonable

1 and prudent that the Board immediately discontinue any
2 viewing of GSI information."

3 And the reply from Mr. Pinks is above.

4 Do you recall that reply?

5 A. Yes. It was --

6 Q. It's an email, so if we move up to the
7 email, do you recall what the Board said in response?

8 A. I mean, I don't have memorized the exact
9 language, but it basically said that the Board would
10 continue to apply the disclosure provisions of the Act
11 and continue to release the data.

12 Q. Okay.

13 A. After the confidentiality period expired.

14 Q. Okay. So I'll just -- your recollection
15 matches the email where, right above it, starting on
16 Page 1, it says: "From Stuart Pinks to Paul
17 Einarsson, with copies to Steve Bigelow, Diana Dalton,
18 and Michael McPhee."

19 And the email reads: "Paul, in response to
20 your most recent email message, please be advised as
21 follows. One, the C-NSOPB does not share your opinion
22 that it is violating any Canadian laws. Two, the

1 Board has not implemented any changes to its
2 long-standing disclosure practices respecting
3 nonexclusive Seismic Data."

4 Was that the C-NSOPB's position at the time?

5 A. Yes.

6 Q. And did the position continue on thereafter?

7 A. Yes.

8 MS. LEMMENS: I'm sorry. We're doing
9 leading again. You just read out an email to him and
10 then said, "is this the Board's position?" That's a
11 leading question.

12 MR. LUZ: Okay. I'll withdraw the question
13 and just leave it as the email speaking for itself.
14 Thank you.

15 I don't have any further questions, Madam
16 Chair.

17 PRESIDENT WALLGREN-LINDHOLM: Thank you. So
18 you have concluded your redirect. Let me ask, would
19 you request a recross?

20 MS. LEMMENS: I don't think there is any
21 need for recross. Thank you.

22 PRESIDENT WALLGREN-LINDHOLM: Thank you.

1 Accepted. I know that at least Mr. Landau has
2 questions.

3 Mr. Landau is this gentleman, Mr. Makrides,
4 an arbitrator, and then you may have some also. We
5 don't know. Okay. At least, let's give the floor to
6 Mr. Landau.

7 QUESTIONS FROM THE TRIBUNAL

8 ARBITRATOR LANDAU: Thank you.

9 Mr. Makrides, I just want to ask you,
10 following up from the question you were asked in
11 redirect, just starting with your First Witness
12 Statement at Paragraph 29 -- you were asked questions
13 about this in cross-examination as well. This is
14 where you refer to the Liability Agreement.

15 THE WITNESS: Umm-hmm.

16 ARBITRATOR LANDAU: And you explain, or at
17 least you say, "I understand," in the last sentence,
18 you gave your understanding as to why the language was
19 set out there in terms of possible violation or
20 possible relevance of intellectual property laws.

21 Do you see that?

22 THE WITNESS: Yes, I do.

1 ARBITRATOR LANDAU: You then go on to say,
2 at the end of this paragraph, that the Board did not
3 take a position as to whether they were or were not,
4 i.e., the intellectual property laws were or were not
5 engaged.

6 Do you see that?

7 THE WITNESS: Yes, I do.

8 ARBITRATOR LANDAU: You put all of that in
9 terms of your understanding. It may be that my
10 questions are really for Michael McPhee or somebody of
11 that sort rather than you. You can just tell me,
12 actually, where does that understanding come from
13 where I say "I understand the language chosen"?

14 THE WITNESS: It would have come from
15 Michael McPhee at the time because he was our General
16 Counsel.

17 ARBITRATOR LANDAU: What I'm curious about
18 is you say there was no position taken by the Board.
19 When we looked to the exhibit that you were shown in
20 redirect, which is R-221, that is an exchange which is
21 focused, in part, on the possible relevance of
22 copyright law.

1 Do you recognize that?

2 THE WITNESS: Sorry. Can you bring up the
3 document, please.

4 ARBITRATOR LANDAU: I can't. But I'm hoping
5 somebody else can. R-221.

6 Do you recall that was the email exchange to
7 which you were copied?

8 THE WITNESS: I don't believe -- I don't
9 believe I was copied.

10 ARBITRATOR LANDAU: You may not have been
11 copied. Forgive me. But you were -- that's an
12 exchange which you seem to have some familiarity with?

13 THE WITNESS: Right.

14 ARBITRATOR LANDAU: You'd cited it in your
15 Statement, I think.

16 THE WITNESS: Umm-hmm. That's correct.

17 ARBITRATOR LANDAU: Yeah. So I have taken
18 you to this document, having just shown you where you
19 said you testified to your understanding that the
20 Board took no position. But the Board seems to have
21 taken a position here by stating -- if you look at the
22 email of August 17, which is at the bottom of the

1 first page of this document, where Mr. Pinks is saying
2 that the Board does not share the opinion that it is
3 violating any Canadian laws. And that is following an
4 assertion by Mr. Einarsson that copyright laws were
5 being violated, or at least potentially violated.

6 Do you see that?

7 THE WITNESS: Yes, I do.

8 ARBITRATOR LANDAU: So can you help me at
9 all on this as to whether or not a position actually
10 had been taken?

11 THE WITNESS: Well, I guess what I was
12 referring to in the statement is there was no, I
13 guess, formal or published opinion, but I guess there
14 obviously clearly was a comment here by Stuart in his
15 email.

16 ARBITRATOR LANDAU: In your Witness
17 Statement, your First Witness Statement from
18 Paragraph 39 onwards, you recite a number of exchanges
19 where the copyright issue was being raised with Board.

20 It seems to me from that that the copyright
21 issue was, must have been well known to the Board, at
22 least you knew that Mr. Einarsson was concerned about

1 the applicability of the copyright legislation.

2 Is that fair?

3 A. Yeah. At the time I was in the supporting
4 role to Mike McPhee.

5 ARBITRATOR LANDAU: I understand that. I
6 understand that, yes.

7 THE WITNESS: So I was aware that there was
8 a lot of correspondence, but I wasn't privy to all
9 that.

10 ARBITRATOR LANDAU: Again this may not be
11 for you. It may be for Mr. McPhee. But what I'm
12 struggling at the moment to understand is, in that
13 context, when you know that the issue is a live issue
14 and it's causing concern, why is it that the Board
15 isn't taking a formal position? Why is it not
16 publishing a statement on the applicability or
17 relevance of copyright legislation?

18 THE WITNESS: I really don't know.

19 ARBITRATOR LANDAU: All right. I think I
20 probably can't take that any further. Can I then just
21 switch to something else which is just a point of
22 detail?

1 And that is, looking at your Second Witness
2 Statement, Paragraph 6, you refer there to a document
3 which you have also -- you were taken to in cross and
4 also redirect, which is the March 1998 publication.
5 I'm not entirely clear in my mind, when you refer here
6 to "nonconfidential Seismic Data," so that is the
7 Seismic Data that was the subject of this March 1998
8 publication. What constitutes "confidential" as
9 opposed to "nonconfidential" Seismic Data at this
10 point?

11 THE WITNESS: I think we are using multiple
12 terms here, so it is probably confusing. So data
13 that's basically passed the Privilege Period, so the
14 Privilege Period as defined in the legislation. So
15 once the Privilege Period expires, we call that data
16 either nonconfidential or released. And sometimes we
17 use the two terms interchangeably.

18 ARBITRATOR LANDAU: I see.

19 THE WITNESS: They mean the same thing.

20 ARBITRATOR LANDAU: So basically, you're
21 referring to all data once it is past the
22 confidentiality period?

1 THE WITNESS: Correct.

2 ARBITRATOR LANDAU: Or what you call
3 privileged -- yeah.

4 THE WITNESS: Yes. That's correct.

5 ARBITRATOR LANDAU: Yeah. Yeah. I see. I
6 just want to ask you, I know you have answered this.
7 You have been asked quite a lot of questions on it.
8 I'm not sure I'm entirely clear, in my own mind, why
9 it is that there was a decision not to disclose SEG-Y
10 information or digital information but a decision to
11 restrict the availability of information to Mylar or
12 hard copy?

13 THE WITNESS: Are you referring to
14 nonexclusive or exclusive data?

15 ARBITRATOR LANDAU: Yeah. No, to
16 nonexclusive.

17 THE WITNESS: Yeah. I think for
18 nonexclusive data, the disclosure format never
19 changed. For the duration of the Board's existence,
20 it's has been the same hard copy.

21 You're asking why it was never changed. It
22 goes back to the discussions, I guess, in the

1 mid-2000s with the International Association of
2 Geophysical Contractors which actually continued up
3 off and on -- not continuously, but off and on right
4 up to the early 2010s.

5 So there was actually discussions happening
6 where I was in a supporting role during that time. It
7 was before I became a manager with Mike and Steve
8 Bigelow -- with the Contractors trying to work out,
9 you know, what were the key issues, what would be
10 acceptable to them -- back and forth, many
11 discussions, discussion papers and the like. Those
12 discussions continued up until about 2013. I
13 apologize for the long answer, but there's a bit of
14 background that is necessary here to understand.

15 And then in 2013, when GSI commenced legal
16 actions against the Board, I think the Board members
17 at the time -- the Board members of the Board took the
18 position to just park the issue until those legal
19 matters had been concluded. And then it was never
20 really picked back up again. So it just remained as
21 hard copy disclosure and continues that way to this
22 day.

1 ARBITRATOR LANDAU: I see. All right. I've
2 got no further questions. Thank you very much.

3 PRESIDENT WALLGREN-LINDHOLM: Thank you. I
4 think there are some questions by Mr. Trey Gowdy
5 sitting here, co-arbitrator.

6 ARBITRATOR GOWDY: Thank you, Madam
7 President.

8 Just picking up on what Mr. Landau KC asked
9 you, his first question. Was GSI the only company
10 raising issues about the reconciliation of the
11 Regulatory Regime with copyright law?

12 THE WITNESS: To my knowledge, GSI was the
13 only one that specifically referenced copyright.

14 ARBITRATOR GOWDY: How many other companies
15 were in this line of work?

16 THE WITNESS: Oh, I couldn't remember the
17 exact number, but there are several companies that
18 were geophysical Contractors that we would meet with.
19 There was probably, could have been seven or eight or
20 more companies that were represented by the
21 association.

22 ARBITRATOR GOWDY: How were those companies,

1 not named GSI, reconciling any perceived discrepancies
2 between the Regulatory Regime and copyright law? If
3 you know.

4 THE WITNESS: Discussions that were
5 happening back and forth with Contractors in the
6 mid-2000s and early 2010s, and the focus was on -- if
7 we were to set up some kind of digital disclosure
8 method for your data, what would you deem to be
9 acceptable? And that's really what the focus of those
10 discussions was on.

11 It wasn't really focused on copyright. It
12 was focused on how long of a confidentiality period
13 for the data would you find acceptable and what sort
14 of disclosure format you find acceptable. That is
15 really what the crux of the issues were at the time.

16 ARBITRATOR GOWDY: To your knowledge - and
17 you may not know -- the other companies engaged in
18 this line of work, did they seek copyright protection
19 for their work?

20 THE WITNESS: Not to my knowledge.

21 ARBITRATOR GOWDY: So to your knowledge, GSI
22 would have been the only company that needed some kind

1 of reconciliation of the copyright law with the
2 Regulatory Regime?

3 THE WITNESS: GSI was the only one that made
4 the specific reference, to my knowledge. But like I
5 say, I was in a supporting role. I can't speak to
6 other members of the management team at the time.

7 ARBITRATOR GOWDY: Do you recall any
8 conversations - and I don't want you to go into the
9 content, but do you recall any conversations about
10 trying to reconcile any perceived discrepancies
11 between the copyright law and the Regulatory Regime?

12 THE WITNESS: I don't recall those
13 personally, no.

14 ARBITRATOR GOWDY: Just the email that said
15 you're following Canadian law without reference to
16 which Canadian law?

17 THE WITNESS: The Board's position, I think,
18 from Stuart Pinks and others was that, you know, the
19 Board had the right to disclose released information
20 at the end of the Privilege Period and didn't really
21 take a position formally on copyright, per se, even
22 though there are comments that have been made by

1 Stuart to that effect.

2 ARBITRATOR GOWDY: One final thing. Can we
3 pull up that email one more time, that one-sentence
4 response? I apologize. I don't know the exhibit
5 number, but my friend from England does recall. It is
6 an email exchange between -- that you I don't think
7 you were copied on. Mr. Pinks may have replied. It's
8 just a one-sentence reply. R-221. And then I'm
9 really interested in the one-sentence response.

10 Because of age and a nonvirtuous lifestyle,
11 I don't know that I can read the print that small. So
12 if --

13 THE WITNESS: I'm with you on that actually.
14 I'm having a hard time reading it myself.

15 ARBITRATOR GOWDY: I think they are taking
16 mercy on us. Okay. So it says "violating any
17 Canadian laws" -- plural, which tells me -- well, it
18 doesn't matter what it tells me.

19 What laws, plural, would have been needed to
20 be reconciled?

21 THE WITNESS: Yeah. I mean, that email was
22 drafted by Stuart, and I wasn't involved in that. He

1 was the CEO. I was a member of the staff. So I was a
2 couple layers down.

3 I don't know what specific laws he's
4 referring to.

5 ARBITRATOR GOWDY: All right. Fair enough.
6 Thank you.

7 THE WITNESS: Yeah.

8 PRESIDENT WALLGREN-LINDHOLM: Thank you,
9 Mr. Makrides.

10 We haven't discussed this, but normally I
11 think that we would allow Counsel to follow up briefly
12 on Tribunal questions.

13 Would there be any such? Ms. Lemmens says
14 yes. Please go ahead.

15 MS. LEMMENS: Yes, please.

16 PRESIDENT WALLGREN-LINDHOLM: Yes.

17 RECROSS-EXAMINATION

18 BY MS. LEMMENS:

19 Q. Mr. Makrides, on the questions of whether
20 other industry was concerned with respect to the
21 Shared Data Repository in the mid-2000s, you recall
22 that we were talking earlier about the International

1 Association of Geophysical Contractors and also the
2 Canadian Association of Geophysical Contractors that
3 were concerned regarding the Shared Data Repository?

4 A. Just to clarify, this was post-Shared Data
5 Repository. The Shared Data Repository initiative
6 kind of died in the early 2000s. This was more on the
7 Boards working towards a disclosure format that they
8 felt would be acceptable, but, yes, similar context.
9 Just not SDR-related, yeah.

10 Q. Okay. But you understand that that
11 association is an association of the industry with
12 many members?

13 A. I do.

14 Q. And the International Association of
15 Geophysical Contractors was, in fact, raising issues
16 about copyright around that time? Do you recall that?

17 A. Like I said, they may have been discussing
18 copyright with Mike McPhee and Steve Bigelow. My
19 involvement with the file is -- like I say, was in a
20 supporting role at the time. In the meetings that I
21 would go to, the topic of conversation was really
22 disclosure format and duration of disclosure.

1 So, you know, if copyright is related in
2 there somewhere, and it -- you know, it certainly
3 could be argued that it is, but it was really around
4 how long do we get for confidentiality and what format
5 are you releasing? That's really what we were
6 discussing at the time, at least when I was on with
7 the Board.

8 Q. Right. So one of the concerns was the
9 period for protection, is what you're saying, when you
10 say "the duration"; is that right?

11 A. Correct.

12 Q. And I think we already established that you
13 don't necessarily have a background in copyright, but
14 do you understand copyright to be protection for a
15 period of time?

16 A. I do understand that, yes.

17 Q. Thank you.

18 I also wanted to take you back to R-221. I
19 didn't actually ask you any questions about this
20 earlier, but Mr. Luz had taken you to it and now the
21 Tribunal has asked you a couple of questions about it,
22 so I just wanted to take you to the last email in that

1 exchange, which is, of course, the first one that we
2 see in time because that's how emails are printed,
3 backwards, it seems. Anyway, so we see an email from
4 Paul Einarsson on August 19, 2009.

5 Do you see that, sir?

6 A. I do.

7 Q. And he responds. And one of his responses
8 there is: "Number one, if you do not believe that the
9 C-NSOPB is not violating the Access to Information Act
10 by ignoring its application to my data submitted in
11 your care, please indicate to me where my analysis is
12 wrong. If you believe that the Copyright Act and
13 intellectual property laws of Canada do not apply to
14 the C-NSOPB and my Seismic Data, please indicate where
15 you see that the C-NSOPB is exempted from these
16 federal laws."

17 Are you aware of any response to this email?

18 It doesn't appear to have a response.

19 A. Yeah. I don't know if there was a response,
20 to be honest. Like I say, it was -- these were
21 correspondence with Stuart. I wasn't involved in
22 these -- email chain.

1 MS. LEMMENS: Thank you. Those are all my
2 questions.

3 PRESIDENT WALLGREN-LINDHOLM: Thank you,
4 Ms. Lemmens.

5 Mr. Luz.

6 MR. LUZ: I do have one follow-up question.

7 PRESIDENT WALLGREN-LINDHOLM: Please go
8 ahead.

9 FURTHER REDIRECT EXAMINATION

10 BY MR. LUZ:

11 Q. At again, Paragraph 44 had a couple -- of
12 your First Witness Statement had a couple of pieces of
13 correspondence, including the one that we just looked
14 at, R-221.

15 Can you pull up Exhibit R-222?

16 So Ms. Lemmens asked you about a response
17 from the Board with respect to this. On Page 7 of the
18 PDF, there's another letter from GSI to the Board
19 dated May 3, 2010.

20 Do you recall this letter?

21 A. Yeah. I mean, I think I may have included
22 it in my Witness Statement.

1 Q. Okay. Can you explain -- do you recall the
2 context of this letter?

3 A. Well, allow me to refresh my --

4 Q. Yeah, please do.

5 A. I'd have to read it to refresh my memory
6 here. I don't have it -- like I don't -- there is a
7 lot of Exhibits here. I don't have them all
8 memorized.

9 Okay. Yeah. I've had a chance to go
10 through it.

11 Q. On the second page it says, under the
12 heading "C-NSOPB," it is Number 3 and 4, where it
13 says: "In advance and immediately provide GSI with
14 evidence to show that the C-NLOPB" -- it says C-NLOPB
15 but I'm assuming it is a misprint -- "can disclose
16 Confidential Information, is exempt from the federal
17 laws of copyright and Access to Information,
18 specifically Section 20, and how any other legislation
19 strips GSI's Confidential Information, filed at the
20 C-NLOPB" -- again, I'm assuming it is a
21 misprint -- "of these federal protections.

22 "Four, to discuss how the Board can take

1 immediate action to protect GSI's further Confidential
2 Information such that the current policies do not
3 cause GSI to lose further control of its intellectual
4 property."

5 Do you recall those assertions by GSI having
6 been previously made?

7 A. Yes. I think they were made a number of
8 times.

9 Q. Okay. And do you recall the Board's
10 response to this letter?

11 A. I don't recall the exact response, but the
12 responses are typically to the effect of the Board
13 maintains it has the authority to disclose data after
14 the end of the Privilege Period.

15 Q. Okay. Can we go up to the top of this to
16 Page 1 of this PDF, Exhibit R-222? It's a letter from
17 the Board to Mr. Einarsson dated May 12, 2010.

18 Can you just read that?

19 A. Yes. I see it there.

20 Q. Can you explain to the Tribunal what this
21 response says?

22 A. It says that -- I guess Stuart is basically

1 saying that the issue has been raised a number of
2 times and, you know, there is no -- they don't
3 agree -- they don't agree with Mr. Einarsson's
4 position, and they don't believe that a meeting would
5 be helpful at this point.

6 Q. Thank you.

7 MR. LUZ: I don't have any further
8 questions, Madam Chair.

9 PRESIDENT WALLGREN-LINDHOLM: Thank you. I
10 believe now that we have concluded the testimony of
11 Mr. Makrides. Thank you very much for appearing from
12 New Orleans, and you are now excused. Thank you very
13 much.

14 THE WITNESS: Thank you.

15 (Witness steps down.)

16 PRESIDENT WALLGREN-LINDHOLM: So now we
17 have -- next in line is Mr. Bennett, and let's look at
18 the time. We have lunch scheduled for 12:30, and it
19 is now 12:00. Should we take in Mr. Bennett now?

20 I'll wait for the signaling to be over, and
21 then --

22 MR. LUZ: I think these are friendly signals

1 going back and forth between counsel --

2 PRESIDENT WALLGREN-LINDHOLM: Yeah, that's
3 how I interpret them. But I reserve --

4 MR. LUZ: I'm sorry, Madam.

5 PRESIDENT WALLGREN-LINDHOLM: -- I reserve
6 final judgment.

7 So, yes?

8 MR. LUZ: I think it would be preferable if
9 we had our lunch break first and then start the
10 cross-examination of Mr. Bennett.

11 PRESIDENT WALLGREN-LINDHOLM: Okay. So we
12 will break now in the hope of lunch being ready to be
13 served.

14 MR. LUZ: I didn't think of that.

15 PRESIDENT WALLGREN-LINDHOLM: Okay. Our
16 secretary encourages us to try.

17 So 1 hour 15 minutes. So we will then be
18 back at 1:15 p.m. Would that be fine?

19 MS. LEMMENS: Thank you.

20 PRESIDENT WALLGREN-LINDHOLM: Thank you very
21 much.

22 (Whereupon, at 12:02 p.m., the Hearing was

1 adjourned until 1:15 p.m., the same day.)

2 AFTERNOON SESSION

3 PRESIDENT WALLGREN-LINDHOLM: Is there
4 anything that we should discuss before we invite
5 Mr. Bennett into the Hearing? Respondent Canada? No.

6 MR. LUZ: Nothing, Madam Chair.

7 PRESIDENT WALLGREN-LINDHOLM: Thank you.

8 And nothing from Claimants.

9 So could you kindly now let Mr. Bennett in.
10 Thank you.

11 (Comments off microphone.)

12 TREVOR BENNETT, RESPONDENT'S WITNESS, CALLED

13 PRESIDENT WALLGREN-LINDHOLM: Mr. Trevor
14 Bennett, I presume?

15 THE WITNESS: Yes.

16 PRESIDENT WALLGREN-LINDHOLM: I can -- thank
17 you. I can see you. Can you see us?

18 THE WITNESS: Yes, I can.

19 PRESIDENT WALLGREN-LINDHOLM: Very good.
20 Before I proceed to the introductions, I just wanted
21 to check that you are complying with the instructions
22 that I understand Canada has given you as to being

1 alone in the venue where you are.

2 THE WITNESS: Yes, I'm alone in my office at
3 home.

4 PRESIDENT WALLGREN-LINDHOLM: Yes. And that
5 your desk is clean. I'm not going to inspect it for
6 dust, but that it has only your two Witness Statements
7 and no notes or other materials.

8 THE WITNESS: That's correct.

9 PRESIDENT WALLGREN-LINDHOLM: Thank you very
10 much. And you're calling in from St. John's, I
11 understand, Newfoundland.

12 THE WITNESS: Yes.

13 PRESIDENT WALLGREN-LINDHOLM: Thank you.
14 Now, you can -- I understand you can see the whole
15 room; right?

16 THE WITNESS: Yes, I can.

17 PRESIDENT WALLGREN-LINDHOLM: Yeah, good.
18 Very good. Now, you have been called to testify as a
19 witness in this NAFTA Arbitration, and you have been
20 called by Respondent Canada, and as already mentioned,
21 you are giving two Witness Statements, and I am
22 assuming thereby that you know what the dispute that

1 we are dealing with here relates to.

2 THE WITNESS: Yes, I do.

3 PRESIDENT WALLGREN-LINDHOLM: I also ask
4 that, if you have any concerns, please address the
5 Tribunal with those concerns or questions. So I will
6 now show you who is the Tribunal. I'll take the
7 Tribunal first. The Tribunal is Mr. Trey Gowdy here
8 and Toby Landau KC on this side. The Secretary to the
9 Tribunal Geraldine Fischer there, and the Court
10 Reporter at the far end.

11 And my name is Carita Wallgren-Lindholm, and
12 unrelatedly, you keep disappearing from one of my
13 screens. I wonder if the IT people would like to come
14 and have a look if there is a problem with this one
15 screen in front of me.

16 (Comments off microphone.)

17 PRESIDENT WALLGREN-LINDHOLM: Then here are
18 the Claimants, Claimants' Counsel and the team and
19 some members of the Einarsson family.

20 And on the other side are Counsel for Canada
21 whom you know. We also have others listening in
22 online, also the two States, not Canada -- Mexico and

1 United States are represented.

2 Now, we do not administer oath in
3 international arbitration, different from a State
4 Court, but you still have an obligation to speak the
5 truth, and any failure to speak the truth may have
6 consequences.

7 Your testimony will be recorded, and it will
8 be transcribed by the Court Reporter. So may I ask
9 you, Mr. Bennett, to confirm for the record that you
10 will speak the truth.

11 THE WITNESS: Yes, I confirm I will speak
12 the truth.

13 PRESIDENT WALLGREN-LINDHOLM: Thank you very
14 much.

15 I'm sure you have been briefed by Counsel as
16 to the protocol that we follow here, but you will
17 first be introduced by Canada with a short
18 introduction and thereafter Counsel for Claimants will
19 conduct a cross-examination, and then there might be
20 two other rounds of questions thereafter. I trust
21 that you have on your screen access to the documents
22 on your computer. Do you?

1 THE WITNESS: No. I don't have any
2 documents I think are going to be -- oh, sorry.

3 PRESIDENT WALLGREN-LINDHOLM: No, but
4 you -- I beg your pardon? You left the -- no, that
5 was as instructed, but do you have a means to access
6 documents that Counsel will present to you
7 electronically?

8 THE WITNESS: Yes. I can see those on the
9 screen.

10 PRESIDENT WALLGREN-LINDHOLM: Yes. That was
11 the question. Very good.

12 THE WITNESS: Okay.

13 PRESIDENT WALLGREN-LINDHOLM: And then we
14 may have breaks when I will sequester you, but that
15 will come in due course when we know how long your
16 testimony will take.

17 So unless you have further questions, I will
18 ask Counsel for Canada to introduce you properly.

19 THE WITNESS: Okay. I have no questions.

20 PRESIDENT WALLGREN-LINDHOLM: Very good.
21 Thank you very much, Mr. Bennett.

22 Mr. Luz, it will be you?

1 MR. LUZ: Yes, it will be, Madam Chair.

2 PRESIDENT WALLGREN-LINDHOLM: Yes. Okay.

3 DIRECT EXAMINATION

4 BY MR. LUZ:

5 Q. Good afternoon, Mr. Bennett. Can you hear
6 me okay?

7 A. Good afternoon. I can, yeah.

8 Q. Great. I just want to confirm, so you have
9 with you two hard copies of the two Witness Statements
10 you filed in this Arbitration, the first one dated
11 January 16, 2023, and the second one dated
12 November 1, 2024; is that right?

13 A. Yes, I do.

14 Q. Okay. Can you introduce yourself to the
15 Tribunal, give some of your background and your role
16 at the C-NLOPB?

17 A. Sure. So I started at the C-NLOPB in
18 October 1988. I started as a Reservoir Engineering
19 Technologist in the Resource Management Group. After
20 completing my training as a Petroleum Technologist
21 through the College of the North Atlantic here in
22 St. John's, after a few years with the Board, I

1 moved -- I stayed with the Board, moved into the -- a
2 computer support role and -- with the Information
3 Technology Group.

4 Then in 1996 went offshore on Hibernia for
5 four years or so, data fluids, I was a Drilling Fluids
6 Technologist and then moved up to a supervisory role,
7 and in 2000, I came back to the Board as the Data
8 Supervisor in the Exploration Department and then
9 moved into the data, or the Information Resources
10 Manager role of the Exploration Department and then it
11 was spun off into a separate entity. So it's an
12 Information Resources Group now.

13 And currently I am the Senior Advisor to the
14 Information Resources Group in preparation for
15 retirement in July. And as part of that role, I was
16 the Access to Information Coordinator.

17 (Discussion off the record.)

18 Q. Our screen blipped off. Can you still hear
19 us?

20 A. Yes, I can.

21 Q. Okay. Great. Thank you very much.

22 MR. LUZ: Madam Chair, I don't have any

1 other direct so over to Matti.

2 MS. LEMMENS: Thank you.

3 (Comments off microphone.)

4 PRESIDENT WALLGREN-LINDHOLM: This goes on
5 and off, but I'm trying to focus on the one that is
6 constantly on, so we will survive here. Thank you.

7 CROSS-EXAMINATION

8 BY MS. LEMMENS:

9 Q. Good afternoon, Mr. Bennett.

10 I'm going to ask you a few questions about
11 your Witness Statements and some of the matters at
12 issue in this proceeding.

13 You have been an Information Resources
14 Manager for the C-NLOPB up until 2021; that's right?

15 A. That's correct, yeah. From 2010 to 2021.

16 Q. And so you're not in that role any more
17 since 2021?

18 A. That's correct. I'm kind of mentoring the
19 current Information Resources Lead.

20 Q. And so, you're the Information Resources
21 Lead.

22 What does that role entail?

1 A. I'm actually the supervisor, I'm
2 actually -- sorry, I am the data -- or the Senior
3 Advisor for the Information Resources Group, so,
4 that -- basically, I'm assisting the Information
5 Resources Lead in bringing her up to speed on the
6 role.

7 Q. Oh, I see. And then when you were the
8 Information Resources Manager, what did that role
9 entail?

10 A. So that entailed management of the
11 Information Resources Group, which received all of the
12 electronic and hard copy information into the
13 organization, and, as well, I was responsible for
14 authorizing the requests for information and Access to
15 Information Coordinator.

16 Q. Given your background, I don't believe that
17 you've ever been involved in creating Seismic Data,
18 but could you confirm that for me?

19 A. That's correct.

20 Q. And you also have not been involved in
21 interpreting Seismic Data; is that correct?

22 A. I've done a little bit of interpretation

1 through the Exploration Department.

2 Q. Okay. And so what was the extent of "a
3 little bit of interpretation"?

4 A. Essentially, I was just interpreting sea
5 floor, seabed of the -- on the workstation.

6 Q. Oh, I see. But not necessarily for
7 hydrocarbon exploration?

8 A. That is correct, not for hydrocarbon
9 exploration.

10 Q. So, sir, in your role with the Access to
11 Information Act, could you tell us a little bit more
12 about what it is that you do in that role?

13 A. Essentially, we receive the requests as they
14 come in, we interpret those requests, communicate with
15 the requestor if there's any questions, source out the
16 documents within the organization, and respond to any
17 complaints, file the info source document, and, as
18 well --

19 Q. Sir. We can't hear you?

20 A. -- Commissioner.

21 (Comments off microphone.)

22 MS. LEMMENS: Sorry. Just at the end there,

1 we didn't quite hear you.

2 THE WITNESS: Was I communicate with the
3 Information Coordinator, or the information -- Office
4 of the Information Commissioner, I respond to
5 complaints.

6 BY MS. LEMMENS:

7 Q. Right. The Federal Commissioner?

8 A. That's correct.

9 Q. Sir, in your Witness Statement, you had
10 referred to -- your First Witness Statement, you had
11 referred to a 1977 Regulation in Newfoundland at
12 Paragraph 8. So you say: "For example, Section 114
13 of the 1977 Newfoundland Regulations provided that
14 Seismic Data and information provided pursuant to
15 Section 111 would remain confidential only until the
16 termination of the License or for a period of
17 five years, whichever was shorter."

18 Do you see that?

19 A. That was Paragraph 8?

20 Q. I believe. Yeah. It's at the end of
21 Paragraph 8 of your First Witness Statement?

22 A. Yes.

1 Q. Do you see that?

2 A. Yes. Yes, I do.

3 Q. And are you able to see the screen with the
4 Witness Statement pulled up on it?

5 A. Yes, I can.

6 Q. Okay. And so did you interpret that
7 Regulation or did someone assist you with doing that
8 for your Witness Statement?

9 A. That one -- no, I would have
10 interpreted -- I would have looked at the one.

11 Q. Okay. And did you prepare your Witness
12 Statement yourself, or did someone prepare it for you
13 and then you reviewed it?

14 A. It was a combination of both.

15 Q. So you wrote portions yourself, and then
16 someone else wrote portions? Is that what I'm to
17 understand, or could you explain that a little bit?

18 A. Yeah. It was written and I edited it and
19 provided comment to it.

20 Q. Okay. Thank you. Did you discuss any of
21 your evidence with Bharat Dixit or Carl Makrides?

22 A. No, I did not.

1 Q. Okay. So this 1977 Regulation, are you
2 aware that there are instances where that Regulation
3 was not applied?

4 A. No, I would not be because I was dealing
5 with the -- the Board didn't form until 1986, so I
6 would have been dealing with the Atlantic Accord
7 implementation, so...

8 Q. Oh, I see. Okay. I'd just like to show you
9 an Exhibit, C-155, which I understand to be a
10 Newfoundland Geophysical Work Permit, an Interim
11 Permit here.

12 A. Okay.

13 Q. Have you seen a document like this before?
14 Maybe not this exact Permit, but --

15 A. I have seen documents similar to this, yes.

16 Q. Okay. And if we -- do you know if you were
17 asked to review any documents like this for the
18 purposes of this Arbitration?

19 A. No, I don't think I was.

20 Q. Okay. And if we go to Section 3 of this
21 Permit, it states: "The Interim Permittee shall,
22 within a reasonable time after completion of

1 operations, submit a full Report to the Director of
2 Energy Resources on the results of all exploratory
3 work carried out under the authority of this Interim
4 Permit, and the Province shall keep all such data
5 confidential until such release date as may be
6 mutually agreed upon."

7 Do you see that?

8 A. Yes, I do.

9 Q. And so you would agree with me that appears
10 to have a slight modification to that Newfoundland
11 Regulation that you had referred to in your Witness
12 Statement.

13 A. Yes, but this would have been -- this would
14 have been pre-Board as well. So this wouldn't have
15 been applied. This is not something I would have
16 applied.

17 Q. I see. It is just that you had referenced
18 the Newfoundland Regulation from 1977, which is before
19 you were at the C-NLOPB, so I thought you might have
20 some knowledge about whether it was always applied or
21 whether it was sometimes applied. But I think your
22 answer is telling me that you don't know that?

1 A. Yeah. I would assume it was applied, but
2 the details of that, you're right.

3 Q. I'm right that you don't necessarily know,
4 though?

5 A. I don't know all the instances, you're
6 correct.

7 Q. Okay. And so if we scroll up on this Permit
8 here just to see who the holder of this Permit was,
9 you'll see there that we see that the Permit was
10 issued to a company called Geophysical Service
11 Incorporated.

12 Do you see that?

13 A. Yes, I do.

14 Q. And so, you may be aware that, at that time,
15 in these earlier years, that was a predecessor to the
16 current GSI.

17 Do you know that, or you've come to know
18 that?

19 A. Yes. I've come to know that, yes.

20 Q. Okay. Yeah.

21 And so, some of the Seismic Data that the
22 C-NLOPB currently holds in its possession is data that

1 predates when the C-NLOPB was established in 1986; is
2 that right?

3 A. That is correct, yes.

4 Q. So, in fact, some of that data includes data
5 that would be under, potentially, permits like the one
6 I'm showing you?

7 A. Potentially, yes.

8 Q. And, although you've seen permits that
9 resemble this one, you may not be reviewing all of
10 those permits when you're determining what is
11 available at the C-NLOPB after the expiry of the
12 Privilege Period under the Accord Act that came in, in
13 1986, when the C-NLOPB was established; is that right?

14 A. Correct. I would apply it against the
15 numbers that are within the Accord Acts, the release
16 dates.

17 Q. Right.

18 And, sir, would you agree with me that the
19 Newfoundland Government has collected significant
20 royalties from its offshore oil-and-gas production in
21 the past?

22 A. I don't know what those numbers are.

1 Q. Are they in the magnitude of billions of
2 dollars?

3 A. I wouldn't know. I haven't looked at those
4 numbers.

5 Q. Sir, what is the purpose of disclosing
6 Seismic Data at the C-NLOPB?

7 A. To provide it for public use within -- and
8 for anyone who wants to research or use the
9 information.

10 Q. Do you understand that the public may be
11 using it for the purposes of exploring and producing
12 offshore oil and gas?

13 A. Some of them may. I'm not sure if they
14 would actually use the information that we would
15 disclose for that or if they would use it for getting
16 a general idea of what's there.

17 Q. The C-NLOPB doesn't take any steps to
18 determine what someone is using the Seismic Data for
19 when they come and use it from the C-NLOPB; is that
20 right?

21 A. That's correct.

22 Q. And so, the C-NLOPB does not inquire as to

1 why someone is looking at the Seismic Data or
2 borrowing it or copying it?

3 A. No. We don't check into that.

4 Q. And the C-NLOPB is aware that copies are
5 made of the Seismic Data; is that right?

6 A. Copies have been made, yes. We are aware of
7 that.

8 Q. And you're aware of that because the C-NLOPB
9 in some instances has actually suggested some copy
10 companies to use to copy the Seismic Data; isn't that
11 right?

12 A. That is correct, yes.

13 Q. Those include copy companies like Wade and,
14 I believe, Cansel.

15 A. Cansel, Wade, I think they were the same
16 company. They were just bought by -- they were just
17 acquired. Wade & Company was the first one, and then
18 Cansel purchased them, I think.

19 Q. And you would agree with me that the C-NLOPB
20 doesn't take any steps to control what third parties
21 are doing with the Seismic Materials that are
22 available at its Board?

1 A. That is correct. We do not monitor what
2 companies are doing.

3 Q. Sir, do you know what revectorization is?

4 A. I'm assuming revectorization is the scanning
5 of seismic sections to return it back to -- to gather
6 some sort of a SEG-Y digital data from it.

7 Q. And so, the C-NSOPB also does not take any
8 steps to determine whether any third parties are
9 creating SEG-Y format Seismic Data from any of the
10 data that's available at the C-NLOPB; is that right?

11 A. Well, I think we do take one step. Under
12 our Disclosure Agreement, we do put a disclaimer
13 saying that there are laws within Canada that they
14 need to apply and possibly are affected by whatever
15 they do with the information.

16 Q. I'd like to talk about those disclosure
17 agreements, then, for a moment, since you've brought
18 them up. And, don't worry, sir, I was going to get to
19 them at some point in time anyway. It's not like you
20 gave me a hint there.

21 A. I know.

22 Q. So, sir, the Disclosure Agreement that you

1 just mentioned, you do talk about it in your First
2 Witness Statement around Paragraphs 28-29, and it's
3 called, in the C-NLOPB's words, the "Disclosure
4 Agreement Information Requests"?

5 A. Yes. That's one of the terms. It was a
6 Disclosure Agreement. It was a borrowing form. There
7 were many -- there were a few different titles on the
8 document.

9 Q. Those agreements indicate that the materials
10 "being disclosed in accordance with the Accord Acts
11 and that such disclosure could be challenged under the
12 intellectual property laws of Canada, the Applicant
13 agrees to use these materials in a manner consistent
14 with those laws."

15 Is that right?

16 A. That's correct. Yes, that's correct. That
17 is what it says.

18 MR. LUZ: I'm sorry, I didn't mean to
19 interrupt. I just didn't know if you were reading
20 from the document or from the Witness Statement.

21 MS. LEMMENS: I must have looked at the
22 exhibit at some point in time, if it's not in the

1 Witness Statement. I'm sorry. I'm not working from
2 the Witness Statement.

3 MR. LUZ: It might be. I'm just wondering
4 if you could pull up -- if you're reading from an
5 exhibit, if you could pull it up so that Mr. Bennett
6 can see it.

7 MS. LEMMENS: I'll do that in this instance,
8 but I don't always do that.

9 MR. LUZ: I ask you to consider, so that
10 when the Witness -- when you're asking the Witness
11 about a document, to show him, because he doesn't have
12 the documents with him.

13 MS. LEMMENS: In this instance, it's quoted
14 in the paragraphs that I had directed the Witness to.

15 MR. LUZ: That's fine.

16 BY MS. LEMMENS:

17 Q. Sir, do you know that Seismic Data is
18 copyright?

19 A. I assume it is. I don't know. I haven't
20 looked into it.

21 Q. Are you familiar with the Common Issues
22 Decision out of the Alberta Courts?

1 A. Yes, I have heard -- seen that Decision,
2 yes.

3 Q. Did you read it?

4 A. I think I read parts of it.

5 Q. Do you know that the outcome of part of that
6 Decision was that Seismic Data is copyright?

7 A. Yes. Yes, you're right, I do. Yep.

8 Q. And that the other part of the Decision was
9 that, but for what the Boards are doing -- maybe that
10 was a wrong way to phrase it -- but what the Boards
11 are doing is in conflict with the copyright law, but
12 the Boards can proceed to do that. I'm not exactly
13 quoting that, but is that your understanding?

14 A. It is my understanding.

15 Q. Okay. Did you know that Seismic Data was
16 copyright before reading the Common Issues Decision?

17 A. No, except for I would have seen copyrights
18 written on some of the seismic sections.

19 Q. You mean on the side labels it indicates
20 that it's copyright to GSI?

21 A. Not necessarily GSI.

22 Q. Other companies, too?

1 A. Possibly, yes, but I've seen it on
2 documents.

3 Q. And so you had seen copyright notices on the
4 side labels of Seismic Data generally, but did you
5 know whether the Seismic Data was copyright when you
6 saw those notices?

7 A. No, I wouldn't have. I would have just -- I
8 saw notices.

9 Q. Did you take any steps to inform yourself
10 about whether there was copyright in Seismic Data,
11 given that you were the Information Resources Manager
12 at the C-NLOPB?

13 A. No, I didn't, because the Accord Act allowed
14 the disclosure of the information.

15 Q. And so, you followed the Accord Act but you
16 didn't inquire about whether the Copyright Act also
17 applied?

18 A. Correct. The Accord Act is what we
19 disclosed the information pursuant to.

20 Q. So, to sort of sum up, I think what you're
21 saying is -- would you agree with me that you did not
22 know whether copyright applied to Seismic Data before

1 the Common Issues Decision?

2 A. Correct, I would have not known.

3 Q. And, therefore, you also did not know
4 whether copying was allowed under the Copyright Act?

5 A. Correct. But we were allowed to disclose
6 the information.

7 Q. I understand. You said that you followed
8 the Accord Act in disclosing, but you weren't
9 following or looking at the Copyright Act when you
10 were doing that?

11 A. Correct.

12 Q. And so, when you used these Disclosure
13 Agreements, sir, was it the intent that the data would
14 be disclosed and the C-NLOPB did not want to have any
15 liability for any sort of activities that might be
16 done with the data that could be challenged under the
17 intellectual property laws of Canada?

18 A. No. I think we were just informing people
19 that other laws may be affected here. So...

20 Q. And so, the C-NLOPB wasn't concerned about a
21 potential liability that the Board had under the
22 intellectual property laws of Canada?

1 A. No. I guess the Board didn't, or we would
2 have done something different, I would assume.

3 Q. What was the purpose of the Disclosure
4 Agreement?

5 A. One was to track what people took, and the
6 other was to make representation that there's other
7 laws could be -- that other laws may apply to whatever
8 you do with the information.

9 Q. And so this C-NLOPB took no position about
10 copyright then?

11 A. Correct.

12 Q. And when you say that it was used to track
13 what data was being taken, it was for the purposes of
14 borrowing the information?

15 A. That's correct.

16 Q. So that you could have it returned?

17 A. Yes.

18 Q. But, otherwise, you were not tracking who
19 was using the data or what data they were looking at?

20 A. We had record of what information they
21 looked at, and we also had record of their contact
22 information.

1 Q. Okay. So if they came to the C-NLOPB to
2 review Seismic Data, someone was monitoring what they
3 were accessing?

4 A. Yep. Someone would actually pull the file
5 and pass them the information and then take it back.

6 Q. Okay. Just a little bit different than some
7 of the other Board practices, so just -- thank you for
8 letting us know.

9 At Paragraph 35 of your First Witness
10 Statement, you referred to cover letters for approvals
11 of GSI's nonexclusive seismic surveys, and those cover
12 letters would enclose the authorizations; is that
13 right?

14 A. That's correct, yes.

15 Q. The cover letters do not refer to copyright;
16 is that right?

17 A. As far as I know, it does not allude
18 anything to copyright.

19 Q. And the authorizations themselves do not
20 refer to copyright; isn't that right?

21 A. No. I think they do discuss disclosure
22 under 119, but not copyright.

1 Q. They discuss "disclosure," but not
2 "copyright"?

3 A. Correct. I think, yes. I don't have one in
4 front of me right now to look at.

5 Q. Sir, I'd like to take a look at
6 Exhibit C-480.

7 Now, sir, do you know who Hal Stanley is?

8 A. Yes, I do.

9 Q. Who is that?

10 A. He was the Chairman of the C-NLOPB at the
11 time.

12 Q. Okay. In 1998?

13 A. Yes.

14 Q. And do you know who Angus Taylor is?

15 A. Yes. He was our lead Counsel at the time.

16 Q. And you were at the C-NLOPB in 1998?

17 A. No. I had left in 1996.

18 Q. Oh, I see. And then when did you return?

19 A. 2000.

20 Q. Okay. Have you seen this document before,
21 sir?

22 A. I think I have seen this document, yes.

1 Q. Okay. And it's not a skill-testing sort of
2 memory test here, so I think that I can ask my
3 questions, and if you don't know the answer then you
4 don't know the answer, sir.

5 We see a memo to Hal Stanley on the first
6 page but, if we go to the beginning of this package,
7 which again -- even though these are letters and
8 memos, it's kind of like an email, it seems to start
9 at the end. So we see a letter from GSI dated
10 July 27, 1998, and it's stamped as "received" by the
11 C-NLOPB there on August 10, 1998.

12 A. Yes.

13 Q. And if we scroll down, we see that the
14 subject line is "Confidential Information in the Hands
15 of the C-NLOPB" -- or C-NOPB at that time. I just
16 want to give you a moment to review it.

17 A. Okay.

18 Q. So here, you see that GSI was attaching, for
19 the C-NLOPB's information, a copy of a legal analysis
20 prepared by GSI's lawyers, Code Hunter Wittmann, which
21 sets out the legal rationale for GSI's position.

22 Do you see that?

1 A. Yes, I do.

2 Q. Have you ever seen that Opinion from Code
3 Hunter Wittmann?

4 A. I think I -- I don't think I read that. I
5 don't think I read that document, no.

6 Q. Okay. And that's okay. I don't need to ask
7 any questions about it. It is in the record before
8 the Tribunal, but I won't ask you questions about it.

9 If we go to the next document in this bundle
10 here, sir, you'll see that there is another letter
11 from GSI on September 25, 1998. And it's stamped
12 "received" by the C-NOPB on September 29, 1998.

13 Do you see that, sir?

14 A. Yes, I do.

15 Q. And if we go to that letter so that we can
16 have a chance for Mr. Bennett to familiarize himself
17 with the letter, it indicates, generally speaking,
18 that GSI had not yet had a response to its earlier
19 letter.

20 A. Umm-hmm.

21 Q. And so, if we go to the next one in the
22 package, sir, we see that there is, in fact, a

1 response on October 6, 1998, from the C-NLOPB to GSI.

2 And this letter indicates that Mr. Stanley, the
3 Chairman and CEO of the Board, says: "This is to
4 acknowledge receipt of your letters dated July 27,
5 1998, with the attachment from Code Hunter Wittmann,
6 on September 25, 1998. The Board is currently
7 reviewing your legal position on this matter and is
8 committed to provide a response so that this matter
9 may be concluded as soon as possible."

10 Do you see that?

11 A. Yes, I do.

12 Q. And if we go to the next memo, sir, this is
13 the one in the package that is going backwards. So we
14 are back to the first part of the document that we
15 were looking at. Okay?

16 We now see October 5, 1998. There is a memo
17 to Hal Stanley from Angus Taylor which was -- I think
18 you called him some sort of Board Counsel?

19 A. Yeah.

20 Q. Okay. So there it indicates Mr. Taylor
21 saying, "Following our in-house discussion on
22 October 5, 1998, my understanding is that the Board

1 will consider GSI's position as reflected in their
2 letter of July 27, 1998, and attachment" -- being the
3 Code Hunter Wittmann attachment -- "and in so doing,
4 will consult with the C-NSOPB and the NEB in regarding
5 their Opinion on this matter."

6 And so, then we get to the bottom of this
7 memo from Mr. Taylor and he says: "I will continue to
8 research this matter in order to prepare an Opinion
9 for the November Board meeting."

10 Do you see that?

11 A. Yes, I do.

12 Q. Have you ever cited that Opinion for the
13 November Board meeting? I realize you were on a
14 hiatus from the C-NLOPB at that exact moment, but you
15 may have been privy to it. I don't want to know the
16 contents of it, but I want to know whether an Opinion
17 was prepared?

18 A. I was not -- I haven't -- I don't think I've
19 looked for that Opinion.

20 Q. And so you've never seen that Opinion?

21 A. Not that I can recall, no.

22 Q. And you're not aware of the C-NLOPB sharing

1 its Opinion that had been prepared with GSI; are you?

2 A. No. Apart from the fact that I think there
3 was a letter at some point that said they didn't agree
4 with the Opinion.

5 Q. And we can get to that a little bit later.
6 I'm not sure if it's quite with respect to the
7 Code Hunter Wittmann Opinion.

8 A. Right. I'm not sure either.

9 Q. I think it is many, many years later.

10 Is that your recollection? Something --

11 A. Many years later?

12 Q. -- 2009, '10. Is that what you're thinking
13 of?

14 A. Possibly, yes.

15 Q. Yeah.

16 A. This one, I'm not sure of.

17 Q. You've not seen an Opinion, such as
18 Mr. Taylor is referring to here, that he had prepared?

19 A. Not that I recall.

20 Q. And you're not aware of seeing any
21 correspondence that sent such an Opinion to GSI in and
22 around this time?

1 A. Correct. Correct.

2 Q. Sir, the C-NLOPB required final reports with
3 paper and Mylar copies and SEG-Y digital seismic
4 traces until 2004?

5 Is that right?

6 A. No, I think we always required it. We
7 changed the format from paper to PDF. Paper and
8 Mylar, but we still required the SEG-Y.

9 Q. You still required the SEG-Y?

10 A. Yes.

11 Q. And in 2004, you changed it to the PDF
12 format?

13 A. Yes.

14 Q. Okay. And so, that was just merely because
15 of the advent of PDF technology at that time or was
16 there some specific purpose behind that?

17 A. No. That was advent of technology.

18 Q. Do you know the first instance in which GSI
19 Seismic Data was accessed from the Board and copied?

20 A. Are we talking the information that the
21 Board authorized, the first GSI program that the Board
22 authorized, or the first one that was copied? The

1 date I'm not 100 percent sure on, the actual first
2 date that it was done.

3 Q. You don't know if GSI data was accessed
4 through the C-NLOPB before 1993?

5 A. To actually say that it was GSI data, no.
6 To say that, I don't. But I do know that there was
7 discussions regarding copying in 1997 for GSI.

8 Q. In your Second Witness Statement, sir, at
9 Paragraph 4, at the end of that Paragraph, sir -- so
10 you're talking about an extension of the Privilege
11 Period from five to ten years for certain types of
12 data?

13 A. Yes. For nonexclusive.

14 Q. Nonexclusive.

15 And what is nonexclusive data?

16 A. Nonexclusive would be information that
17 a -- for instance, an exclusive program would be
18 something one of the operators would contract a
19 geophysical company to go out and acquire information
20 for their purposes. The nonexclusive would be what is
21 also referred to as "spec," where a geophysical
22 operator would go and acquire information for sale.

1 Q. And so the period was extended because of
2 what reason?

3 A. As far as I know, GSI and one or two other
4 geophysical Contractors contacted the organization and
5 said that five years wasn't enough time for them to
6 recoup their losses or recoup their expenditures on
7 the acquisition of the information.

8 Q. At the end of your Paragraph 4 there, sir,
9 you say: "However, as I explained in Paragraph 16 of
10 my First Witness Statement, the C-NLOPB felt that an
11 additional five years struck the appropriate balance
12 between the needs of nonexclusive seismic companies
13 and the public interest in the timely disclosure of
14 Seismic Materials to encourage further exploration."

15 Do you see that?

16 A. Yes, I do.

17 Q. So that was a feeling that the C-NLOPB had?

18 A. Yes. I guess that would be a feeling that
19 the C-NLOPB had. It was the balance
20 between -- balance between the disclosure and the
21 ability for the nonexclusive companies to recoup some
22 of their Costs.

1 Q. And so what is the need of nonexclusive
2 seismic companies that is being balanced, other than
3 the need to make money, as you're describing? Or is
4 that it? It is just about them being able to make a
5 return on their investment?

6 A. To assist them in making a return on their
7 investment.

8 Q. And so once the Seismic Data was disclosed
9 by the Board, it was known by the Board that those
10 companies might not be able to make a return on their
11 investment as they were saying?

12 A. We didn't know how much -- I
13 assume -- again, I was offshore at the time, but the
14 organization -- there was still time for the company
15 to go market their information that they had acquired.

16 Q. But it was known by the Board, that after
17 the disclosure, the companies were telling you that
18 they were not going to be able to make money on the
19 data that was getting disclosed; is that right?

20 A. That was the message we were receiving,
21 yeah, from GSI. I don't know if there were other
22 companies in that same situation.

1 Q. And so that was a change in policy regarding
2 disclosure of nonexclusive Seismic Data then?

3 A. Yes, it was.

4 Q. And so there were some changes to the
5 practices of C-NLOPB over the years?

6 A. Related to disclosure.

7 Q. Right. And also to submission, given that
8 it turned into PDF format and that sort of thing?

9 A. Yeah. Yes. But the overall requirement to
10 gain an authorization, acquire the information, and
11 submit the information and then there was a disclosure
12 period --

13 (Interruption.)

14 A. Yeah. So the Operator would have to gain an
15 authorization, acquire the information, submit it to
16 the Board, and then it would be disclosed after a
17 Privilege Period.

18 Q. At the end of Paragraph 5 of your Second
19 Witness Statement, sir, you indicate that companies
20 have been requesting copies of Seismic Data Materials
21 which were no longer confidential for many years.

22 It should be at the end of the paragraph.

1 A. Yes.

2 Q. And you then cite a bunch of examples. Were
3 those examples supposed to be about GSI data or just
4 generally?

5 A. General data. General data that was
6 available from the C-NLOPB.

7 Q. Because when we looked at them, we weren't
8 seeing GSI data. So I just wanted to confirm that for
9 you.

10 Okay. So you recall, sir, that the C-NLOPB
11 provided some names and contact information of third
12 parties who had accessed GSI Seismic Materials after
13 the Board was compelled to do so by the Court in 2003?

14 A. Yes.

15 Q. And that list did not indicate which of
16 those Parties copied GSI data; is that right?

17 A. That's correct. It also didn't include the
18 ones that copied or didn't copy. There was no notice
19 on it. It was based on the access information request
20 that was originally received.

21 Q. And so it was just about who had accessed
22 it?

1 A. Yes. That was what the company requested.

2 Q. Sir, have you assisted in making copies of
3 Seismic Data for third parties?

4 A. How do you mean "assisted"?

5 Q. Have you personally assisted in making sure
6 that they were connected with copy companies or
7 actually copied it yourself?

8 A. As the manager of the Information Resources
9 Group, I guess I would have that role, yeah, I would
10 have assisted.

11 Q. So, sir, unfortunately this isn't the first
12 time that we've had occasion to meet. And I
13 cross-examined you about a year ago; is that right?

14 A. That's correct, yes.

15 Q. Maybe on another time it won't be so bad.

16 A. It's not really so bad.

17 Q. No. Okay. Good.

18 So, sir, I wanted to ask you some questions
19 about what we call "Secondary Submissions." And I
20 understand that is not a term that the Board uses
21 necessarily, but I think you understand what I'm
22 referring to when I say that?

1 A. Yeah. I think you're referring to a program
2 without fieldwork, whereby an operator applies to the
3 organization -- to C-NLOPB for a program that has been
4 acquired previously. And they do some work on it.

5 Q. And so, we've talked about the fact that
6 there is different confidentiality periods for
7 exclusive and nonexclusive data. And I'd like to know
8 what steps the Board takes to determine whether
9 Seismic Data is exclusive or nonexclusive.

10 A. It's indicated on the Application when the
11 Operator submits the Application whether it's
12 exclusive or nonexclusive.

13 Q. So there is sort of a box that is ticked on
14 the form that indicates whether it is exclusive or
15 nonexclusive?

16 A. Correct. That's what they are going to use
17 the information for, the acquisition company.

18 Q. And is that the form that is used for
19 allowable expenditure credits?

20 A. No.

21 Q. Okay. So is there any information on the
22 allowable expenditure credit form which indicates

1 whether it's exclusive or nonexclusive?

2 A. Yes. The original program has to be
3 indicated on that -- on the program without fieldwork
4 Application. And there's a code that's in the program
5 number, which indicates whether it is exclusive or
6 nonexclusive, and that program number is included on
7 the program with their fieldwork Application.

8 Q. Sir, should I understand it that, beyond the
9 form indicating whether it's exclusive or
10 nonexclusive, the C-NLOPB doesn't take any steps to
11 confirm whether the data is exclusive or nonexclusive?
12 It is just simply the form?

13 A. It is simply the form.

14 Q. And so from the ticked-off box on the form,
15 you then at the Board determine the confidentiality
16 period to apply to the Seismic Data; is that right?

17 A. That's correct, yeah.

18 Q. Just so we understand correctly how the
19 allowable expenditure credit program works, it's an
20 operator applying for a work expenditure credit to
21 apply towards their work commitments out in the
22 Offshore Area to reduce the Cost. They say: "Look,

1 we spent X dollars on Seismic Data. It was part of
2 our Exploratory Costs, and we'd like to have some
3 credit towards our further work producing in this
4 area." And so it acts as a credit in that sense.

5 A. It is tied to the land expenditure bid. So
6 when they acquire lands offshore, they put in a bid.
7 There is a security deposit required. And the
8 allowable expenditures -- if they apply for
9 them -- can apply towards credit on that security
10 deposit. They don't necessarily have to apply for a
11 work expenditure credit.

12 Q. And when the C-NLOPB gets some Seismic Data
13 that is Seismic Data without fieldwork, it files that
14 data under whatever parties' name that is submitting
15 it; is that right?

16 A. That's correct, yes.

17 Q. So even though -- I'm going to use GSI as an
18 example here. This is just a hypothetical, so we can
19 understand how it works. If you have GSI data as the
20 original program, and then it gets submitted by one of
21 its licensees as part of an allowable work expenditure
22 or credit application, it would be filed under the

1 licensee's name?

2 A. Correct. With the original GSI program
3 associated with it through the application process.

4 Q. Now, because you are the Access to
5 Information Act Officer -- or you were. I don't know
6 if you are still now, but you were at a time at the
7 Board. You understand that there are limitations on
8 what can be provided under the Access to Information
9 Act in terms of commercially sensitive information; is
10 that right?

11 A. Yes.

12 Q. And so when an oil company is making an
13 allowable work expenditure credit application and
14 submitting Seismic Data with it, is that considered
15 commercially sensitive information that the C-NLOPB
16 would ask the oil company for permission to disclose;
17 and if they objected, would not disclose?

18 A. I'm sorry. Can you rephrase? I'm not sure
19 I fully followed the question.

20 Q. So when you have commercially sensitive
21 information that is requested under the Access to
22 Information Act, the Board might ask the party related

1 to that commercially sensitive information for
2 permission to disclose it; is that right?

3 A. That's correct.

4 Q. And if that party objects to the disclosure,
5 then the Board would not disclose it; is that right?

6 A. That's correct. If there was -- if there
7 was no -- in the case of seismic information, there is
8 a different process pursuant to 119(5)(d) which allows
9 the disclosure of that information.

10 Q. Right. But the work expenditure credit
11 applications, are those disclosable?

12 A. With consent.

13 Q. With consent.

14 A. Yeah.

15 Q. So in other words, if GSI's data was
16 submitted as part of one of those applications by an
17 oil company and GSI requested to know who it was that
18 submitted it, the oil company would be asked for their
19 consent about whether they would let that be known to
20 GSI?

21 A. No. In actual effect, in that released G&G
22 Reports, we actually indicated that GSI did the

1 original program from which that information came from
2 was there listed in that program, in that document.

3 Q. I know, but I'm asking about who is
4 submitting the allowable work expenditure credit
5 application, that form?

6 A. The form is different than the person who
7 would know. The organization would be known from the
8 program number because there's a code. And the
9 Operator that submitted it was in that released G&G
10 Report. The actual application would be considered
11 third-party confidential information.

12 Q. Right.

13 A. And would require consent to be disclosed.

14 Q. So it wouldn't be disclosed without consent?

15 A. The actual application, correct.

16 Q. So GSI wouldn't be able to see who it was
17 that submitted the data?

18 A. They could because it's in the released G&G
19 Report with the operators listed there. So they know
20 who would submit it because it also says that there is
21 GSI -- the GSI program number is there too.

22 Q. So there's a list of all of the operator

1 codes?

2 A. Yep.

3 Q. Where is that?

4 A. That's in that Released G&G document that we
5 talk about earlier. The Codes are all there. Program
6 numbers are there, and the Operator name is there.

7 Q. The C-NLOPB, it never checked the copyright
8 registry of Canada to see who was the author and owner
9 of Seismic Data; is that right?

10 A. That's correct.

11 Q. When an oil company submits reprocessed
12 data, how is that categorized? Just the data without
13 fieldwork?

14 A. Yeah. There's a 27 code goes on the -- in
15 the program number, or historically went in the
16 program number, then the Operator Number, and then it
17 would be just filed as the -- so the Operator, the
18 Code would be associated with the Company that
19 submitted it, and then at the end of that title it
20 would say which program it was from.

21 Q. But you would agree with me that the
22 submitter of the Seismic Data, for instance in the

1 case of the allowable expenditure credit applications,
2 is not always the party that created the data. Is
3 that fair?

4 A. The original acquisition in the case of
5 programs of fieldwork?

6 Q. Yes.

7 A. I would agree.

8 Q. And so you have -- does -- scratch that.

9 No GSI SEG-Y Data has ever been released.
10 You indicated that in your Witness Statement, your
11 first one, at Paragraph 26.

12 A. That's correct. That is what my review of
13 the files indicate.

14 Q. When you made that statement, are you also
15 checking any of the Secondary Submissions?

16 A. Yes. Because we didn't start disclosing
17 data, SEG-Y Data, until around 2021, I think it was.
18 So there is only 70 programs for SEG-Y Data that has
19 been disclosed to the public.

20 Q. Why did you start disclosing it in 2021?

21 A. Because we implemented a new data disclosure
22 policy, which allowed for that disclosure.

1 Q. Okay. So you had yet another policy change
2 in 2021?

3 A. Yes.

4 Q. So what was that policy change?

5 A. That was the disclosure of SEG-Y Data.

6 Q. That's the only policy change?

7 A. Yep.

8 Q. Does the C-NLOPB vectorize any seismic
9 materials for internal purposes?

10 A. No.

11 Q. Does the C-NLOPB know whether third parties
12 are vectorizing any of the Seismic Data from the
13 Board?

14 A. No. We don't -- again, we don't monitor
15 that.

16 Q. The C-NLOPB hosts an online database of
17 Seismic Data materials called "Arc hub." Is that
18 right?

19 A. It is "SEG-Y's ArcGIS platform, and we have
20 got it called our data and information hub.

21 Q. And does the C-NLOPB record who accesses
22 that hub?

1 A. No.

2 Q. And so, therefore, it probably also doesn't
3 record what data is accessed; is that right?

4 A. From the information that is there, we
5 don't, but if they request SEG-Y, it's a different
6 process, a different process where they contact
7 Information Resources Group and then the SEG-Y gets
8 disclosed. And there is no GSI data on the hub,
9 original GSI data, and there is no reprocessed
10 programs apart from one that are on the hub.

11 Q. And why is there no GSI data?

12 A. Because of the -- we have just decided it
13 would be -- until everything was resolved or whatever,
14 we decided that we just wouldn't put it there.

15 Q. So once everything is resolved with GSI,
16 then you'll make a decision about whether to put SEG-Y
17 Data on the hub or not?

18 A. We're not putting -- SEG-Y Data doesn't go
19 on the hub.

20 Q. Okay.

21 A. So we're not -- and I'm retiring in July, so
22 that decision will not be made by then. So I don't

1 know what they're -- I don't know if they will put GSI
2 there data there or not.

3 Q. Okay. But we are all waiting for the issue
4 to be resolved; is that right?

5 A. Yeah. Any issues with GSI, yeah.

6 Q. And so on the Arc Hub, and the C-NLOPB also
7 doesn't record how many times a specific seismic
8 survey is accessed; is that right?

9 A. I think there's a number -- I think we do
10 record the number of hits on a particular program but
11 we don't record -- we don't have the ability to record
12 who was actually hitting it.

13 Q. Did the C-NLOPB consider a plan to make
14 nonexclusive data available online in digital format
15 in the late '90s into the mid-2000s?

16 A. I think there was a discussion. There was
17 multiple discussions at the time.

18 Q. And that was to do something alongside the
19 C-NSOPB to have some sort of Shared Data Repository?

20 A. That's correct, yeah.

21 Q. The intention at the time was to make all
22 sort of Seismic Data available that had gone past the

1 expiry of the Privilege Period under the Accord Acts
2 available in that manner?

3 A. That's as far as I know. I wasn't involved
4 directly in those discussions. It was just I heard
5 what was happening around -- from the time.

6 Q. Sir, why did that plan not proceed?

7 A. As far as I know, one of the oil companies
8 didn't want to proceed with it.

9 Q. Okay. And that wasn't GSI because GSI is
10 just a seismic company?

11 A. Yep.

12 Q. And do you know why that was that they
13 didn't want to proceed?

14 A. No.

15 Q. Do you think that the C-NLOPB has the
16 discretion to proceed with such a plan?

17 A. For Shared Data Repository or to disclose
18 the information?

19 Q. Shared Data Repository.

20 A. I'm not sure.

21 Q. And why are you not sure?

22 A. Because I haven't researched it. I do know

1 we have the ability to disclose the information, and
2 we do so through the hub, but that was -- so that
3 was -- I think that was a situation where the
4 operators would submit the information to a hub and
5 then we would pull -- we would set disclosure and
6 there was a whole back-end piece of that. So...

7 Q. So how do you come to know what can be
8 disclosed or what can be requested in a submission?
9 How do you have that information?

10 A. From the Accord Act and the guidelines.

11 Q. Okay. And so you review it yourself and
12 determine that?

13 A. Not necessarily. In relation to disclosure,
14 I would have been reviewing that, but in regards to
15 submission, there's a data management group that now
16 looks at that along with the Resource Management and
17 the Exploration Departments.

18 Q. Okay. So those are separated?

19 A. Yes.

20 Q. Sir, you have, at the end of your initial
21 Witness Statement, a map showing GSI and non-GSI
22 Seismic Data in the Offshore Areas of Newfoundland and

1 Labrador.

2 A. Yes.

3 Q. Sorry, we are just going to pull it up for
4 you. The First Witness Statement. The Annex. Okay.
5 I think I'm looking for the initial Witness Statement
6 map. Sorry.

7 So we have a series of maps here, sir. Did
8 you create these maps?

9 A. Pardon me? I didn't hear your question.

10 Q. So there's a series of maps attached to your
11 Witness Statements.

12 A. Yes.

13 Q. Sir, did you create the Maps?

14 A. I was involved in the creation of those
15 maps. I didn't actually create them myself, but I did
16 review them after the fact.

17 Q. Okay. And what did you review about them?

18 A. To make sure that the data was consistent
19 with what I had requested be put on the map.

20 Q. And you requested that the maps be created?

21 A. Yes.

22 Q. Did you discuss that at all with Mr. Dixit

1 or Mr. Makrides, because you all have maps that have
2 been created for your Witness Statements in this
3 proceeding?

4 A. I did not discuss with Mr. Dixit or
5 Mr. Makrides about any of this.

6 Q. So you all independently came up with the
7 idea to have maps created for your Witness Statements?
8 Is that what I'm to understand?

9 A. I create -- I came up with these maps.

10 Q. Who else worked on the map?

11 A. There was one of the girls in the data
12 management group.

13 Q. Who is that?

14 A. Danielle Deere.

15 Q. And so, was she the one that was actually
16 creating the map under your instructions?

17 A. Yes. And I would have reviewed the
18 underlying data that went along with them.

19 Q. Okay. And did you determine whether any of
20 the companies that had submitted the Seismic Data
21 actually continued to maintain that data for sale or
22 license?

1 A. No.

2 Q. And so it's possible that some of the
3 companies have actually abandoned the Seismic Data?
4 They have decided not to maintain and store it any
5 longer for licensing?

6 A. Well, if they didn't maintain it for any
7 further, they would be required to submit it back to
8 the C-NLOPB, so we would have a copy of it.

9 Q. Right. But it wouldn't necessarily be
10 available for licensing in the market?

11 A. Correct.

12 Q. And if we scroll through the maps here, sir.
13 On Annex II A, sir, we see GSI 2D and 3D Seismic Data
14 offshore, and we see a lot of colors because there is
15 a lot of different surveys that GSI had done over
16 the years in those areas; is that right?

17 A. Yes. Yep. Yes.

18 Q. And in Annex 2B we see non-GSI data as green
19 lines and GSI 2D data as blue lines; is that right?

20 A. Correct. Yep.

21 Q. So you would agree with me that there is not
22 complete overlap there; right?

1 A. As far as from looking at this map, yes, I
2 would agree with that. But I don't think the lines
3 necessarily have to overlap to show the information.

4 Q. And are we seeing, in the top right-hand
5 corner, what -- what land mass is that?

6 A. Greenland.

7 Q. Okay. So some of the data actually goes
8 quite close up to Greenland. Do you see that?

9 A. Yes. Yes, I do.

10 Q. And so is that actually in Greenland's
11 territory, or is that in Canada's territory?

12 A. That's a good question. It is outside of
13 the C-NLOPB, but it just information. It's the
14 shotpoint data that we have.

15 Q. So, in other words, GSI was required to
16 submit data outside of the Canadian waters near
17 Greenland to the Canadian Government for it to
18 disclose?

19 A. They would have been required to submit the
20 program number, the program information, yes.

21 Q. And that's available for disclosure now?

22 A. I'd have to double-check on some of those.

1 Just because we have the seismic shotpoints and
2 location of the lines doesn't necessarily mean we have
3 the lines or that we would disclose them.

4 Q. I just want to understand why it is that
5 Canada believes that it has the jurisdiction to have
6 data that is outside of those bounds. Do you know?
7 It was just part of the program?

8 A. No.

9 Q. Okay.

10 A. Part of the program. Because those lines
11 might have started on the tip of Labrador and went
12 north.

13 Q. And did you verify these maps to ensure they
14 were completely accurate?

15 A. These were essentially as accurate as they
16 need to be at this scale. This was just to
17 show -- this was just simply to show where the
18 information lies. They weren't meant for
19 interpretation or for anything further than that.

20 Q. Okay.

21 MS. LEMMENS: If I could have a few minutes
22 with my team just to ensure that I've completed. I

1 don't expect to be long, if I come back.

2 PRESIDENT WALLGREN-LINDHOLM: Yes. That
3 would be my question, that you anticipate finishing in
4 a little bit?

5 MS. LEMMENS: Yes.

6 PRESIDENT WALLGREN-LINDHOLM: And then we'll
7 take a proper break.

8 MS. LEMMENS: I was just wondering if I
9 could liaise with the rest of my team just before I
10 close out.

11 PRESIDENT WALLGREN-LINDHOLM: Yes. I
12 understood that.

13 Okay. So you take five minutes.

14 MS. LEMMENS: Yes.

15 PRESIDENT WALLGREN-LINDHOLM: Yeah. Sure.
16 Thank you.

17 MS. LEMMENS: Thank you.

18 Mr. Bennett, I'm just going to take a
19 five-minute break and then I would be back.

20 THE WITNESS: Okay.

21 PRESIDENT WALLGREN-LINDHOLM: I believe
22 Mr. Luz wants to say something.

1 MR. LUZ: Yes, Madam, Chair, I'm wondering
2 if Claimants would agree to a 10-minute break just so
3 that I can also prepare a possible redirect and so we
4 don't have to have another -- or are we going to take
5 a break after? Oh, I see. Okay. Yes. If you are
6 just going to take a five-minute break --

7 MS. LEMMENS: If you need 10 minutes so that
8 we can just proceed into redirect --

9 PRESIDENT WALLGREN-LINDHOLM: Then we could
10 take a 15-minute break and then come back.

11 MR. LUZ: If that's okay with the Tribunal,
12 that would give a little bit more time.

13 PRESIDENT WALLGREN-LINDHOLM: That is
14 absolutely, okay.

15 And, Mr. Bennett, then, we will break for
16 15 minutes, 1-5, and I wish to remind you that you
17 should not discuss your testimony with anybody. And
18 preferably, if you can, just stay in your office and
19 we shall revert in 15 minutes. Okay. That means that
20 you are sequestered. I'm sure that you know the term.

21 THE WITNESS: Yeah.

22 PRESIDENT WALLGREN-LINDHOLM: Yes. Thank

1 you very much. Thank you.

2 THE WITNESS: Okay.

3 (Brief recess.)

4 PRESIDENT WALLGREN-LINDHOLM: Let me take
5 this opportunity to ask, do we have any new arrivals
6 today?

7 MS. TABET: Madam President, I would like to
8 introduce Mr. Barry Sookman who has filed Reports in
9 this arbitration. He will be joining us.

10 PRESIDENT WALLGREN-LINDHOLM: Yes. Okay.
11 Welcome.

12 And on Claimants' side?

13 MS. LEMMENS: Yes. We just had the arrival
14 of our Canadian Law Experts. We have Prof. Nigel
15 Bankes, I believe, at the very end.

16 PRESIDENT WALLGREN-LINDHOLM: Yes.

17 MS. LEMMENS: And then we have Dr. Cameron
18 Hutchison as well from the University of Alberta that
19 has also just arrived, and I believe he's in the
20 middle here.

21 PRESIDENT WALLGREN-LINDHOLM: Yes. Okay.
22 You're very welcome, but we will still now continue

1 the testimony of Trevor Bennett.

2 Thank you very much.

3 Could we invite Mr. Bennett to reappear on
4 the one screen that we have here. In the break next
5 time, we could check the other screen here.

6 (Witness reappeared on videoconference.)

7 PRESIDENT WALLGREN-LINDHOLM: Welcome back,
8 Mr. Bennett. I will now ask whether Ms. Lemmens
9 wishes to pursue her cross-examination.

10 MS. LEMMENS: I did pursue it, but it is now
11 complete.

12 PRESIDENT WALLGREN-LINDHOLM: It is. I see.

13 Okay. Thank you.

14 The cross-examination having been completed,
15 I shall ask Mr. Luz whether he would like to redirect?

16 MR. LUZ: Yes, please, Madam Chair.

17 PRESIDENT WALLGREN-LINDHOLM: Okay. So
18 please go ahead.

19 MR. LUZ: Thank you.

20 REDIRECT EXAMINATION

21 BY MR. LUZ:

22 Q. Mr. Bennett, I'm not sure which direction

1 I'm looking at, but I'll probably just look at my
2 screens.

3 Do you recall the questions from Ms. Lemmens
4 regarding Secondary Submissions and you referred to
5 a -- I believe you called it Released G&G Reports was
6 what you'd said?

7 A. Yes.

8 Q. Can you explain to the Tribunal what you
9 meant by this publication Released G&G Reports?

10 A. Oh, that's a listing that we would have
11 created for all the programs that would be available
12 from the C-NLOPB that had passed their relevant
13 disclosure or Privilege Period.

14 Q. I'm going to ask to pull up Exhibit R-516.
15 And it's entitled: "Released Geophysical and
16 Geological Reports Newfoundland Offshore Area
17 March 1996."

18 Is this one of the publications you were
19 just referring to?

20 A. Yes, it is.

21 Q. And where would one have got this
22 publication in March 1996?

1 A. That one would have been available from the
2 Board, and I'm not sure if it was on our website at
3 that time or not.

4 Q. And would it have been put on the website
5 later?

6 A. It is available. It was available on the
7 website, yes.

8 Q. And are there subsequent publications of a
9 similar nature available on the Board's website?

10 A. Currently the hub, the data hub outlines
11 that same information.

12 Q. Okay. Can you explain to the Tribunal in a
13 little bit more detail what this kind of publication
14 allows people to look at and consult?

15 A. Essentially a catalog of all the information
16 that we have available for disclosure, so it lists
17 where the program was, who acquired it, the release
18 date, the date it was acquired, the date it was
19 released. I think it also had the date it was
20 completed, and that covered geophysical, geological,
21 and I think we also had well information on there as
22 well.

1 Q. Okay. And this included what the Board
2 referred to -- and I think you referred to in your
3 testimony as "data acquisition"?

4 A. Yes. Any acquired data. Data that would be
5 acquired under the authorization that was provided.

6 Q. Okay. Can I point you to Page 32 of the
7 PDF, which is Page 28 of the document. And there are
8 four entries there. The first one starts with Mobil
9 Oil, and then there's four entries: GSI, Husky Oil,
10 Petro-Canada, Parex and there is various columns. Can
11 you explain to the Tribunal what all of these codes
12 and contents and complete -- just explain what all of
13 this means, if you can.

14 A. Right. So the Operator is the Company that
15 would have acquired the information. So in the case
16 of Mobil, you'll see that has an E at the end of it on
17 the program number, so that would be an exclusive
18 program that Mobil Oil contracted.

19 The "86" in the beginning of the program
20 number would have indicated that it was a pre-Board
21 Application. The "27" is that it was reprocessed.
22 The "M003" is the code that we would have used for

1 Mobil, and the "019" would be the 19th program.

2 This one and a -- so then there was a date
3 completed. The lats and longs of the program, the
4 number of kilometers, and the type. So that was a 3D,
5 and then whether or not we have Mylar and the
6 reprocessing, the -- basically it's the contents of
7 what the information would be.

8 Q. Can you explain the next entry? GSI?

9 A. All right. So then GSI is the Operator.
10 The "86" is the same. It is pre-Board. The "24" is a
11 geophysical program, so that was an acquisition. The
12 "G0005" would be assigned to GSI, and the "11" would
13 be the 11th program, and the "P" would be a spec
14 program. And then again the kilometers, date
15 completed, the lats and longs of the program, and the
16 type of information.

17 Q. When you say "P" and you said "spec program"
18 meaning?

19 A. That's the P. That is spec program. So
20 that's the nonexclusive. That's the one that they
21 would have had for sale.

22 Q. Okay. And then under "GSI," there is three

1 entries for Husky Oil, Petro-Canada, and Parex. Can
2 you explain what those three entries mean?

3 A. Right. So it's the same thing, we've
4 got -- Husky would be the "H006." And then it would
5 be the fourth program, the DA would have indicated
6 that it was a data acquisition, or a data purchase.

7 So the other items -- so H006 would be
8 Husky, the "27" is that it was a reprocessed or a data
9 acquisition, and then in the next one we have P028
10 would be for Petro-Canada, the P49 would be for Parex,
11 and then over in the contents part, you would see that
12 it was an interpretation of data purchased from the
13 original GSI programs. So it lists those programs.

14 Q. All right. And so these were data
15 acquisitions that GSI has described as Secondary
16 Submissions?

17 A. Yes. That would be. From my understanding
18 what Secondary Submissions are, yes, that's what these
19 would be. So these would be programs that Husky and
20 Petro-Canada and Parex would have applied, assume from
21 an Application for program without fieldwork because
22 these were all pre-Board as well.

1 Q. Okay. Thank you.

2 A. And we would have no Mylar for those.

3 Q. Okay. Thank you.

4 On a different topic, Ms. Lemmens showed you
5 an internal Board memo from October 5, 1998. It was
6 Exhibit C-480.

7 Do you recall that?

8 (Overlapping speakers.)

9 A. Yes, I do.

10 Q. And I don't recall if you had the chance to
11 read it, but if you could read it and provide the
12 Tribunal with your understanding of what this means?

13 A. So, essentially, the way I see this is that
14 GSI sent in an opinion to our legal -- our -- the
15 legal counsel would be reviewing it, discussing it
16 with counterparts C-NSOPB and the NEB, and that GSI
17 felt that the information should be governed by the
18 Federal Access to Information Act as opposed to the
19 Accord Act for disclosure.

20 Q. And it also refers to GSI's position on
21 copyright?

22 A. Yes.

1 Q. Okay. Do you recall that Ms. Lemmens asked
2 you a question about whether the Board had responded
3 to GSI's position?

4 A. Yes. I think. Yes.

5 Q. And I think it was suggested to you that the
6 response -- I think -- I don't have the exact quote in
7 front of me, but it was suggested to you that it was
8 years later?

9 A. Yes. I think she said there was a 2010
10 opinion.

11 Q. Right. I'm going to refer you to -- to
12 Paragraph 7 of your Rejoinder Report and ask you to
13 read it and see if that refreshes your memory.

14 A. Yes, the Board did, yeah. So, that's the
15 one -- I think that might be the one that I was
16 thinking of, but I wasn't sure, but --

17 Q. And the footnote that you cited, it is
18 Exhibit R-274. Can we pull that up and you can take a
19 look at it and see if that's the one you were thinking
20 of.

21 Go to next page. Yeah. Thank you.

22 A. Yes. That's the one I was thinking of.

1 Q. Okay. Thank you, Mr. Bennett. I don't have
2 any other questions.

3 MR. LUZ: Madam Chair, I don't have any
4 other questions.

5 PRESIDENT WALLGREN-LINDHOLM: Thank you very
6 much.

7 Mr. Bennett, Trey Gowdy, the gentleman to my
8 right seen from me has a couple of questions for you.

9 THE WITNESS: Okay.

10 QUESTIONS FROM THE TRIBUNAL

11 ARBITRATOR GOWDY: Good afternoon,
12 Mr. Bennett.

13 If we could pull up your Statement just so
14 you can see it. You may have it in front of you,
15 RWS-02, in particular, Paragraph 28. You let me know
16 when you have that.

17 THE WITNESS: Yes, I've got it.

18 ARBITRATOR GOWDY: Second to-the-last
19 paragraph, the last sentence: "The Applicant agrees
20 to use these materials in a manner consistent with
21 those laws."

22 Do you see that?

1 THE WITNESS: Yes, I do.

2 ARBITRATOR GOWDY: And "laws," plural, would
3 be modifying what?

4 THE WITNESS: I assume it would be the
5 intellectual property and copyright in this particular
6 case, I would think.

7 ARBITRATOR GOWDY: Okay. And if you were on
8 notice, either active or constructive, that a borrower
9 of this information or data was using the materials in
10 a manner potentially inconsistent with one of those
11 laws that you made reference to, what would you have
12 done?

13 THE WITNESS: I don't know what we would
14 have done. I'm not sure.

15 ARBITRATOR GOWDY: Well, the reason I
16 ask -- and I'm looking, I guess, at the timestamp
17 13:51:21 in response to a question. I don't know who
18 asked the question. I think you said: "I guess the
19 Board didn't or we would have done something
20 different, I would assume," and I'm wondering what you
21 would have done differently.

22 THE WITNESS: I'm not sure what we would

1 have done. We would have had to -- I assume we would
2 have discussed it with legal and see what could be
3 done.

4 ARBITRATOR GOWDY: Do you know what the
5 range of options would have been?

6 THE WITNESS: We could have stopped
7 disclosing information to that requestor.

8 ARBITRATOR GOWDY: Do you recall having
9 conversations about doing that?

10 THE WITNESS: No, I don't.

11 ARBITRATOR GOWDY: Did you yourself consider
12 doing that?

13 THE WITNESS: No, because I don't think that
14 we were using -- I don't -- we didn't have any
15 information to say that any requestor was using it
16 outside the laws.

17 ARBITRATOR GOWDY: I guess my question was a
18 little bit different. If you were on notice that
19 someone believed the borrowed material was being used
20 improvidently. Did you have notice that -- did
21 somebody raise the issue that that information might
22 be being used improvidently?

1 THE WITNESS: Not that I recall, no.

2 ARBITRATOR GOWDY: Nothing from GSI?

3 THE WITNESS: No, because this was based on
4 the requestor. And we disclosed it -- we disclosed
5 the information pursuant to the Accord Act, and then
6 it would be up to -- if we received any information
7 from someone else, I assume that we would have to act
8 on it after discussions with Legal.

9 ARBITRATOR GOWDY: But -- and I guess my
10 question, which I didn't state very artfully was, if
11 there was tension between the Accord Act and copyright
12 law, how would you have resolved that tension?

13 THE WITNESS: I'm not sure.

14 ARBITRATOR GOWDY: All righty. Thank you.

15 PRESIDENT WALLGREN-LINDHOLM: Thank you.
16 Nothing further.

17 MS. LEMMENS: You know what, I did actually
18 have a question.

19 PRESIDENT WALLGREN-LINDHOLM: You did have a
20 recross.

21 MS. LEMMENS: I did, but I think maybe you
22 mistook my nodding of my head with go ahead earlier.

1 So I do have a couple questions.

2 PRESIDENT WALLGREN-LINDHOLM: Yes. Well,
3 Counsel for Claimants has one more recross question.

4 RECROSS-EXAMINATION

5 BY MS. LEMMENS:

6 Q. Sir, Mr. Luz just took you to a letter in
7 1999, and we will just pull it up on the screen. It
8 is R-274.

9 Sir, this letter from the CNLOPB to GSI in
10 1999, it did not actually address the position of GSI
11 with respect to copyright; isn't that right? There is
12 no mention of copyright in this letter.

13 A. No. It just talks about the 1999 letter and
14 the Board's position.

15 MS. LEMMENS: Thank you. That's all I have.

16 PRESIDENT WALLGREN-LINDHOLM: Thank you,
17 Ms. Lemmens.

18 Mr. Bennett, I believe this concludes your
19 testimony, and you can log out. I thank you for
20 appearing today.

21 THE WITNESS: Thank you.

22 PRESIDENT WALLGREN-LINDHOLM: Thank you.

1 THE WITNESS: All right. Thank you.

2 (Witness steps down.)

3 PRESIDENT WALLGREN-LINDHOLM: Shall we take
4 five minutes to get organized.

5 MS. LEMMENS: I think if you just turn the
6 Transcript off for a moment, because we're just going
7 to have to talk to get somebody up in the table, then
8 we could do it very quickly while everybody just stays
9 in the room so that we don't lose people.

10 (Comments off microphone.)

11 PRESIDENT WALLGREN-LINDHOLM: We will then
12 take a 10 minutes' break. You look at the Report and
13 you will get organized. Fine.

14 (Brief recess.)

15 NIGEL BANKES, CLAIMANTS' WITNESS, CALLED

16 PRESIDENT WALLGREN-LINDHOLM: Prof. Nigel
17 Bankes, welcome here. Good afternoon.

18 You have been called as an Expert in this
19 NAFTA Arbitration by Claimants, and you have given an
20 Expert Report in this Arbitration, and I trust that
21 you know generally what these proceedings relate to
22 and who the Parties are.

1 THE WITNESS: I do.

2 PRESIDENT WALLGREN-LINDHOLM: Also, if you
3 have any questions or concerns in relation to the
4 procedure, please address us as the Tribunal. I will
5 introduce us in a second.

6 So to my right is Trey Gowdy, co-arbitrator;
7 to my left, Toby Landau KC. My name is Carita
8 Wallgren-Lindholm, and I'm presiding. We have
9 Geraldine Fischer as the Tribunal's Secretary from
10 ICSID, and then the Court Reporter, Dawn Larson at the
11 very end.

12 The Claimants I'm sure you're familiar with.
13 Here are Counsel for Respondent and some other
14 interested Parties including -- yes. Including also I
15 believe other Experts, and then we have online
16 attendees and also representatives from the
17 Governments of Mexico and the United States.

18 We do not administer oath in international
19 arbitration, but I would ask you to give an
20 affirmation of your independence from the Disputing
21 Parties and Counsel and of your genuine belief in the
22 Opinions expressed in your Report.

1 THE WITNESS: I so affirm.

2 PRESIDENT WALLGREN-LINDHOLM: Thank you.

3 Your testimony will be recorded and also transcribed
4 by the Court Reporter.

5 The Parties have agreed that you first make
6 a presentation of your Report, which I have here now
7 and which has been received, for up to 30 minutes,
8 whereafter, opposing Counsel, namely Counsel for
9 Canada, will cross-examine you. Thereafter, there can
10 be a redirect and maybe a recross.

11 Any -- do you need any access to the
12 computer? Do you have what you need there?

13 THE WITNESS: I have my Report, and I also
14 have the trial -- a clean copy of the trial judgment
15 in --

16 PRESIDENT WALLGREN-LINDHOLM: Okay. So
17 we're fine.

18 And then we shall see how many breaks we
19 take. And if that happens, I want to say already now,
20 lest I forget, that you are asked not to discuss your
21 Expert Report in the break.

22 Now, would you have any questions before we

1 proceed?

2 THE WITNESS: I have no questions.

3 PRESIDENT WALLGREN-LINDHOLM: Thank you very
4 much, Professor. And then I'll ask you to proceed to
5 the presentation of your Expert Report, you have
6 30 minutes.

7 THE WITNESS: Okay. Thank you.

8 (Interruption.)

9 DIRECT PRESENTATION

10 THE WITNESS: So good afternoon, Madam
11 Chair, Tribunal Members. My name is Nigel Bankes,
12 and, yes, I understand that I can make a presentation
13 relating to my Report, so this is the outline. I will
14 speak briefly about my background, and then I will
15 then turn to the two questions that Counsel asked me
16 to address, namely the legal effect of the Court's
17 Decisions in GSI and Encana, and a second question
18 relating to the interpretation principle of lex
19 specialis.

20 So in terms of my background, I have the
21 background of a Professor of Law. I taught at the
22 University of Calgary from 1984 through to June 2021

1 when I retired. I taught property law throughout my
2 career, and but also taught oil-and-gas law, energy
3 law, resources law, amongst other subjects.

4 I was the coauthor, coeditor of Canadian Oil
5 and Gas, which was the leading Oil and Gas Law
6 textbook, and I've authored many refereed articles and
7 book chapters. I have testified before the Federal
8 Court of Canada and given testimony to various
9 Parliamentary Committees.

10 And I continue to comment on developments in
11 oil and gas and energy law in Canada, and many of
12 those are reported on the ABlawg, which is the blog
13 site of my home faculty, and attached to my Report,
14 are two posts that I wrote contemporaneously on the
15 two GSI v. Encana Decisions, the Court of Queen's
16 Bench Decision and the Court of Appeal Decision.

17 While my appointment has been at the
18 University of Calgary, I have also had various
19 visiting appointments over the course of my career,
20 including a one-year period with the Department of
21 Foreign Affairs and International Trade, an adjunct
22 position at the University of Tromsø in Norway for

1 many years, and other visiting appointments.

2 So, turning then to the two questions I was
3 asked first of all to address, the legal effect of the
4 Courts' Decisions in GSI and Encana.

5 So GSI commenced 25 actions in the Alberta
6 Court of Queen's Bench against Regulators, against oil
7 and gas companies, and against a number of copying
8 companies alleging breach of copyright in marine
9 Seismic Data.

10 The case management judge, Chief Justice
11 Wittmann, ordered a trial of two issues that were
12 common to those 25 actions. The first question was:
13 What is the effect of something called the Regulatory
14 Regime on GSI's Claims, and the second question was,
15 can copyright subsist in seismic material of the kind
16 that are the subject matter of GSI's Claims?

17 So what we mean by the "Regulatory Regime"?

18 The Regime refers to the petroleum leasing
19 and regulatory statutes applicable to Canada's Arctic
20 and Offshore, and these statutes are listed in an
21 appendix to Justice Eidsvik's Decision, but, in sum,
22 there are two categories of statutes: One set of

1 statutes relating to Canada's Arctic, and these
2 statutes comprise the Canada Petroleum Resources Act,
3 which I will refer to as the CPRA, and COGOA, the
4 Canadian Oil and Gas Operations Act, which I refer to
5 as the Regulatory Statute.

6 So the CPRA deals with leasing. The COGOA
7 deals with the regulation of activities. Justice
8 Eidsvik refers to that as the Operational Statutes.

9 And then for the East Coast, we have what's
10 known as the Accord legislation. So this is
11 legislation designed to implement two political
12 Accords, one Accord between Canada and the Province of
13 Nova Scotia and the other Accord between Canada and
14 the Province of Newfoundland and Labrador, and the
15 implementation legislation is both federal and
16 provincial, is what's referred to as mirror
17 legislation.

18 And I think what is significant to note is
19 that this legislation, the Accord Legislation is based
20 upon the two Arctic statutes, and they are amalgamated
21 into a single statute that performs both the leasing
22 function and the regulatory function of those two

1 statutes.

2 And the language, there is additional
3 language in relation to the responsibilities of these
4 offshore Boards, but in terms of the substantive
5 issues that we're concerned with today, the
6 legislation is essentially identical.

7 The drafter was following the model of the
8 CPRA and COGOA with one difference, which is referred
9 to in Justice Eidsvik's Judgment, and that is that
10 there is a -- well, I'll refer to as a trumping clause
11 in the Accord legislation, which is to the effect that
12 in the event of any inconsistency between this Act and
13 other statutes, the Accord Act will prevail to the
14 extent of the inconsistency.

15 So turning now to how Justice Eidsvik
16 answered. The questions -- she answered them in
17 reverse order. So she started off, I think,
18 logically, with the copyright question: Can copyright
19 subsist in seismic material?

20 And she answered unequivocally, "yes," that
21 both raw Seismic Data and processed data meet the
22 originality, skill, and judgment tests to qualify for

1 copyright protection under Canada's Copyright Act.

2 And I should say that all the square bracketed numbers
3 are references to paragraphs in my Opinion.

4 The bundle of rights, as we know, is
5 protected -- that is protected by the Copyright Act
6 include "the sole right to reproduce or
7 reproduce -- to produce or reproduce the work or any
8 substantial part thereof in any material form
9 whatsoever -- whatever," and this conclusion was not
10 contested on appeal.

11 So we now then turn to the second question,
12 what is the effect of the Regulatory Regime on GSI's
13 copyright Claims?

14 We have already talked about what the
15 Regulatory Regime is, but some of the key elements
16 would be that persons such as GSI seeking to conduct
17 seismic activities in the Arctic or the Offshore
18 require a License or, more specifically, require a
19 License to carry out seismic operations in general,
20 and also an authorization for specific activities,
21 those Licenses and authorizations being granted in the
22 case of Arctic Regime by -- under the terms of the

1 Canada Oil and Gas Operations Act.

2 The regime requires Licensees to file
3 Seismic Data with the relevant Regulator. The NEB, as
4 it then was, for the Arctic, the offshore Boards in
5 the case of the East Coast offshore.

6 And then crucially the Canada Petroleum
7 Resources Act, Section 101 stipulates that that
8 information is privileged and the Regulators have a
9 duty not to disclose, which is the word used in the
10 legislation, this information for a period of
11 five years. So a duty not to disclose resulting
12 therefore in the material being held confidential.

13 That five-year period, that nondisclosure
14 period was intended -- and the record shows this, and
15 it's explored in detail in Justice Eidsvik's Opinion
16 and in the Court of Appeal was intended to balance
17 interests.

18 The interests of Parties engaged in the
19 acquisition of speculative seismic to be able to
20 market the results of that activity and recover their
21 Costs, and the State's interest in, as it's put in the
22 Judgment, regulating dissemination of that information

1 to others more broadly to encourage interest in the
2 resource base, to encourage others to acquire rights
3 under the Canadian Petroleum Resources Act, for
4 example, to engage in drilling exploration.

5 So while the legislation says five years, as
6 a matter of practice, the relevant Regulators extended
7 the statutory nondisclosure period -- so I'm going to
8 refer to this as the discretionary extended period as
9 follows: The National Energy Board followed a
10 practice of adding an additional 10 years for a total
11 of 15.

12 The Accord Boards followed the practice of
13 extending the nondisclosure period for an additional
14 five-year period. And then after the relevant
15 confidentiality period, the Regulators made the data
16 available to those requesting access.

17 The judgment records, as Justice Eidsvik's
18 judgment records that the NEB's practice warned of
19 possible copyright concerns associated with the
20 disclosure that it was offering. And we know that one
21 form of data, data in the form of SEG-Y was not
22 disclosed by any of the three Regulators.

1 So how did Justice Eidsvik answer the
2 questions that are being posed? She first of all
3 concluded that, at the expiration of the Privilege
4 Period, whether that's five years or as
5 extended -- that at that time the legislation
6 implicitly authorized disclosure. The legislation
7 didn't say that the Regulators could disclose, but
8 Justice Eidsvik took that as a logical corollary of
9 the fact that there was no longer a duty to hold the
10 information privileged.

11 She went on to say that, while the CPRA,
12 Section 101, does not explicitly authorize or even
13 mention copying, Section 101 -- I'm quoting
14 here -- "does not make sense" unless copying is
15 permitted. "In effect, permission to access and copy
16 is part of the right to disclose."

17 And that then led her to identify a conflict
18 between the term, the period of protection offered by
19 the CPRA and as extended by the Regulators, and the
20 term of copyright, life of author, plus, at the time
21 of the litigation, 50 years; under the current version
22 of the Act, 70 years, and that that conflict must be

1 resolved in favor of the more specific Regime, which
2 she identified as the Canada Petroleum Resources Act.

3 And it wasn't necessary, she said, for
4 Parliament to specifically indicate within Canada's
5 Copyright Act that disclosure pursuant to the Canada
6 Petroleum Resources Act was not an infringement of
7 copyright. And so the reference there is to
8 Section 32.1 of Canada's Copyright Act, which makes a
9 specific exception, for example, in relation to access
10 to information legislation, and says that a release
11 pursuant to the Access to Information legislation does
12 not constitute an infringement of copyright.

13 Justice Eidsvik said that that was not
14 necessary in this case because the conflict was
15 already resolved by the application of the principle
16 of *lex specialis*, and that had Parliament elected to
17 include a specific provision dealing with Section 101
18 of the CPRA, it would merely have been codifying the
19 common law understanding based upon the application of
20 *lex specialis*.

21 She also said that, if necessary, in
22 addition to relying on *lex specialis*, she would also

1 conclude that the Regulatory Regime created a
2 compulsory licensing system.

3 And, finally, she referred at several points
4 in her judgment to a section in the CPRA. It is
5 Section 111(2) which says that Parliament has decided
6 that, to the extent that there is a taking under the
7 CPRA, it is understood that that is to be a taking
8 without the payment of -- without the payment of
9 compensation.

10 Justice Eidsvik's language is the language
11 of confiscation. That -- the interpretation of that
12 section is contested, the breadth of it, but I think
13 the point is that she relies on it to some degree to
14 support the conclusion that she has reached.

15 There was another issue that GSI raised in
16 this part of the litigation, and that related to the
17 question of Access to Information. So I've already
18 referred to Canada's Access to Information
19 legislation. GSI said effectively that at the
20 conclusion of the Privilege Period, then Access to
21 Information, if available, should only be made
22 available under the terms of the Access to Information

1 legislation.

2 And like, I think, many, access
3 statutes -- that such statutes provide protection for
4 third-party material. Justice Eidsvik ruled that that
5 Regime would in general, be inapplicable. In other
6 words, the controlling Regime was the CPRA Regime, and
7 as she had interpreted, it allowed for disclosure at
8 the end of the Privilege Period without reference to
9 the Access to Information legislation.

10 She conceded that had it might have some
11 application in this discretionary extended period that
12 I've referred to, but, in general, it would be of no
13 application. And that brings me then to the Court of
14 Appeals Decision.

15 The Court of Appeals Decision is designated
16 by the Panel as a reserved judgment. The significance
17 of that, in the practice of the -- at the Court of
18 Appeal -- and my Opinion addresses this -- is that the
19 Panel was of the view that it was deciding a new point
20 of law in handing down its judgment. And the practice
21 of the Alberta Court of Appeal in such a case is for
22 the Panel to circulate the reason -- the draft reasons

1 for comment by the entire appellate bench.

2 There was no appeal, as we've already talked
3 about, on the question of whether or not copyright can
4 subsist. So that's taken as a given at this stage,
5 but beyond that, the Court of Appeal largely confirmed
6 the Opinion of Justice Eidsvik, in fact, did confirm
7 the Opinion of Justice Eidsvik.

8 So the Court confirmed that the legislative
9 right to disclose after the expiration of the
10 Privilege Period included by implication a legislated
11 right to copy, confirmed that any conflict between the
12 provisions of the -- the limited term protection
13 offered by the CPRA and the extended exclusive copying
14 accruing to an author under the copyright legislation
15 would be resolved in favor of the CPRA, as both more
16 recent and more specific legislation -- alternatively
17 they accepted the characterization of the CPRA as
18 authorizing a compulsory licensing scheme.

19 And they then went on to say, that while
20 Justice Eidsvik correctly interpreted the confiscatory
21 nature of the regime as taking away elements of the
22 copyrights, the entitlement that she'd already

1 identified, it wasn't necessary to consider the
2 implications of that no-compensation provision,
3 Section 111(2) that I've already referred to. And the
4 Appeal Court took the view that Justice Eidsvik's
5 analysis was not premised on her understanding of
6 Section 111(2).

7 Final point is to say that there was an
8 appeal sought, leave sought to appeal to the Supreme
9 Court of Canada. The Supreme Court of Canada denied
10 leave. We can't read anything into that other than
11 that the Court was of the view that this was not a
12 significant-enough case to justify granting leave. It
13 certainly doesn't represent endorsement of the
14 position of the Court of Appeal.

15 So that's the first question that I was
16 asked to comment on.

17 The second question was framed by Counsel
18 as: What is the Canadian legal interpretation
19 principle of the doctrine of *lex specialis*? So my
20 last few slides address that question. So *lex*
21 *specialis*, an interpretive principle, the Court may
22 apply when it identifies a conflict between the

1 provisions of different statutes, in this case of the
2 same legislature, the Parliament of Canada.

3 And it holds that in the event of a
4 conflict, the legislature must be presumed to have
5 intended that the more specific rule prevails to the
6 exclusion of the more general.

7 But what we are doing, of course, is
8 identifying, using this as an aid, what the
9 interpreter considers to be the true intention of the
10 legislature. And important to overemphasize that in
11 the broader context of Canadian approach is to
12 statutory interpretation. It is clear that you can't
13 apply this sort of principle in isolation, but only in
14 the context of what we refer to as the overall
15 prevailing approach to statutory interpretation in
16 Canada, known as Driedger's Modern Principle.

17 Driedger was the author of a standard text.

18 Summarized as: "Today there is only one
19 principle or approach, namely, the words of an Act are
20 to be read in their entire context and in their
21 grammatical and ordinary sense but harmoniously with
22 the scheme of the Act and the object of the Act and

1 with a view, I would say, to identifying the intention
2 of Parliament.

3 "So the crucial point is, it's a broad
4 contextual approach to ascertaining the intention of
5 Parliament. And in thinking about how to apply
6 *lex specialis*, the first issue, of course, is whether
7 or not one can identify a conflict between two
8 statutes of the same legislative body. And, here, the
9 Courts strongly say that there is a presumption of
10 coherence between different statutes."

11 In other words, we don't readily assume the
12 existence of a conflict. Indeed, our starting
13 proposition is that Parliament would not be
14 legislating in conflict with its own statutes and
15 that, therefore, the statutes should be able to
16 operate in parallel.

17 But the Courts have also said we can
18 identify two examples, at least two examples, of
19 conflict that may appear: One is referred to as
20 operational conflict. So operational conflict will be
21 an example where Statute A says you can do A. Statute
22 B says you can't do A., so a clear conflict between

1 two different provisions.

2 The other example is incompatibility of
3 purpose where the Courts identify that the application
4 of both statutes would cause -- would be inconsistent
5 with the purpose -- would undermine the fundamental
6 purpose of one statute; and that, therefore, it would
7 be appropriate to prefer the application of one
8 statute to the exclusion of the other statute.

9 And the Courts have also said -- so I won't
10 in this presentation go through all the cases I
11 identify and discuss in my Opinion, in the interest of
12 time, but one of the things that courts have said is
13 that, where statutes have different purposes, it may
14 be difficult to identify a conflict. Rather than,
15 where there are different purposes, the job of the
16 interpreter is to give effect to both of those
17 purposes through their different statutes.

18 But if there is a conflict, then it is
19 presumed that the legislature intended, using the
20 *lex specialis* rule, that the more specific rule should
21 apply to the exclusion of the more general. That
22 presumption would, of course, be rebutted if the

1 legislature had prescribed the different ordering. It
2 is simply a presumption.

3 So one can think of the provision in the
4 Copyright Act providing that a release of information
5 under the Access to Information Act is not an
6 infringement of copyright. One could think of that as
7 a section that describes effectively the relationship
8 between the two statutes; and, therefore, there would
9 be no need to resort to *lex specialis*.

10 We also know from the case law that
11 sometimes it can be contested as to which is the more
12 specific and which the more general. That,
13 ultimately, might be a question of judgment, and the
14 Opinion refers to one example of that.

15 So in sum, *lex specialis* is simply a
16 principle. It must be read with coherence in mind,
17 and it must be read and applied taking into account
18 this broad approach, contextual approach of Driedger.

19 And that, perhaps, as a result of all of
20 this, it is actually, I think, difficult to say in
21 advance what will be the outcome where there is a
22 suggestion of alleged incompatibility between

1 different statutory regimes.

2 So that concludes my introductory remarks.

3 Thank you, Madam Chair.

4 PRESIDENT WALLGREN-LINDHOLM: Thank you very
5 much, Prof. Bankes. I think that before we proceed to
6 cross-examination, I believe that co-arbitrator Toby
7 Landau has a question.

8 QUESTIONS FROM THE TRIBUNAL

9 ARBITRATOR LANDAU: Thank you very much,
10 Prof. Bankes.

11 Forgive me for asking a question right at
12 the outset before the Counsel have had their turn to
13 ask you questions, but I just want to understand the
14 scope of the testimony, the Expert testimony, that
15 you're putting before us. And the reason I ask the
16 question is that you've appended to your Report two
17 critiques, which are part of the blog, I think, that
18 you publish on.

19 THE WITNESS: Correct.

20 ARBITRATOR LANDAU: And they are a critique
21 of the First Instance and critique of the Court of
22 Appeal. You reference them in your Report, but you

1 don't return to them.

2 THE WITNESS: Correct.

3 ARBITRATOR LANDAU: And, of course, this is
4 a product of the questions that you've been asked to
5 answer. What I'm not clear about at the moment is
6 we've got -- you've helpfully set out for us the
7 principles, I think, and you're doing it, as far as
8 you're concerned, in a neutral way, but we're not
9 hearing from you in your Report any of the criticisms
10 or the application of those principles in this case.

11 So I just want to clarify, in order to
12 understand where we go from here, what the purpose is
13 or you saw the purpose of your testimony.

14 Was it to draw attention to those critiques
15 as part of your testimony or not?

16 THE WITNESS: Thank you for the question.

17 So my testimony was intended to respond to
18 the two questions that I was asked. I added the two
19 blogs, I think, in the interest of disclosure on the
20 basis that I would have thought that Counsel might be
21 upset if they found that I had already commented on
22 the cases without disclosing that in the Report.

1 ARBITRATOR LANDAU: That's clear. Thank
2 you.

3 PRESIDENT WALLGREN-LINDHOLM: Thank you.

4 Can we then proceed to cross-examination?

5 MS. DEUTSCH: Certainly. We have paper
6 copies available of the material, and I will introduce
7 myself right after that. But just as a preliminary
8 point.

9 THE WITNESS: I better move over here.

10 MS. DEUTSCH: Would you like some paper
11 copies of the material to follow along?

12 THE WITNESS: Yes, I would please.

13 MS. DEUTSCH: Okay.

14 THE WITNESS: Will you be asking the
15 questions, Ms. Deutsch?

16 MS. DEUTSCH: Yes.

17 THE WITNESS: I don't want to get that
18 screen in the way.

19 CROSS-EXAMINATION

20 BY MS. DEUTSCH:

21 Q. Good afternoon, Prof. Bankes. My name is
22 Julia Deutsch, and I'm Counsel for Canada in these

1 proceedings.

2 I will be asking a series of questions, but
3 before I get to that, I want to go over a few
4 household rules. First, to the extent that your
5 answers to my questions are yes or no, I'd appreciate
6 if you would answer that way for the record. And
7 throughout my questioning, I'm going to be using the
8 abbreviation "ABQB" to represent the Alberta Court of
9 Queen's Bench, as it then was.

10 Finally, if there is anything unclear in
11 what I'm asking you, please let me know, and I will do
12 my best to rephrase or reframe.

13 Does that sound agreeable to you?

14 A. It does.

15 Q. Excellent. Let's begin.

16 MS. LEMMENS: Sorry, I just want to confirm
17 that the witness can answer a question in whichever
18 way he feels is appropriate, and it just doesn't have
19 to be yes or no.

20 MS. DEUTSCH: Oh, certainly. Only if the
21 answer is "yes" or "no" anyway.

22 MS. LEMMENS: Thanks.

1 MS. DEUTSCH: We just appreciate those
2 words. Thank you.

3 BY MS. DEUTSCH:

4 Q. Let's first turn to Paragraph 11 of your
5 Report, which is at Tab 1. We can pull that up on
6 screen as well. I understand that you are an emeritus
7 professor at the University of Calgary, where you held
8 the Chair in Natural Resources Law from 2008 until
9 your retirement in 2021; correct?

10 A. Yes.

11 Q. In that same paragraph, you note that your
12 CV appears as Appendix A to this Witness Statement.

13 Just to be clear, you were aware that you
14 were presenting an Expert Report; right?

15 A. Yes.

16 Q. Thank you. And would it be fair to say that
17 your expertise is in Natural Resource and Energy Law?

18 A. I claim to have expertise in natural
19 resources and Energy Law but also other areas of law.
20 I indicated in my opening remarks that I taught
21 Property Law, for example, throughout my career.

22 Q. Right. But you're not representing yourself

1 as a Copyright Law Expert today?

2 A. I am not.

3 Q. Thank you.

4 Let's turn now to Appendices B and C to your
5 Report. Those are your blog posts on the Decisions by
6 the ABQB and the ABCA as published in the blog
7 "ABlawg"; correct?

8 A. Correct.

9 Q. So they appear exactly as they were
10 published?

11 A. Correct.

12 Q. Let's turn back now to your Report at
13 Paragraph 2. You note that you corresponded
14 with -- we can pull that up on screen
15 actually -- Mr. Paul Einarsson around the time of the
16 ABCA -- so Alberta Court of Appeal -- Decision;
17 correct?

18 A. Correct.

19 Q. Did you also advise Mr. Einarsson on a
20 potential Request for Leave to Appeal to the Supreme
21 Court?

22 A. I don't recall doing so.

1 Q. But you provided him with your blog post on
2 the ABCA Decision; correct?

3 A. Yes.

4 Q. That same document currently appears as
5 Appendix C to your Report?

6 A. Yes.

7 Q. Thank you.

8 Let's proceed to Paragraph 5 of your Report.
9 You indicated -- and we can pull that up on screen.
10 Thank you.

11 You indicated that you provided comments to
12 GSI's Counsel on GSI's draft factum to the ABCA;
13 correct?

14 A. Correct.

15 Q. So you're familiar with GSI's submissions to
16 the ABCA?

17 A. At the time I provided those comments, I
18 would have been. I have not gone back and reviewed
19 that material since.

20 Q. So you have not read the materials that
21 appear on this record, R-656?

22 A. I'm not sure what record R-656 is referring

1 to.

2 Q. Well, if it helps, it's at Tab 5 of the
3 binder, but thank you. I've taken note.

4 Are you aware that your blog post in which
5 you criticized the ABQB Decision was referenced twice
6 in that submission, R-656?

7 A. I am not.

8 Q. Would you like to take a look?

9 We can pull it up. It is Tab 5, and we can
10 pull it up on screen here for you. So let's go to
11 Paragraph 55, please, PDF Page 20.

12 Do you recognize the extract up on screen at
13 Paragraph 55 citing you?

14 A. It looks to be taken from the blog, yes.

15 Q. From the ABQB blog?

16 A. Yes. Yes. It's a comment on the Trial
17 Judge.

18 Q. Correct. And that, once again, was part of
19 GSI's submissions to the ABQA?

20 A. On the basis of this, yes. But I don't know
21 when it would have been included.

22 Q. Understood. Thank you. Let's move on.

1 Prof. Bankes, on a similar note, are you
2 familiar with GSI's Leave to Appeal to the Supreme
3 Court of Canada, R-587, on this record?

4 A. I am not.

5 Q. That's at Tab 6.

6 Are you aware that GSI relied on your ABQB
7 blog post in their Leave Request as well?

8 A. I am not.

9 Q. Would you like us to take you there just to
10 see?

11 A. By all means.

12 Q. Let's take a look at the two secondary
13 sources that were submitted in that leave request.

14 They will appear on screen momentarily. R-587. And
15 the List of Authorities. Bottom of Page 21, please.

16 A. I will say in response that I have not seen
17 the Application for Leave to Appeal until now, and I,
18 therefore, have no idea that this was referred to in
19 the course of preparing the leave to appeal.

20 Q. Thank you.

21 And you do not recall discussing this matter
22 with Mr. Einarsson either, the leave to appeal?

1 A. No, I do not.

2 Q. Thank you.

3 Moving on, I'd like to make sure that I
4 understand the scope and methodology of the Opinion
5 you've provided. Let's head back to Paragraph 7 of
6 your Report. So that's at Tab 1, CER-1, and if we
7 could pull up Paragraph 7, please.

8 So these are the two questions that you
9 cited in your Report and just now in your
10 presentation. With respect to the latter question on
11 *lex specialis*, let's go to Paragraph 10 of your Report
12 and let's pull that up on screen.

13 You note that you rely on two standard texts
14 for the interpretation of statutes in Canada, and
15 that's the works of Ruth Sullivan and Pierre André
16 Côte; right?

17 A. I refer to those two texts and also say in
18 my understanding of the relevant case law.

19 (Interruption.)

20 Q. Is that because these are the predominant
21 authorities on the subject of statutory interpretation
22 in Canada?

1 A. It would be my view that those are the two
2 most authoritative texts --

3 Q. Thank you.

4 A. -- in the English language.

5 Q. Let's move on to Paragraph 19 of your
6 Report, please. So still Tab 1, and if we could pull
7 up Paragraph 19 on screen.

8 You note that the ABQB Judgment concludes
9 that Seismic Data collected and created by GSI is
10 subject to copyright; correct?

11 Those are your words.

12 A. Those are my words.

13 Q. And that conclusion was not contested on
14 appeal?

15 A. Those are also my words.

16 Q. Exactly. Thank you.

17 For clarity, let's now turn to the
18 conclusion of the ABQB at R-149. I believe that is
19 Tab 8 of your binder. That's the Judgment roll. And
20 if we could pull up, I believe it is Page 8 on screen.
21 Thank you. I can't read that so give me a moment.
22 Please scroll down.

1 So I'm just going to read it into the
2 record: "It is ordered and adjudged that, one,
3 copyright can subsist in both raw and field Seismic
4 Data and in processed Seismic Data.

5 "Two, the Regulatory Regime, as defined in
6 the Reasons for Judgment; (a), is a complete answer to
7 the Plaintiff's Claims that the Boards acted
8 unlawfully in disclosing the information and
9 documentation to the public; (b), is a complete answer
10 to whether the copying companies and other
11 organizations were entitled to receive and copy the
12 information and documentation for customers; and, (c),
13 for oil companies, establishes that there is nothing
14 unlawful about accessing or copying information from
15 the Boards, leaving open other contractual issues in
16 each case; three, costs are reserved to be spoken to
17 at a later date if the Parties are unable to agree."

18 Prof. Bankes, do you agree that the court
19 did not make a finding on whether GSI or anyone else
20 had copyright in specific seismic data?

21 A. I agree that the judgment was general in the
22 sense of talking about the eligibility of Seismic Data

1 and processed Seismic Data to qualify for the purposes
2 of copyright protection.

3 Q. Thank you.

4 So you would agree that the AB ruling that
5 Seismic Data was protected -- was that Seismic Data
6 was protected, in principle, by copyright; correct?

7 A. It is eligible to qualify for copyright
8 protection, yes.

9 Q. And, once again, there was no appeal on that
10 point; correct?

11 A. There was no appeal on that point.

12 Q. Let's linger a moment on the second finding
13 in the judgment roll if -- okay. It's up on screen.

14 Do you agree that this is the core finding
15 of the ABQB in this case?

16 A. I think I'm driven to say yes.

17 Q. Thank you.

18 Now, let's turn back to Paragraph 25 of your
19 Report. Here you summarize the legal effect of
20 Justice Eidsvik's decision on the regulatory issue
21 amounted to a confiscation of GSI's copyright and
22 other proprietary rights over its Seismic Data;

1 correct?

2 A. Correct.

3 Q. And you cite for this proposition the ABQB
4 Decision. So that is R-001, which should be your
5 Tab 2, Paragraphs 318 and 321.

6 So let's go there in succession. So first
7 at Paragraph 318.

8 Do you see the word "confiscation"?

9 It's on the screen, if that's easier,
10 Prof. Bankes.

11 A. I don't see the word "confiscation" or
12 "confiscate" in Paragraph 318.

13 Q. Thank you. And at Paragraph 321, do you see
14 the word "confiscation"?

15 A. I do not, but I also note that
16 Paragraph 322, which is part of the context for
17 looking at Paragraph 321, refers to the statute as
18 making it clear that there is no compensation for any
19 confiscation under the Act.

20 Q. Let's take a closer look at that paragraph,
21 Paragraph 322.

22 Do you see the first part of that sentence

1 where the Judgment refers to Senator Hays?

2 A. I do.

3 Q. So is it fair to say that in that particular
4 paragraph, Justice Eidsvik is referring to the
5 language used by Senator Hays in the context of a
6 Senate standing committee debate on the subject of the
7 Regulatory Regime?

8 A. The reference is clearly to Senator Hays'
9 comments, but the preface to the sentence is "as
10 pointed out by Senator Hays" suggesting, I think, that
11 Justice Eidsvik is concurring with Senator Hays'
12 assessment of the effect of the legislation.

13 Q. That's your interpretation?

14 A. That's my interpretation.

15 Q. Thank you. Does Justice Eidsvik ever define
16 the term "confiscation" in the Judgment?

17 A. No, she doesn't. But she does use the term.
18 I don't have a listing in front of me of the number of
19 times that she does use it, but it is a part of her
20 judgment. She characterizes the loss of copyright as
21 a result of the operation of Section 101 of the CPRA
22 as confiscatory.

1 Q. But that's not in the footnote that you cite
2 for that proposition in your Report?

3 A. I concede that the two paragraphs I listed
4 do not themselves refer to the word "confiscate."

5 Q. Thank you. And you would also agree that
6 the word "confiscation" does not appear in the
7 Judgment roll? Or should we go back there?

8 A. I am prepared to accept your statement.

9 Q. Thank you.

10 Finally, let's turn to the exercise of
11 statutory interpretation that was undertaken by the
12 ABQB and led to the ruling of a conflict.

13 Let's turn to Paragraph 47 of your Report.
14 So again, that is Tab 1, PDF Page 15. Thank you.

15 You say -- sorry.

16 You say that a court can only call upon the
17 principle of *lex specialis* if it has ascertained that
18 the application of Driedger's Modern Principle,
19 supported by other relevant interpretive principles,
20 leads to the identification of a conflict." I'd like
21 to ensure I understand your position in this
22 paragraph.

1 So in your view, courts may, in the spirit
2 of the Modern Principle, still identify a conflict?

3 Yes?

4 A. Yes.

5 Q. And if a conflict has been identified, a
6 court may call upon *lex specialis* to resolve that
7 conflict.

8 Yes?

9 A. It may call upon that principle. It may
10 decline to apply that principle. It may refer to
11 other principles, as a way of resolving a conflict.
12 So it is part of the armory, interpretive armory, I
13 would say, that a court may refer to in doing justice
14 to the overall contextual approach required by the
15 application of Driedger's Modern Principle.

16 So it isn't cut-and-dried; right? I think,
17 is the main point of this contextual approach. These
18 cases will be difficult by their nature.

19 Q. Understood. Let's take up Exhibit R-112 at
20 1105(6). So that is PDF Page 37. Prof. Bankes, I
21 believe that is at Tab 7 of your materials. My
22 apologies, I meant to go to PDF Pages 29 and 30.

1 Thank you. So let's take a closer -

2 A. This is Tab-- Tab 7?

3 Q. Tab 7 should be R-112, Ruth Sullivan, the
4 construction of statutes.

5 A. It is.

6 Q. Excellent.

7 So I apologize. There is a lengthy Table of
8 Contents, but it should lead you to Section 11.01,
9 Paragraph 2. Or if you prefer, it is also on screen.

10 A. I prefer the written version, if I can find
11 it.

12 Q. Take your time.

13 A. I've got 11.05. 11.01. I have it, the
14 Presumption of Coherence.

15 Q. Excellent. So just taking you to the third
16 paragraph: "If the provisions cannot apply without
17 conflict, the Courts resort to" -- sorry -- "one of
18 the conflict resolution techniques at their disposal."

19 Is that what you meant by the armory of
20 tools available? So *lex specialis*, amongst others?

21 A. That would be a similar understanding, yes.

22 Q. Excellent. So that view is consistent with

1 the view of Ruth Sullivan, in other words, your view
2 is consistent with that of Ruth Sullivan?

3 A. I would like to think so.

4 Q. In your view, it is not easy to establish
5 the existence of a conflict; correct?

6 A. That would be my view in many cases. So
7 some cases will be easy and straightforward; others
8 will be more challenging. And I guess I think that's
9 an important point to make. Yeah.

10 Q. Understood. Provisions of legislation are
11 presumed to be a coherent whole; correct?

12 A. Yes.

13 Q. However, you would agree that the
14 presumption no longer applies if there is a conflict;
15 correct?

16 A. The Presumption of Coherence, I think, along
17 with Ruth -- the Driedger's Modern Approach has to be
18 used to determine in the first place whether or not
19 there is a conflict. In other words, regard must be
20 had to the application of the Modern Approach to both
21 statutes that are under consideration.

22 Q. Let's now take a quick look at that same

1 paragraph or that same section. So "overview of
2 strategies for achieving coherence." Let's take a
3 look at the last sentence of the second paragraph.

4 A. So we're still under square bracket 3, are
5 we?

6 Q. We are under square bracket 2.

7 A. Okay.

8 Q. Oh, sorry, so I meant to say -- so square
9 bracket 2, second paragraph, second sentence.

10 If that could be highlighted on screen.

11 A. Yes, I see that now.

12 Q. Okay. And now everyone else can, as well.
13 Okay.

14 So that says: "If the provisions are in
15 conflict, then it is presumed that both provisions are
16 meant to apply in accordance --" Sorry.

17 A. "If the provisions are not --"

18 Q. "If these provisions are not in conflict,
19 then it is presumed that both provisions are meant to
20 apply in accordance with their own terms."

21 In other words, if there is a conflict, then
22 that presumption no longer applies. That's Ruth

1 Sullivan's view.

2 Is that a view that you share?

3 A. I guess I'm not sure about the question.

4 The first highlighted text is making it clear that, if
5 there is no conflict, then both provisions apply in
6 accordance with their terms.

7 Q. But if there is a conflict, then that
8 presumption is rebutted. Let's take a look at the
9 last sentence of that paragraph. The presumption of
10 overlap is rebutted by evidence that one of the
11 provisions is meant to be an exhaustive account of
12 applicable law.

13 So in other words, if the -- and read
14 together with the next sentence, if the provisions
15 cannot both apply without conflict, the Courts need to
16 apply one of the conflict resolution techniques at
17 their disposal; correct?

18 A. Yes.

19 Q. Okay. Thank you.

20 So courts can establish the existence of a
21 conflict?

22 A. Absolutely.

1 Q. But as you say, it isn't easy; right?

2 A. I say that, in some cases, it can be very
3 challenging. In other cases, it may be very
4 straightforward. Such as, if we're concerned with the
5 application of two different Limitation Periods, both
6 of which seem to speak to the same fact pattern, that
7 seems to be an easy case of conflict resolution.

8 Q. But it's, nonetheless, the business of
9 judges to attempt these challenging questions; is it
10 not?

11 A. It is.

12 Q. And is it fair to say that sometimes even
13 judges can disagree on the existence of a conflict?

14 A. Absolutely.

15 Q. In fact, I think you cite several examples
16 of this in your Report and in your presentation;
17 correct?

18 A. I do.

19 Q. For example, the broadcast reference,
20 Thibodeau, were those unanimous decisions?

21 A. No, they were split decisions in some cases,
22 badly split decisions.

1 Q. Badly split.

2 A. In the sense of 5-4 or something like that.

3 Q. So even at the highest level, judges can
4 disagree about the existence of a conflict?

5 A. Yes.

6 Q. Thank you.

7 I'm now briefly going to turn to a couple of
8 points in your presentation just now, that I just
9 wanted to get some clarity on. The first one
10 is -- and I don't know if we can pull them up on
11 screen, but do you have a hard copy in front of you?

12 A. I don't.

13 Q. Oh. We have it on screen. Slide 8, please.
14 Can you see the second-to-last bullet there?

15 A. "In the alternative, the Regulatory Regime
16 created a compulsory licensing system." Yes.

17 Q. So you agree that this was, indeed, a
18 finding in the alternative; correct?

19 A. It is a finding in the alternative but with
20 really no explanation or, with respect, coherence,
21 analysis, supporting the conclusion.

22 Q. Does it form part of the Judgment roll?

1 A. You would have to take me to the
2 Judgment roll again.

3 Q. I'm very happy to do that. R-149.

4 A. Tab. Help me, please.

5 Q. Oh, sorry. That is Tab 8.

6 A. Thank you.

7 Q. Page 8, please. Do you see the word
8 "compulsory licensing system" in the Judgment roll?

9 A. Should I?

10 Q. Would you agree that it's not there?

11 A. I agree it's not there.

12 Q. Would you agree that it then does not form
13 part of the Decision of the Judge? It's a finding in
14 the alternative?

15 A. It's clearly a finding in the alternative.
16 And, as I said, it's a finding in the alternative that
17 is not supported by detail or, I think, with much at
18 all in the way of reasoning.

19 I think if you're asking me, does it form
20 part of the ratio decidendi of the Decision, the
21 reasons for reaching the conclusion that the Court
22 reached? Then I think my answer is that the principle

1 ratio of the Judgment relates to the *lex specialis*.
2 But, given that this is stated as an alternative
3 reason for reaching the conclusion that the Court did,
4 then I think it's part of the Court's reasons for its
5 conclusion.

6 Although, as I said, this is not a
7 well-supported conclusion in the Judgment. But I
8 think the test of whether or not something is part of
9 ratio doesn't depend on the quality of the reasons
10 given for reaching the particular conclusion.

11 Q. Just to repeat my question, so this is a
12 finding in the alternative?

13 A. It's a finding in the alternative, very
14 poorly reasoned.

15 Q. Thank you.

16 Let's move on to my next point.

17 So in your -- in the same slide, the last
18 bullet, there is a discussion on the compensation
19 clause. I just want to turn briefly to R-656, which,
20 as you'll recall, is the submission of GSI to the
21 ABCA.

22 And if you could take us to Page 37 of the

1 PDF. So that is Paragraphs 143 and 144.

2 A. Could you give me the tab again, please.

3 Q. Absolutely. That is R-656. At Tab 5.

4 Sorry.

5 A. Thank you. Tab 5 and Paragraph --

6 Q. 143, 144.

7 A. Great.

8 Q. So you will recognize once again that that
9 is, indeed, an extract of your blog. And, therefore,
10 the argument that you presented today on that
11 particular section, are you presenting as consistent
12 with your position in that blog post?

13 A. I believe I am because what I'm addressing
14 here today is the question of whether or not
15 Justice Eidsvik relied upon Section 111(2) in reaching
16 her conclusion that it was Parliament's intention to
17 resolve any conflict in favor of the CPRA to the
18 exclusion of the Copyright Act.

19 In my view -- and this takes me to the
20 blog -- that is an incorrect interpretation of
21 Section 111(1) and (2) of the CPRA. But, that said,
22 the point for present purposes is that there is

1 evidence in the Judgment that Justice Eidsvik relied
2 upon that incorrect interpretation to support her
3 conclusion that the provisions of the Copyright Act
4 had effectively been overridden by the CPRA.

5 The fact that I think that is an incorrect
6 conclusion is, in a sense, beside the point. What I'm
7 trying to do today is to describe what it was that
8 Justice Eidsvik decided and why and on what basis.

9 Q. Understood. And, again, that particular
10 extract was -- formed part of GSI's submissions to the
11 ABCA, to the Court of Appeal. So in other words, the
12 ABCA considered exactly that argument; correct?

13 A. I don't believe that they did because what
14 the ABCA said right at the end of its Judgment -- do
15 we have that in the package here?

16 Q. Oh, absolutely. Yes. That is at Tab 3.
17 I'm sorry. Yeah.

18 A. Yes. So the section that I'm referring to
19 now is R-002, ground 2 on Page 32 of the
20 Judgment because there were two grounds of appeal to
21 the Court of Appeal: One ground related to the
22 consistency of -- related generally to the Court's

1 interpretation of the relationship between the CPRA
2 and the Copyright Act.

3 And there was a distinct ground as to
4 whether the Trial Court had erred in determining that
5 Section 112 of the CPRA was applicable, relevant, to
6 the question of the loss of copyright. And the
7 Court's response to that is that we don't need to
8 consider this.

9 Q. Let's take everybody to that passage,
10 actually.

11 Can we turn to Paragraph 107 of the
12 Judgment?

13 A. Could we start with Paragraph 106?

14 Q. Let's take a look at 107. And we will see
15 if -- let's tie this together.

16 A. Okay.

17 Q. So their conclusion with respect to the
18 ground that you were just mentioning is, indeed, at
19 Paragraph 107; correct?

20 A. Well, I think what I'm saying is that the
21 Court of Appeal doesn't express a view about the
22 proper interpretation of Section 111(1) or (2). What

1 they say -- and they say in 107, "irrespective of
2 those interpretations on which we offer no opinion."

3 But what they then say is that in our view,
4 Justice Eidsvik did not rely on the availability of
5 Section 112 in reaching her conclusions. They say
6 that her resulting conclusion was neither undertaken
7 nor premised on Section 111, discussed in only three
8 paragraphs of the Decision.

9 Whether or not the Court of Appeal is right
10 on that, I think there is room for a difference of
11 opinion. One can point to parts of Justice Eidsvik's
12 Judgment where she clearly does say that 111 is
13 relevant to the interpretation of Section 101(7) of
14 the CPRA, which is the provision dealing with
15 disclosure.

16 Q. Right. Just to recall the context of the
17 ABCA's review, their ultimate finding was that Justice
18 Eidsvik committed no reviewable errors; correct?

19 A. That's certainly the case with respect to
20 the first question. And with respect to the second
21 question, they declined to answer the question.

22 Q. They declined to answer the question because

1 Justice Eidsvik made a correct finding with respect to
2 principles of statutory interpretation? Is that not
3 what that paragraph says?

4 A. I think what this paragraph is saying is
5 that we don't need to offer an opinion on the proper
6 interpretation of Section 111 because it is our view
7 that Justice Eidsvik didn't rely on Section 111 in
8 reaching her conclusion. It was neither undertaken
9 nor premised upon Section 111.

10 Q. And that finding was found to be correct on
11 a standard of correctness; correct?

12 A. The Court's conclusion under Ground 2 is
13 that we will not answer that question and here are the
14 reasons why we will not answer that question.

15 Q. Because it's unnecessary?

16 A. I beg your pardon?

17 Q. Oh, sorry.

18 Because it's unnecessary to do so, given
19 their answer to the first ground?

20 A. Yes, and because it was not part of the
21 informing conclusions, in their view, for Justice
22 Eidsvik's opinion.

1 6 Q. Thank you very much.

2 MS. DEUTSCH: That concludes my questions.

3 THE WITNESS: Thank you.

4 PRESIDENT WALLGREN-LINDHOLM: Thank you very
5 much.

6 Will there be redirect, and will there be a
7 break?

8 MS. LEMMENS: I have no further questions of
9 the Expert.

10 PRESIDENT WALLGREN-LINDHOLM: Okay.
11 Mr. Landau has a question.

12 QUESTIONS FROM THE TRIBUNAL

13 ARBITRATOR LANDAU: Mr. Bankes, I just want
14 to confirm, essentially, where you get to in your
15 testimony that you have presented to us. I do this
16 treading a little carefully because of the question I
17 asked you at the outset about the questions you have
18 actually been asked to answer and what seems to be
19 what you've not been asked to address, which are the
20 blog posts attached to your Report.

21 As I understand it -- but you'll correct me
22 if I've not understood this correctly -- you have

1 explained to us what a conventional approach would be
2 as a matter of Canadian law to resolve the
3 reconciliation of what might be competing or
4 inconsistent statutes or Regulatory Regimes.

5 And you've done so by reference to what
6 you've said are the standard texts, for example, the
7 one edited by Sullivan. And I've understood that the
8 approach that is set out in Sullivan has a number of
9 steps. The first step is to identify a conflict
10 broadly. The second one is to then apply a number of
11 different techniques to address that conflict.

12 And I know that you take issue outside of
13 your Report with the first step, which is whether or
14 not a conflict was properly identified here. And as I
15 understand it, you do so by reference to what is the
16 scope of disclosure under Section 101.

17 But, putting that aside, am I right in
18 saying that the takeaway from all of this is that what
19 the Judge did here at first instance was conventional
20 in terms of approach? The Judge firstly identified
21 whether or not there was a conflict, and having found
22 a conflict, the Judge then applied, in your

1 terminology, a weapon in her armory to resolve it,
2 which happened to be *lex specialis*, as well as an
3 alternative.

4 I know you don't agree with how she did it,
5 but is it right then to conclude that her approach was
6 within the realms of a conventional approach as a
7 matter of Canadian law?

8 THE WITNESS: I think my one qualification
9 to that will be the speed with which Justice Eidsvik
10 found there to be a conflict and whether or not she
11 fully applied the contextual approach of Driedger's
12 Modern Rule to find that conflict.

13 And I guess what I have in mind there is
14 that there is no exploration of alternative scenarios
15 in which these statutes might have lived together.
16 And so, for example, one might say that the central
17 piece of the CPRA is a duty of nondisclosure and
18 confidentiality.

19 The central piece of the Copyright Act isn't
20 confidentiality at all. Copyright doesn't care about
21 confidentiality. It is concerned with the exclusive
22 right to copy and the licensing of that right to copy.

1 So there's a -- so I -- it's that -- yes, on the face
2 of it, the Court is applying the methodology and
3 saying I must find a conflict first, and then think
4 about a way, a part of the armory, to resolve that
5 conflict.

6 ARBITRATOR LANDAU: But that -- the way
7 you've put it, if I can just come back on that,
8 suggests that what you're really taking issue with is
9 not so much methodology as the merits of the Decision.
10 So what the Court has done is it's asked itself the
11 question, is there a conflict? And then it's asked
12 itself, having answered that first one in the
13 affirmative, then it's applied an approach to resolve
14 it.

15 And your testimony, as I understand it, is
16 that you would have decided that first step
17 differently, but the question I really have is, are we
18 dealing with something that is completely bizarre and
19 perverse and unexpected and inexplicable as a matter
20 of Canadian law, in terms of approach, or are we
21 dealing with a case which might look like a
22 recognizable methodology, although you disagree with

1 the result?

2 THE WITNESS: So my response to that is,
3 yes, I agree there's a distinction between
4 identification application of Methodology and its
5 actual application. But I think there's a point at
6 which one can say that the identification of the
7 methodology is so perfunctory it isn't really an
8 application of what is the agreed methodology,
9 mathematical approach to the interpretation of
10 statutes and the identification of a conflict.

11 ARBITRATOR LANDAU: I see. All right. I
12 have understood that. Thank you.

13 PRESIDENT WALLGREN-LINDHOLM: Thank you.
14 And now Mr. Trey Gowdy will ask you a couple of
15 questions.

16 ARBITRATOR GOWDY: Good afternoon,
17 Professor. I spent three years being asked questions
18 by law professors, so I just find it irresistible the
19 opportunity to reverse roles.

20 Paragraph 317 of the Trial Court's decision,
21 for want of a better way of phrasing it, can you
22 identify that and then I want to ask you a question

1 about it.

2 THE WITNESS: 317, sir?

3 ARBITRATOR GOWDY: Yes, sir. 317. Yes,
4 sir. Of the Opinion.

5 PRESIDENT WALLGREN-LINDHOLM: Could I ask
6 that it be pulled up here too?

7 ARBITRATOR GOWDY: I think it is Page 60 of
8 the Opinion if that helps anyone.

9 THE WITNESS: So this is part of the
10 discussion of compulsory license?

11 ARBITRATOR GOWDY: Right. Do you have it in
12 front of you?

13 THE WITNESS: I do.

14 ARBITRATOR GOWDY: All right. So the
15 sentence that begins: "In my view," and then it
16 continues: "GSI has been forced to grant in effect a
17 compulsory license to permit its offshore Seismic Data
18 to be released and used by the public. The Regulatory
19 Regime provides for this as discussed above. GSI may
20 not have liked to do so, it certainly never consented,
21 and it may be unfair, but it was the Regulatory
22 Regime."

1 I'm trying to -- I don't want to get into
2 discussion of the debate between Oliver Wendell Holmes
3 and Judge Learned Hand, but the word "unfair" appears
4 twice in this Opinion. What are we to make of that?
5 It is also two paragraphs down that the Judge herself
6 uses the word "unfair." What, if anything -- and I
7 guess, to put a finer point on it, is there a point
8 where unfairness rises to the level of a denial of
9 justice?

10 THE WITNESS: My understanding of Justice
11 Eidsvik's use of the word "unfair" is linked to her
12 use -- I may have got the paragraphs incorrect, but
13 the use of the word "confiscation." So I think she
14 identifies that the result that she has arrived at,
15 which is the loss of copyright protection as a result
16 of her resolution of the conflict is, in some sense,
17 unfair to persons in the position of GSI.

18 But I think it is also linked to her
19 discussion of 111(2) because she says, in a sense, the
20 Parliament of Canada contemplated this unfairness when
21 it said that takings could occur, including takings of
22 copyright, but that they would be noncompensable.

1 ARBITRATOR GOWDY: I suppose with any piece
2 of legislation, there's a group that considers that
3 legislation to be unfair. I'm not aware of many laws
4 that have unanimity in terms of people viewing them as
5 being fair.

6 That said, under Canadian law, can there be
7 a taking without compensation?

8 THE WITNESS: That's a big question, sir.

9 ARBITRATOR GOWDY: What would be a big
10 answer?

11 THE WITNESS: The clear response is there's
12 no constitutional protection for property rights in
13 Canada's Constitution. And so, for example, it is
14 crystal clear that a legislature, if it speaks
15 clearly, can take without paying compensation. And
16 this section, 111(2), whatever it is directed
17 at -- and I understand that there's a live debate as
18 to what its directed at -- is clearly a provision of
19 that nature, i.e., Parliament in its sovereign
20 capacity saying that we are taking and that we are
21 taking without the payment of compensation, and that
22 is constitutionally valid in this jurisdiction.

1 ARBITRATOR GOWDY: All right. So -- and
2 forgive me for not being familiar with Canadian law.
3 I'm not that familiar with U.S. law, but there could
4 be a taking, either under the constitution or under a
5 statute without compensation?

6 THE WITNESS: This is an example of a taking
7 under a statute without compensation, and it's
8 constitutionally valid.

9 ARBITRATOR GOWDY: Okay. My last question:
10 Is there a way to read these competing statutes, these
11 competing pieces of legislation without relying on lex
12 specialis?

13 THE WITNESS: In my view, there was a route
14 which was to say that -- I think as I've discussed
15 with Mr. Landau, to some degree at least -- that the
16 CPRA was concerned with confidentiality, and at the
17 end of the nondisclosure period, confidentiality was
18 lost. That's a clear finding with which I take no
19 issue.

20 And, yet, at the same time one could say
21 that the Copyright Act was concerned with copyright
22 and not confidentiality, and, therefore, both systems

1 could run in tandem. Yes, the Boards could disclose,
2 but the disclosure and those taking advantage of that
3 disclosure must abide by the terms of the Copyright
4 Act, which might have caused -- allowed them to copy
5 under some circumstances, such as the fair dealing
6 exception of the Copyright Act.

7 So that would be an example, I think, of a
8 parallel application of those two statutory regimes,
9 each respecting the purpose of Parliament in enacting
10 those regimes.

11 ARBITRATOR GOWDY: When, if at all, can a
12 decision that someone may take exception to, which
13 happens with every decision made by a Court -- when if
14 at all can that rise to the level of a denial of
15 justice?

16 THE WITNESS: I don't think Canadian law
17 recognizes the concept of a denial of justice in that
18 broad way. It would recognize it in the context of
19 our charter of rights and freedoms and the right to
20 life, liberty and security, for example, and the right
21 not to be deprived thereof, except in accordance with
22 principles of fundamental justice, but there is no

1 freestanding rights of the sort that you refer to
2 here, sir.

3 ARBITRATOR GOWDY: All right. Thank you.

4 PRESIDENT WALLGREN-LINDHOLM: Professor, I
5 have one question if you would care to enlighten a
6 foreign lawyer, a civil lawyer, that is.

7 Could you please expand a bit on the
8 statement that the fact that the Court of Appeals
9 Decision was made in plenum, a plenary decision, that
10 which normally is resorted to for a new point of law.

11 THE WITNESS: So this refers to the fact
12 that the Panel itself describes their judgments,
13 labels their judgments as a judgment held under
14 reserve. So the Practice Notes from the Court of
15 Appeal, and they are quoted in my Opinion --

16 PRESIDENT WALLGREN-LINDHOLM: Yes.

17 THE WITNESS: -- that speak to the
18 circumstances in which Judgment is reserved and the
19 practice is to -- for the three-person Panel, which it
20 was, to reserve judgment in any case where they are
21 establishing a new point of law.

22 And the implication of that then is the

1 draft of the Judgment is circulated for comment to the
2 entire appellate bench. So it doesn't become the
3 Opinion of the 20 or whatever members of the Court of
4 Appeal. It is still the judgment of the Panel that
5 authored it, but the Panel is signifying that, in a
6 sense, we did our due diligence. We identified this
7 as a new legal issue, and we took pains to ensure that
8 we, in formulating it, were considering possible
9 arguments.

10 PRESIDENT WALLGREN-LINDHOLM: Thank you,
11 Professor.

12 Would the questions of the Tribunal have
13 given rise to follow up questions by Counsel?

14 MS. LEMMENS: I had just a couple of
15 questions following on Mr. Landau's questions, if I
16 could?

17 PRESIDENT WALLGREN-LINDHOLM: Yes. Please
18 go ahead.

19 MS. LEMMENS: Thank you.

20 RECROSS-EXAMINATION

21 BY MS. LEMMENS:

22 Q. Sir, when you were talking to Mr. Landau, he

1 had asked you about whether it was sort of -- I don't
2 have the exact words -- but the typical application of
3 the methodology for statutory interpretation in the
4 Common Issues Decision, something along those lines.

5 But as we looked at in the Ruth Sullivan
6 extract that Ms. Deutsch had taken you to earlier,
7 there are many different ways to deal with conflicts
8 between statutes. Do you recall that?

9 A. I do recall that.

10 Q. And so, when you have an array of different
11 tools at the Court's disposal, is there any way of
12 knowing which tool will be used or how it will be used
13 beforehand?

14 A. I think it all depends on the individual
15 case. In some cases one might be able to say with
16 some certainty what the decision rule will be. For
17 example, the easy example I've resorted to before is
18 two different Limitation Periods. And I think that
19 there are several cases saying *lex specialis* is a
20 really good way of resolving that sort of conflict.

21 But I think in other cases, more complex
22 cases -- and I would categorize this as a complex

1 case, given the very different subject matters of
2 statutes that we're dealing with -- that it would be
3 difficult to predict in advance how the conflict would
4 be resolved.

5 Q. And who is it that can use those statutory
6 interpretation rules to make a decision?

7 Is it the Court, or is it the layperson?

8 Who ultimately can make that decision?

9 A. Well, I think all engaged in the practice of
10 law make that decision one way or another by giving
11 advice to clients and by arguing cases before the
12 Court and ultimately -- and this, I guess, is the
13 ultimate response. Ultimately, it's the Court's
14 Decision within the established hierarchy that
15 establishes what the outcome of, is there a conflict?
16 If so, how should the conflict be resolved?

17 MS. LEMMENS: Thank you.

18 PRESIDENT WALLGREN-LINDHOLM: Would there be
19 any thing now on the Respondent's side?

20 MS. TABET: Thank you, Madam President.
21 Nothing further for Professor Bankes. Thank you very
22 much.

1 But I do have another matter once Mr. Bankes
2 is excused.

3 PRESIDENT WALLGREN-LINDHOLM: Okay.

4 So should we then say thank you to
5 Prof. Bankes and say that your Expert testimony has
6 now been concluded, with thanks.

7 THE WITNESS: Thank you.

8 PRESIDENT WALLGREN-LINDHOLM: So you may
9 leave, or you may stay, but if you stay, you need to
10 change tables.

11 THE WITNESS: Thank you.

12 (Witness steps down.)

13 MS. TABET: Madam President, I wonder, given
14 that we have just a little bit of time before the end
15 of the day today and it may not be appropriate to
16 start with Prof. Hutchison's testimony and, instead, I
17 wanted to, with your indulgence, perhaps take the
18 opportunity to respond to Mr. Gowdy's questions on the
19 first day. And I see that there are many more
20 questions today on denial of justice, so I wanted to
21 come back to that point. Would this be an appropriate
22 time?

1 PRESIDENT WALLGREN-LINDHOLM: I agree with
2 you that we probably should not try to squeeze in a
3 further Expert testimony at this hour. And,
4 Ms. Tabet, if you want to respond to the question
5 raised, please go ahead.

6 MS. TABET: Thank you. And maybe can I
7 start by clarifying that we understand --

8 PRESIDENT WALLGREN-LINDHOLM: Sorry.
9 Please, did you --

10 MS. LEMMENS: Sorry. I was unaware that
11 this was going to be proposed, but I would think that
12 we would respond at the same time, and I just
13 understand that my team was going to get me something
14 for tomorrow. I think we were asked for a few
15 examples, or a couple of examples of denial of
16 justice.

17 ARBITRATOR GOWDY: Yes. It doesn't
18 matter to me when they come--

19 (Interruption.)

20 ARBITRATOR GOWDY: I said, yes ma'am, but it
21 doesn't matter to me when those examples come.

22 PRESIDENT WALLGREN-LINDHOLM: But is Counsel

1 for Claimant saying that they there should be
2 symmetry?

3 MS. LEMMENS: I would think that there would
4 be symmetry. I'm not sure what is being presented
5 now.

6 MS. TABET: I was going to respond to
7 Mr. Gowdy's questions, but I'm happy to wait until
8 tomorrow, if you prefer.

9 MS. LEMMENS: I mean, we aren't ready to
10 present because my team is still working on it. So
11 I'm not sure that we would be in a position to do
12 that. And I'm not sure if symmetry is required or
13 not, not knowing what is being proposed.

14 PRESIDENT WALLGREN-LINDHOLM: Yeah. There
15 seems to be a consensus at this end that we could well
16 wait until tomorrow. So that is what we will do then.

17 MS. TABET: Thank you very much.

18 PRESIDENT WALLGREN-LINDHOLM: Thank you very
19 much for the offer all the same. Thank you.

20 And then tomorrow -- let's just see if there
21 is anything we need to do now that we got an
22 unexpected slot of free time. So we will start with

1 Mr. Hutchison tomorrow at 9:30 and there is nothing
2 else foreseen in terms of nonscheduled performances,
3 then the answer, and you can choose when you want to
4 do it, but I assume that you will want to pick a
5 moment that doesn't interfere with the Expert's
6 timing. So you can choose, if you want to start
7 there. Will you want to start tomorrow morning?

8 MS. LEMMENS: I'd prefer to address the
9 Expert, Dr. Hutchison, if we could, so that he could
10 then leave because he's not actually a resident in
11 Calgary.

12 MS. TABET: Yes.

13 PRESIDENT WALLGREN-LINDHOLM: I guess this
14 not a controversial issue. So we will do it at some
15 point later, the Q&A. Okay.

16 Then I'll bid you a good evening and say
17 thank you.

18 MS. LEMMENS: Thank you.

19 MS. TABET: Thank you.

20 (Whereupon, at 5:05 p.m., the Hearing was
21 adjourned until 9:30 a.m. the following day.)

POST-HEARING REVISIONS

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter,
do hereby attest that the foregoing English-
speaking proceedings, after agreed-upon
revisions submitted by the Parties, were
revised and re-submitted to the Parties per
their instructions.

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.

[Signed]

Dawn K. Larson

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

AND

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW, AS ADOPTED IN 1976

- - - - -	x	
In the Matter of Arbitration	:	
Between:	:	
	:	
THEODORE DAVID EINARSSON,	:	
HAROLD PAUL EINARSSON,	:	
RUSSELL JOHN EINARSSON, AND	:	
GEOPHYSICAL SERVICE INCORPORATED,	:	
	:	ICSID Case No.
Claimants,	:	UNCT/20/6
	:	
and	:	
	:	
THE GOVERNMENT OF CANADA,	:	
	:	
Respondent.	:	
- - - - -	x	Volume 4

HEARING ON JURISDICTION, MERITS, AND LIABILITY

Thursday, March 6, 2025

Calgary Marriott Downtown Hotel
110 9th Avenue SE
Calgary, AB, T2G 5A6
Canada

The Hearing in the above-entitled matter
came on at 9:32 a.m. before:

MS. CARITA WALLGREN-LINDHOLM, President

MR. TREY GOWDY, Co-Arbitrator

MR. TOBY LANDAU KC, Co-Arbitrator

ALSO PRESENT:

On Behalf of ICSID:

MS. GERALDINE R. FISCHER
Secretariat to the Tribunal

Realtime Stenographer:

MS. DAWN K. LARSON
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
Certified Realtime Captioner (CRC)
Larson Reporting, Inc.
2564 West 280 North Street
Hurricane, Utah 84737
United States of America
+1 720 298 2480
DawnStenosTheWorld@gmail.com
DawnStenosTheWorld.com

APPEARANCES:

Attending on behalf of the Claimants:

**MS. MATTI LEMMENS
MR. VINCENT LANCTÔT-FORTIER
MS. MARIANNE BASTILLE-PARENT
Stikeman Elliott LLP
Bankers Hall, 4200 3 St SW West 888
Suite 14200
Calgary, AB, T2P 5C5**

Party representatives:

MR. HAROLD PAUL EINARSSON

APPEARANCES: (Continued)**Attending on behalf of the Respondent:**

MR. MARK LUZ
MS. SYLVIE TABET
MS. JULIA DEUTSCH
MS. ELENA LAPINA
MS. CAMILLE BÉRUBÉ-LEPAGE (virtual)
Trade Law Bureau
Global Affairs Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada

MS. MOLLY RUMPKE
Core Legal Concepts

MS. DAPHNÉE CAMPEAU
Global Affairs Canada

MR. ALEXANDER BLACK
Crown-Indigenous Relations and Northern
Affairs Canada & ISC Legal Services,
Indigenous Rights and Relations Portfolio

MR. PETER WIGEN (virtual)
Canadian Heritage Legal Services

MR. MARK KLAVER (virtual)
Office Legal Services Sector

MR. FRANCO BELLO (virtual)
MS. KIM PHILLIPS (virtual)
MS. JESSICA MACINTOSH (virtual)
MS. JEAN-FRANCOIS ROMAN (virtual)
Natural Resources Canada

APPEARANCES: (Continued)

MR. SÉBASTIEN FOURNIER (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada

MR. SCOTT LITTLE (virtual)
MS. SUSANNA KAM (virtual)
MR. VINCENT BOULANGER (virtual)
Global Affairs Canada

MS. TARA SNELL (virtual)
MS. NATALIE GIASSA (virtual)
MS. PIERRE-LUC RACINE (virtual)
Innovation Science and Economic Development

MS. TIFFANY SANDERS (virtual)
MS. LYNETTE GIBBONS (virtual)
Canada Newfoundland & Labrador Offshore
Petroleum Board

Respondent's Party Representatives:

MR. MARKO VESELY
Canada Energy Regulator

MR. ALEX MILLER
Core Legal Concepts

MR. CHRIS REYNOLDS
Core Legal Concepts

Non-Disputing Parties:

MS. KRISTINA E. BEARD (virtual)
Office of International Claims and
Investment Disputes
U.S. Department of State

MR. ALAN BONFIGLIO RÍOS (virtual)
MS. PAMELA HERNÁNDEZ MENDOZA (virtual)
MR. ALDO GONZÁLEZ ARANDA (virtual)
Secretaría de Economía

C O N T E N T S

PAGE

PRELIMINARY MATTERS.....	801

WITNESSES:

CAMERON HUTCHISON

Direct presentation.....	806
Cross-examination by Ms. Tabet.....	826
Redirect examination by Ms. Lemmens.....	864
Questions from the Tribunal.....	865
Recross-exam. by Ms. Tabet.....	880

BARRY SOOKMAN

Direct presentation.....	888
Cross-examination by Ms. Lemmens.....	908
Redirect examination by.....	1011
Recross-exam by Ms. Lemmens.....	1012
Questions from the Tribunal.....	1013

P R O C E E D I N G S

CAMERON HUTCHISON, CLAIMANTS' WITNESS, CALLED

PRESIDENT WALLGREN-LINDHOLM: Good morning, everyone, and welcome to our fourth day of Hearing on March 6, 2025.

Have I understood correctly that everyone is in agreement also, Canada -- that we proceed directly to examine Prof. Hutchison, or was there anything you wanted to raise first?

MS. TABET: Thank you. No, nothing yet -- this morning.

PRESIDENT WALLGREN-LINDHOLM: Thank you.

(Comments off microphone.)

PRESIDENT WALLGREN-LINDHOLM: Yes?

MR. LUZ: Madam Chair, we will introduce Alexander Black who is Legal Counsel at Crown Indigenous Relations and Northern Affairs Canada who is just going to be sitting in for this morning.

PRESIDENT WALLGREN-LINDHOLM: Thank you very much. I already had the pleasure also.

Welcome, sir.

Anybody on your side?

1 MS. LEMMENS: Good morning, Madam Chair, and
2 Members of the Tribunal. No, we don't have any
3 additional people today.

4 PRESIDENT WALLGREN-LINDHOLM: Thank you very
5 much. Then we will proceed to the examination of
6 Prof. Cameron Hutchison.

7 Good morning. You have been called as an
8 Expert in this NAFTA Arbitration by Claimants who sit
9 on that side, who I trust you're familiar with and you
10 have given an Expert Report. And so I understand that
11 you're generally aware what these proceedings relate
12 to and who the Parties are?

13 THE WITNESS: Correct.

14 PRESIDENT WALLGREN-LINDHOLM: I also want to
15 say, as a point of order, that, if you have any
16 questions or concerns in relation to procedure, please
17 address them to the Tribunal.

18 So let me introduce us. On that side of the
19 room we have --, I can multitask, sits Counsel for
20 Canada, and certain other Parties and interested
21 Parties. We also have the Governments of Mexico and
22 the United States remotely, and we here are the

1 Tribunal. To my right is Mr. Trey Gowdy; to my left
2 Toby Landau KC. I am Carita Wallgren-Lindholm, and
3 I'm presiding.

4 Then we have the Tribunal's Secretary,
5 Geraldine Fischer, and the Court Reporter Dawn Larson.

6 As you may know, we do not administer oath
7 in international arbitration, but I would ask you to
8 give an affirmation of your independence from the
9 disputing Parties and Counsel and of your genuine
10 belief in the Opinions expressed in your Report?

11 THE WITNESS: I so affirm.

12 PRESIDENT WALLGREN-LINDHOLM: Thank you.
13 Your testimony will be recorded and transcribed. The
14 Parties have agreed that you first make a presentation
15 of your Report for up to 30 minutes. We have it here.

16 Thank you very much. Whereafter opposing
17 Counsel will cross-examine you on matters relevant to
18 this Arbitration. Then at the close of this slot, we
19 will address the question of the break and your
20 activities or nonactivities during any break. Thank
21 you very much.

22 THE WITNESS: Thank you, Madam Chair, and

1 Tribunal Members. I do have a question of procedure.

2 I just wonder if I could have my Report available.

3 PRESIDENT WALLGREN-LINDHOLM: Oh, most
4 certainly.

5 THE WITNESS: Yeah. There is a correction
6 I'd like to make.

7 PRESIDENT WALLGREN-LINDHOLM: Very good.

8 I also trust that the Expert has access to
9 whatever tools he might need during this.

10 MS. LEMMENS: Yes. So Ms. Lyseng just left
11 the room because we were a little bit late getting in
12 this morning, and she's just going to grab his Expert
13 Report that has been printed. Additionally, if we
14 need to refer to any of the case Authorities, the
15 Canadian case Authorities that are referenced, we have
16 all of the exhibits available and we can pull them up
17 on the screen for him.

18 PRESIDENT WALLGREN-LINDHOLM: You pull them
19 up and the Professor can see them on the screen.

20 MS. LEMMENS: Yes. That's right.

21 PRESIDENT WALLGREN-LINDHOLM: As we can.
22 And opposing Counsel, I trust, yes.

1 MS. LEMMENS: I don't think we're connected
2 to the screen so we can't just check it yet, but the
3 mouse should be turned on and the keyboard should be
4 turned on and then you can scroll there. Does that
5 work? Perfect. Thank you.

6 THE WITNESS: Thank you.

7 (Comments off microphone.)

8 MS. TABET: And just -- sorry. Apologies,
9 good morning, Prof. Hutchison. I just wanted to say
10 that we have for you also a copy of the Alberta Court
11 Decisions unless you already have them.

12 THE WITNESS: I don't have them. This is
13 somebody else's Expert Report here.

14 MS. TABET: Okay. So we will give you a
15 copy. Thank you. [inaudible on audio]

16 THE WITNESS: Thank you.

17 PRESIDENT WALLGREN-LINDHOLM: So are we
18 ready to commence, Ms. Lemmens, please?

19 MS. LEMMENS: Yes.

20 PRESIDENT WALLGREN-LINDHOLM: So will we go
21 directly to the Professor? Yes. Okay.

22 MS. LEMMENS: Yes.

1 THE WITNESS: Okay.

2 DIRECT PRESENTATION

3 THE WITNESS: Okay. Thank you. Again, good
4 morning, Tribunal, and Madam Chair, Tribunal Members,
5 Counsel.

6 I am here to talk about myself first of all
7 and then give an Expert Report on -- I think it was
8 three issues that were given to me to provide an
9 Opinion on. And I'm going to filter that through a
10 more direct inquiry into, I think, what is the crux of
11 the issue, and -- in the GSI and Encana Common Issues
12 Case. In terms of my CV, you have my CV. I'll just
13 highlight my main points.

14 My education, I have a -- four degrees
15 ending with a doctorate at University of Toronto, I
16 practiced, general practice, for three years prior to
17 becoming University Professor starting as an
18 assistant -- and I don't remember when I became a full
19 Professor. I think it was about 10, 12, 13 years ago,
20 maybe 15 years ago.

21 And I've been teaching intellectual property
22 and researching in the area of intellectual property

1 since 2005, statutory interpretation arising out of my
2 interests from reading IP cases. I started developing
3 a course and teaching it since 2008, and those are
4 really -- I have taught a lot of other courses, but
5 those have kind of been my mainstays for the last
6 almost 20 years, 20 or so years, give or take.

7 In terms of my publication record, I have
8 written two Books: Digital Copyright Law which I'm in
9 process of doing a second edition on. It's quite
10 dated now. Also the Modern Principle of Statutory
11 Interpretation, which is the Second Edition, most
12 recently 2022, and I'm a coeditor of a cases and
13 materials book on intellectual property and have
14 numerous Law Review articles touching on these issues,
15 a number of other issues in the law that I've become
16 interested in.

17 So the issues I addressed in my Report are
18 these. And I won't go through them again because you
19 are well aware of -- you have a copy of the Report. I
20 do want to highlight an error in my Report.

21 I mistakenly -- this is at Page -- or
22 Paragraph 13, last sentence. I say: "Notably the

1 CCAA, which took priority in this case was both the
2 earlier and more general statute." That's the holding
3 of the dissent, not the majority. It doesn't affect
4 my analysis, but I just want to be clear about that.

5 MS. TABET: Apologies, Prof. Hutchison, I
6 don't want to interrupt. I'm just trying to identify
7 exactly where. Can you --

8 THE WITNESS: Yeah. Sure. Okay. Yeah.
9 Just the last Paragraph 13, yeah. Last sentence.

10 MS. TABET: Oh, thank you.

11 THE WITNESS: Sorry. Does everybody have
12 that? And accordingly, I kind of restate it again in
13 a different way later on, so that should be changed.
14 Sorry. Let me just find that. This would be
15 Paragraph 23, second sentence: "Had the Supreme Court
16 and Century Services relied on *lex specialis* to
17 resolve the case, it would have arrived at opposite
18 result and it did use the modern principle."

19 And that's also wrong because it is
20 basically restating the error in the first -- wrong in
21 the sense that that majority held otherwise.

22 Okay. Again, I don't think that affects my

1 analysis.

2 So I thought it would be -- instead of
3 restating my Report, to try and synthesize the issues
4 through an examination, I think, of the crux of the
5 issue in the Common Issues Trial Judgment. What is
6 the legal relationship between Section 101 of the
7 Canadian Petroleum Resources Act permitting Seismic
8 Data to be disclosed after a five-year confidentiality
9 period and GSI's exclusive rights in the Seismic Data
10 under the Copyright Act.

11 So there are, I guess, in the course of
12 things, both the Opinion and Expert Reports dialogue,
13 three possible -- or four possible ways of sort of
14 dealing with this issue, we are looking at it. I
15 think the first one is the way to go in terms of
16 resolving it. I think we don't have to really go any
17 further than that, but for the sake of completeness, I
18 will talk, give an Opinion on the other issues as
19 reflected in my Report.

20 So what do the principles of statutory
21 interpretation say about resolving legislation that
22 overlaps? Can Section 101 be characterized as an

1 exception to copyright? Can participation in the
2 disclosure regime be characterized as an implied or a
3 compulsory license, and is there any relevance at all
4 to technological neutrality in terms of anything
5 pertinent to that issue.

6 So in -- Justice Eidsvik in the Trial
7 Decision, I'm sure you're well aware of, comes to the
8 conclusion that the data under the copyright -- sorry,
9 GS rights in the Seismic Data under the copyright
10 conflict head on with the rights of the obligations
11 under the Regulatory Regime. The solution to the
12 conflict is to be found in the principle of lex
13 specialis, and that in applying it these provisions of
14 the copyright are extinguished, I guess to the extent
15 of the conflict.

16 So Justice Eidsvik does reference "Modern
17 Principle," and I think it might be helpful to talk
18 about a little bit of the history of the Modern
19 Principle. It is Elmer Driedger's creation. He is
20 the author who is always cited. The case that is
21 always cited -- and his book is foundational book in
22 this area where he analyzes this principle, was first

1 published sometime in the 1970s, I believe. It wasn't
2 actually officially adopted as -- in Canada by the
3 Supreme Court until 1998.

4 The principle reproduced in my Report,
5 Prof. Banks had it on the screen last day. It
6 basically asked Courts to look at the ordinary meaning
7 of language in the statute as judged in its context,
8 considering its purpose and the intent behind the Act.
9 "Intent" I take to mean legislative history, other
10 authoritative pronouncements of intent, for example,
11 by a sponsoring Minister in Parliament.

12 All these things are to be -- are inputs,
13 considered legitimate inputs into the process of
14 construing the meaning of the legislative intent
15 behind a statute or a provision, specific provision.

16 Now, prior to that -- so this is something,
17 I guess, of the last 25-plus years where this is sort
18 of officially been adopted, although it was picked up
19 in the case law beforehand. Prior to that, you had a
20 lot of rules of statutory construction which I would
21 say are based largely on sort of a textual
22 interpretation. And you know, all approaches to

1 statutory interpretation say that the text is the
2 starting point, and the starting point for finding
3 what the legislative intent is, and all approaches to
4 statutory interpretation are geared towards finding
5 what that legislative intent is.

6 I know in the U.S., for example, there's
7 strong debates about how to find out what is the best
8 way to get that legislative intent. Is it the plain
9 language, is it the legislative history? And these
10 are legitimate debates. People have different views
11 on these things.

12 In Canada, we've sort of brought all these
13 inputs in, and we're supposed to weigh all that before
14 we get to a final conclusion on the meaning of a
15 statute.

16 Now, those other principles that existed
17 prior to the Modern Principle, they still exist, and
18 their relationship to the Modern Principle is a -- I
19 think a synergistic one, to a large extent. I mean, I
20 think they help elucidate those particular factors in
21 the Modern Principle, so -- and I'll talk about that
22 in a second.

1 So they're not contradictory at all. But
2 the point I want to say is -- the point I want to make
3 is -- and I think the critical point is a full Modern
4 Principle inquiry has to be concluded in every case.
5 And this is, and when we get to the issue of
6 overlapping statutes, there is a presumption that
7 statutes don't conflict. And I think all of this is
8 uncontroversial.

9 So I said the existing principles, rules of
10 construction, as they are, are legitimate and are
11 complementary to the Modern Principle inquiry.

12 Presumption of consistent expression, for
13 example, is a contextual inquiry. We understand the
14 language of a term, that the same words or word used
15 in a statute to be understood in the same way. Not
16 always, it's a presumption, but that helps us
17 understand that, if we understand the meaning in one
18 particular provision of a particular word, then that's
19 going to have a lot of weight when we try to
20 understand that same word in another part of the same
21 statute.

22 There are certain unique presumptions in

1 statutory interpretation in the sense that, when
2 statutes are fully construed, they can still be
3 ambiguous, and that's a well-established principle.
4 Bell expressed views often cited for that principle.
5 If you can, after Modern Principle construction, come
6 to the conclusion that there are two more or less
7 equally plausible meanings to a statute or a provision
8 in the statute, what do you do then?

9 What you, what the Courts have said they are
10 to do, the Supreme Court anyways says you're supposed
11 to do is to apply presumptions of last resort, and
12 there's a list in my book, but other places you can
13 see these presumptions. They're familiar, I think, in
14 other jurisdictions as well; rule of Lenity that a
15 penal provision, for example, shall be construed in
16 favor of the accused.

17 Presumption of domestic law, laws are to be
18 interpreted, again, where they're truly ambiguous, in
19 accordance with international legal instruments with
20 international law.

21 So all of which brings us to *lex specialis*.
22 I think, you know, *lex specialis* is and can be both of

1 these things. I don't want to mislead anybody and say
2 that Courts have said it's a presumption of last
3 resort. It's not. Okay. Nobody has said that. I
4 think it probably functions most usefully that way.
5 It might be a way of resolving a conflict, a true
6 conflict. That is, you fully construed the two
7 statutes. You determine that you really can't do one
8 without the other, or you can't do one without doing
9 violence to the other, and then, therefore, you might
10 say, well, maybe we should apply *lex specialis* or the
11 general -- or the more recent statute trumping the
12 earlier statute, or some other provision or -- I won't
13 say some other, but those are the two main ones for
14 resolving questions of ambiguity.

15 So, but it's also used, of course, as a way
16 to -- as the other presumptions are, as a way to try
17 and get to -what, how do we construe this legislation?
18 You know, it's a more recent statute. Does that tell
19 us that, you know, this provision should prevail
20 because of legislature having considered the statute
21 book as a whole, which it's notionally thought to do.
22 They must have been aware of this. Maybe they

1 weren't. But notionally they must have been aware of
2 it, you know, and, therefore, they drafted the
3 legislation this way, and we might take that as their
4 most recent legislative intent on the issue. Lex
5 specialis works in a different way that we find a
6 conflict and -- or we see two overlapping statutes,
7 and we determine that one of them is more specific.
8 There is more of a specific legislative intent there
9 to deal with that particular issue, and, therefore, we
10 say that has precedence.

11 So there's nothing wrong with lex specialis,
12 per se. I think the problem, what happens is, when
13 it's resorted to without doing a full Modern Principle
14 construction. And with respect, I think that might
15 have happened in this case. I think Justice Eidsvik
16 did a very good job at canvassing the legislative
17 record looking for, among other things, a sign of that
18 relationship. I think that excavation into the
19 legislative history revealed the purpose of this
20 disclosure regime which was to, after five years, to
21 disclose so as to encourage offshore exploration. So
22 it was productive that way. But I don't know, it

1 didn't say anything, and I take it from that, from her
2 Judgment, that there is nothing in the record
3 suggesting what the relationship is between the
4 Copyright Act and the disclosure regime, and so I
5 don't think that legislative history inquiry was
6 productive on that account, but it did help us
7 understand the purpose of disclosure regime.

8 After that, we may look to the context of
9 the -- and this is something, I'm afraid, again, with
10 respect, I don't think she did. She might have done
11 it with respect to the -- I do want to say that I'm
12 not an oil-and-gas Expert, and I'm not putting -- I'm
13 not offering any interpretation of the CPRA beyond
14 Section 101 and the disclosure regime in particular,
15 but I there might have been some construction with
16 respect to the context of the CPRA in terms of
17 Section 111. I think there was a copy provision in
18 100, I think, both of which I don't, I won't venture
19 an opinion on, but I know Prof. Bankes didn't think
20 those were particularly relevant to the disclosure
21 regime.

22 But she didn't actually look at the

1 Copyright Act. What does the context of the Copyright
2 Act say? Again, trying to understand what these
3 regimes are trying to accomplish, what the intention
4 of them is, and how they might relate to one another.
5 And I think, finally -- and had she looked at the
6 Copyright Act, she might have seen that the Copyright
7 Act is very much a balance system of rights
8 between -- generally speaking, balance between
9 copyright-holder rights and user rights, writ large,
10 and balance pervades, permeates through all of
11 copyright jurisprudence in Canada.

12 Probably most striking to my eyes reading
13 the Judgment was a lack -- of what is the purpose of
14 the overlapping -- so the most striking thing about
15 the Judgment to me in terms of looking at it, the
16 disclosure regime's relationship to copyright, is
17 that, okay, we have a purpose of copyright which is
18 generally to incentivize and reward authors for their
19 creations. Purpose of disclosure regime is to
20 disseminate, disclose information for the purpose of
21 encouraging exploration. How can these two purposes
22 be reconciled? Can they be reconciled? Now I think

1 Justice Eidsvik says that, well, "disclosure," of
2 course, means copying, and I think the real question
3 to ask was: Could there be a form of disclosure that
4 minimized the impact on the copyright holder's rights?

5 In other words, could there have been a
6 presentation of the material in such way that didn't
7 involve copying, and could you achieve the purpose of
8 offshore exploration by doing that?

9 Maybe not as perfectly, necessarily, as if
10 you provided the copies. You know, it's a balancing
11 exercise. And I don't know what the answer is to
12 that, but I think that's a question I had reading the
13 Judgment. And I think that actually is, to me,
14 that's -- until I know the answer to that question, I
15 can't really say -- I don't know if there's a conflict
16 here. I just don't know. I don't know if -- because
17 it hasn't been truly construed. We interpret
18 provisions coherently -- right? -- two separate
19 statutes that overlap coherently. I don't know if we
20 can, and I don't know that we explored the question of
21 if we can in the Judgment. Can we do both?

22 So if it's possible to do both, there is no

1 conflict. If it's not possible to do both, then, yes,
2 there may be a conflict.

3 Okay. So exceptions to copyright, I'll just
4 generally talk about the nature of exceptions in the
5 Copyright Act and outside of the Copyright Act which
6 is fair dealing, which is the most broad exception
7 under the Canadian copyright law, not
8 judicially -- nomenclature is not an exception
9 anymore. It's called a "user right." It's considered
10 to be a very vibrant expansive right. The purposes of
11 fair dealing under Section 29 and 29.2 are to be
12 interpreted broadly and largely, but they are to be
13 interpreted with due regard to copyright holders'
14 rights. In other words, we don't diminish
15 copyright-holder rights any more than we have to to
16 accomplish the purpose. So that's the basic tenor of
17 fair dealing analysis.

18 After that, you get into a lot of
19 exceptions, many of which are, I think, most -- many
20 of which -- maybe not all of them necessarily, but
21 most of which are caught in 29.21-32.3, which are very
22 specific -- often include very specific uses with

1 specific requirements in terms of how the work is
2 used. But, in all these exceptions to copyright,
3 you're balancing what are considered important public
4 policy goals for user rights against the importance of
5 maintaining that incentive and respecting the
6 legitimate rights of the copyright holder.

7 In my Report, I don't really -- I only found
8 one exception to copyright, mentioned the Copyright
9 Act. Outside of the Copyright Act, some statutes deal
10 with bridging intellectual property rights to achieve
11 other public-policy objectives like competition, the
12 Competition Act.

13 Is Section 101 an exception? It's not
14 stated as an exception, but if we can construe it that
15 way, then I still think we're back to, well, we have
16 to construe it as an exception like any other
17 copyright exception, we have to balance the rights
18 here.

19 Is Section 101 and GSI's participation in
20 that disclosure regime an implied license or a
21 compulsory license? This is another avenue of inquiry
22 of how to resolve. The problem is this is less

1 about -- more about a legal relationship, more about a
2 licensing, I guess, relationship
3 being -- conceptualizing a licensing relationship
4 insofar as participating in a Regulatory Regime.

5 I thought, again, when I read this, I thought
6 this was a fairly novel way of looking at it. I don't
7 disagree necessarily that there could be a concept of,
8 you know, you're playing by the rules. If
9 those -- you know, by participating in a regime, it's
10 possible you might -- you could be construed to have
11 consented to participating in a regime. But I don't
12 think you'd call that an implied license. I don't
13 think you'd call that a compulsory license.

14 I think it's important, when we think about
15 licensing, to come back -- I'm always more comfortable
16 trying to, in all these areas, actually, trying to
17 understand and make sense of the law by understanding
18 first principles, as opposed to what a particular
19 court said here or a court said there and especially
20 when they're not saying the same thing.

21 You know, I think implied -- infringement is
22 premised on lack of consent. Similarly, licensing is

1 premised on consent, and consent, in a copyright
2 context, is a free consent suggesting you have choice
3 and control over what you do with your property.

4 Implied license -- so the Act requires that
5 exclusive licenses, assignments of copyright
6 ownership, in other words, very valuable and important
7 dispositions of the property are to be in writing and
8 signed by the Parties.

9 An implied license is something that doesn't
10 require that. It does not require writing. It can
11 be -- well, implied can't be -- you have nonexclusive
12 licenses which can be valuable, but when we get to an
13 implied license, that's usually a permission to use a
14 work in a certain way. Still, you know, tied to a
15 notion of consent that there's some -- by your
16 conduct, you have consented. We don't know your
17 subjective mind, but the Court might suggest
18 that -- or read that your mind was you did this or you
19 communicated this, this particular use. So it's
20 typically a permission to use that's inferred by
21 conduct or circumstances.

22 Again it's, when you are -- when you think

1 of licensing as a form of having to participate in a
2 Regulatory Regime, it's a little jarring. I just
3 don't think any way anyone in copyright would imagine
4 that their copyright could be dealt with or that the
5 copyright owner is implying their consent or to -- in
6 a situation where you kind of have to do it, if you
7 want to participate, do the business activity that you
8 want to engage in.

9 And you don't necessarily know how the works
10 always going to be disseminated, or you don't have any
11 control over it. So, I mean, again, I think you
12 can -- it's a concept. I just don't think it's a
13 concept that fits easily with implied license.

14 PRESIDENT WALLGREN-LINDHOLM:

15 Prof Hutchison-- Mr. Luz. Go ahead.

16 I just wanted to remind you that you had
17 30 minutes, and I think that we are about to exceed
18 that.

19 THE WITNESS: Okay.

20 PRESIDENT WALLGREN-LINDHOLM: So I wonder if
21 you could wrap up.

22 THE WITNESS: Wrap up?

1 PRESIDENT WALLGREN-LINDHOLM: Thank you.

2 THE WITNESS: You got it. Okay.

3 I'll just finish by saying Justice Eidsvik,
4 as well, did not think the consent, at least on the
5 facts here, was present and had trouble characterizing
6 it as an implied license.

7 Compulsory licensing, the other theory of
8 what's going on with the disclosure regime, I'll just
9 briefly say that she did find it was a -- she
10 characterized it as compulsory licensing in perpetuity
11 over the copyrighted material. Compulsory licensing
12 in Canadian law, Plant Breeders' Rights, Patent Act
13 has a certain -- is a certain type of regime. I'll
14 let my slides do the talking there, but this does not
15 fit with those -- that type of regime.

16 Finally, and I don't think the principle of
17 technological neutrality has any -- in terms of how it
18 has been developed in the copyright jurisprudence, has
19 any unique insights or application here. I think the
20 fact that these regimes moved, both in the filing and
21 the disclosure stage, moved from a system of paper and
22 Mylar or microfiche to digital manifestations of

1 various kinds, and the law never addressed that. It
2 is not controversial the law evolves with changing
3 technologies. So I don't think that aspect of it -- I
4 don't think it justifies the making of
5 copies -- copies either, by the same token.

6 So I'll leave it at that. Thank you.

7 PRESIDENT WALLGREN-LINDHOLM: Thank you,
8 Prof. Professor.

9 You will now be cross-examined by Counsel
10 for Canada.

11 THE WITNESS: Okay.

12 CROSS-EXAMINATION

13 BY MS. TABET:

14 Q. Good morning, Prof. Hutchison.

15 A. Good morning.

16 Q. My name is Sylvie Tabet. Let me just
17 introduce myself. Thank you very much for the
18 presentation this morning.

19 I wanted to confirm that we left with you a
20 copy with the Alberta Court Decisions. I'll be mainly
21 referring to the trial Decision, and I may take you as
22 well to your Report. I think we will also put the

1 relevant passages on the screen to make it easier for
2 everyone.

3 But take your time, of course. And if you
4 need to read more or take time to read the passage I'm
5 drawing your attention to, please do so.

6 A. Okay.

7 Q. So in your presentation this morning, you
8 explained your background. I was actually looking for
9 your CV and couldn't find it, so I thank you for
10 clarifying that. I understand that you're a professor
11 in IP law and also teach statutory law. And would it
12 be fair to say, based on what I heard this morning,
13 that you're not a practicing lawyer? You're mainly an
14 academic.

15 A. That's correct.

16 Q. Okay. And are you called to the bar?

17 A. I am called at the bar in Ontario. I'm
18 under administrative suspension because I didn't pay
19 my fees.

20 Q. Okay. Understood.

21 A. I don't practice, no.

22 Q. Okay. You don't practice. All right.

1 So in your Report at Paragraph 3, you refer
2 to some of the material that you read for the
3 preparation of your Report?

4 A. Yes.

5 Q. And you said you read the Alberta Court of
6 Queen Bench's Decision as well as the Court of Appeal
7 Decision. Now, you don't reference a review of the
8 pleadings of GSI and the defendants in those cases.

9 Did you -- does that mean you did not review
10 them, or did you review them?

11 A. I think I probably did. I know I have
12 since, but I didn't cite that.

13 Q. Okay. So you're --

14 A. Please go ahead.

15 Q. I'm just trying to ascertain the basis of
16 your Report and whether you had a chance to review
17 those Pleadings.

18 A. I had a chance. I'm familiar with the
19 website. I didn't, I'm not sure exactly what I looked
20 at. There is a lot of material there.

21 Q. Yeah. Okay. Thank you.

22 So you're not sure if you looked at those

1 Pleadings.

2 Did you look at the GSI's Leave to Appeal to
3 the Supreme Court of Canada?

4 A. No.

5 Q. And had you read the Alberta Decisions prior
6 to the preparation or prior to being retained by GSI?

7 A. Not in its entirety. We use the copyright
8 ability of raw and Seismic Data as an example of a
9 work. So that aspect of it I was familiar with.

10 Q. Okay. And in the preparation of your Report
11 then, did you read the entire Decision or did you
12 focus mainly on the areas necessarily to respond to
13 the questions?

14 A. Mainly on the areas necessary to respond to
15 the questions.

16 Q. Okay. I think I understand, understood this
17 morning that you're not familiar with the CPRA and/or
18 the Offshore Seismic Data Regulatory Regime in Canada?

19 A. No.

20 Q. Apart from maybe what you read?

21 A. I'm not. Apart from what I read in the
22 Common Issues Decision, no, I'm not.

1 Q. So you're knowledge of the Regulatory Regime
2 that was at issue is based on what you read in the
3 Decision?

4 A. Yes.

5 Q. Okay. You didn't look at any of the
6 legislative history that Judge Eidsvik --

7 A. No.

8 Q. Okay. Now, you took us helpfully to your
9 questions this morning on, and on the issue of the
10 first question that was put to you, on whether there
11 was a singular approach under Canadian principles of
12 statutory interpretation to the Resolution overlapping
13 statutory provisions.

14 And if I understand correctly, your response
15 is, yes, that is the Modern Principle?

16 A. I'm sorry?

17 Q. That the response to that question is, yes,
18 that you have to apply the Modern Principle?

19 A. Yes. Yes. Of course, yeah.

20 Q. Okay. And you articulated the Modern
21 Principle in your Report by referring to the Supreme
22 Court of Canada. So if I can take you to Paragraph 6

1 of your Report. You are citing to Ruth Sullivan and
2 the Supreme Court of Canada Case and Rizzo Shoes; is
3 that right?

4 A. Ruth Sullivan and Elmer Driedger, Fourth
5 Edition, yes and Rizzo Shoes.

6 Q. Those are the authorities. And I think I
7 heard you say this morning, as well, that the Modern
8 Principle incorporates a range of legitimate inputs.
9 And you say that at Paragraphs 7-11 of your Report.
10 And you were emphasizing this morning that the purpose
11 is to ensure an interpretation that aligns with
12 legislative intent?

13 A. Yes.

14 Q. You explained this morning that those input
15 include ordinary meaning at the context, the scheme of
16 the Act and the object of the Act.

17 Now, at Paragraph 10, you say that the
18 interpretation of a provision should align with the
19 object or discoverable purpose of the legislation.
20 And you also refer to this as the intention of
21 Parliament.

22 Those are the same things; right?

1 A. No, I don't think they are.

2 Q. Okay. Please --

3 A. Because I struggled with that and Courts use
4 it interchangeably. And I read a book which helped me
5 understand this a lot better which is that "intention"
6 can be derived towards specific things; whereas,
7 "purpose" is directed towards the hopeful impact of a
8 legislative provision.

9 So for example, no vehicle in the park. We
10 might - we might inquiries would be different,
11 formally speaking. Why do we have no vehicles in the
12 park? We might say there is a purpose. We want, say,
13 safety in the park. Is a Segway included as a
14 vehicle? Well, we might look at the legislative
15 history to see whether there was a specific intention
16 that things should be included. That's the way I
17 understand it.

18 Q. Thank you, Prof. Hutchison.

19 But, so if I can just take you back to your
20 Report. You do say that intention of Parliament
21 invites Courts to consider legislative history?

22 A. Correct.

1 Q. And that legislative intention also refers
2 to authoritative sources of meaning? So I think, just
3 maybe, if we come back to the purpose of applying the
4 Modern Principle.

5 I heard you say this morning -- and I think
6 this is also what Prof. Bankes said -- that, if I read
7 at Paragraph 11 of your Report, you say that: "Judges
8 must use their judgment to arrive at an interpretation
9 that is the most persuasive account of legislative
10 intent." So you agree with Mr. Bankes on this point?

11 A. Absolutely. I've heard a supreme court
12 justice say the exact same thing.

13 Q. Exactly, yes, yes. So, by saying they must
14 exercise their judgment, I understand you to be saying
15 that this is not a purely mechanical exercise?

16 (Interruption.)

17 A. Absolutely not no. I'm sorry

18 Q. Exercise, yes.

19 (Overlapping speakers.)

20 A. No, it's not a mechanical exercise.

21 Q. Thank you for clarifying that.

22 And now I paused a little bit when I read

1 your next sentence, but you say: "Judges may apply
2 the Modern Principle and still arrive at different
3 interpretations of legislative intent."

4 I think that is maybe what you -- a result
5 of what you were saying. It's not a mechanical
6 exercise. There are different ways of actually doing
7 it in practice, applying it?

8 A. Yes.

9 Q. Okay. I guess that's why judges sometimes
10 get reversed on appeal.

11 A. That's why they don't agree with each other.

12 Q. They don't agree with each other. Right.
13 Okay.

14 A. I could expand on that a little bit if you
15 want. What I don't think it's a free-for-all.

16 Q. No, of course.

17 A. I think it is an exercise of judgment. I
18 think, you know, and this is an open question. And
19 it's a really interesting question for me, and I don't
20 have the answer to it. But I think and we understand
21 judgments as convincing. One judgment is more
22 convincing than another.

1 And why is that? I don't know the "why" of
2 that is, but I do think that people, judges, lawyers,
3 can often form a consensus that this is probably the
4 right opinion on something. I don't think it's a
5 free-for-all. That's why I wrote on book on this.
6 I'm trying to make it a less of a free-for-all, in
7 terms of how legislation is interpreted.

8 Q. Okay. Maybe we can turn to the Alberta
9 Trial Court Decision, which is for the record, R-001.
10 I'm sure everyone has it very well annotated by now.

11 And I would draw your attention to
12 Paragraph 133.

13 You will agree that your description of the
14 Modern Principle is in line with Judge Eidsvik
15 characterizes the Modern Principle. I think you're
16 citing to the same?

17 A. Yeah. I absolutely am.

18 Q. Okay. Now, we discussed earlier identifying
19 the legislative intent, including the intent of
20 Parliament going through the legislative history.

21 If I can draw your attention to
22 Paragraph 136.

1 The Judge says -- well, I think here
2 Judge Eidsvik is restating Paragraph 136 of the
3 Decision. Yeah, is restating that: "The Court must
4 form an impression of the meaning of the text, taking
5 into account the purpose of the provision and all
6 relevant contexts, including established legal norms."
7 And it goes on to cite Sullivan.

8 And then I think the next paragraphs,
9 starting at Paragraph 143 -- in fact, let's take
10 Paragraph 142 first. The Judge says: "Before turning
11 to the various statutory interpretation arguments, I
12 will review the legislative history since it is key to
13 determining the meaning of Section 101."

14 So I assume you've read this lengthy
15 analysis of the legislative history in preparing your
16 Report?

17 A. Yes.

18 Q. You agree that it was appropriate for
19 Judge Eidsvik to take a look at the legislative
20 history?

21 A. Absolutely. Yeah.

22 Q. Okay. I want to take a closer look at what

1 she actually does here because -- would you agree that
2 it was also an important part of how she reached her
3 conclusions?

4 A. I'm not so sure about that.

5 Q. Okay. Well, let's look at it together.

6 A. Yeah. Okay.

7 Q. So in the first few paragraphs, at
8 Paragraphs 145 to 147, she goes through the applicable
9 submission and disclosure provisions in the Regulatory
10 Regime that date back to the 1950s and '60s.

11 I won't take you through that, but she very
12 dutifully traces back the history of the Regime.

13 And then she proceeds to look at legislative
14 debates and readings surrounding the adoption of
15 COGA -- C-O-G-A, for the Court Reporter. That is at
16 Paragraph 153 to 162. And she was looking at that
17 because it factored into the successor legislation,
18 the CPRA.

19 So you agree that it was appropriate for her
20 to trace back this history?

21 A. Yes.

22 Q. Okay. Did you -- you said earlier you

1 didn't review the debates and readings that led to
2 this, but you do read what she has put in the Decision
3 on that; yes?

4 A. Yes.

5 Q. And there's nothing unusual about her
6 looking at all of this legislative history?

7 A. No. I think it all relates to the
8 disclosure regime.

9 Q. Okay.

10 A. It seems to me.

11 Q. The Judge also looks at clause-by-clauses
12 and House of Common debates. Those are also tools
13 that judges often look at when they are available?

14 A. Yeah. I have a view on that.

15 Q. Your personal view? Your academic view?

16 A. Insofar as legislative debates are
17 concerned, I don't know that I've ever seen -- they
18 might look at the debate generally speaking. But in
19 terms of relying on a pronouncement of what the
20 meaning of a term is in legislation, the most
21 authoritative, the only authoritative source, I think,
22 the Courts have ever relied on in terms of debates is

1 the sponsoring Minister of the legislation.

2 So what I'm trying to get at is you wouldn't
3 necessarily look at an opposition member's views on
4 what the legislation means and say: "Oh, that's what
5 it means."

6 Q. Of course.

7 A. No. It is strategic.

8 Q. But you would look at the answers and
9 discussions?

10 A. Absolutely. What goes on in committee?
11 What were they talking about? What? You know, and I
12 would be really curious, you know, if anybody ever
13 mentioned copyright in committee debate.

14 So yeah, I think, bring it all in. I also,
15 sometimes these prepping notes that kind of appear,
16 which I don't know what the pedigree of that is or the
17 source of that is. So I take it a little bit of
18 issue -- and Courts do rely on stuff like that. I
19 take a little bit of issue on that because I don't
20 know where it's coming from. But I don't know.

21 Q. But Courts do rely on clause-by-clause?

22 A. Sorry. Clause-by-clause?

1 Q. Do you know what a clause-by-clause is?

2 A. No, I don't. No.

3 Q. You don't know that that is a document that
4 is prepared, together with the bill that explain each
5 of the clauses? You've never read a clause-by-clause?

6 A. No.

7 Q. So Judge Eidsvik looks at the interplay of
8 the CPRA between the objectives of promoting natural
9 resource and development and disclosure provisions at
10 Paragraph 171 and the clause-by-clause, which was the
11 document that was prepared for Parliament in
12 preparation for the bill to be introduced.

13 Says that this provision: "Strike a balance
14 by generally protecting confidentiality. But then in
15 subsection (7) creating a number of exceptions whereby
16 certain types of information may be disclosed after
17 certain periods."

18 So she's referring to that as one of the
19 relevant elements between the commercial value of what
20 is done through Seismic Data and the important Crown
21 interest in ensuring dissemination of information.

22 Actually, let me take you to the next

1 paragraph, paragraph 175. So this is where
2 Judge Eidsvik goes on to look at the Transcripts of
3 the Senate Standing Committee on Energy and Natural
4 Resources that was being considered.

5 And you agree that proceedings of standing
6 committee, you agreed earlier, that those are
7 relevant?

8 A. Yes.

9 Q. Okay. Do you see the reference to GSI's
10 concerns having been made known during the debate in
11 Paragraph 175?

12 A. I don't know what those concerns are but
13 that's what the first sentence says.

14 Q. Okay. Let's read on: "A review of the
15 proceeding Transcripts demonstrates the tension
16 between the Companies involved in spending large sums
17 of money to obtain Seismic Data on a nonexclusive or
18 speculative basis and the Government's desire to
19 disseminate information to the public to encourage
20 exploration and development."

21 A. That's the concern.

22 Q. That seems to be the concern.

1 And if you go on to look at Paragraph 176, I
2 guess one of the senators was taking on GSI's concerns
3 and concerned that the Regime -- the bill would amount
4 to a retroactive confiscation of the valuable asset,
5 the Seismic Data.

6 Do you see that?

7 A. Let me read the whole thing.

8 Q. Please, please, take your time.

9 A. Yes.

10 Q. Okay if we move to the next paragraph,
11 Prof. Hutchison, I think this is a response by a
12 government official at the Minister's request, the
13 Deputy Minister of COGLA. I guess that's a senior
14 official.

15 And it talks about the concerns that were
16 discussed with the industry and it talks about the
17 need to -- it's a balancing act. And if you look at
18 the very end of Paragraph 177, there's a discussion
19 there about balancing the public good and the private
20 good to want to keep the information as secret as long
21 as possible.

22 So it seems, would you agree, that this

1 discussion of balancing and the different -- the
2 tension between the public and private was something
3 that had been -- at least was before discussed at the
4 time of the adoption of the Regulation?

5 A. Is it on. Insofar as the confidentiality
6 period is concerned, yes.

7 Q. Okay. Let's go to Paragraph 180.

8 Do you know who Mr. Clink is?

9 A. I don't, no.

10 Q. I guess he was President of Old GSI, the
11 predecessor company. And he was raising, also,
12 concerns about government release of speculative data
13 without compensation is, in effect, confiscation of
14 private property and was asking the Minister at the
15 time to amend the legislation to hold it confidential
16 for longer period of time.

17 So it seems like there was, at the time, the
18 main concerns were with this idea of releasing the
19 information and that it would become public.

20 Okay. I want to move on because I think the
21 Judge you referred to of the Judge having properly
22 undertook a lengthy discussion of legislative history,

1 obviously it's not the only input. And so you would
2 agree that the Judge then went on to -- we look at
3 Paragraph 214, to consider the ordinary meanings of
4 the word with the legislative history in mind.

5 Would that be -- I think she says at
6 Paragraph 213: "With this legislative history in
7 mind, I turn to the various arguments." And she looks
8 at Section (a) a little bit below at "plain meaning of
9 the words."

10 A. Yeah.

11 Q. So the Judge does look at the arguments
12 regarding the plain meaning of the word; doesn't she?

13 A. Okay, so I see some discussion about
14 "disclosures" opposed to the word "publish," and
15 that's a meaningful inquiry. A legislature chooses
16 its words meaningfully.

17 What I don't see, in terms of just the
18 ordinary meaning -- so the ordinary meaning is a
19 meaning we understand when we first read through the
20 statute. I think that's a good way of understanding.
21 That's what the Driedger Principle says. So that's,
22 kind of, at first blush, what does it seem to you to

1 mean?

2 Courts typically try and understand the
3 ordinary or plain meaning -- I don't know there any
4 difference between those two descriptors -- by
5 considering the meaning of the word and issue.

6 So "disclose," through "disclosure," what
7 does that mean? Typically, that they will look at a
8 dictionary. What does that mean? They don't,
9 dictionaries don't necessarily determine the meaning.
10 Often, they don't let -- sometimes they adopt a
11 dictionary meaning, usually they don't. And I think
12 that's appropriate. The dictionary meanings are quite
13 broad. They try and adopt a meaning that is more
14 tailored to the context of the provision.

15 I don't really see her unpacking what
16 "disclosure" means, at least in terms of what I'm
17 suggesting, which is, well, you can disclose things in
18 many ways. You can, you know, make it concrete in
19 this case. You could allow somebody
20 pass-word-protected access on a screen. You could
21 send out copies. You could provide unlimited number
22 of copies.

1 So disclosure could take many forms. So I
2 would have liked to have seen more of a discussion of
3 what "disclosure" means. I mean, I think at the end
4 of the day it's not -- it doesn't
5 really -- "disclosure" can mean any of those things
6 probably. But in terms of her analysis, I don't think
7 it was thorough enough on the ordinary meaning.

8 Q. Okay. So you don't think it was thorough
9 enough, but she does go through the exercise of
10 looking at ordinary meaning, and I think if you look
11 at the following paragraphs, she also considers
12 arguments about the context and other provisions, for
13 example, at Paragraph 233. So there's at least a
14 couple of pages where she does engage in that
15 exercise.

16 A. Yeah. Yes, some exercise of like
17 looking -- there is some sui generis argument. Is
18 that what you're referring to?

19 Q. Yes.

20 A. Yeah, I think that relates-- I think she was
21 addressing the issue of whether disclosure was
22 mandatory or not. If I'm not mistaken, in the

1 argument I think from the Claimant's Counsel was that
2 wasn't necessarily mandatory because of the previous
3 wording, or previous language in the section.

4 So that is a contextual understanding of
5 "disclosure" for the purpose of that particular issue,
6 I guess, yes.

7 Q. Okay. Let me just take you to
8 Paragraph 241. I think that is one of her conclusions
9 on the Parliamentary debates as the twin objectives of
10 the CPRA of protecting confidentiality in Seismic Data
11 and promoting resource exploration and development.
12 So she does seem to come back to -- and she goes on to
13 say "would be best met by imposing a period of
14 privilege over geophysical works and then allowing
15 such materials to be disclosed without further
16 restrictions."

17 So that seems to be a point that --

18 A. Sorry. Where's -- without further? 241?

19 Q. 241. I think she comes back to this in
20 several places in her judgment looking at the result
21 of her analysis. Now, give me a second.

22 A. Sure

1 Q. Prof. Hutchison, I want to understand the
2 comments you made this morning on how to resolve
3 conflict in overlapping statutes, and I think I heard
4 you say that you agreed with Prof. Bankes that *lex*
5 *specialis* was one of the tools you could use in
6 resolving a conflict, or do you have a different
7 opinion from Prof. Bankes?

8 A. Do I have a different opinion from
9 Prof. Bankes? I'm not -- I don't want to use my
10 memory to try and remember what his nuance of his
11 argument on this, but...

12 Q. Fair enough.

13 A. So, *lex specialis*, I think -- so, yes, as I
14 said in my presentation, *lex specialis*, it's one
15 inquiry into legislative intent. We might look at
16 that and say, okay, this is the most recent
17 legislation. Again, given this notional consideration
18 that we -- I'm sorry, the *lex specialis*, we may say,
19 okay -- I'll use the Company creditor's case, for
20 example.

21 In that case -- and this is why the
22 confusion on -- my Report on it, because they actually

1 said the most -- more specific provision was a CCAA
2 case -- statute, when the real issue in that case was
3 whether the Crown could -- had a deemed trust in their
4 GST automatically prior -- as soon as a company
5 is -- goes into bankruptcy and before a reorganization
6 might take place under the CCAA.

7 And so you say, well, yeah, that's a more
8 specific -- that seems to address the issue. GST is
9 supposed to be considered a deemed trust, but there's
10 a general waiver provision in the CCAA which said that
11 you can waive these kinds of trusts because we want
12 companies to succeed. We don't want them to
13 immediately go into dissolution liquidation generally.

14 It's a reach for me because it's not my
15 area, but I think that's generally what was going on.
16 But it seemed to me that GSI -- or the GST deemed
17 trust was explicitly provided for in a piece of
18 legislation. That seemed to be the more specific.
19 But they ended up saying the CCAA was more specific.

20 So it's an inquiry. It doesn't -- I
21 think -- it doesn't always lead necessarily to a
22 particular result. I'm afraid maybe I might have made

1 it more complicated in terms of answering your
2 question. So maybe I'll circle back and try again.

3 It is used. It's fine for it to be used,
4 but it's just one input, and I think it -- I think it
5 might be most productive or most useful in a situation
6 of ambiguity, but that is my opinion.

7 Q. Okay. I think that's helpful. Thank you.

8 I had misunderstood your Report as
9 suggesting that there can never be conflict, but I
10 think you've clarified the issue now.

11 A. Well, if I could just speak to that. Okay.

12 So I don't look at it as conflict, and I
13 don't think it is right -- even though Courts will
14 sometimes say this and books will say this, and I
15 think this leads to confusion, is I think of them as
16 overlapping statutes, because they don't truly
17 conflict until you have construed them fully. And
18 then we can say we have a conflict here.

19 I don't think any Court that is fully
20 construed, Supreme Court that is fully construed using
21 the Modern Principle, apparently, fully construed
22 a -- two provisions has ever found that there is

1 actually a conflict. They find one provision takes
2 precedence over the other, but it's not -- I don't
3 consider that a conflict. But it is theoretically
4 possible you could have a conflict.

5 And often -- if I could just be more
6 specific about how its *lex specialis* is used,
7 sometimes it is not used at all. Let's get that
8 clear, I think. Just as many cases will refer to it
9 as don't refer to in resolving overlapping statutes.

10 Where it seems to come in is after a
11 court -- and again, I'm talking about Supreme Court
12 cases -- have fully construed the provision as best
13 they can, and they say, yeah, also to -- you know,
14 we're fortified in this approach because, you know,
15 this is the later statute -- or sorry, this is the
16 more specific statute, and that is the clearest
17 indication of legislative intent.

18 Q. Prof. Hutchison, didn't the Supreme Court
19 find a conflict in Broadcast Reference?

20 A. I think Justice Rothstein actually mentions
21 conflict, but --

22 Q. Speaking for the majority?

1 A. Yeah, I fully admit, I've seen -- I've seen
2 Supreme Courts say these are overlapping statutes in
3 conflict. I'm trying to create clarity because there
4 is no conflict if you construe this statute such that
5 one provision applies and -- it's -- and maybe we're
6 just getting into nomenclature what we're calling
7 here, but overlapping provisions -- let me put it this
8 way.

9 I think overlapping provisions -- the most
10 common type of overlap, of so-called "conflict" of
11 overlapping statutes is where one statute -- there is
12 no operational conflict, which Prof. Bankes talked
13 about. I've never seen that where one statute tells
14 you to do A, another statute tells you not to do A. I
15 don't think that applies.

16 I think one statute will give you a right
17 and another statute might take that away, but in
18 Apotex and Eli Lilly Case, which I refer to, kind of
19 does that. It says: "Well, we have a valid exercise
20 of patent rights, but if that valid exercise of patent
21 rights leads to anti-competitive effects such that a
22 pharmaceutical has a monopoly on a pharmaceutical

1 process, that is anti-competition." And so, which one
2 is it?

3 And the Court looks at the context and the
4 purpose and says, you know, the purpose of the patent
5 bargain is to reward in ventures, and licensing and
6 assignments is a way that they get rewarded. That's
7 how they make money.

8 And it's even more valuable when you -- the
9 assignment is even more valuable if you can assign it
10 to a pharmaceutical company that has a monopoly, but
11 that creates an anti-competitive effect, and that
12 purpose, we construe that purpose to take precedence
13 over section of the patent act which allowed patents
14 to be freely transferred.

15 And I think that is -- either that or one
16 statute, like in the Broadcasting Reference Case, they
17 said they just didn't have jurisdiction. CRT started
18 regulating in an area that was covered by Copyright
19 Act, and they said they just didn't have jurisdiction
20 to do that.

21 Or you can have a Company Creditor's Case
22 where -- which I talked about previously, where they

1 say, well, there's a temporal harmony which is this
2 act applies until such time as that is a CCAA, we are
3 going to give corporate reorganization, a chance. If
4 it doesn't work, then the excise tax or the tax in
5 favor of the Government for GST kicks in.

6 So you have a temporal harmony there.

7 But I freely admit that Courts will
8 characterize that one statute taking precedence over
9 another as a conflict. I just don't look at it that
10 way.

11 Q. Thank you for clarifying that,
12 Prof. Hutchison.

13 Then let me go back to a comment you made in
14 your presentation this morning that, or earlier, that
15 you had wanted to see a little bit more discussion as
16 to whether "disclosure" includes copying.

17 Can I take you to Paragraph 253 of the
18 Decision, please?

19 A. Umm-hmm.

20 Q. This is Paragraph 249-253 of the Decision.
21 The Judge does discuss this issue of "disclosure" in
22 (and?) copying, and I think you're saying, well, this

1 section is maybe not lengthy enough.

2 But would you agree that this is responding
3 to that argument that comes after much of the
4 discussion on responding to the other arguments and
5 the legislative history. So I think by that time the
6 Judge says at Paragraph 253: "Section 101, read in
7 its entirety does not make sense unless it is
8 interpreted to mean that permission to disclose
9 without consent after the expiry of the five-year
10 period or under conditions found in Section 101(6)
11 must include the ability to copy the information."

12 If I heard you this morning, I think you
13 were saying that you don't necessarily disagree, but
14 it would mean you would have to engage in an exercise
15 to see if you can access the information without
16 copying.

17 Is that what I understood?

18 A. Well, my point was "disclosure" can be many
19 things. That wasn't my point, but I think that is
20 what I'm saying now. "Disclosure" could be many
21 things. The purpose of the disclosure regime is to
22 encourage exploration in Offshore Areas, oil-and-gas

1 exploration.

2 And if the goals of that disclosure regime
3 to encourage that exploration can be more or less
4 accomplished by not copying, say, a digital
5 presentation of the work on a screen, I mean, most
6 obvious thing I think of is access to information,
7 make a request, they give you a password, and you can
8 access the information on a screen. Of course, you
9 can -- and not be able to copy it.

10 Q. Okay. That must be fairly recent, because
11 as far as I know, we've -- for many, many years it was
12 copying, but it doesn't really matter. I think that's
13 a bit nongermane to the question.

14 A. That's okay. I'm talking about Alberta.
15 They do that.

16 Q. I see.

17 A. That's the technology I'm referring to. So
18 they give you a password, you'll access it, you can
19 see it, but you can't copy it. I'm not sure about the
20 access to information in Alberta, whether you can copy
21 it or not, but -- I think you can, but you can have it
22 so it's not copied.

1 Q. So it would be better to have it on the
2 screen without copying?

3 A. Well, if you're going to accomplish the
4 purpose of encouraging exploration. And then you have
5 harmony, because they can go to the GSI and while they
6 are interested, they want to explore it, they want to
7 process it further. And then they go and buy -- get a
8 license. So it seems to me, again, you don't -- you
9 really don't have a conflict there. You are not even
10 saying one takes precedence over the other. You're
11 saying both can operate harmoniously in fact.

12 Q. Are you aware that some of the seismic
13 companies were objecting to having the data digitally
14 available?

15 A. Again, I'm not -- I don't know the back
16 story on all this stuff.

17 Q. Sorry.

18 A. And I don't know whether that -- my only
19 point is a point of principle, which is that if you
20 can harmonize it - if you can, I'm not saying -- if
21 you can't, then I think you do have a conflict, but if
22 you can -- and I think for me that was unsatisfactory

1 to just -- for Justice Eidsvik to just say
2 "disclosure" means "copying" and not examine that
3 further by looking at the purpose.

4 Q. Okay. And have you ever looked at a Seismic
5 Data on a microfiche, Prof. Hutchison?

6 A. No.

7 Q. So it is possible, in your opinion, that if
8 allowing someone to only look at it on microfiche
9 might not fully achieve the intent of the legislation?

10 A. I don't know that fully -- so you're saying,
11 if it's hypothetically or --

12 Q. I'm just wondering if that would be a
13 relevant consideration.

14 A. If it's not possible at all?

15 Q. Well, if it would not achieve the intent of
16 dissemination of information.

17 A. Okay. So again, I'll go back to the Apotex
18 and Lilly case because I think that helps -- that's a
19 Federal Court of Appeal case, but I think it is kind
20 of most germane to this point, which is, okay, we have
21 two overlapping statutes, one has to end up taking
22 precedence. And there's a consideration of the

1 purpose here, so -- and one purpose is thought -- it
2 diminishes the other purpose in this in these
3 particular facts.

4 So again, if it's a situation where you
5 can -- only one purpose, one statute or one provision
6 has to prevail, like in that case, then I think you
7 have to make a choice.

8 If, again, the notion of balance is a notion
9 of compromise, so if we're talking about whether a
10 company, oil exploration company could most
11 efficiently and most thoroughly develop their
12 exploration potential by having copies of it, I don't
13 think that's the right way to look at it. I think the
14 issue is, can you accomplish that purpose of
15 disclosing the data so that people might say: "Well,
16 hey, I'm interested in that." And I think there's
17 some possibility there and then you can go and get a
18 license.

19 So the point being that it might not as
20 ideally and perfectly facilitate disclosure vis-à-vis
21 what the Government -- or oil exploration vis-à-vis
22 public policy of the Government of Canada, I don't

1 know that 100 percent perfect meeting that purpose in
2 the most efficient and desirable way, vis-à-vis the
3 Government of Canada and the disclosure regime, is the
4 only way to look at it. I think that's part of the
5 puzzle.

6 You have to compromise that with the rights
7 of the copyright holders. So if it can effectively
8 more or less accomplish that goal, maybe -- but not as
9 quite as effectively if you provided copies. Then I
10 think you're in an area of harmony still, is what I'm
11 trying to say.

12 Because you're -- again, balance suggests
13 compromise; right. Because I mean, even a digital
14 display is a copyright holder's right.

15 Q. Understood.

16 Prof. Hutchison, can we turn to
17 Paragraph 297 of the Decision. I think again here the
18 Judge is looking at how the legislation came about and
19 I think comments here on some of the balancing
20 considerations -- I will just maybe have one last
21 question for you now, and then, perhaps, we can take a
22 break. So bear with me.

1 At Paragraph 297, the judge
2 says: "Parliament was aware of the commercial value
3 of Seismic Data and attempted to take this into
4 consideration in its legislative drafting." And the
5 Judge goes on to say: "The consideration balanced in
6 this regard are the same as those found in the
7 Copyright Act. The rights of the creator versus the
8 rights of the public to access data."

9 And then, wouldn't you agree that the Court
10 here is trying to understand what the Parliament the
11 legislation was trying to address?

12 A. That a bit of --

13 Q. I think -- feel free to read on to
14 Paragraph 298, I think that is also instructive:
15 "Parliament made the logical decision to deal with
16 disclosure of material filed under the Regulatory
17 Regime exhaustively through provisions contained in
18 the Regulatory Regime."

19 Would that be one of the reasonable
20 interpretations?

21 A. So looks like Paragraph 297, it's a bit of a
22 non sequitur, the two sentences: "Parliament was well

1 aware of the commercial value and took this into the
2 consideration of copy right of legislative drafting."
3 Never was Copyright Act or copyright mentioned. We're
4 talking about a confidentiality period; we're not
5 talking about copyright.

6 "Considerations balanced in this regard are
7 the same as those found in the Copyright Act."

8 Q. Is the balancing you were referring to that
9 permeates the Copyright Act?

10 A. Yeah, but that doesn't really answer the
11 question whether there's a copyright after the
12 disclosure period. What happens to that copyright
13 after the disclosure period? This a confidentiality
14 period.

15 Q. Isn't the Judge here saying that the
16 balancing was done through the CPRA? That's the
17 Judge's interpretation of what the intent of
18 Parliament was?

19 A. That might be her understanding.

20 Q. Okay. Thank you. I think it's
21 been -- thank you for your patience.

22 A. Thank you.

1 MS. TABET: I think we'll take a short
2 break, Madam President, and we'll come back. We may
3 have half an hour after the break.

4 PRESIDENT WALLGREN-LINDHOLM: Thank you very
5 much.

6 We will break until 11:15.

7 And, Prof. Hutchison, you are under
8 testimony, so I would ask that you don't talk to
9 anybody about your Expert testimony in the meanwhile?

10 THE WITNESS: Sure. Stay right here.

11 PRESIDENT WALLGREN-LINDHOLM: But you're
12 allowed a coffee or the like. Okay. Thank you.

13 (Brief recess.) {"2}

14 PRESIDENT WALLGREN-LINDHOLM: Welcome back,
15 everyone.

16 We will now continue the cross-examination
17 of Prof. Hutchison.

18 Ms. Tabet, please.

19 MS. TABET: Thank you, Madam President.

20 Prof. Hutchison, I think, in fact, I have no
21 further questions for you.

22 THE WITNESS: Okay. Thank you.

1 PRESIDENT WALLGREN-LINDHOLM: Thank you for
2 that.

3 And then redirect?

4 THE WITNESS: Disappointed. I was looking
5 forward to it.

6 MS. LEMMENS: Just a very short one and one
7 clarification, and just that it wasn't a question that
8 ultimately got posed to the witness, but I just wanted
9 to clarify that Mr. John Clink is noted in the
10 Decision as being a President of Arctic -- President
11 and Manager of Arctic Exploration of GSI Delaware.

12 So the prior entity, and I think you just
13 said that he was the President of the Old GSI, but he
14 wasn't actually the President of the Company. He was
15 sort of a President -- a Vice President type person of
16 a Department of Arctic Exploration.

17 MS. TABET: Thank you for that
18 clarification. I did not realize that. I read
19 President and Manager of GSI Delaware. Understood
20 that it was a President that --

21 MS. LEMMENS: Yes. The Decision clarifies
22 that it is of that Arctic Exploration area.

1 REDIRECT EXAMINATION

2 BY MS. LEMMENS:

3 Q. So, sir, you were asked about a
4 clause-by-clause by Ms. Tabet and mentioned that you
5 had not read one before?

6 A. No.

7 Q. In relation to statutory interpretation,
8 what have you seen in case law regarding
9 clause-by-clauses?

10 A. I don't think I've seen anything. There's
11 a -- if I can just elaborate a little bit, there is a
12 bit of a disconnect between legislative drafters and
13 interpreters. In the sense that I don't know that we
14 necessarily -- and I went to a conference in Ottawa
15 sponsored by the Government of Canada in legislative
16 drafting, and I learned lots of things there. On the
17 interpretive side, there's a lot of things that go on
18 that you're not necessarily aware of.

19 Q. Thank you, sir.

20 MS. LEMMENS: Those are all my questions.

21 PRESIDENT WALLGREN-LINDHOLM: Thank you very
22 much. And then I shall turn to my co-arbitrators.

1 Let me start on this side now.

2 Mr. Landau?

3 (Comments off microphone.)

4 QUESTIONS FROM THE TRIBUNAL

5 ARBITRATOR LANDAU: First, I don't have many
6 questions, just a couple of clarifications.

7 (Interruption.)

8 ARBITRATOR LANDAU: You said in the course
9 of your testimony, when looking at materials emanating
10 from Parliamentary debates, that one would, perhaps,
11 focus on the Statements, if you are going to focus on
12 the Statements, those are the sponsoring Minister.

13 So, I understand a clause-by-clause as being
14 what perhaps in the U.K. we would have -- we would
15 call "notes on clauses," which is a document that
16 accompanies a bill in its passage through the Houses
17 of Parliament with a clause-by-clause explanation, and
18 that would be produced by the sponsoring agency. So
19 that would be the explanation to members as to what is
20 the intent of the bill on which they are going to
21 debate.

22 (Overlapping speakers.)

1 THE WITNESS: Yeah, that rings a bell --

2 (Interruption.)

3 ARBITRATOR LANDAU: Does that accord with
4 your understanding?

5 THE WITNESS: I haven't seen a
6 clause-by-clause. I've seen -- I don't know if I have
7 the exact name of it correct, but I've seen
8 legislative backgrounds on legislation. I've seen
9 explanatory notes, and they are referred to by Judges,
10 and they carry some weight as of legislative intent.
11 The process by which they are made is opaque to me.

12 Certainly -- I mean, I haven't gone through
13 great efforts to find out where those things come
14 from, but it sounds likely that they come from the
15 sponsoring department or Ministry.

16 So I think that's maybe the same thing.

17 ARBITRATOR LANDAU: I see. All right.

18 THE WITNESS: Yeah. Okay.

19 ARBITRATOR LANDAU: All right. I just want
20 to ask you, pulling back from your -- the detail of
21 your testimony.

22 THE WITNESS: Right.

1 ARBITRATOR LANDAU: We have the judgments
2 that we can read. We've got your testimony, we've got
3 the testimony we heard, the Expert testimony we heard
4 yesterday. We've got the competing testimony on the
5 other side, for example Mr. Sookman, that you would
6 have read his Reports with different possible views on
7 how the Canadian Courts might have approached this
8 issue.

9 And you, yourself, have testified today
10 about the possibility of different approaches, the
11 recognition is not a mechanical exercise. There are
12 perhaps some academic attempts to consolidate and
13 rationalize the field, which, perhaps, you're a
14 proponent of. Is that fair?

15 THE WITNESS: Yes. Yes. That is absolutely
16 fair.

17 ARBITRATOR LANDAU: And putting all that
18 into context, we, as a Tribunal, of course, have got
19 to approach this -- understanding Canadian law in
20 order to then apply international law. So I set that
21 as the premise for the question I want to ask you,
22 which is, if you pull back and look at what -- look at

1 these judgments, First Instance, Court of Appeal
2 Judgments, how would you assess what has happened here
3 from a Canadian law perspective?

4 Are you shocked by the results? Are you
5 surprised by the results? Do you find it -- are they
6 results that you would plot on the spectrum of
7 possible outcomes, even if you don't agree with them?

8 Can you give us a guide as to what's
9 your -- where do you end up at the end of your
10 testimony on this?

11 THE WITNESS: I end up -- so there's two
12 questions there, where -- I think. Maybe where I end
13 up, what I think is the right way to approach it.
14 That's what my presentation --

15 ARBITRATOR LANDAU: That -- well, you've
16 testified how you would approach it.

17 (Overlapping speakers.)

18 THE WITNESS: What I think the law --

19 ARBITRATOR LANDAU: Yeah.

20 THE WITNESS: Okay. I know I got -- I
21 understand the -- I have trouble making sense of it
22 myself. And I'm -- absolutely, that's one of my goals

1 in writing the Modern Principle Book that I wrote.

2 (Overlapping speakers.)

3 ARBITRATOR LANDAU: So can I just
4 put -- when you say trouble making sense of it, you
5 mean trouble rationalizing the body of jurisprudence
6 on the statutory interpretation?

7 (Overlapping speakers.)

8 THE WITNESS: No. I don't have trouble
9 rationalizing the principles that are said to apply by
10 our highest Court and what Courts -- what I have
11 problems with is how Courts --

12 ARBITRATOR LANDAU: Yeah.

13 THE WITNESS: -- sometimes apply it,
14 recognizing that Courts can have legitimate
15 disagreements on how the Modern Principle applies.

16 So I think -- and I'm encouraged to see that
17 increasingly, if not always now, that when the Supreme
18 Court gets a case, they will look at the text, they
19 will look at the ordinary meaning. They will go
20 through it step by step what the construction of the
21 principle is. And my impression of why there is
22 confusion, unnecessary confusion, is that -- and this

1 is anecdotal, and I don't want to cast this dispersion
2 on all Trial Courts, but I don't -- they have a lot of
3 evidence to go through.

4 ARBITRATOR LANDAU: Yeah.

5 THE WITNESS: There -- in a case like this,
6 most intellectual property disputes go to the Federal
7 Courts. This is a generalist judge, and God help me
8 if I had to decide some of the cases, like understand
9 the CCAA and the Bankruptcy Act and all that stuff, I
10 think it's a very difficult exercise. And -- plus, I
11 don't think necessarily that courts at the trial level
12 always do construe the legislation as fully as courts
13 on appeal do. That is definitely something I have
14 noticed.

15 So I think the law is clear, it's a modern
16 principle. It's a presumption of coherence. We use
17 those inputs as best we can to understand the meaning,
18 and in the case of overlapping statutes, we try and
19 understand how best to make them can work
20 harmoniously. And if they can't both operate
21 together, then we have to -- and Courts do
22 the -- again, the Supreme Court, I think does do this

1 using the Modern Principle.

2 They often end up coming to a conclusion
3 about which statute, or which provision takes
4 precedence or whether they are supposed to apply
5 sequentially or whether one doesn't have jurisdiction
6 or, most commonly one is thought to take precedence
7 over the other.

8 ARBITRATOR LANDAU: Yeah.

9 THE WITNESS: But -- and the reason I am
10 focused so much on -- and I'm afraid I might have been
11 unclear on the statutory overlap and conflict, is my
12 concern with the using "conflict" too readily is that
13 the Courts will go to these tiebreaker -- not these
14 tiebreaking, but these presumptions automatically.
15 They will say, oh my goodness, this seems to conflict
16 with this. I don't know what to do with that, you
17 know, *lex specialis* or something like that.

18 And Supreme Court, if I invite you if it's
19 an important issue at all in this proceedings to read
20 some of the cases on statutory overlap and how Courts
21 reason through that. They do use those -- they use
22 those rules of construction to help get to a Modern

1 Principle construction ultimately. And sometimes they
2 carry weight and sometimes they don't --

3 ARBITRATOR LANDAU: Yeah.

4 THE WITNESS: -- have much weight and
5 sometimes they are not even mentioned.

6 ARBITRATOR LANDAU: Yeah.

7 THE WITNESS: I hope that helps.

8 ARBITRATOR LANDAU: Yeah. That helps
9 immensely. Thank you very much.

10 PRESIDENT WALLGREN-LINDHOLM: Mr. Gowdy?

11 ARBITRATOR GOWDY: Thank you, Madam
12 President.

13 Welcome, Professor. I may bounce around a
14 little bit.

15 THE WITNESS: Okay.

16 ARBITRATOR GOWDY: It's not to pay law
17 professors back for what they did to me, it is just
18 the way my wayward mind works.

19 So let's assume arguendo you have two
20 provisions of law that can be argued are
21 contradictory. A judge decides that the material is
22 protected, but it can be taken without compensation.

1 How does that implicate international law?

2 THE WITNESS: I'm sorry. I'm not sure I
3 quite understand the question. Can you rephrase it.

4 ARBITRATOR GOWDY: Well -- sure. Well, I'll
5 try to rephrase it in a different way.

6 People disagree with judicial decisions all
7 the time.

8 THE WITNESS: Right.

9 ARBITRATOR GOWDY: Almost every decision by
10 a judge someone takes exception to.

11 When does it rise to the level of a
12 violation of international law?

13 THE WITNESS: I do have a -- my training, my
14 master's degree was in -- and, to some extent, my
15 Ph.D. was in international law, so what's a violation
16 of international law? There's customary international
17 law rules, there is jius cogens rules or preemptory
18 norms, it could be violating a treaty that you've
19 ratified, implemented.

20 I don't know if those are the -- that's my
21 understanding of when you would be -- certainly on the
22 customary and jus cogens preemptory norms.

1 You can't say well, this is our national law
2 based on sovereignty. These are in conflict with
3 international law. I think that's not a legitimate
4 reason to go against international law, or I suppose
5 you are technically violating international law if you
6 are legislating something contrary to a treaty
7 commitment you made. I don't know if that's the -- if
8 I'm going down the right alley with you or not.

9 MS. LEMMENS: I don't mean to interject too
10 much, but this is a little bit beyond the scope of
11 what we were qualifying his expertise to be, which is
12 his statutory interpretation and copyright. I didn't
13 take it --

14 ARBITRATOR GOWDY: He's welcome to tell me
15 that he's not an expert in that field. I'm not trying
16 to make him an expert if he's not, but if he has an
17 expertise, I'd be interested in it.

18 But if I'm asking you something outside of
19 your area of expertise, tell me.

20 THE WITNESS: Yeah. It's outside of my
21 area. I have familiarity. I'm not current with it.
22 I'm certainly not knowledgeable on expropriation and

1 international law.

2 ARBITRATOR GOWDY: All right. Well, then
3 let me ask you something you may be more familiar
4 with.

5 I think this is what you said, but if it's
6 not, I want you to correct me.

7 Disclosure without copying could be a
8 remedy, could have been an alternative. Is that a
9 fair characterization of your testimony?

10 THE WITNESS: If it could accomplish the
11 purpose of the disclosure regime, yes.

12 ARBITRATOR GOWDY: Disclosure without
13 copying. That could just be seen as who has the best
14 memory. That's a memory test, who can remember what
15 they saw.

16 THE WITNESS: Well, again, if you think of
17 the purpose of the provision -- and, again, I'm not
18 familiar with the practices of the industry, but, I
19 mean, if you look at something on a screen and you see
20 a possibility there and you want to explore it
21 further, then that is not memory. That is, okay -- I
22 mean, I don't know how -- you can look at it as long

1 as you want and make a decision about whether you want
2 to get a license for the data.

3 So I think it's not memory.

4 ARBITRATOR GOWDY: Okay. I think you also
5 said that -- I don't want to ask you -- I'll ask you
6 what you said. If it's not an implied or compulsory
7 license, what is it?

8 THE WITNESS: Well, it's nothing that I can
9 think of that's been recognized in the law. They are
10 trying to fit this rules-of-the-game argument into an
11 implied license, and, again, maybe I should just
12 invoke ignorance or my lack of expertise on what is
13 it. All I can say is it's really not an implied
14 license or a compulsory license or anything that I've
15 seen in connection with copyright law. I know there
16 is -- yeah. I mean, I think the one case that talked
17 about that was a competition or regulatory case, which
18 talked about licensing somehow in that context. But I
19 don't know how much purchase that has in this case or
20 for copyright.

21 ARBITRATOR GOWDY: Is it fair to say, in
22 Paragraph 322, that Senator Hays kind of weighed and

1 balanced the competing interest and said that we're
2 well-aware that this is a confiscation without
3 compensation, but we don't care?

4 THE WITNESS: Sorry. 322?

5 ARBITRATOR GOWDY: Yes, sir. Of what I call
6 the "Trial Court Opinion," but that may not be the
7 right phraseology.

8 THE WITNESS: I would have called it that
9 too, before this case. I never heard of a Common
10 Issues Case before.

11 What tab is that?

12 ARBITRATOR GOWDY: Paragraph 322 of the
13 Alberta Decision. Do you see where it says, "as
14 pointed out by senator Hays."

15 THE WITNESS: Yes, I do. Thanks.

16 ARBITRATOR GOWDY: Right. "The regime has
17 confiscated Seismic Data, and is not apologetic for
18 it, it makes clear there is no compensation for
19 confiscation under the Act."

20 THE WITNESS: To be quite honest, I'm not
21 sure what the legal significance of that is. I mean,
22 I think she had reached her holding by that point, and

1 then he does say "confiscated." That's -- I'm not
2 sure -- I know it's referred to earlier in the
3 materials. I'm not sure if he's saying that in an
4 ordinary -- in a common parlance or if he's saying in
5 a legal sense. I'm not sure what to make of that, to
6 be honest, especially since it follows after the
7 holding of the case.

8 ARBITRATOR GOWDY: Two more questions and
9 then I will be done.

10 You made reference to the word "holding." I
11 don't know whether it's dicta or holding. I'll let
12 other people make that decision, but twice the word
13 "unfair" appears in this Alberta Decision. Twice the
14 Trial Judge either said "unfair" or "unfairly."

15 What do you make of that?

16 THE WITNESS: I'm sorry, I don't feel I'm
17 being very helpful, but I'm going to have to say I
18 don't know what to make of that. I'm looking at how
19 she reasoned through the law, and how she -- I mean,
20 my focus is on characterizing it as one of these
21 things, compulsory license or *lex specialis*. I think
22 a judge's duty and role is to make that determination

1 to talk about whether that determination is unfair, if
2 that's what she's doing. It seems a bit unusual to
3 me.

4 ARBITRATOR GOWDY: All right. So if I were
5 to reduce your Opinion to a single sentence, it is the
6 Court could have relied upon something other than lex
7 specialis to resolve these two statutes, which then
8 would involve compensation for the Party that argues
9 it was aggrieved?

10 THE WITNESS: Yes, more or less, that's what
11 I'm saying. I mean, again, I'm assuming that both
12 objectives can more or less be met, not maybe
13 perfectly for those who had purchased the data in
14 terms of exploring -- you know, they have all the
15 information they could need, but they need to, you
16 know, to determine whether to go forward or whatever,
17 but enough information to effectively make a decision
18 like that. So, yes, assuming that's the case. And
19 I'd say that, you know, that flows from fully
20 construing the purpose of the disclosure regime, and I
21 just think that's absent here.

22 ARBITRATOR GOWDY: Thank you.

1 PRESIDENT WALLGREN-LINDHOLM: Thank you.

2 Would there be any follow-up? You,

3 Ms. Tabet?

4 MS. TABET: Thank you, Madam President.

5 RE CROSS-EXAMINATION

6 BY MS. TABET:

7 Q. Just a quick follow-up on the question that
8 Arbitrator Gowdy put to you on disclosure without
9 copying.

10 Can I take you to R-002. It's the Alberta
11 Court of Appeal Decision. I think there's a
12 discussion at the end of Paragraph 100. Mr. Gowdy was
13 putting to you the memory test question, whether that
14 was -- on this issue of whether it can be just looked
15 at without copying, and the Court of Appeal at
16 Paragraph 100 seems to consider that permitting the
17 data to be copied was the best way of meeting with the
18 intention of allowing the data to be used.

19 So would you agree that that would be one of
20 the considerations in determining whether "disclose"
21 includes copying?

22 A. Sorry. Can I just read that paragraph?

1 Q. Absolutely.

2 A. I don't see any reference to memory.

3 Q. That's right, not memory, but on this point
4 of how do you interpret disclosure, whether it means
5 only to look at or also to copy.

6 A. Again, I don't think that's examined, much
7 like the trial Judgment, whether that's possible or
8 not, and let's just assume that copying is required.

9 Q. Okay. Please feel free to read the
10 following paragraphs.

11 Isn't it true that, in the next paragraph,
12 the Court of Appeals specifically considers GSI's
13 argument as to whether "disclosure" includes copying
14 or only exposing to view, and whether it's consistent
15 with the intention of the Regulatory Regime?

16 A. So just 101 or go on?

17 Q. Indeed. 101.

18 A. Just 101. "Expose to view." I mean, I'm
19 not sure what "exposed to view" in this context means,
20 maybe they're talking about on-site inspection, and
21 that's the memory thing. But I would be surprised if,
22 in this day and age, that would be necessary with

1 digital display, as I suggested earlier. So,
2 "Disclosure", to accomplish the purpose of the Act
3 harmoniously with the Copyright Act, might mean a
4 better way to disclose, which is to use the internet.

5 Q. To use the internet.

6 Okay. Thank you, Prof. Hutchison.

7 Just one last question. Mr. Gowdy asked you
8 for your Opinion, and I don't want to paraphrase, so.
9 Let me just make sure I read it correctly. Okay.

10 Mr. Gowdy asked, to summarize your Opinion
11 as to whether the Court could have relied upon
12 something other than *lex specialis* to resolve these
13 statutes, and said "which then would involve
14 compensation for the Party," you don't address that in
15 your Reports; is that right?

16 A. I'm sorry, can you repeat that.

17 Q. I'm just trying to understand your response
18 to Mr. Gowdy as to whether you address "compensation"
19 in your Reports?

20 A. No, I don't. No.

21 Q. Okay. Thank you.

22 A. Well, I mean, to the extent I talk about

1 lack of -- to characterize this as compulsory
2 licensing is inaccurate, I guess, because it doesn't
3 involve remuneration to the License, to the copyright
4 holder.

5 Q. Okay. Prof. Hutchison, let me ask you
6 another question then. Mr. Gowdy also asked
7 you -- you refer to the fact that, if it wasn't lex
8 specialis, you didn't think it was a compulsory
9 license and you didn't think it was a mandatory
10 license, and I think there was a question put to you
11 as to whether it could be something else.

12 Could it have been understood by the Judge
13 to be an exception to the copyright? And let me take
14 you to Paragraph 294 of R-001, so the Trial Court
15 Judgment, where the Judge says: "In my view, the
16 Regulatory Regime creates an exception to GSI's
17 exclusive rights?"

18 A. Sorry. You say 291?

19 Q. 294. Apologies.

20 A. Sorry. 94.

21 Q. Yeah.

22 A. Sorry. What's the question?

1 Q. If that was one of the interpretations -- it
2 looks like the Judge considered it to be an exception
3 to copyright, therefore, not requiring compensation?

4 A. Yeah. I don't know if she -- again, I'm not
5 sure she's speaking about exception in a copyright
6 sense or it's kind of being rolled up as part of lex
7 specialis in the compulsory licensing argument, but
8 she does say "exception," but I think it's open to
9 interpretation what that is.

10 Q. Okay. Thank you very much.

11 A. Thank you.

12 PRESIDENT WALLGREN-LINDHOLM: Thank you,
13 Prof. Hutchison. Nothing further? Then I thank you
14 for your arrival this morning. And you are now
15 excused, Professor.

16 THE WITNESS: Thank you very much.

17 (Witness steps down.)

18 PRESIDENT WALLGREN-LINDHOLM: So we will
19 take in Mr. Sookman now?

20 MS. TABET: We're in the Tribunal's hands,
21 but we'll need just a few minutes to set up.

22 PRESIDENT WALLGREN-LINDHOLM: To put into

1 place arrangements, is it convenient for Claimant that
2 we continue?

3 MS. LEMMENS: Yes, it is, Madam Chair. It
4 would be helpful if we could get started on it. I
5 think we will just get through the presentation. We
6 haven't received the presentation materials just yet,
7 but that will be fine because we can review it over
8 the lunch hour.

9 MS. TABET: And just to clarify, I believe
10 it was just sent to you, and apologies, given that we
11 didn't know we wouldn't be starting until after lunch.

12 PRESIDENT WALLGREN-LINDHOLM: Thank you very
13 much.

14 (Comments off microphone.)

15 BARRY SOOKMAN, RESPONDENT'S WITNESS, CALLED

16 PRESIDENT WALLGREN-LINDHOLM: So welcome,
17 Prof. Sookman (Hutchinson). I think you have also
18 been an adjunct Professor, so I guess that title
19 sticks.

20 So welcome, Professor. You have been called
21 as an Expert in this NAFTA Arbitration by Respondent,
22 by Canada. And you have given an Expert Report in

1 these proceedings and then a Summary that we just
2 received. So I trust that you know, generally, what
3 these proceedings relate to?

4 THE WITNESS: I do.

5 PRESIDENT WALLGREN-LINDHOLM: I also say, as
6 I said to other Experts, that, if you have any
7 questions or concerns, please address the Tribunal.
8 And I will introduce us.

9 But, first, you will be familiar with
10 Counsel for Canada. And here on this side are Counsel
11 for Claimants: GSI and the Einarssons. And this is
12 the Arbitral Tribunal: Mr. Toby Landau KC and
13 Trey Gowdy. I am presiding. My name is Carita
14 Wallgren-Lindholm. The Tribunal's Secretary,
15 Ms. Geraldine Fischer; and the Court Reporter, Dawn
16 Larson.

17 We also have other interested Parties and
18 Parties in the room, as well as online, where we also
19 have the representatives for the Governments of Mexico
20 and the United States.

21 Now, as you will have heard because I think
22 you have been here, but I will still repeat it. We do

1 not administer oath in international arbitration, but
2 I would ask you to give an affirmation of your
3 independence from the disputing Parties and Counsel
4 and also of your genuine belief in the Opinions
5 expressed in your Report.

6 THE WITNESS: Yes, I do.

7 PRESIDENT WALLGREN-LINDHOLM: Thank you.

8 And your testimony will be recorded and
9 transcribed. And then you are probably briefed on the
10 fact that you will get a chance now to give 30 minutes
11 of your presentation, whereafter, Counsel for
12 Claimants will cross-examine you, followed by a right
13 to redirect and possible cross.

14 So having said this, I leave the floor
15 directly to the professor. Please, Professor.

16 MS. TABET: Mr. Sookman, I can't see you,
17 but please go ahead with your presentation.

18 PRESIDENT WALLGREN-LINDHOLM: Can I just ask
19 that you also know how to operate -- very good.

20 THE WITNESS: Thank you, Madam Chair. I've
21 seen technological problems like this.

22 DIRECT PRESENTATION

1 THE WITNESS: I am a practicing lawyer.
2 I've been practicing in the technology and IP field
3 for over 30 years. I've been an Appellate Counsel at
4 the Supreme Court of Canada and other Appellate
5 Courts, very much in the copyright and technology
6 area, which is my specialty.

7 I'm also an author of an eight-volume
8 treatise on Computer Internet law, which includes a
9 pretty large chapter on copyright. I've also
10 published many articles. And I've been a professor,
11 adjunct Professor, for many years at Osgoode Hall Law
12 School in Toronto where I have taught their core
13 copyright course and their IP course.

14 In these remarks, I'm going to cover briefly
15 the three questions that Canada has asked me to
16 address in my comments. I'm going to start with the
17 first one, which is the approach to statutory
18 construction used by the Court.

19 And the first question, which the Judge
20 addressed in her reason was: Whether or not copyright
21 can subsist in material of the kind that are the
22 subject matter of the Claim? And so it's pretty

1 clear, in my view, that she was asking the question
2 about whether copyright could subsist, not whether
3 copyright could subsist as a matter of fact in any
4 particular surveys that had been filed. And I
5 understand that Nigel Bankes took the same position
6 yesterday.

7 The main other part of the Decision was:
8 What was the effect of the Regulatory Regime on GSI
9 Claims? And you've all heard that the Judge had two
10 different ways of approaching it: One was that the
11 CPRA is a complete regime, and the other was the
12 license theory and what that means. I'm going to go
13 into how I interpret the Decision.

14 So she starts off with a reference to the
15 Modern Principle, refers to the leading cases,
16 including the Rizzo Case, which, as you know, is one
17 of the leading cases in 1998. She quotes from Rizzo,
18 in terms of the Modern Principle.

19 She goes on and quotes from Ruth Sullivan,
20 who you have heard, is one of leading textbook writers
21 who took over from Driedger. And she makes a
22 point -- right? -- that the purpose of this is to

1 arrive at what Parliament's intent was.

2 Her methodology that she used was reviewed
3 by the Court of Appeal. The Court of Appeal agreed
4 that the Modern Principle was the starting point for
5 statutory interpretation. And the Court agreed that
6 she had properly applied the approach as mandated by
7 the Supreme Court of Canada. And then having reviewed
8 the record, the Court of Appeal found no errors.

9 She then went through a very detailed review
10 of the legislative history, which is one of the
11 important ingredients of statutory interpretation.
12 And she said: "With this legislative history in
13 mind," she then went to answer some of the specific
14 questions that were important in the trial.

15 One was the right to disclose. And she
16 looked at that, and she came to the conclusion that
17 necessarily, as a matter of statutory interpretation,
18 the CPRA permitted the right to disclose. And the
19 Court of Appeal reviewed that and agreed that that was
20 the right interpretation.

21 She then moved on to the next question,
22 which is: Whether the right to disclose included the

1 right to copy? And she came to the conclusion that
2 that necessarily followed from the requirements of the
3 Regime. And the Court of Appeal reviewed that and
4 agreed that, permitting the data to be copied,
5 squarely meets that intention.

6 So she looked at the legislative intention,
7 she looked at the right to copy and came to the
8 conclusion that copying was necessary in order for the
9 disclosure right to be effected.

10 Next step, once she had interpreted the
11 right to disclose as including a copy, she came to the
12 conclusion that there was a conflict. Because the
13 Copyright Act has an exclusive right of the right to
14 copy. And the CPRA disclosure right included the
15 right to copy.

16 She then referred to one of the leading
17 cases in the area, the broadcast reference case. The
18 Decision of Justice Rothstein, a well-known jurist.
19 She cited what the test for conflict was, including
20 absurd results and frustrate the purpose, which is
21 what the vernacular when you refer to "absurd". It
22 could frustrate the purpose of the legislation.

1 And then using the test that was articulated
2 by the Supreme Court of Canada in Broadcast Reference,
3 she came to the conclusion that there was a conflict.
4 Having then found the conflict, she then had to
5 resolve the conflict. And she resorted to the -- I'll
6 call it the implied exception. You've also heard it
7 call the *lex specialis* rule. And she then found that
8 was the way to resolve the conflict.

9 She cited the Supreme Court of Canada
10 Broadcasting Reference Case, which made it clear that
11 the specific law could take precedence over a more
12 general law where they conflicted. And she came to
13 the conclusion after that following that methodology
14 that the *lex specialis* applied.

15 And she resolved the conflict by coming to
16 the conclusion that the Regulatory Regime trumped the
17 Copyright Act to the extent of the conflict.

18 The Court of Appeal reviewed the methodology
19 of the trial judge, including the resort to the
20 implied exception rule, and came to the conclusion
21 that it was a correct application of the statutory
22 interpretation methodology.

1 Now, you've heard a lot about the
2 lex specialis rule. And you will see in my Reply
3 Report, I've cited numerous cases where the
4 lex specialis rule has continued to be applied, even
5 after the 1998 case where the Modern Principle was
6 articulated.

7 In fact, the cases go way back to old
8 English cases which were then adopted in the Canadian
9 cases. So this is not some new doctrine, not some
10 unknown doctrine and it's been applied in numerous
11 times.

12 Where it fits within the modern framework is
13 a question; right? But when you look at what Sullivan
14 says, Sullivan says that these rules of statutory
15 construction, like lex specialis, is actually part of
16 the tool set that Courts have for determining the
17 intention of Parliament.

18 So you could either say it fits within the
19 Modern Principle, or you could say the Modern
20 Principle looks at everything else when there's a
21 conflict you apply it. But at the end of the day, in
22 my view, it doesn't really make a difference. It's an

1 academic exercise. You find a conflict. This tool,
2 is one of the many tools that can be used and was
3 applied by the Court in this case.

4 I now want to get to the issue about how you
5 deal with the Court's references to "compulsory
6 license" or a "consent." And I've got to tell you,
7 when I first read the Decision, I scratched my head
8 also. Because how could you have a compulsory license
9 and say it is implied? They seem to be inconsistent.

10 And when I later delved into it carefully,
11 looking at what the Judge said, I came to the
12 conclusion about what she really was getting at. But
13 I've got to tell you -- right? -- the section is
14 relatively short. She does cite a number of cases for
15 the that support the propositions I'm going to tell
16 you -- right? -- but the use of the "term" compulsory
17 license, I think, was used kind of not in the
18 conventional sense the way IP lawyers would use it,
19 but, maybe, the way a generalist judge might think of
20 the term.

21 And so I want to just take you back a little
22 bit to give you kind of a landscape about what the

1 Judge said on the license question.

2 So first she says that the Regime creates an
3 exception to exclusive rights. She used that
4 reference. And then she said that GSI the defendants
5 argued that GSI impliedly licensed its data. And she
6 says, this is another way of viewing the allegedly
7 competing legislation. This is another way of viewing
8 it. And then she says it creates a mandatory or
9 compulsory license.

10 And then she had the further or, in the
11 alternative, to show that it was an alternative
12 argument, or an alternative basis for reaching her
13 conclusion. But when you read the Decision carefully,
14 you will see she doesn't just use the word "compulsory
15 license." She used the term "mandatory license," and
16 then she also says "in effect a mandatory license" or
17 "in effect a compulsory license." Clearly, in my
18 opinion, not using the term in the strictest IP sense.

19 So what did she mean by these terms? She
20 didn't define in the Decision what she meant by
21 "mandatory" or "compulsory license." The term
22 "mandatory license" has no understood meaning in

1 Canadian copyright law. And the term "compulsory
2 license," even if you went to it in my initial Report,
3 I had many citations as to what it could mean -- it
4 doesn't have a settled meaning. It could mean
5 different things.

6 In the strict legal sense, though, in the
7 highest sense, it's an involuntary license, and
8 Sterling is probably the author of that, it gives you
9 the strictest definition.

10 And there are examples of
11 so-called "compulsory licenses." One is if a
12 copyright holder can't be found, someone can make an
13 application to the copyright Board to grant them a
14 license. That's a statutory license under the
15 Copyright Act, and the Order can be made with or
16 without payment. So it doesn't necessarily involve
17 requirement of payment.

18 There is also Section 32 of the Competition
19 Act where a court can grant a license that addresses
20 anti-competition. So you can have these things, even
21 outside the Copyright Act, and the Competition Act is
22 an example of that and that would be a statutory

1 license by way of an Order.

2 And then the Judge also referred to the
3 Retransmission Regime, which the Supreme Court in the
4 Broadcast Reference case calls a compulsory license,
5 but it is really -- in the Act it is an exception to
6 infringement. So sometimes the term is used in a
7 different way. It is not just a statutory license.
8 Sometimes it could be, or at least called colloquially
9 or by, in this case, the Supreme Court, as a
10 compulsory license.

11 So how does the Copyright Act or other
12 statutes deal with the situation of a license or other
13 term that is voluntary? So it is true, under the
14 Copyright Act, a person can infringe copyright if they
15 do something without the consent of the copyright
16 holder, subject to there being an exception where
17 consent is not needed.

18 And these licenses can be express or they
19 can be implied. But when you look at the cases, they
20 are not consistent in terms of how the wording or the
21 terminology is used. Sometimes they are called also,
22 they're "presumed" or sometimes they're "inferred."

1 So can you have a spectrum of situations where you
2 have an implied license where it is "inferred" or it
3 is "presumed." So someone doesn't actually expressly
4 consent, but they are "presumed" to have consented.

5 And there are examples of that, which I cite
6 in my Report. For example, the Catnic case -- which
7 is a UK case, which wouldn't be binding in Canada but
8 in my view it's persuasive. A person makes an
9 application for a patent, gets a patent, and then
10 someone copies the drawings from the patent
11 specification. And then the pertinent files for the
12 patent sues for infringement. The Court said, uh-uh,
13 you are taken to have granted a license by virtue of
14 you participating, right, in the patent process.

15 So the patentee didn't consent like an
16 express consent, but is taken to, is deemed to have
17 consented. And that's there's a similar situation in
18 the Sutherland Case which the Judge looked at as well
19 where a person who does something in relation to the
20 Planning Act is also deemed or taken to have consent
21 to something, even though that person sued for
22 infringement later saying, hey, I didn't consent, but

1 they are taken to have consented.

2 Then there's a line of cases that the Judge
3 referred to in the Decision starting from the
4 Wholesale Travel case, but it was also followed by
5 another Supreme Court of Canada case in Fitzpatrick.
6 And in this line of cases, the Supreme Court looks at
7 whether somebody who obtains a license as part of a
8 Regulatory Regime consents to the terms and conditions
9 of the regime.

10 And in this case the Supreme Court of Canada
11 said that if you knowingly participate in a regulated
12 regime, and if there are known terms associated with
13 that regime, then you are deemed to have accepted
14 those terms. And what the Supreme Court said and what
15 the Fitzpatrick Fitzgerald court said later, that's
16 another Supreme Court of Canada case, these are
17 considered to be voluntary agreements. The
18 voluntariness comes from the participation in the
19 regime, and if you participate, then you are
20 voluntarily taken to have agreed to the terms, the
21 rules of the road.

22 So she referred to that case.

1 And in my Opinion, those line of cases are
2 consistent with the Catnic type of cases, where if you
3 participate in a regime and the regime has certain
4 rules of the road, then even if you haven't expressly
5 consented, you are deemed to have agreed.

6 Now, this takes me to what the Judge, in my
7 Opinion, found. And this is my interpretation, having
8 read all the tea leaves of the "in effect" and so
9 forth. So here's a very important passage that she
10 cites where she says: "The defendants argue that by
11 participating in the Regulatory Regime, GSI impliedly
12 licensed its data for public use pursuant to the rules
13 of the road."

14 And that's exactly what you would get from
15 the Sutherland case and from the Wholesale Travel
16 case.

17 And then she says: "This is another way of
18 viewing the allegedly competing legislation." She
19 says, that is to take the view that it creates a
20 mandatory or compulsory license. So that's part of
21 how she gets there.

22 Now, a compulsory license in this strict IP

1 sense, is nonvoluntary, and so, it cannot be applied.
2 So, how do you make sense of this? And in my view, by
3 her reference to another way of viewing the Regulatory
4 Regime is that it creates an implied license, a
5 license, that is mandatory or compulsory, but it is
6 deemed to be given, or implied, by virtue of the
7 voluntary participation in the Regulatory Regime.

8 Now, how do you square that with the Judge's
9 finding that GSI may not have liked to do so, it
10 certainly never consented. Right. She says that.
11 So, how do you square those two findings? And in my
12 view, the way in which it's squared is to recognize
13 that there was no express consent, but she had not put
14 her mind to excluding that line of cases where there
15 is a deemed consent, where you are taken to have
16 accepted.

17 And so, that's how you could read the
18 Decision in a rational way by recognizing that there
19 was protestations, but the license came from the
20 voluntariness of participating in the Regulatory
21 Regime.

22 And my opinion on that seems to be confirmed

1 that that is actually GSI's view. If you look at
2 their Application for Leave to Appeal the Supreme
3 Court of Canada -- and I refer you to Paragraph 75 and
4 76. Subparagraph 75 says, paraphrasing, a compulsory
5 license cannot be implied on the record, given that
6 GSI has persistently maintained its position and
7 fought against disclosure of Seismic Data. Just what
8 the Judge said, right. No consent.

9 But then it goes on in Paragraph 76: "The
10 Trial Judge implies the copyright license on the basis
11 of GSI knowingly participated in the Regulatory
12 Regime. A license of this nature should not be
13 applied from agreement or conduct of a party.
14 Allowing for such applied licenses creates a dangerous
15 precedent."

16 This appears to support the interpretation
17 in my Report that, in fact, the nature of the license
18 was by virtue of the participation of the -- in the
19 regime, and the Leave to Appeal motion is saying, this
20 should not be the case. This should not be the case,
21 Supreme Court take the case. But this, to me,
22 supports the interpretation that I have about the

1 nature of the license and then effectively it is
2 voluntary by virtue of GSI having participated in the
3 Regulatory Regime.

4 So the last point I want to get to is some
5 remarks related to confiscation. And I first want to
6 make the point that the decision itself makes it clear
7 that the Judge was interpreting the Regulatory Regime.
8 She says that. She says: "I accept that this is how
9 the Regulatory Regime works. It may be misplaced, but
10 it's the Regulatory Regime." She was interpreting the
11 Regulatory Regime.

12 And there's a Supreme Court of Canada case
13 that relied on what is now the U.K. Supreme Court
14 Decision, that where Courts engage in statutory
15 interpretation, the role is to interpret and give
16 effect to the statute. That's their role. And, based
17 on that law, it's my opinion that she was engaging in
18 that function, and that's how the Supreme Court would
19 view the rule of the Trial Judge in this case.

20 The second point I want to make on this is
21 dealing with the doctrine of stare decisis, which may
22 be the same in the United States as it is. But

1 decisions of Courts in Canada are only authorities for
2 what they actually decide, only authorities for what
3 they actually decide.

4 And when you look at the Judgment roll, that
5 is, when you look at the Judgment that the Court
6 ordered after delivering her reason, the Judgment roll
7 reflects what was decided in the case, and you will
8 not see any reference in the Judgment roll to rights
9 being confiscated. That's not part of what was
10 decided. In fact, it wasn't even part of the
11 questions that were put to the Judge. And, so in my
12 view, the Judgment roll supports that.

13 MS. LEMMENS: Sorry, I just note that you
14 are commenting on the Judgment roll, and I don't
15 recall that from your Report, and I'm sort of working
16 through this presentation as we're moving along
17 because I didn't get it in advance.

18 THE WITNESS: My Report did cite the
19 Judgment roll. It's in a footnote that is there, but
20 my Report did say Courts are only Authorities for what
21 they actually decide, and I'm putting the two
22 different -- the footnote and the paragraph together

1 for the proposition that this is what the
2 Judgment actually decided. And there are other
3 paragraphs in the Initial Report in my view where I go
4 over this.

5 I will also, just in closing, draw to your
6 attention a finding that the Judge made that the
7 regime did not provide for -- they disagreed with the
8 Defendants who had argued the regime does not provide
9 proprietary rights in Seismic Data. Instead, in my
10 view, GSI has full copyright and other proprietary
11 rights over its Seismic Data, subject of course, to
12 the effect of the license.

13 And then I point out, just in finishing,
14 that the Decision dealt with those two questions. If
15 that case had proceeded further, the Court would have
16 had to look at other potential defenses in the case,
17 including fair dealing, which, as you heard from
18 Prof. Hutchison is very broad, considered as a user
19 right, and there could also have been issues related
20 to the Limitation Act, which under Copyright Act is
21 three years when you know or ought to know of the
22 infringement.

1 So, Madam Chair, I'd like to give you back
2 two minutes.

3 PRESIDENT WALLGREN-LINDHOLM: Appreciate it.
4 Thank you.

5 So then, you will be cross-examined by
6 Counsel for Claimants. Ms. Lemmens.

7 MS. LEMMENS: Yes. Do you want me to
8 proceed now at 12:27, or do you want me to start after
9 the break because I didn't get an opportunity to
10 review the presentation before he started.

11 PRESIDENT WALLGREN-LINDHOLM: May I
12 interpret that as a request for lunch break? That
13 will be fine.

14 (Comments off microphone.)

15 MS. LEMMENS: I'll make a joke and say it
16 was implied.

17 PRESIDENT WALLGREN-LINDHOLM: Yes. So we
18 will then break for one hour and 15 minutes, which
19 leads us to 1:45 p.m. And then I will remind you,
20 Mr. Sookman, which you probably know already, that
21 during the break you are not to discuss your testimony
22 with Counsel or with anybody else, since you are still

1 under testimony.

2 (Comments off microphone.)

3 PRESIDENT WALLGREN-LINDHOLM: I think that
4 normally what I say in the Nordic countries, which
5 maybe is more informal than here, I would recommend
6 that you stay in your own bubble.

7 THE WITNESS: So be it.

8 PRESIDENT WALLGREN-LINDHOLM: Okay. Thank
9 you.

10 (Whereupon, at 12:30 p.m., the Hearing was
11 adjourned until 1:45 p.m., the same day.)

12 AFTERNOON SESSION

13 PRESIDENT WALLGREN-LINDHOLM: So good
14 afternoon. Are we ready now to proceed to
15 cross-examination of Professor Sookman? Thank you.

16 MS. LEMMENS: Yes. Thank you, Madam Chair,
17 Members of Tribunal.

18 CROSS-EXAMINATION

19 BY MS. LEMMENS:

20 Q. Good afternoon, Mr. Sookman. Thank you for
21 the presentation that you provided before the lunch
22 break, and I apologize for your sequestration during

1 the lunch break as well.

2 In your initial Report, you set out your
3 instructions from your client in this matter, which is
4 Canada, at Paragraph 7 of your initial Report.

5 A. Yes.

6 Q. And so, we see that there were three
7 different questions that you were asked to answer
8 there, sir?

9 A. That's right.

10 Q. Your expertise is in copyright law; correct?
11 Or intellectual property laws?

12 A. So I have expertise in different areas. My
13 specialty is in intellectual property law. I also do
14 have --

15 (Interruption.)

16 A. I also do have substantial expertise in the
17 area of statutory interpretation. I've litigated many
18 cases, both in the Supreme Court and in other courts,
19 and these days if you don't know principles of
20 statutory interpretation, you're kind of like missing
21 the mark.

22 Secondly in my book, I have a Section on

1 statutory interpretation. It's in the context of the
2 Copyright Act, but it also refers to the leading cases
3 on statutory interpretation. And then in my 30 -- I
4 hate to say it -- but more than 30 years of practice,
5 I have given many Opinions to clients in -- that
6 require detailed analysis of statutory interpretation.
7 So I believe I have expertise in the two areas in
8 which I've offered Opinions.

9 Q. Turning to your -- the questions that you
10 were instructed to answer, you are weren't asked to
11 opine on fair dealing; isn't that right?

12 A. I was asked to reply in my Reply Report to
13 Prof. Hutchison, and in that context, I did make some
14 comments on fair dealing because I was asked to
15 respond to his Report.

16 Q. Did any of the other members of your law
17 firm, McCarthy Tétrault, assist you in preparing this
18 Report?

19 A. The Report was mine; I did have an associate
20 who helped me with legal research on questions that I
21 wanted to run down, but the Reports, both of them are
22 mine.

1 Q. Did your associate prepare research
2 memoranda for you to use in preparing this Report?

3 A. He -- I can't remember if it was a research
4 memorandum or emails on points that I asked for, but
5 at the end of the day, I took the research I got, I
6 read the cases and was responsible for writing the
7 Reports.

8 Q. So that research from the emails or the
9 memoranda that you received, you incorporated it into
10 the Report then?

11 A. I incorporated it, my take on the research,
12 into the Reports. In other words, there were
13 questions that I wanted to run down to be thorough,
14 and so I had some help in doing that, and then I took
15 the research, analyzed it, and wrote the Reports.

16 Q. And were there parts of the memoranda and
17 research that you did not incorporate into this
18 Report?

19 A. I'm sure they -- I'm sure there were.

20 Q. I'm sure there are, too. That's how it goes
21 in this business.

22 Do you recall whether you included any cases

1 that were more favorable that -- you didn't decide to
2 include some cases that were more favorable to the
3 position of the Claimants in this matter?

4 A. I don't recall. One thing that I wasn't
5 trying to do was "boil the ocean" with cases. I did
6 cite probably more cases than I needed to. I cited
7 the appropriate cases. I don't think I consciously
8 excluded any relevant cases. I was also responding to
9 the different Reports, and if there were already cases
10 in those Reports that dealt with it, I didn't see the
11 need to repeat it.

12 Q. And did you ask your client for anything in
13 particular that you wanted to review? Did you have
14 access to what you felt that you needed from the case
15 materials?

16 A. I did, but I didn't see it as my rule to
17 review this whole record or to, frankly, thoroughly
18 understand the facts. I took most of the facts for my
19 Report from the Decisions, and I did look at some
20 other things, but the majority of what I looked at
21 were the Decisions. I think early on there were a
22 couple of things that I looked at.

1 I think I mentioned those in my initial
2 Report in terms of what I looked at, but frankly, I
3 can't even remember them now.

4 Q. Sorry, and I wasn't trying to suggest that
5 you needed to look at the whole of the record here.
6 Obviously, we have Members of the Tribunal that can do
7 that as well, and I'm sure they will.

8 But did you at any point in time look at the
9 authorizations, the Geophysical Work Authorizations
10 that GSI and its predecessors obtained from the
11 Government in order to create the Seismic surveys?

12 A. I don't recall looking at them. I do recall
13 reading in the Trial Judgment the fact that there were
14 authorizations, but I don't recall actually looking at
15 any of the text of them.

16 Q. Okay. So it's fair to say that you did not
17 review them at the authorizations and, therefore, you
18 don't know the wording of them?

19 A. That's true, and in my Initial Report,
20 you'll see I had a footnote where I noted that there
21 could have been another theory based on wording in
22 them, but the Trial Judge didn't go there. I didn't

1 see any need to explore it, given the task that I was
2 given was to express my Opinion on what the Judge did
3 decide rather than what she didn't decide, and so I
4 didn't see any need to look at them.

5 Q. Fair enough. And, as you said, there is not
6 really any mention of the wording of the
7 authorizations in the Common Issues Decision, as we
8 call it?

9 A. So there is a reference to authorization,
10 authorizations. The Judge makes a finding that, in
11 order to engage in exploration, there had to be
12 permission from the -- I'll just say the Crowns, to
13 use that generically, that there was an Application
14 for an authorization, and then once that authorization
15 was granted, that would open the door to it. But I
16 didn't look at the actual wording.

17 Q. Thank you for confirming that.

18 In preparing your Opinion for
19 the -- Opinions for this case, did you review the
20 Commentary from legal scholars in Canada, such as
21 Teresa Scassa?

22 A. I did not see any Commentary from Teresa

1 Scassa. I didn't know she wrote anything on this.

2 Q. Okay. And did you review the Commentary
3 from Prof. Nigel Bankes regarding the Alberta
4 Decisions?

5 A. I did see them. They were attached to
6 the -- to his Report. I was curious about why they
7 were attached. He said yesterday it was a matter of
8 transparency. I did not see it as my job to comment
9 on those Reports one way or the other. I was asked to
10 comment on his actual Opinion, not his blogs, but I
11 did -- I did read them.

12 Q. And you posted online on social media about
13 the Common Issues Decision somewhat contemporaneously
14 when the Decisions had come out; isn't that right?

15 A. I think I might have done a tweet, if that's
16 what you mean, just a tweet that announced it, but I
17 didn't do a blog or any writing on the case. It was
18 simply a tweet.

19 I used to have -- I have a blog on
20 intellectual property and copyright, and I used to
21 have this feature where I would tweet out something
22 that was a Decision, and then every week I'd have a

1 program called Twitter Digest, which would harvest all
2 the tweets and publish something just with a summary
3 of it, but it was just a tweet of the case like I
4 would have done -- any other case that I noticed.

5 Q. So you would agree with me that you did
6 notice the Common Issues Decision, and that's why you
7 tweeted about it?

8 A. So when the Decision came out in 2016, the
9 part of the Decision that I read carefully was the
10 part dealing with originality. I have long studied
11 that area, even before it became like a bigger issue.
12 Now with artificial intelligence, I'm kind of back in
13 the area that I know. So I looked at that carefully.

14 I did notice frankly the second part of the
15 Decision, but I didn't -- I didn't analyze it or read
16 it carefully except to notice that GSI lost, but I
17 didn't look at that part of the Decision or analyze
18 it, to my recollection.

19 Q. And that makes sense; you're a lawyer in the
20 intellectual property law field, and so you would take
21 notice of a Decision like the Common Issues Decision
22 respect to the copyright question; right?

1 A. That was the question that -- that was the
2 issue that I was interested in. You know, it's
3 conceivable that I would be interested in the parts of
4 the case dealing with the licensing, but I didn't
5 focus -- didn't focus on it at all. I focused on the
6 part of the Decision in the area that I've been
7 studying for years.

8 Q. And the copyright component of the Decision,
9 that was the first time that you were aware that
10 Seismic Data had been found to be copyright; is that
11 right?

12 A. That's right.

13 Q. You also, for the preparation of your
14 Report, were provided with a copy of PwC's Initial
15 Report and Chip Gill's Initial Report in this matter;
16 is that correct?

17 A. So I'd have to look at what I said I looked
18 at.

19 Q. You might refer to Paragraph 8, sir.

20 A. Paragraph 8, was Nigel Bank, Paul Sharp Chip
21 Gordon--

22 (Interruption.)

1 A. In Paragraph 8, but I couldn't tell you,
2 sitting here today, who Paul Sharp is or who Chip
3 Gordon is, and even whether he was associated with
4 PwC. This goes back awhile, so I don't recall it.

5 Q. Okay. And do you know why you were provided
6 with those Reports then, sir?

7 A. I can't remember.

8 Q. Okay. Were you asked to comment on the Paul
9 Sharp and Chip Gill Reports in this matter?

10 A. So I was asked to comment on those three
11 questions. I was not asked to comment -- if you're
12 saying one of these two, and I don't know which it
13 was, was from PwC and provide advice on damages. I
14 was not asked to provide any advice one way or the
15 other on any damage question.

16 Q. Okay. And so did you have any meetings with
17 The Brattle Group at all in this matter?

18 A. The who?

19 Q. Okay. Sounds like you didn't.

20 A. No.

21 Q. Did Canada ever provide you with a copy of
22 a -- Opinion by the law firm Code Hunter Wittmann in

1 this case?

2 A. Not that I can recall. What was that about?

3 Q. It was about a lot of the substance in this
4 case, but it was from the 1990s.

5 A. I don't recall looking at that or receiving
6 it, and if I had, probably would have mentioned it in
7 Paragraph 8, so I've got no recollection of seeing
8 that.

9 Q. Okay. And have you heard of that firm
10 before? Are you aware that it became part of
11 the -- Gowling's law firm here in Canada?

12 A. What was the name of the firm?

13 Q. Code Hunter Wittmann, which was Chief
14 Justice Wittmann's -- of the Alberta Courts former
15 firm?

16 A. No. Doesn't ring a bell.

17 Q. You're aware that Chief Justice Wittmann is
18 the Judge that ordered the two Common Issues, though?
19 You would have read that in the Decision?

20 A. So I did read that there was an Order. I
21 don't know the Judges in Alberta to know who it was,
22 so I know there was an order for Common Issues because

1 there were 25 different cases, and that was an
2 efficient way that was decided to resolve them. But
3 the Judge that made that Order doesn't ring a bell
4 either.

5 Q. The Copyright Act was last significantly
6 amended in 2012; is that right?

7 A. That's true. There was an amendment after
8 2012 to extend the copyright term. There was an
9 extension for sound recordings and then another term
10 extension, but the major amendments to the Act, like
11 the ones that included many different provisions were
12 done under the Copyright Modernization Act in 2012.

13 Q. Which was before the Common Issues Decision
14 but after the CPRA came into effect; correct?

15 A. So it was 2012; the Common Issues Decision
16 was in 2016.

17 Q. Right. And that's after the CPRA came into
18 effect in the 1980s?

19 A. Yes.

20 Q. The extension that you're referring to there
21 in terms of the term of copyright, that came around
22 more recently somewhat, in part, because of the U.S.

1 MCA; is that right?

2 A. So the term extension for sound recordings
3 which extended the term from 50 years to 70 years,
4 that was the -- not part of the U.S. MCA. The term
5 "extension," I believe it's right that it might have
6 been influenced by the U.S. MCA. I'd have to go back
7 and check. That issue had been a live issue for a
8 number of years. Many of Canada's trading partners
9 had terms of protection of more than 50 years.

10 Mexico had more than 50 years. European
11 Union members had more than 50 years, so there had
12 been, I think, continual requests by copyright owners
13 to extend the term. I can't remember precisely
14 whether it was only done at the insistence of the
15 negotiations in the U.S. MCA. I'd have to go back and
16 check that to be really sure.

17 Q. And sir, there were also part of the
18 industry in the U.S. that were wanting longer term
19 copyrights, and they, in fact, enjoyed longer term
20 copyrights in the U.S.?

21 A. They did.

22 Q. You would agree with me that it is important

1 to provide copyright protections to creators to
2 incentivize creativity?

3 A. So I agree as a general proposition that's
4 the case. Interestingly, in a case when I was in the
5 Supreme Court, Justice Abella asked me that question.
6 She might not have accepted that. I do agree that the
7 Copyright Act is intended to balance various
8 interests. One is to incent the creation of works.

9 The other is the dissemination, but the
10 Supreme Court of Canada, just to be clear, decided in
11 a case called *Théberge v. Galerie* that in classically,
12 just to paraphrase, in classically economic terms, it
13 would be a mistake to have two strong rights which
14 could affect other uses including the public domain.

15 So there is a line and no one knows exactly
16 where it is, but there is a line between creating
17 incentives and going too far, and that's -- was a
18 seminal Decision by Justice Binnie in the *Théberge*
19 Case which has been carried forward and quoted many
20 times by the Supreme Court.

21 Q. But in Canada, our Parliament and the
22 legislators have determined that that is life of the

1 author plus now 70 years, but at -- a time it was 50?

2 A. The actual term of protection is set out in
3 the Copyright Act, and that was a Decision made by
4 Parliament in its wisdom as to what -- what the
5 balance ought to be between how long a Work would
6 enjoy copyright and when it would go out of copyright.
7 That's true.

8 Q. And so, in fact, you have previously
9 commented that advancing the interests of creators
10 advances the interests of users; isn't that right?

11 A. So there is an argument that the assumption
12 that the two balancing principles in the Act are
13 actually intention, intentioned with each other and
14 are contradictory. In the United States, the U.S.
15 Supreme Court has emphasized that the purpose of the
16 Copyright Act is create incentives, and if the
17 incentives are there, then that will also promote the
18 dissemination.

19 I've thought that there was merit in that.
20 Our Supreme Court has not, however, accepted that.
21 Our Supreme Court still looks at balance, and
22 it -- the analysis, more often than not -- but they

1 have not used this terminology -- is a zero-sum gain.

2 The longer -- the stronger the rights, the
3 less it affects public interest. My own personal view
4 is that it is somewhere in the middle, but the Supreme
5 Court of Canada has not adopted the U.S. view that, if
6 you provide sufficient incentives, the dissemination
7 publication takes care of itself.

8 Q. Sir, I'm not sure you're quite answering my
9 questions when I'm asking them. I understand you're
10 wanting to give color, but I had just asked you if you
11 have actually commented that advancing the interests
12 of creators advances the interests of users. You've
13 said that; right?

14 A. In particular context, I'm sure that's true.
15 It may not be true always.

16 MS. TABET: I'm sorry, Ms. Lemmens, I don't
17 mean to interrupt, but I do believe he was answering
18 your question and please provide him the opportunity
19 to explain himself.

20 MS. LEMMENS: I let him explain himself, but
21 I'm just reminding him that I asked a question that he
22 hadn't answered.

1 THE WITNESS: I thought I answered it.

2 Sorry. But if there's something that you say I have
3 written, like a blog or something, then it would be
4 useful for me to see that article for context.

5 BY MS. LEMMENS:

6 Q. It's not in evidence. Sorry.

7 A. Okay.

8 Q. The exclusive rights of copyright are
9 important for incentivizing creators to continue to
10 create; is that right?

11 A. I think that's true up to an extent.

12 Q. If those exclusive rights are not available,
13 further innovation and creativity is likely not then
14 incentivized?

15 A. So from an economic perspective, that may be
16 true in some cases but not true in other cases. The
17 Copyright Act has a raft of exemptions where
18 Parliament in its wisdom has whittled down, carved out
19 from the exclusive rights various activities that
20 would not be infringing. So Parliament has taken the
21 view that certainly by keeping exclusive rights, they
22 are providing incentives.

1 But it's also taken the view with various
2 limitations or exceptions -- right? -- that there is a
3 balance. So it may be true to a point, but again, to
4 go back to Justice Binnie in classically economic
5 terms, it could go too far and stifle innovation.

6 Q. If the exclusive rights are eroded?

7 A. No. If the exclusive rights are too strong,
8 then it might stifle innovation. That was Justice
9 Binnie's point when he talked about in classical
10 economic terms. The argument had been made that
11 copyright provides incentives. And so the more
12 copyright, the more incentives there were, and his
13 point was in describing the balance in copyright that,
14 if the rights were too strong, it would actually
15 stifle uses in the public interest. So it is a
16 balance and there's a point at which it doesn't apply.

17 Q. And so the Copyright Law is a Framework Law
18 which creates incentives, incentives to create,
19 incentives to invest, incentives to create new markets
20 for cultural products; is that right?

21 A. I agree that it is a Framework Law. The Act
22 has actually numerous purposes. In my copyright

1 class, I spend the first three hours going over the
2 different purposes of copyright. One is to create
3 economic incentives. There is also attempts to use
4 copyright to promote cultural purposes, to tell, you
5 know, Canadian stories. It is also a Framework to
6 enable users to use copyright work. So it's
7 multi-dimensional purposes, not singular purpose.

8 Q. You have in the past been quite critical of
9 the Canadian Government's approach to copyright; isn't
10 that right?

11 A. I have had criticisms over the years with
12 respect to some approaches, and, in fact, I've given
13 testimony before Parliament on proposed reforms to the
14 Copyright Act. I've had some things where I actually
15 approved what they were doing and in other cases
16 objected to where they were going.

17 During the Copyright Modernization Act, for
18 example, in 2012, the Government came out with a
19 package of amendments, some of which were to implement
20 the WIPO Treaties which, by in large, were to provide
21 new rights, like a making available right, protection
22 for technological protection measures.

1 Those were to foster the Economic Framework,
2 but it also had a raft of exemptions, which were also
3 viewed as in the public interest or to correct certain
4 things that they thought the Copyright Regime was
5 doing that ought to have been clarified.

6 Q. And you previously commented on Canada's
7 copyright laws not keeping up with its trading
8 partners, such as the G8?

9 A. Can you refer me to what you're talking
10 about?

11 Q. You've spoken about the international IPA
12 Section 3.01 Report recommending that Canada be placed
13 on the priority watch list?

14 MS. TABET: Miss Lemmens, I'm sorry, are you
15 referring to a document on the record?

16 MS. LEMMENS: No, but I'm asking him about
17 copyright in Canada.

18 MS. TABET: You seem to be reading from a
19 document that Mr. Sookman does not have the
20 opportunity to look at in context.

21 MS. LEMMENS: In fact, I'm not reading from
22 a document than -- other than my notes, Ms. Tabet, and

1 I watched a lot of YouTube videos that Mr. Sookman has
2 on the internet. So I am quoting from his
3 presentations. They are not a document.

4 MS. TABET: Madam President --

5 PRESIDENT WALLGREN-LINDHOLM: Yes. Now,
6 it's on. Yes, please.

7 MS. TABET: I do believe the Witness should
8 be able to see a document and not have things quoted
9 at him without knowing the context in which these
10 things are put to him.

11 PRESIDENT WALLGREN-LINDHOLM: Yes. I think
12 that it would be fair to the Witness if he would, at
13 least, have the time to familiarize himself. This is
14 part of your production, as I understand it.

15 MS. LEMMENS: No. No, it's not, but it's
16 part of Mr. Sookman's Opinion on copyright in Canada.
17 And I think it is important to flesh out what his
18 Opinion is about Canadian copyright protections, given
19 his Opinion.

20 MS. TABET: Just, if I may, on this point.

21 Mr. Sookman provided an initial Report. The
22 Claimants had a chance to respond to his Report and

1 put any document they wished on the record to
2 criticize his Report. That has not been done. So if
3 they wanted to put things on the record to bring to
4 his attention, that should have been done while the
5 evidentiary record was open.

6 MR. SOOKMAN: I wish I was making money on
7 YouTube videos; I don't get a penny. Could've made
8 \$0.10 on you looking at my videos.

9 MS. LEMMENS: Had to play it a couple times
10 to get your quote down.

11 PRESIDENT WALLGREN-LINDHOLM: The consensus
12 is that it is not entirely fair to quote something
13 where the Witness or the Expert Witness cannot see the
14 context of what is being presented, but you are
15 allowed to rephrase and somehow else discuss his
16 Opinions. And I think also the Witness is perfectly
17 capable of saying when it goes beyond what he can
18 assess when answering the question; right?

19 THE WITNESS: Thank you, Madam Chair. I'll
20 try.

21 PRESIDENT WALLGREN-LINDHOLM: Is that
22 adequate for you?

1 THE WITNESS: So of course, it depends on
2 the questions. But, generally, you know, I have been
3 prolific over the years and some things are recent,
4 some things are older, some things are in particular
5 context.

6 PRESIDENT WALLGREN-LINDHOLM: Yes.

7 THE WITNESS: And so I do not think it is
8 fair to get cross-examined on documents that I can't
9 see to look at the contents of it and the context in
10 which a statement was made.

11 You can cherry-pick anything, Madam Chair.
12 And so ideally, if there is a document that's being
13 relied on or a YouTube video, I'd like to know, you
14 know -- I'd like to -- now, I don't expect to play a
15 YouTube video -- right? -- but in fairness, I would
16 like to see it, read it, look at the context.

17 PRESIDENT WALLGREN-LINDHOLM: Yes. I do not
18 think we have any YouTube videos on the record. So
19 they are not on the record.

20 I think, Ms. Lemmens, you have heard now and
21 I think that you will observe what has been said going
22 forward.

1 MS. LEMMENS: Of course, Madam Chair.

2 PRESIDENT WALLGREN-LINDHOLM: Thank you.

3 BY MS. LEMMENS:

4 Q. Sir, do you recall the international IPA
5 Section 3.01 Report commenting that and recommending
6 that Canada be placed on the priority watch list among
7 nations that have the worst copyright laws around
8 world? That Canada is on that list with Russia, the
9 Philippines, and Egypt, regarding piracy problems?

10 A. So that Report -- you're talking about the
11 USTR Report?

12 Q. I believe so, yes.

13 A. You believe so.

14 Q. Normally, I'm the one asking the questions
15 here, sir.

16 A. You're asking me to comment.

17 So over every year, my understanding is that
18 the USTR does an evaluation of copyright laws and does
19 single out various countries. But what they single
20 out, from time to time, are particular areas where the
21 law may not be kind of what the United States thinks
22 it should be.

1 The United States is -- I won't say
2 aggressive, but does want to see strong intellectual
3 property rights. The USTR takes the you know that
4 U.S. position. Again, one has to look at what are the
5 specifics of the criticisms are because generally when
6 a country is put on that Report, it could range from
7 kind of widespread piracy and misappropriation of
8 intellectual property, like, perhaps, Russia or China,
9 or it could be very specific things where Canada's IP
10 law wasn't what it should be.

11 I do recall -- again, I don't know what
12 reports, but there were some Decisions from the
13 Supreme Court of Canada dealing with fair dealing.
14 And there had been a lot of criticism from American
15 publishers, U.K. publishers and others that the fair
16 dealing exemption was far too broad, particularly in
17 the educational sector.

18 And, in fact, the way Canada's fair dealing
19 law was being described as a "Canadian flu." There
20 was a concern that it would spread to other countries.
21 And there was a case involving access copyright which
22 changed the IP framework in a very significant way in

1 favor of user rights.

2 In fact, there had been a continual
3 evolution of the Supreme Court of Canada cases
4 interpreting fair dealing very broadly. There was a
5 CCH Case which was the first fair dealing case after
6 Théberge that called it a user right. Then and there
7 was the Access Copyright Case, the Bell Case, and
8 later on there were others.

9 So it is conceivable again, because I don't
10 know which USTR Report you're talking about, but I do
11 seem to recall that one of the criticisms in one of
12 the Reports was that Canadian fair dealing law went
13 too far and, in fact, had a devastating impact on
14 educational publishing. Now, it turned out since then
15 the educational publishers have bounced back and done
16 well, but at the time there was a criticism of the
17 fair dealing regime.

18 I think that might have been what was in one
19 of those reports but, again, I don't know which one
20 you're talking about.

21 Q. So, sir --

22 PRESIDENT WALLGREN-LINDHOLM: Excuse me, can

1 I just check, USTR, that is what body in the U.S?

2 THE WITNESS: United States Trade
3 Representatives.

4 PRESIDENT WALLGREN-LINDHOLM: Yes, I thought
5 so. Thank you.

6 BY MS. LEMMENS:

7 Q. Thank you, and just while you're on the
8 topic of fair dealing, you had mentioned the case of
9 CCH. The Alberta Decisions was not decided in
10 accordance with the CCH Decision; right? The outcome
11 wasn't the same as in CCH?

12 A. I don't know what you mean.

13 Q. Well, the outcome of the Alberta Decisions
14 was not a finding of fair dealing like it was in CCH;
15 is that right?

16 A. So in CCH there was a finding of fair
17 dealing. It was a case that was the first case. And
18 the Supreme Court set out the six nonexclusive factors
19 that are taken into account in assessing a fairness.

20 They also looked at what the meaning of
21 research is under Canadian fair dealing to fall within
22 fair dealing. You first have to fall within one of

1 the kind of "gates," which is research. And then,
2 secondly, it had to be fair.

3 So the Supreme Court of Canada set out the
4 framework in the Access Copyright Case. That same
5 framework was applied, except the Court, instead of
6 relying on research, focused on the meaning of
7 "private study."

8 It was a case where teachers were making
9 copies of some text for students. And the Court said
10 this is a facilitating private study. And then the
11 Supreme Court applied the factors and found -- and
12 came to a different conclusion. But the framework had
13 been really set out in the CCH Case.

14 Q. So coming back to my question, Mr. Sookman,
15 Justice Eidsvik did not decide that this was a fair
16 dealing like in CCH?

17 A. She expressed the Opinion that, had the case
18 gone forward -- and I don't want to get her wording
19 exactly right, but to paraphrase it "was something
20 that could have succeeded."

21 Q. Sorry, in the Common Issues Decision she
22 said that?

1 A. No. She said that in another Decision
2 subsequent. I think it was the Canwest Decision, or
3 Calwest, something like that.

4 Q. The Calwest Case.

5 A. Yes.

6 Q. Right. And are you aware of the facts in
7 the Calwest Case, sir?

8 A. I have read the Decision. I did not see the
9 evidence. I noticed her remarks, but I don't know
10 what the record was on which she expressed that view.

11 Q. You're aware that fair dealing was not
12 actually a defense that was pleaded in the Calwest
13 Case?

14 A. I don't know what the Pleading was. I know
15 what Justice Eidsvik said about fair dealing, but I
16 didn't look at I didn't see the Pleading.

17 Q. And so she didn't actually say that she
18 found fair dealing in the Calwest Case either; isn't
19 that right?

20 A. She said that it was a defense that could
21 have succeeded.

22 Q. But wasn't made?

1 A. She didn't have to decide it. So she didn't
2 have to say what it was made out, but she expressed
3 the Opinion that it was a defense that could have been
4 made out.

5 Q. And do you know that the facts in the
6 Calwest Case were that the Quebec Government was
7 copying the data for itself to have at the Quebec
8 Government's office?

9 A. I can't remember the specific facts in the
10 case.

11 Q. So if we turn to Paragraph 5 of the
12 Decision, sir. It's also on the screen before you, if
13 that assists you.

14 A. I'll just turn the pages. I'm old
15 fashioned.

16 PRESIDENT WALLGREN-LINDHOLM: Could we get a
17 reference? It's on the Transcript, but if we want to
18 pull it up.

19 MS. LEMMENS: It is Exhibit R-150.

20 BY MS. LEMMENS:

21 Q. At Paragraph 5 there, sir, you see that the
22 Calwest action involves the copying of Seismic Data

1 collected in --

2 A. I'm sorry. Are you talking about the
3 Calwest Decision?

4 Q. I am talking about the Calwest Decision,
5 sir.

6 A. Sorry.

7 Q. We, additionally, have a paper copy if you
8 require that.

9 A. Sure. If you could, that would be terrific.

10 Q. Okay. We thought we printed all of them,
11 but it doesn't look like we have. Can you see that on
12 the screen there, sir?

13 A. No, I kept the monitor here, so I can see
14 everybody. No, I can see what it says. I don't have
15 the rest of the Decision in front of me, but I see
16 that paragraph.

17 Q. Okay. So let me get back to it.

18 Paragraph 5: "The Calwest action involves
19 the copying of Seismic Data collected in 1982 from the
20 Gulf of St. Lawrence and Sable Island areas, the 1982
21 data. In January 2010, employees of Calwest accessed
22 and copied the 1982 data from the National Energy

1 Board's offices in Calgary and forwarded the
2 microfiches that the 1982 data was reproduced on to
3 its customer, the Ministry of Natural Resources and
4 Wildlife of the Government of Quebec, the Quebec
5 Ministry."

6 A. Okay.

7 Q. That use would have an impact on the fair
8 dealing analysis; wouldn't it?

9 A. So the fair dealing analysis takes into
10 account six nonexclusive factors. It looks at the
11 purpose of the use. It looked at the amount of the
12 copying. It could look at the effect of the market.
13 But the burden on the Supreme Court is that the
14 copyright owner has to prove that it would have a
15 detrimental effect on the market, which is different
16 from the U.S. cases. So all of the facts are
17 important.

18 The other thing I don't know is in a fair
19 dealing analysis, you would also look at what the
20 purpose of the use was, both in terms of the person
21 who provided it, as well as the ultimate use.

22 Under the Supreme Court of Canada precedence

1 in CCH, you can establish fair dealing by showing that
2 you're facilitating somebody else's research. And
3 then that framework was developed even further from
4 the user perspective to say that you analyze fair
5 dealing from the perspective of the ultimate user.

6 Prior to that, if someone was to make a
7 copy, you would analyze the fair dealing by reference
8 to what the copying person did. But the Supreme Court
9 changed the framework to say that you would analyze
10 fair dealing from the perspective taking into account
11 specifically what the ultimate user's purpose was.

12 So when I look at this paragraph, under the
13 Supreme Court precedence, you would need to understand
14 what the uses of the ultimate customer were as a major
15 part of the analysis.

16 Q. Right. And, so here we see the facts that
17 it was the Quebec Natural Resources and Wildlife
18 Ministry that was obtaining a copy here and not an
19 oil-and-gas company.

20 Do you see that?

21 A. I do. I don't know what their purposes
22 were, though.

1 Q. Well, I don't know. You probably aren't
2 aware because you don't practice in Energy Law, but
3 the Quebec Government -- are you aware that the Quebec
4 Government had entered into an accord, a Memorandum of
5 Understanding, with respect to its Offshore Areas with
6 the Government of Canada, just like with Newfoundland
7 and the Government of Canada and Nova Scotia and the
8 Government of the Canada?

9 A. No. I think that wasn't referenced in the
10 Common Issues Decision.

11 Q. I understand that. But perhaps as a
12 Canadian lawyer, you might have heard of that.

13 Anyhow, so here with the facts that we are
14 aware of from the Calwest Case, you'd have to look at
15 the end-user being the Quebec Ministry, as opposed to
16 an oil and gas company?

17 A. So you, I think, would not be limited to the
18 person. You would be looking at the activity that
19 they were engaged in, because it's the activity of
20 copying that matters from a fair dealing perspective,
21 not just who it is.

22 And so I don't know what the purposes would

1 have been to be able to make an assessment about what
2 it was. Just to give you an example, this is not my
3 area, that there could be some research by a
4 commercial entity -- right? -- that would be fair, and
5 the Supreme Court of Canada has said that you can have
6 fairness, even if it's commercial.

7 And so in this case, I can't tell you
8 sitting here how it would have been resolved.
9 Ultimately, the Court would have looked at what the
10 ultimate user was going to do; and, yes, that would
11 have been a factor in a fair dealing analysis.

12 Q. Thank you for confirming that.

13 Sir, in Canadian law when something is
14 privileged, we generally refer to that more along the
15 lines of solicitor-client privilege or litigation
16 privilege or settlement privilege, but it can
17 sometimes mean confidentiality; is that right?

18 A. What's the context that you're asking?

19 Q. Well, what is your understanding of the
20 legal meaning of the word "privilege"?

21 A. So the one that I understand, is a
22 relationship between a solicitor and client that

1 arises in a number of ways, including by a client
2 retaining a lawyer and getting legal advice.

3 If it's a term of art in other areas, I need
4 to know -- you'd have to remind me what other areas
5 you're referring to, so I could make an assessment
6 about whether it includes Confidential Information.

7 It may or may not. I just don't know the
8 context as to whether it's fair to say in every case
9 if there's some reference to privilege, it necessarily
10 includes Confidential Information. It could, but I
11 just don't know the context you're asking. I'm sorry.

12 Q. And I don't think I was suggesting that it
13 means "confidentiality" in every case, sir.

14 A. Okay.

15 Q. So what I'm wanting to get at is what's your
16 understanding of the term "privileged" in the Common
17 Issues Decision?

18 A. So in the Common Issues Decision, my
19 understanding is that there is a period of time in
20 which information that is deposited with the Boards
21 will remain confidential and will not be disclosed,
22 except under the situations where there are exceptions

1 in Section 101.

2 Q. And with respect to Canadian Copyright Act,
3 confidentiality is not something that is synonymous
4 with copyright; is that fair?

5 A. There are often overlapping rights.
6 Copyright deals with works. Confidential Information
7 can also be works, but the focus of the Copyright Act
8 is on the exclusive rights related to works.
9 Confidential Information may or may not be protected
10 as a work, even if it is confidential.

11 Q. Right. And so I think you would agree with
12 me that "confidentiality" and "copyright" are not
13 synonymous in Canadian law because they have different
14 attributes?

15 A. So generally speaking, the Supreme Court in
16 the Lac Corona Case and then the Cadbury Schweppes
17 Case confirmed what are the, what is the legal basis
18 for protecting Confidential Information in Canada.

19 The information has to be confidential.
20 It's got to be disclosed in circumstances of
21 confidence. And then there had to be a wrongful use.
22 It is not statute-based, as in the Copyright Act.

1 It's a sui generis basis. It could also be through
2 contracts.

3 Q. And so you would agree with me that
4 "confidentiality" and "copyright" are not synonymous
5 with one another because they have different
6 attributes, as you just explained?

7 A. There are different principles. My point is
8 they there can be both copyright and confidentiality
9 protection associated with the same thing.

10 Q. You would agree with me that they are
11 generally considered to be sort of three main
12 exclusive rights in copyright; is that right?

13 A. So the Copyright Act in Section 3(1) does
14 speak about the right to publish, which has been
15 construed to be first published to publicly perform,
16 which includes the communication right, and to
17 reproduce all their substantial part. And it also
18 includes the right to authorize. But there are other
19 exclusive rights, as well, within that.

20 For example, there is a making available
21 right. In Section 27(2), there are infringement
22 causes of action for distributing infringing copies of

1 works that the person knows are being infringed.

2 There are also specific rights dealing with
3 broadcasters, dealing with makers of sound recordings.

4 So, yes, Section 3 has a panoply of rights.
5 Generally, the reproduction right is one of them, and
6 it's an important right.

7 Q. And so you would agree with me that the
8 Alberta Decisions eliminated, at least, some of those
9 exclusive rights for copyright being the reproduction
10 right and also the first publication right?

11 A. I would not agree with that. When you look
12 at the Common Issues Decision, the Common Issues
13 Decision talks about copying. It doesn't use the word
14 "reproduce" and there is potentially a distinction
15 between the right to copy and the right to reproduce.

16 In the Th  berge Case, the Supreme Court of
17 Canada talked about the right to reproduce and what it
18 includes. In the United States, there's a right to
19 make copies and a right to create derivative works.
20 It's a work based on a drive from another work.

21 We don't have that derivative work right.
22 It is caught within the definition of "reproduction."

1 But when you look at the Copyright Act, the Copyright
2 Act uses extensively the term "copy" and so, and not
3 the word "reproduce."

4 And so, to the extent that there is a gap
5 between the word -- what would be included in copying
6 and what would be included in reproducing, which would
7 mean doing other things, modification enhancing, or
8 something. It might not be caught. But also the
9 Common Issues Decision of the Trial Court did not
10 say -- and this was your wording -- that it eliminated
11 copyright. What it said was, in fact, the copyright
12 remained in the copyright owners but was subject to
13 the effectively nonexclusive rights that arose by
14 virtue of the regime.

15 Q. Sir, I'd like to take you to the Alberta
16 Court of Appeal Decision in the Common Issues, which
17 is Exhibit R-002.

18 A. I have that Decision. Sure. What
19 Paragraph?

20 Q. Paragraph 104 where it says -- you might
21 find it at -- I don't know if it's the same version?

22 A. Yeah.

1 Q. Here that means GSI's exclusivity to its
2 Seismic Data ends for all purposes, including the
3 Copyright Act, at the expiry of the mandated Privilege
4 Period.

5 So what exclusive rights end under the
6 Copyright Act?

7 A. So that is actually a really interesting
8 sentence. When I first read it, I scratched my head
9 because the Trial Court said that exclusivity was not,
10 in fact, all lost. It was very clear that the
11 formulation was only to the extent of the conflict.

12 And then if you turn back to Paragraph 24 of
13 the Decision, you'll see the Court of Appeal is
14 looking at the Decision of the Trial Court, and it
15 says: "Thus, in the Trial Court's view, although GSI
16 has copyright and other proprietary rights over its
17 Seismic Data" -- right? -- which is what the Trial
18 Court said -- "the Regulatory Regime applies to the
19 extent that it conflicts with the Copyright Act."

20 So that was what the Trial Court said.
21 That's what the Court of Appeal had said.

22 And so when I read this Paragraph 104, I

1 think it has got to be read together with
2 Paragraph 24, which is that the exclusivity, that is
3 the rights that GSI had, were subject to the licenses
4 to the extent that they conflict. I don't think you
5 can cherry-pick one paragraph without looking at
6 Paragraph 24. I do agree, when you just look at this
7 language, you could say, you know, what is this? But
8 given the finding in the Trial Court, given that the
9 Court of Appeal is referring to that, I don't read
10 that as if it literally means -- which you might first
11 read it at. I think you have to read it contextually.

12 The other thing that I think is important to
13 note is this Paragraph 104 is really focusing on the
14 rights of the Board, not the rights of the oil
15 companies. So if you look at the beginning, it talks
16 about, "As found by the Trial Judge, there is no
17 breach of copyright in the manner by the Board's
18 disclosure of Seismic Data."

19 And it talks about the authority of the
20 CPRA. Further, in the alternative, it creates --

21 (Interruption.)

22 A. Further, or in the alternative, the

1 Regulatory Regime created a compulsory licensing
2 system through which the boards have authority to
3 copy, and then it's the sentence that you referred to,
4 Ms. Lemmens. And then it says: "Thereafter, GSI had
5 no legal basis or lawful entitlement to interference
6 or object to any decisions made by the Board related
7 to the collective data."

8 So I read this paragraph, both subject to
9 Paragraph 24, and then also it was focusing on the
10 actions of the Board. And that's actually consistent
11 with the Common Issues Decision, where, when you look
12 at the Common Issues Decision, the Judge says, it is
13 not infringement for the Boards, like the Boards
14 haven't been infringing, but then when it talks about
15 the oil-and-gas companies, it talks about it's not
16 infringing for them to access and copy. So there's a
17 different formulation in terms of what the effect of
18 the regime is, both on the Boards and potentially on
19 the Companies.

20 Q. Sir, coming back to my question, I was
21 asking you what exclusivity GSI would lose in its
22 exclusive rights under the Copyright Act. So looking

1 at Paragraph 104, it says: "GSI's exclusivity to its
2 Seismic Data ends for all purposes, including the
3 Copyright Act." It also says: "GSI has no legal
4 basis or lawful entitlement to interfere or object to
5 any Decisions made by the Boards relating to its
6 collected data."

7 So, isn't it the case that GSI could no
8 longer sue for copyright infringement for Parties that
9 were copying its data from the Boards?

10 A. So you'd have to look at the common issues
11 Decision, because what was decided was what the
12 Judgment roll said, and the Judgment that was appealed
13 from was affirmed, right. And so the questions were
14 answered.

15 And so the scope of the license was for the
16 boards that they could copy and disseminate and were
17 not liable. And on the oil companies, they could
18 access and copy. So if -- from material they got from
19 the Boards, they -- the decision didn't deal with the
20 full panoply of the reproduction rights. It didn't
21 say that the recipients could also authorize third
22 parties to engage in activities that would have been

1 infringing.

2 So there is actually a lot of analysis that
3 Justice Eidsvik didn't do because she didn't have to
4 do in terms of all the possible scenarios.

5 But there was certainly a finding that the
6 Boards could copy and make disclosures to anyone that
7 asked. That is clear, and that would not have been
8 infringing, and there was also a clear finding that
9 the Boards could access and copy the materials they
10 got. That's the scope of the loss of exclusivity that
11 they -- let me -- I'm going to put it this way.

12 So the rights that GSI had under the
13 Copyright Act would always have been -- I'll use the
14 word "encumbered" but always have been subject to the
15 Regulatory Regime. They could only get what the
16 Regulatory Regime provided. So although it talks
17 about here the loss of exclusivity, the issue is, did
18 they actually lose anything, or did they just not
19 get -- because they participated in the regime, the
20 rights that they otherwise would have had but for the
21 regime.

22 It is sort of a But-For question. So I'm

1 just taking a little bit of issue with the
2 interpretation because I don't view it as a loss. I
3 view it as they only get the rights that the combined
4 regime permits them to have, and then, you know, you
5 can maybe colloquially say it's a loss, but you can't
6 lose something you never had.

7 Q. Sir, but you would agree with me that GSI
8 cannot sue for copyright infringement for certain
9 particular matters when the Boards are disclosing data
10 to be copied?

11 A. That's true.

12 PRESIDENT WALLGREN-LINDHOLM: Ms. Lemmens, I
13 think we have been going on for about an hour, so when
14 you come to a suitable junction here, we can take a
15 break.

16 MS. LEMMENS: Thank you. I'm close to a
17 spot where I could take a break. I just have a couple
18 more questions on this.

19 PRESIDENT WALLGREN-LINDHOLM: Okay. Thank
20 you.

21 BY MS. LEMMENS:

22 Q. And so, sir, you see here that the Court of

1 Appeals decision does not say that there's an implied
2 license. We don't have that same sort of terminology
3 that carried over, or being carried over from Justice
4 Eidsvik's Decision at the trial level.

5 A. The Court of Appeal reviewed the Decision
6 and said it found no fault with the Decision, which,
7 in my mind, included -- would have included her
8 formulation, and what it did was, it did reproduce
9 Paragraph 318, but I think when you read the Court of
10 Appeal Decision, you have to read it in the context,
11 like to understand it in the context in which it was
12 made, because the Trial Court used the words
13 "mandatory license," "compulsory license," "in
14 effect," "mandatory," whatever.

15 So I don't regard this quote as being
16 anything that somehow cuts down or whittles the
17 interpretation of the nature of the license just
18 because it says "created a compulsory license." This
19 is just copying one paragraph from the Decision.

20 Q. Well, here we see that the Court of Appeal
21 has indicated in its conclusion that there is no
22 breach of copyright in this matter by the Board's

1 disclosure of Seismic Data after the Privilege Period,
2 including allowing data to be copied. The specific
3 legislative authority of the Canada Petroleum
4 Resources Act and the Federal Accord Act overrides the
5 general rights contained in the Copyright Act

6 A. Umm-hmm.

7 Q. So that's one conclusion. And we don't see
8 the words "implied license"; correct?

9 A. In that sentence is dealing with the CPRA,
10 the CPRA didn't find -- like in -- when you looked at
11 the decision of the Trial Judge, she had two alternate
12 ways of reaching her conclusion. The first was the
13 specific regime, and so, this -- you wouldn't expect
14 to see that in that first sentence.

15 Q. And then we see an alternative decision in
16 the next sentence.

17 "Further, or in the alternative, the
18 Regulatory Regime created a compulsory licensing
19 system through which the Boards have authority to
20 copy."

21 We still don't see the words "implied
22 license"; is that right?

1 A. So you don't, but the Court of Appeal is
2 just repeating one of the paragraphs from the
3 Decision, and I don't read that as being a rejection
4 because the Court of Appeal doesn't define what they
5 mean by compulsory "license system," like neither the
6 Court of Appeal nor the Trial Court explained what
7 they meant by "compulsory license."

8 So I don't know the extent to which they put
9 their mind to it. But, to me, it is not saying -- it
10 doesn't do anything other than leave one with the same
11 question: What did they mean by "compulsory license"?

12 Q. And we can get into compulsory licenses once
13 we return from the break, sir, in more detail.

14 Compulsory license doesn't show up in the
15 Copyright Act.

16 A. So it depends on terminology and how you
17 define "compulsory license." You don't see in the
18 Copyright Act today an express provision saying that
19 there is a compulsory license, but if it's an
20 involuntary license, right, the Supreme Court of
21 Canada has said that the Retransmission Regime, which
22 creates exceptions for retransmitter, they

1 characterize it as compulsory license. So I don't
2 want to give you inaccurate answer. You don't see
3 what sometimes would be considered to be a statutory
4 regime, specifically creating a license.

5 It is in the Section of the act that deals
6 with copyright ownership cannot be located. That is
7 actually the ability of a copyright Board to grant a
8 compulsory license. It doesn't say it's a compulsory
9 license, but that's what it is, and it's the closest
10 thing to a -- to what you think of as a copyright
11 license, but the wording, the terminology is not
12 always consistent.

13 Q. And so you would agree with me that
14 "compulsory license" does not appear in the Copyright
15 Act?

16 A. Those words do not appear.

17 Q. Compulsory license is something that has
18 come out in some of the case law from the Supreme
19 Court of Canada, for instance, in the retransmission
20 right under the Broadcasting Act; is that right?

21 A. They did call the rights of retransmitters.
22 That's like a cable broadcaster who takes a signal,

1 like a distant signal, and then retransmits it over
2 cable or satellite. That's what we're talking about.
3 And the Act has it as an exemption, which the Supreme
4 Court called a compulsory license.

5 Q. And you had referenced that case in one of
6 your Reports, I think in your Rejoinder Report, sir.
7 That case is found at Exhibit C-321, and it was found
8 in that case -- we'll pull it up. I don't know if you
9 need to look at it, because I expect you're probably
10 pretty familiar with it, but in that case the
11 compulsory license was one in which there was a
12 payment of royalties that went with the compulsory
13 license regime in that case.

14 A. So in that case the regime permitted
15 retransmitters to retransmit works and exercised the
16 communication to the public right, as long as they
17 complied with certain conditions which included paying
18 amounts set by the copyright Board. But there was a
19 second right, which was also included in the
20 exemption, which would have been part of the
21 communication to the public right. And that was the
22 right of a retransmitter to grab a local signal. And

1 that was also excluded, and there was no compensation
2 for that.

3 Q. But we see here in the Decision that there
4 is, in fact, supposed to be a right to receive
5 royalties as payment for the simultaneous
6 retransmission of those works, the royalties are
7 determined by the copyright board.

8 Do you see that?

9 A. Well, I don't see it, but I know it.

10 Q. Oh, sorry. It is on your screen, sir, but
11 it is also -- additionally we can provide it in a
12 paper copy for you as well.

13 A. I'm not disagreeing that the Retransmission
14 Regime has a component that conditions the exemption
15 from infringement on meeting the conditions, which
16 include a royalty that has to be paid.

17 Q. Right. And so as we know now, the Copyright
18 Act doesn't have compulsory licenses. "Compulsory
19 license" is a term that we find in case law, and where
20 it is found we see that there is reference to
21 royalties. They are a form of compensation for that
22 compulsory license?

1 A. So in some cases compulsory licenses are
2 conditioned on the payment of royalties. But in other
3 cases they are not. For example, in the Competition
4 Act, which -- where the Court has the authority to
5 grant effectively a compulsory license to address
6 unfair competition, there is no compensation, and in
7 the part of Copyright Act that permits the copyright
8 Board to make -- to grant statutory licenses to use
9 works where the copyright owner can't be found, that
10 also one is not conditioned on the payment of
11 royalties.

12 And so, sometimes there is royalties;
13 sometimes there are not.

14 Q. But you would agree with me that in the case
15 of the Common Issues Decision, it is not found that it
16 is a Competition Act compulsory license; right?

17 A. So there was no reference to a Competition
18 Act in the Common Issues Trial.

19 Q. And from the Common Issues Decision, I think
20 you would agree with me, given that there was no
21 compensation to GSI, as found in the Decision, that
22 there does not appear to be any royalty associated

1 with a compulsory license in the Common Issues
2 Decision; isn't that right?

3 A. So I think this needs to be clear. There
4 was a quid pro quo. The quid pro quo is that it is
5 legal to engage in seismic surveying without obtaining
6 authorization. That authorization confers a valuable
7 economic right to the party that gets the
8 authorization, and what they get is the ability to
9 engage in that seismic surveys.

10 What they also get is a right that -- that
11 Privilege Period where they can go and license that
12 data to someone else. So, you're right, there are no
13 royalties, but it's not fair to say there isn't
14 consideration or payment for the license that ends up
15 being granted.

16 Q. Sir, I just -- if I could --

17 MS. LEMMENS: If you could indulge me for a
18 few more minutes just because I'm on something that I
19 would like to get to the bottom of. Is that possible?

20 PRESIDENT WALLGREN-LINDHOLM: Can we go on
21 for a few more minutes?

22 THE WITNESS: A few more minutes. I'm in

1 your hands, Madam Chair.

2 PRESIDENT WALLGREN-LINDHOLM: Okay. So a
3 few. Less than five. Thank you.

4 BY MS. LEMMENS:

5 Q. I'd like to take a look at the Judgment roll
6 from the trial Decision, sir, that you had referenced
7 earlier, and that's at Exhibit R-149.

8 A. This is actually one page of these six
9 pages. Okay.

10 Q. That's a long style of cause, given the
11 number of actions that were involved.

12 So, sir, you'd agree with me that in this
13 Judgment roll we don't see "compulsory license"?

14 A. We don't.

15 Q. We also don't see "implied license"?

16 A. We don't. This is the result of the Judge's
17 reasoning. It is answering the question. The Judge
18 was asked various questions, and these are the -- only
19 the answers.

20 Q. And do you recognize the wording in the
21 Judgment roll from the actual Trial Decision at its
22 conclusion --

1 A. I do.

2 Q. And you realize that the Judgment roll was
3 based on Paragraph -- I think it is around 321. If we
4 go back to Exhibit R-001.

5 A. So what paragraph are you referring to?

6 Q. Sorry. If we just go down a little bit.

7 A. I think it is Paragraph 323.

8 Q. 323.

9 A. 323, yes.

10 Q. And so, there you see the words "replicated"
11 in the Judgment roll, sir, the complete answer
12 language that we see in the Judgment roll?

13 A. Vis-à-vis the Boards, yes.

14 Q. And also, with respect to the oil companies.

15 A. No. It doesn't say it's a complete answer
16 for the oil companies. Says it is a complete answer
17 as to whether the copying companies were entitled to
18 receive and copy. So, if you look at Paragraphs
19 A -- Paragraph A, it's a complete answer to the
20 plaintiff's claims that the Boards acted unlawfully in
21 disclosing information. Broader --

22 PRESIDENT WALLGREN-LINDHOLM: Professor,

1 could you please try to speak into the microphone
2 because I believe the Court Reporter is struggling.

3 THE WITNESS: I'm so sorry, Madam Chair.

4 PRESIDENT WALLGREN-LINDHOLM: Thank you.

5 THE WITNESS: So I'm pointing out that the
6 complete answer in Paragraphs 2A and 2B are different.
7 The first vis-à-vis the Boards, its complete answer to
8 them acting unlawfully and disclosing the information
9 to the public. (B), the complete answer is narrower.
10 It's to the copying companies who were entitled to
11 receive and copy the information for customers. And
12 then, (C), nothing unlawful about accessing or copying
13 from the Boards, leaving aside contractual issues.

14 So the -- what was not infringing are
15 different, depending on which category of user you're
16 talking about.

17 BY MS. LEMMENS:

18 Q. And so you see that there's no reference to
19 GSI consenting to that? Do you see that there?
20 Because I don't.

21 A. This is the Judgment roll, which is
22 summarizing the answers to the question. You wouldn't

1 expect to see it.

2 Q. Well, you took us to the Judgment roll in
3 your presentation and wanted to make some
4 representations about it. So I just wanted to clarify
5 that it doesn't say that GSI consented.

6 A. Doesn't deal with that issue one way or the
7 other. I agree with that.

8 Q. And it doesn't say that GSI participated in
9 the Regulatory Regime and, therefore, it is not
10 entitled to a copyright infringement?

11 A. It does not. But that's the view that GSI
12 took in its Leave to Appeal motion to the Supreme
13 Court of Canada.

14 Q. And you would agree with me that an argument
15 to get a case heard at the Supreme Court of Canada is
16 nothing more than an argument to get interest by that
17 Supreme Court of Canada to hear the case?

18 A. So it is actually quite an art in doing a
19 Leave to Appeal motion to the Supreme Court. I have
20 been involved in a lot of them. The test for getting
21 leave is -- takes into account the public interest,
22 either in the case or the public interest in a point

1 of -- in a point of law.

2 Supreme Court has a lot of copyright. They
3 have actually taken a lot of copyright cases, I'm glad
4 to say, but they don't give reasons. Sometimes they
5 take a case, and you don't know why. Sometimes they
6 don't take a case, and you don't know why. It is up
7 to the gods to decide which cases get leave, but
8 generally it's a case that they would consider, they
9 likely would not take it if they didn't consider it
10 was a matter of public importance.

11 Q. And so, you would agree with me that a Leave
12 to Appeal Application is nothing more than an argument
13 to meet the test to have a case heard?

14 A. So, it's -- I don't know if it's an
15 argument. You have to persuade the Court that it's
16 worthy of the Court taking up the decision. I
17 wouldn't condense it to say it's an argument.
18 Obviously, you have to make arguments in a leave
19 motion, and you have to do it persuasively. I don't
20 know that the word "argument" kind of encapsulates
21 everything you need to do, but certainly you have to
22 convince the Court in your written materials that it

1 is one that falls within the framework of what they
2 would accept.

3 Q. GSI in its Leave to Appeal argument to the
4 Supreme Court of Canada doesn't say "this is my
5 position that there's an implied license." It is
6 simply arguing a point of law in order to try and get
7 access to have its case heard at the Supreme Court of
8 Canada?

9 A. I wouldn't say that.

10 Could you put up the leave motion,
11 Paragraph 75 and 76?

12 Q. Gladly. I don't know. He wanted to see
13 some paragraphs, so he'll have to let you know.

14 A. Is this the Leave motion?

15 Q. We are looking at R-587.

16 A. Okay. So go to Paragraph 75. So this is
17 the - this is the this is what the Supreme Court was
18 being told: "The Regulatory Regime does not expressly
19 provide for a compulsory license nor can one be
20 implied on the record given that GSI has persistently
21 maintained its position."

22 So that's a statement of GSI's position

1 dealing with whether it consented.

2 Now, go to Paragraph 76, please. "The Trial
3 Judge" -- this is now a summary of what GSI is saying
4 the Trial Judge found.

5 "The Trial Judge implies the copyright
6 license on the basis GSI knowingly participated in the
7 Regulatory Regime." That sentence is not an argument.
8 That sentence, in my view, is describing the nature of
9 the basis of the license. Then it goes on: "However,
10 any copyright license of this nature should be
11 grounded in statute since the Boards derive their
12 authority from statute."

13 That sentence is argument. Then it goes
14 on: "A license of this nature, appropriating a right,
15 should not be implied from agreement or a conduct of a
16 party." So that is argument, but it goes on and says:
17 "Allowing for such implied licenses creates a
18 dangerous precedent and facilitates the justification
19 of breaches of intellectual property rights."

20 I read that as saying that, Supreme Court,
21 you ought to take this case because the basis for the
22 Trial Judge Decision is that it knowingly participated

1 in a Regulatory Regime. And it is saying, allowing
2 such implied licenses -- the implied licenses that
3 arise by virtue of participating in a Regulatory
4 Regime -- creates a dangerous precedent. In other
5 words, they are saying, this is a precedent. This is
6 what was decided -- and facilitates the justification
7 of breaches of intellectual property rights.

8 So I think that GSI is here, and I think, if
9 I remember right, this appeal motion was signed by a
10 lawyer, who was one of the lead lawyers both at trial
11 and in the Court of Appeal, and this is a lawyer who
12 was expressing a view that the license was based on
13 knowingly participation, which is another way of
14 saying GSI was taken to have been deemed to have
15 consented to the license.

16 And there's an invitation to the Supreme
17 Court to take it up, because I think the implication
18 is, or at least what GSI is trying to say is, this
19 is -- this kind of license is one that should not have
20 been found. Take it up, Supreme Court, and see if
21 you'll reverse it.

22 Q. And I'd like to go to Paragraph 29 of this

1 document, sir, because it explicitly sets out exactly
2 what needs to be met in an application for Leave to
3 Appeal, which is an issue of national and public
4 importance, and so it is in that framework that this
5 interpretation is offered to the Supreme Court of
6 Canada in order to make a case sound as though it is
7 of national and public importance in order to get
8 Leave to Appeal to the Supreme Court of Canada.

9 Do you understand that?

10 A. So I do know what the test is to get leave,
11 and what I understand GSI to be saying is that the
12 finding that a person could become subject to
13 effectively a voluntary license by participating in a
14 Regulatory Regime is a question of public importance.
15 That was the decision. It's a question of public
16 importance. Supreme Court of Canada, you should take
17 it up based on this test.

18 Q. And you can see there that GSI does not in
19 fact formulate the question as you've suggested about
20 participation. It says: "What is the appropriate
21 interpretation in balancing of the Copyright Act and
22 the Regulatory Regime governing seismic surveys in

1 Canada? If the two apparently conflict, should the
2 Court adopt an interpretation that allows for
3 breaching copyright without compensation? Should the
4 Court endorse the transformation of a Regulatory
5 Regime into a proprietary acquisition scheme?"

6 Nowhere does it even use the word
7 "participation" as you suggested, sir?

8 A. Well, if you want to read out Paragraph 75
9 and 76, I'm not making this up. I'm just pointing out
10 what GSI itself said and then how it's -- you know,
11 how it fits into the overall argument is, you know,
12 anyone can take away.

13 My only point is, that there was this
14 statement which I view as a factual statement about
15 the nature of the license, and that's pretty clear in
16 Paragraph 76.

17 MS. LEMMENS: Okay. Let's take a break.

18 PRESIDENT WALLGREN-LINDHOLM: Maybe we could
19 break now. I think this a good moment.

20 So let's see now. At 3:35. Right.

21 And, Professor, I just remind you that you
22 are still in your bubble.

1 THE WITNESS: Thank you.

2 PRESIDENT WALLGREN-LINDHOLM: Okay.

3 (Brief recess.) {"4}

4 PRESIDENT WALLGREN-LINDHOLM: So we
5 will continue the cross-examination.

6 Ms. Lemmens, to you.

7 MS. LEMMENS: Thank you, Madam Chair.

8 BY MS. LEMMENS:

9 Q. Sir, at the outset of your testimony, we
10 were talking about your instructions, and I noted that
11 you did not include in your instructions there that
12 you were to opine on fair dealing, and I have had an
13 opportunity to go back to your Reports and, in fact,
14 you did use -- you did deal with fair dealing in your
15 First Report and, yet, it doesn't show up in your
16 instructions.

17 So, how did it come to be in your Report?

18 A. So my Report was, if you go to the
19 questions, it included a Paragraph 7(b), how are the
20 references to compulsory license or lack of consent to
21 be understood.

22 So what I was doing -- and there was also

1 some questions about confiscation -- was providing
2 just a background of how Canadian copyright law
3 worked, and so I gave an overview of what the
4 exclusive rights were, I gave an overview of what
5 consents were, and I gave an overview of exceptions
6 including fair dealing, but it wasn't a major part,
7 but it was part of the background to these questions.

8 Q. And I know you said you don't know or you
9 said the "Brattle who" when I asked you about The
10 Brattle Group, but are you familiar with the Brattle
11 Group referencing fair dealing in its Valuation Report
12 in this matter?

13 A. No, I'm not.

14 Q. Were you asked at a later time to address
15 fair dealing by your client?

16 A. I was asked in my Reply Report to address
17 the Opinion of Professor Hutchison, and so that's why
18 you see comments on fair dealing in the Reply Report.

19 Q. Right. But I guess my question, I thought,
20 was a little bit different. But maybe you didn't
21 understand.

22 In your initial Report, you commented on a

1 GSI case out of Texas.

2 Do you recall that?

3 A. I do recall commenting on the Nopec Case, if
4 that's the one you're referring to.

5 Q. No. I'm talking about a GSI case in Texas.

6 A. Isn't that GSI and Nopec.

7 Q. Oh, sorry. You said Nopec. I thought you
8 said notepad.

9 A. No. Nopec. Sorry.

10 PRESIDENT WALLGREN-LINDHOLM: Please,
11 Professor Sookman, do you think you could take the
12 microphone a bit closer without lifting it up too
13 much. That's apparently the appropriate technique.

14 (Comments off microphone.)

15 THE WITNESS: So I do deal with that case
16 starting at Paragraph 76 of my Report.

17 BY MS. LEMMENS:

18 Q. And I just wanted to confirm that you are
19 not called to the State bar in Texas?

20 A. I am not.

21 Q. You also commented on a GSI case from the
22 Falkland Islands?

1 A. I did.

2 Q. You're not called or entitled to practice
3 there, that you're aware of?

4 A. If I was aware of it, I'd probably know, but
5 the Falklands case is premised on --

6 Q. Sir, I was just asking you about where you
7 were called to the bar. I just want to make sure that
8 I know that you're not entitled to practice law in
9 either of those jurisdictions, Texas or Falkland
10 Islands.

11 A. I'm not.

12 Q. So you're also not entitled to provide legal
13 advice with respect to the laws in those
14 jurisdictions?

15 A. I'm entitled to review the Decisions and
16 comment about whether they would be persuasive
17 authority to a Canadian court or not.

18 Q. Right. And we're not in front of a Canadian
19 court. So do you know the terms of the license that
20 was involved in the Falkland Islands case?

21 A. I did read the Decision of the Trial Judge
22 and the Court of Appeal.

1 Q. So did you read the terms of the license
2 involved in the Falkland Islands case? Do you know
3 the specific terms involved?

4 A. I did, and the terms in the Falkland Island
5 ones were much more express. They were incorporated
6 by reference into the specific permit, and the Trial
7 Judge who looked at it found on that basis there was
8 an express license, but he also made an alternate
9 finding of an implied license, which was based on the
10 process and the awareness of GSI with respect to those
11 terms.

12 Q. Sir, I'd like to now talk a little bit about
13 statutory interpretation.

14 You would agree with me that paramouncy
15 rules in statutory interpretation such as preferring
16 the later legislation in time can sometimes conflict
17 with other rules of statutory interpretation, such as
18 the more specific provision overriding the more
19 general; right?

20 A. You could have two principles. They could
21 both lead to the same interpretation. They could lead
22 to opposite interpretations. On the *lex specialis*

1 rule, it applies regardless of whether the statute was
2 later or earlier. So it wouldn't make a difference in
3 *lex specialis*.

4 Q. Well, sorry. *Lex specialis* doesn't have
5 some sort of paramouncy to the rule about
6 later-in-time legislation.

7 Isn't that right?

8 A. It applies regardless of whether the statute
9 is later in time or earlier in time. It is just a
10 principle of construction.

11 Q. But, in fact, if a judge decided to see
12 which statute was later in time and whether that
13 repealed the earlier statute, that could be used
14 instead of using *lex specialis* in certain instances;
15 isn't that right?

16 A. So judges have different -- I think the word
17 that was used before was "tools in their arsenal." I
18 think Prof. Bankes used that term. They apply those
19 terms, those different rules to the facts and the
20 legal issues that they are looking at with the
21 objective of interpreting the intent of Parliament.

22 Sometimes they may be of the Opinion that

1 it's appropriate to apply the *lex specialis*.

2 Sometimes they may apply a different principle. It is
3 a matter of the Judges knowing the rules or of
4 statutory interpretation applying the ones that are
5 most appropriate, or, in some cases, multiple tools of
6 interpretation that both lead to the same result.

7 Q. Turning back to a couple questions about
8 copyright again, sir, you referenced the Olympic 1976
9 Act when Canada had the Olympics in Montreal here as
10 an Act that limits the rights of copyright holders.

11 Do you recall that?

12 A. I do. Montreal here, though, I think we're
13 in Calgary.

14 Q. I mean in Canada. We're dealing with a
15 Tribunal full of members that are not from our
16 country.

17 A. Okay.

18 Q. And so, that Olympic 1976 Act, sir, it
19 specifically references the Copyright Act, doesn't it?

20 A. It does.

21 Q. You also reference the Competition Act in
22 your Second Report, sir, as an Act that provides the

1 federal Court with certain powers to restrain the use
2 of copyrights for anticompetitive behavior, and you
3 even mentioned it earlier this afternoon.

4 A. Yes, it applies to copyrights but it could
5 be -- it wasn't limited to copyright. It could also
6 be patents or another intellectual property right that
7 was used in an anticompetitive way.

8 Q. But that Act does specifically reference
9 copyright, doesn't it?

10 A. The Competition Act does.

11 Q. You also referenced --

12 A. Well, it -- I think it refers to
13 intellectual property rights. I can't recall whether
14 it specifically calls out copyright but it would
15 include copyright.

16 Q. You also reference the Bankruptcy and
17 Insolvency Act as an Act addressing certain rights of
18 licensees in respect of copyrights when they enter
19 into bankruptcy proceedings and whether they can be
20 assigned?

21 A. Yes. So the -- there's the Bankruptcy
22 Insolvency Act, there is the CCAA. There is multiple

1 statutes that it applies to, and some of it says that,
2 if there is a bankruptcy or insolvency, a license
3 granted under an intellectual property right can
4 survive. So I'm not sure that each of the provisions
5 refer to the Copyright Act. It talks about the
6 licenses survive which would be a -- you know, usually
7 a -- under intellectual property right.

8 Q. But there is specific reference to
9 intellectual property rights in all of these
10 instances; correct?

11 A. I'd have to go back and look at the specific
12 wording. That provision appears in multiple places in
13 the Bankruptcy Insolvency Act. I'd have to do back
14 and look at the specific wording. I know it has the
15 effect of grandfathering and preventing licenses to
16 intellectual property from being interfered with
17 because of a bankruptcy.

18 There is a similar provision in the United
19 States law to protect licensees after a series of
20 cases. But I can't remember whether it actually
21 refers to how it -- how the wording is articulated.

22 Q. But you'd agree with me that the CPRA does

1 not actually reference copyright or intellectual
2 property rights?

3 A. It doesn't do so expressly. It talks about
4 the privilege, and it talks about that with respect to
5 information. So it's providing protection with
6 respect to some rights that exist in the material. It
7 doesn't use those words, but by having the right to
8 disclose and by having the right implicitly to include
9 the right to copy, it indirectly is addressing
10 intellectual property rights. But it doesn't have
11 that word in it, I agree with that.

12 Q. Sir, I just wanted to take you to
13 Paragraph 17 of your Rejoinder Report for a moment.
14 So we're looking at RER-05, which is Mr. Sookman's
15 Second Report in this matter. And here you are
16 commenting on Dr. Hutchison's Report.

17 Do you see that?

18 A. I do see that.

19 Q. And you state here that: "The Hutchison
20 Report states that 'rights licensed will, at some
21 point, revert to the owner '."

22 Do you see that?

1 A. I do.

2 Q. You then go on to explain that "there can be
3 licenses of different durations such as nonexclusive
4 and sole licenses, which at the end of these licenses,
5 if they're for a fixed term or some other limited
6 duration they do not revert to the copyright holder.
7 They terminate."

8 Do you see that?

9 A. I do.

10 Q. But did you understand that Dr. Hutchison
11 was actually referring to exclusive licenses in the
12 passage that you're quoting from there?

13 Did you want to take a look at his Report?

14 A. Yep.

15 Q. Yes?

16 A. I'm going to do that.

17 Q. Okay. Well, let's put it up on the screen
18 for everybody else here. So if we go and look at
19 Dr. Hutchison's Report at CER-04, at Paragraph 36, he
20 states at Paragraph 36: "Read together, these
21 provisions allow a copyright owner to license
22 exclusive rights to a third party by way of contract

1 without relinquishing their ownership of the
2 copyright."

3 So do you see that he's referencing an
4 exclusive -- "the exclusive license must be in writing
5 signed by the owner of the right and is governed
6 according to the law of contracts."?

7 A. So I don't read this sentence the way you
8 said it. Paragraph 36 says: "These provisions allow
9 a copyright owner to license exclusive rights to a
10 third party by way of contract without relinquishing
11 their ownership of the copyright."

12 So I hadn't read that as being an exclusive
13 license, but even if it was an exclusive license, a
14 license is merely a permission to do an act that would
15 otherwise be unlawful. An exclusive license is a
16 permission to do something coupled with a covenant, a
17 promise that the copyright owner won't engage in the
18 contact or license it to someone else.

19 So the exclusive rights don't revert, it is
20 simply a license coupled with a contractual term that
21 the owner of the copyright won't do the things that
22 are licensed. So in no way do the rights kind of

1 revert. It's just the promise -- the promise not to
2 exercise those rights goes away.

3 Q. Sir, turning back to the Common Issues
4 Decision, Justice Eidsvik had mentioned a few times
5 throughout the Decision this term "confiscatory" or
6 "confiscate" or "confiscation." And so, she went on
7 to also say that it was unfair to GSI.

8 Did you notice that in the Trial Decision?

9 A. I did.

10 Q. And the unfairness is that GSI's rights in
11 its Seismic Data, it can't enforce them so far as they
12 conflict with the Regulatory Regime.

13 Do you understand that?

14 A. So she doesn't explain what she means by
15 "unfairness." My take on it is that the unfairness is
16 that the regime doesn't provide a longer term of
17 protection beyond what the -- beyond what Parliament
18 enacted and that GSI believed it should have had a
19 longer period of protection. And she was
20 commenting -- right? -- I think that that was
21 perceived as being unfair.

22 Q. You would agree with me that the word

1 "confiscate" is, in general parlance, meant to mean
2 taking something away?

3 A. So in this case, the Judge does not indicate
4 what is meant by "confiscate." In my view, since
5 you're asking me, in this case the reference to
6 "confiscate" was a reference to the regime as it was.

7 In other words, if GSI had gone out and
8 somehow could get an authorization without the
9 Section 107 terms, except it would be confidential,
10 then it would have had a longer term in which its
11 information was confidential.

12 But the Regime, as GSI participated in it,
13 only provided, based on the Government's policy, a
14 shorter period. So what might have the ordinary
15 meaning to "take," has to be -- again, the Judge
16 doesn't say what she means; right? But I take the
17 references to "confiscate" to mean a lesser term of
18 protection than GSI would have had but for the
19 regulatory regime.

20 So not something is being taken away, but
21 that GSI doesn't get the longer benefit that it might
22 have had but for the regime.

1 Q. Sir, you commented that Justice Eidsvik
2 didn't cite any of the relevant case law regarding the
3 term confiscate or confiscatory in her Decision. You
4 mentioned that in your Report.

5 Do you recall that?

6 A. I do.

7 Q. But I noticed that you also didn't cite any
8 of the case law about confiscate or confiscatory in
9 your Report. And I had occasion to look up in words
10 and phrases what confiscate has meant in prior cases.

11 And would you be surprised to hear that the
12 word "confiscate" was used in an Alberta Court of
13 Appeal case and this is what was said about it: "The
14 word confiscate is defined by the new Oxford
15 dictionary as meaning 'to appropriate private property
16 to the sovereign or the public treasury.'"

17 Are you surprised to hear that definition,
18 sir?

19 A. So when you look at the remarks of
20 Judge Eidsvik, you'll see in at least in one case she
21 puts -- I can't remember if it was confiscate or
22 confiscated in quotation marks -- right? -- which

1 suggests she didn't necessarily mean it had an
2 ordinary meaning. My point in my Report is she didn't
3 describe what was meant when she used the term.

4 Q. But she didn't actually put it in quotes in
5 every instance. In fact, in Paragraph 322 of the
6 Decision, sir, you'll see that it
7 specifically -- yeah, please pull it up on the screen.

8 A. She didn't do it in every case, but she did
9 it at least in one situation. It was in quotation
10 marks.

11 Q. Right. We don't see it in quotation marks.

12 A. Not everywhere.

13 Q. And so my question coming back to it, sir,
14 is are you surprised to hear that the definition of
15 "confiscate" in Canada, in Canadian Courts, is defined
16 by the new Oxford dictionary as meaning to appropriate
17 private property to the sovereign of the public
18 treasury?

19 A. I actually don't have expertise in the laws
20 related to expropriation or confiscation. So I'm not
21 able to give an Opinion on what it might have meant in
22 different context. All I can tell you is my

1 interpretation of the word in the context of this
2 Decision.

3 Q. Okay. Fair enough.

4 And you also sort of suggest that it's an
5 obiter dicta comment of Justice Eidsvik and the
6 Decision.

7 You mentioned that at Paragraph 16 of your
8 initial Report. I don't know that you need to go
9 there to know that, but...

10 A. No, I do say that.

11 Q. And, as we know, you were not Counsel at the
12 trial of the common issues; correct?

13 A. I was not.

14 Q. And so are you aware whether anybody took a
15 position before Justice Eidsvik that there was
16 confiscation or not?

17 A. So my point in the Report on what was
18 obiter dicta was based on what the questions were to
19 the Judge. And, more importantly, what was the core
20 holding of the Judge, which was to talk about the
21 effect of the Regime, and then what the Judgment roll
22 found.

1 So it is my Opinion in looking at what the
2 issues are, what her logic and reasoning was in coming
3 to her conclusion, and, based on what obiter dicta is,
4 its obiter -- I will also point out that in
5 Paragraph 107 of the Court of Appeal Decision, and it
6 says: "The Parties have put forth competing
7 interpretations of Section 111(2) of the CPRA and
8 whether it could lend support to a Trial Judge's
9 findings. Irrespective of those interpretations, on
10 which we offer no Opinion, it is clear that the Trial
11 Court's extensive analysis add to the intention and
12 nature of 101, and the resulting conclusions was
13 neither undertaken nor premised on Section 1101, where
14 the three paragraphs referred to, which do not impact
15 the core findings."

16 And in several places, where she refers to
17 confiscation, she also refers to paragraph to
18 Section 111. But my view on why it is obiter is the
19 same as the Court of Appeals with respect to
20 Section 111, which is, she made certain core findings.
21 And, in my view, she also did look at the legislative
22 history, she looked at the comment from Senator Hays,

1 and she did make reference to confiscation. But in my
2 Opinion, those were not core to the Decision, and they
3 were obiter.

4 Q. Were you provided a copy of the trial
5 Transcripts for the Alberta trial of the common
6 issues?

7 A. I was not.

8 Q. Okay. And so you're not aware that the
9 Parties, in fact, raised this interpretation as
10 confiscatory then?

11 A. All I read was the actual trial Decision,
12 with respect to it. I did not see the evidence or the
13 arguments.

14 Q. And just for the record, I will note that
15 the trial Transcripts are at C-405, Exhibit C-405.
16 Because there are, in fact, arguments there, but it
17 doesn't sound like you had reviewed them.

18 A. No. But the issue isn't what the arguments
19 were --

20 Q. I didn't ask a question, sir. So I would
21 like to ask you another question.

22 Are you aware that Seismic Data is not

1 submitted to Canada under the CPRA?

2 A. So I understand that some Seismic Data is
3 not, like the raw data is not, is my understanding.

4 Q. Sorry?

5 A. What was your question?

6 Q. Are you aware that Seismic Data is not
7 submitted to Canada, i.e., the Boards, under the CPRA?

8 A. Yes.

9 Q. Okay. And so you understand that Seismic
10 Data is submitted pursuant to the Geophysical
11 Regulations under the Canada Oil and Gas Operations
12 Act?

13 A. So I understand that they are submitted
14 under Regulatory Regime. She uses she goes through
15 extensive legislative history, and she makes her
16 decision based on the Regulatory Regime. My
17 understanding would be, that as she said, I think in
18 Paragraph 2 of her Decision, that materials were
19 submitted under the Regulatory Regime.

20 Q. Right. But the Regulatory Regime is many
21 Acts and Regulations; correct?

22 A. Yes.

1 Q. It's not a singular Act under which
2 submission of the Seismic Data is done and the
3 disclosure of the Seismic Data is done? Those are two
4 separate Acts.

5 A. Okay. All I can say to that is that she
6 does an analysis in the end. She goes on through all
7 the legislative history and the different statutes
8 that apply. And then she does her analysis of the
9 CPRA. And she says my analysis would apply to
10 everything. But the specific regulation that governed
11 the submission of data, I couldn't tell you for sure.

12 Q. And that's because you are not necessarily
13 an expert in natural resources or energy law?

14 Should I understand that to be the case?

15 A. My expertise extends to gardening, and I
16 can't stand that.

17 Q. And so you don't advise clients on the
18 Regulatory Regime; is that fair?

19 A. This Regulatory Regime, I do not.

20 Q. Was this instance of reading the Common
21 Issues Decision for this case the first time that you
22 were really looking at the CPRA or the Canada Oil and

1 Gas Operations Act?

2 A. Yes. It was these Decisions. I mean, this
3 is where I got what I know about oil and gas. And
4 everything I know about the regulation is from the
5 Decisions.

6 Q. Fair enough. Okay. Then I won't ask you
7 any questions about the Regulatory Regime, sir. I
8 just wanted to clear that up.

9 So you have referred to the Wholesale Travel
10 and Montykola Investment Cases in your First Report.

11 Do you recall that?

12 A. I do.

13 Q. And I just want to clarify that the
14 Wholesale Travel Case is not a case about copyright?

15 A. It is not.

16 Q. It was about vacation packages and false or
17 misleading advertising under the Competition Act?

18 A. In particular, it was about the standards of
19 proof that were required in the circumstances of an
20 advertising company that was subject to licensing. It
21 wasn't a copyright case, but Justice Cory did take
22 into account that the person who was charged was

1 subject to the rules of the licensing regime, but it
2 wasn't copyright case.

3 Q. Right, sir. And so you raised these in the
4 context of talking about participation in a regulated
5 activity in your Report. And I just wanted to go to
6 the Common Issues Trial Decision, sir, which is R-001
7 in the record at Paragraph 313-317.

8 A. So you're talking about the Decision?

9 Q. Yes.

10 A. Okay.

11 Q. Justice Eidsvik's Decision.

12 A. Okay. Where do you want me to go?

13 Q. Paragraph 313-317.

14 A. Okay.

15 Q. And so you raised the Montykola Investments
16 Case and the Wholesale Travel Case in your Opinion
17 when you're talking about participation in a regulated
18 activity. But, in fact, those two cases were
19 addressed in the Common Issues Trial Decision, and
20 they were not accepted by Justice Eidsvik.

21 Are you aware of that?

22 A. So that's the question about whether they

1 were or were not accepted by her. In my view, she
2 does cite that. If you look at Paragraph 308 and 309,
3 you will see -- and she had already summarized. I
4 think she summarized later. She went through all the
5 cases.

6 But she says here, referring to
7 Paragraph 308: "As noted above, the Defendants argue
8 that by participating in the Regulatory Regime, GSI
9 impliedly licensed data for public use pursuant to the
10 'rules of the Regime.'" And then she cites Robertson;
11 Nopec; the Texas Case; the Sutherland case, which is a
12 case of involving an architect and the planning
13 regime; and the Wholesale Travel case, which was under
14 a regulatory license regime.

15 And then she says: "This is another way of
16 viewing the allegedly competing legislation; that is,
17 to take the view that section of the CPRA creates a
18 mandatory compulsory license."

19 So in my view, and for the reasons I gave in
20 my opening presentation, I am of the Opinion that she
21 used these cases to find an applied license.

22 Now, in my Report, you'll see I used the

1 term "Implied License," capital "I" implied, capital
2 "L" license. Because when you go through all the
3 cases, the Judges are not always consistent in how
4 they describe the nature of a license.

5 Sometimes it's presumed. Sometimes it is
6 deemed or deemed to be accepted. Sometimes it is
7 voluntarily accepted. And in the Wholesale Travel
8 Case, the Supreme Court of Canada said a term that a
9 person is taken to agree to when they enter a
10 Regulatory Regime is implied.

11 So the label as to what it is -- you'll see
12 in my Report I had "Implied License" because the
13 Courts don't always use the same terminology. But in
14 my view, they assimilate to the fact that there is an
15 agreement that is taken to be given by the
16 participation in the planning act regime, in the
17 patent regime or, more generally speaking, in another
18 regime that is licensed, which is the Wholesale Travel
19 and the Fitzpatrick Cases.

20 Q. So sir, you took us to the start of the
21 section on Compulsory License just above Paragraph 308
22 in the Decision. And as you see, she references the

1 Montykola Case and she references the Wholesale Case.

2 And she's talking about the Defendant's
3 argument about participating in the Regulatory Regime
4 and this rules of the regime. And she described the
5 argument, not her conclusion, as another way of
6 viewing the allegedly competing information. She goes
7 on to discuss the cases there below one by one,
8 including Montykola at Paragraph 313 and in
9 Paragraph 314 she discusses the Wholesale Travel Case.

10 And what she concludes in that section is
11 that: "Upon a more careful review, however, it
12 appears to me that these so-called rules have changed
13 somewhat over time in the form of legislative changes
14 and the discretionary decision over disclosure made by
15 Ministers and Boards. Nonetheless, the basic
16 statutory rule that data could be disclosed to third
17 parties subject to some discretion being exercised
18 over the implementation of this Rule was always in
19 place. The timing of the disclosure changed somewhat,
20 but it was always a possibility.

21 "It is also clear that GSI fought against
22 this disclosure policy for years and obviously is

1 still fighting. To suggest that it has consented to
2 the disclosure of it's very valuable Seismic Data,
3 impliedly or not, does not sit well with me. In my
4 view, GSI is being forced to grant, in effect, a
5 compulsory license to permit its offshore Seismic Data
6 to be released and used by the public."

7 So it does not say that there's an implied
8 license. She rejected that; isn't that right?

9 A. So, first, I don't read Paragraph 309 the
10 way you read it. She refers to the defendant's
11 argument that by participating in a Regulatory Regime,
12 it licensed its data, and she says: "This is another
13 way of viewing the allegedly competing legislation.
14 That is, to take the view that it creates a mandatory
15 or compulsory license." So I hear her saying that
16 that is another way of viewing what happened here.

17 Then when you go to 316, the rule she's
18 talking about are the rules of the regime there.
19 She's not talking about -- she's not talking about the
20 cases. But she makes the point that: "The basic
21 statutory rule that data could be disclosed to third
22 parties was always in place. The timing of the

1 disclosure changed somewhat, but it was always a
2 possibility."

3 To me, that's a really important finding,
4 because under the cases that deal with participation
5 in a regime, the fact that someone -- the fact that
6 the regime provides for something is an important fact
7 in coming to the conclusion that a person assumes
8 those particular terms.

9 And then, as I've said for Paragraph 317, I
10 have to tell you, I spent time thinking about what
11 that meant as well until, after reading it more than
12 once, several times -- because you have to really read
13 it to understand what the Judge is getting at, I think
14 where she says, to suggest it has consented, right,
15 impliedly or not does not sit well with me.

16 So what she is saying there is to suggest
17 that there's an express consent, uh-uh, and then
18 impliedly or not, I think she is still talking here
19 about the type of consent that you would have in a
20 traditional copyright situation, I consent to you
21 doing this or that.

22 But she doesn't exclude those deemed

1 consents that are presumed to arise by virtue of the
2 participation in the Regulatory Regime. She goes on:
3 "The Regulatory Regime provides for this. They may
4 not have liked it. It may be unfair, but that's the
5 Regulatory Regime."

6 So I don't think this is inconsistent with
7 my Opinion, and it is certainly not inconsistent with
8 the Opinion of GSI and the Supreme Court. That is
9 exactly the precise opinion I was giving, Paragraph 75
10 and 76 in the Leave motion.

11 Q. Well, I disagree, but we can move on, sir.

12 Let's talk about fair dealing, again. You
13 set out in your Rejoinder report, sir, the six -- six
14 factors to consider in doing a fair dealing analysis.
15 And I'm sure you know those six factors probably off
16 the top of your head.

17 A. So take me to the part of the Opinion you're
18 going to be asking me about.

19 Q. Paragraph 27, sir. You deal with the six
20 factors, and I believe you cite to CCH?

21 A. Yes.

22 Q. So those six factors don't actually appear

1 in the Copyright Act. They were borne out of a court
2 decision that made -- or determined that there were
3 six factors that should be considered in a fair
4 dealing analysis; correct?

5 A. They were borne out of the Federal Court of
6 Appeal Decision in CCH and the Supreme Court largely
7 adopted that in the Supreme Court in CCH.

8 Q. So there are some instances in which the
9 Courts can, in fact, make law on particular points?

10 A. So under the Supreme Court of Canada case in
11 Hislop and the U.K. Supreme Court, what it's now
12 called, in National Westminster, when courts are
13 interpreting a statute, they're not making law.
14 Courts will -- for example, the Supreme Court in CCH,
15 when it articulated these factors, it wasn't making
16 law; it was interpreting what the factors were in
17 order to make an assessment of a fairness.

18 Q. Those are the factors that are now used to
19 do a fair dealing analysis, even though they're not
20 set out in the Copyright Act; correct?

21 A. That is true.

22 Q. And so some of those factors would require

1 you to look at the -- as you were talking about
2 earlier this afternoon -- the end-user of a work;
3 right?

4 A. Yes.

5 Q. And you would also look at the -- whether
6 the -- whether the allegedly fair dealing use of a
7 copyright work is a commercial use. Is that right?

8 A. So commercial use is a factor. Supreme
9 Court has said that a dealing can be fair even if it's
10 commercial. So the fact that it's commercial does not
11 sort of ipso facto make it unfair. It's a criteria.
12 The Supreme Court said in CCH it may be more likely to
13 be unfair if it's commercial, but was very clear that
14 commercial dealings could be fair.

15 And, in fact, in the Rogers case where the
16 ISPs were making available portions of musical works
17 for -- so that users could decide whether they wanted
18 to buy -- work -- this was in the older days where
19 people would kind of buy an MP3 or a different format,
20 that was a commercial use, and found to be fair.

21 Q. And the number of times that a work is
22 copied, that would also be considered in a fair

1 dealing analysis?

2 A. It would be. The Supreme Court said, in
3 fact, though, that because fair dealing is a user
4 right and because the users are the end users, the
5 fact that there are numerous copies does not derogate
6 or count against fair use, necessarily. The Court can
7 look at it, but the Court came to the conclusion
8 believe it or not, that you could have multiple
9 individuals, all who are using the same work because
10 they have received it from the same person, and they
11 could be fair and notwithstanding the very large
12 number of individuals who got it because the fair use
13 analysis is looked at from the point of view of the
14 end-user, not the person who is making the multiple
15 copies.

16 Q. And is the ability to license a work
17 directly from the copyright owner also taken into
18 consideration in a fair dealing analysis?

19 A. It is not. In CCH there was an intervention
20 specifically by one party to say that the availability
21 of a license is a factor in fair dealing. In some
22 U.S. cases it is a factor, and it was being argued in

1 the Supreme Court to try to persuade the Supreme Court
2 that the availability of a license should be a factor.
3 The Supreme Court expressly rejected that on the basis
4 that, if you had a right to fair dealing, then a
5 copyright owner couldn't get around that by simply
6 offering a license, and it was on that basis that they
7 rejected that proposition.

8 Q. And I know we talked about this earlier, but
9 the CCH fair dealing was not the outcome of the Common
10 Issues Decision?

11 A. Fair dealing was not addressed as part of
12 Common Issues, that's correct.

13 Q. Now, we talked about the Calwest Case a
14 little bit earlier, and I just wanted to ask you, did
15 you review the whole of the Calwest Decision?

16 A. I can't remember.

17 Q. Do you recall that in the Calwest Case with
18 GSI that Justice Eidsvik did, in fact, find that GSI
19 had copyright in the Seismic Data at issue in that
20 case?

21 A. I'd have to go back and look at the case to
22 be sure.

1 Q. Okay. We can pull it up. It is Exhibit
2 C-132. And I think if we scroll down to -- further
3 down. Here we go. Sorry.

4 If you just go up to Paragraph 31 here: Is
5 GSI the lawful owner of the 1982 data? So it did, in
6 fact, find that in the 1982 data there was copyright
7 and that GSI owned it. But I'll let you take a look
8 at that.

9 A. So the first paragraph is dealing with chain
10 of title, from what I can see. Where do you see that?

11 Q. If we scroll up, perhaps. Go up. If you go
12 up. Sorry. I don't have the mouse. Thank you.

13 MS. TABET: Ms. Lemmens, is it possible for
14 the witness to also use his mouse, or no?

15 MS. LEMMENS: He can use the mouse too, but
16 if we go to Paragraph 18 there, sir, you'll see that
17 the 1982 data consists only of the original processed
18 data created in Calgary for the reason -- and it goes
19 on to describe them there. But it says: "For the
20 reasons I discuss in my Common Issues Decision, the
21 creation of the 1982 data meets the Canadian skill and
22 judgment test laid out by the Supreme Court of Canada

1 in CCH, and should be considered original, artistic or
2 literary compilation productions in the scientific
3 domain and, therefore, copyright works."

4 Do you see that?

5 THE WITNESS: I see what you've read to me.

6 BY MS. LEMMENS:

7 Q. So, in fact, copyright was found in this
8 Seismic Data?

9 A. I mean, to be fair, I'd have to go back and
10 reread the Decision to make sure what's here.

11 I see the words on the Page. I just -- to
12 give you a truthful answer as to whether that was a
13 finding, I need to read the entirety of the Decision.

14 Q. Okay. I mean, I think it's pretty clear
15 from the words there, sir. "For the reasons I discuss
16 in my Common Issue Decision" -- being about how
17 copyright can subsist in Seismic Data. "The creation
18 of the 1982 data meets the Canadian skill and judgment
19 test laid out by the Supreme Court of Canada in CCH
20 and should be considered original, artistic or
21 literary compilation productions in the scientific
22 domain and, therefore, copyright works"?

1 A. Right. I see the language. I'm not
2 debating it with you. It is -- it says what it says.

3 Q. And, sir, did you review the federal court
4 decision in GSI and Canada in the course of preparing
5 your Opinion?

6 A. Which decision are you referring to?

7 Q. Well, we could pull it up. It is Exhibit
8 R-494. So it's a Decision of Justice Boswell of the
9 federal court in 2019. I understand my colleague has
10 provided you with a copy here as well. It is also on
11 the screen. And the federal court in Canada hears
12 more copyright cases usually than the Superior Courts.
13 I don't know if you agree with that?

14 A. I think that is generally true.

15 Q. Okay. So here we are before the federal
16 court, and are you familiar with this case? Did you
17 review it?

18 A. I think I had looked at it at one point. I
19 don't believe I have analyzed or know what all the
20 issues are, but I do recall reading it or some of it,
21 but not analyzing the decision and what it stood for.

22 Q. Okay. Well, I'd like to take you to

1 Paragraph 39 of the case, and it states, with
2 reference to the GSI and Encana decision, which is the
3 Common Issues Decision, sir. It states: "These
4 findings by the Prothonotary, in my Opinion,
5 collectively constitute a palpable and overriding
6 error. The decisions in GSI and Encana held that,
7 while Seismic Data can receive protection under the
8 Copyright Act, those elements of the Copyright Act
9 which conflict with the Regulatory Regime, such as the
10 right to exclude others from unauthorized use of the
11 copyrighted work were overridden. Those Decisions
12 held that there was no violation of the Copyright Act,
13 not that there was no expropriation."

14 A. What are you asking me?

15 Q. Did you read that with me?

16 A. I just read it.

17 Q. And did you read that before you expressed
18 your Opinions in this case?

19 A. I did not read this before I expressed my
20 opinions in this case. When I look at this Paragraph,
21 it does say: "Those elements of the copyright which
22 conflict the Regulatory Regime," so again, I take that

1 to mean where there is a conflict, such as the right
2 to exclude others, I think that sentence is maybe a
3 little loose, because the Common Issue Decision was
4 much more precise in terms of which persons and which
5 act.

6 And then those Decisions held that there was
7 no violation of a Copyright Act. Yes, for the things
8 that were decided. And then it says "not that there
9 was no expropriation." And I agree that the Common
10 Issues Decision did not deal with whether there was or
11 was not an expropriation. That wasn't the Common
12 Issue.

13 Q. Right. And so it didn't decide that there
14 was not an expropriation.

15 If you read Paragraph 40, further, sir, it
16 says: "In my view, the Prothonotary erred by finding
17 that legislation could not expropriate rights which
18 never existed. GSI still retains copyright in its
19 Seismic Data and will do so for the time permitted by
20 Section 91 of the Copyright Act. The Regulatory
21 Regime diminishes GSI's ability to act to prevent
22 unauthorized use of its Seismic Data after the

1 Privilege Period expires. There is still copyright in
2 the Seismic Data, even after the Privilege Period
3 expires; but by virtue of the regime, it is modified
4 or restricted copyright. Copyright is more than just
5 the right to exclude others from unauthorized use.
6 There are, for example, still moral rights in the
7 Seismic Data and these rights survive."

8 Do you see that, sir?

9 A. I see what you read me, yes.

10 Q. And again, I just want to confirm that you
11 did not read that before expressing your Opinion in
12 this case?

13 A. That's right. I do not see anything here
14 that would have changed my opinion, however.

15 MS. LEMMENS: Thank you. Those are all my
16 questions.

17 PRESIDENT WALLGREN-LINDHOLM: Thank you,
18 Ms. Lemmens.

19 Redirect on Respondent's side?

20 MS. TABET: Thank you very much, Madam
21 President. I only have one brief question.

22 REDIRECT EXAMINATION

1 BY MS. TABET:

2 Q. I'd like to provide the opportunity to
3 Mr. Sookman just to fully look at the R-494 which you
4 were just given and Paragraph 1 of the Decision, and
5 if you have a chance to read it and maybe provide some
6 context for the Tribunal as to --

7 A. This is the Justice Boswell Decision in
8 Paragraph 1?

9 Q. Yes. Can you explain the context to the
10 extent that that Decision was put to you, what was --

11 A. So it --

12 Q. Yes.

13 A. It looks like there was an appeal from the
14 Prothonotary, which is sort of like a junior judge in
15 the federal court, and it dealt with whether a matter
16 was properly pleaded or not and talked about arising
17 from the Crown's vicarious liability, so it looks like
18 the issue was the Crown's vicarious liability, from
19 what I can see.

20 MS. TABET: I have no further questions.

21 MS. LEMMENS: I have a further question.

22 RECROSS-EXAMINATION

1 BY MS. LEMMENS:

2 Q. If we look at Paragraph 2, can you see that
3 there are several grounds of appeal there, sir,
4 GSI -- if we can just get it on the screen. You'll
5 see there at Paragraph 2 it is actually much beyond a
6 vicarious liability case. It says that GSI advances
7 the following grounds for the motion. The
8 Prothonotary erred in law in finding that de facto
9 expropriation, confiscation, regulatory, or compulsory
10 taking is the statutory taking of property rights by
11 the Government when it can also be the taking of
12 property rights by the Government through its actions
13 or conduct.

14 Number two, the Prothonotary erred in law by
15 ignoring or giving no weight to jurisprudence finding
16 that the legislative scheme regarding offshore Seismic
17 Data in Canada's confiscatory or compulsory license,
18 and so forth.

19 So it's not just about vicarious liability;
20 isn't that right?

21 A. So I got to tell you, to make heads or tails
22 of this, I would have to read the orders and reasons

1 of Prothonotary to be. The words say what they say,
2 right. I don't know what the issues really are in
3 this case.

4 MS. LEMMENS: Fair. Thank you.

5 PRESIDENT WALLGREN-LINDHOLM: Thank you.

6 Mr. Gowdy, would you have a question?

7 ARBITRATOR GOWDY: I'll defer to Mr. Landau.

8 PRESIDENT WALLGREN-LINDHOLM: You defer to
9 your colleague.

10 Mr. Landau, would you have a question.

11 ARBITRATOR LANDAU: I have one.

12 QUESTIONS FROM THE TRIBUNAL

13 ARBITRATOR LANDAU: Mr. Sookman, I've just
14 got one question I want to ask you. You were in the
15 room I believe when we heard the testimony of the
16 Prof. Banks.

17 THE WITNESS: I was.

18 ARBITRATOR LANDAU: And you may recall and
19 you may have read his Report that he referred to the
20 procedure by which the Court of Appeal in the Common
21 Issues Case reserved their judgment or used as an
22 expression of that sort.

1 In his Expert Report, he refers to an
2 authority. It is Crown and Arcan of 2010, which he
3 uses -- he quotes from it to say that this is a
4 procedure that the Court uses when there is some new
5 law or something that prompts the Court to want to
6 consult its brethren before it commits to a judgment.

7 Is that a process you're familiar with?

8 A. So I know that some courts have a regular
9 practice of circulating judgments before they are
10 rendered. For example, the Supreme Court -- the
11 Judgments are always circulated to the other Judges to
12 get Opinions, and I'm not familiar with the practice
13 in all the Courts of Appeal, but I wouldn't be shocked
14 to find out that, if there was an interpretation of a
15 statute that hadn't been interpreted
16 before -- right? -- that a Judge might circulate the
17 Decision. But I'm not familiar with this particular
18 practice --

19 ARBITRATOR LANDAU: I see.

20 THE WITNESS: -- in Alberta.

21 ARBITRATOR LANDAU: I see.

22 And maybe I -- I don't know if anybody can

1 bring up Prof. Bankes' Expert Report. I'm looking at
2 Paragraph 29.

3 MS. LEMMENS: We can do that. Just give us
4 one moment.

5 ARBITRATOR LANDAU: Can you do that? Yeah.
6 Thanks. There we go. So it is Paragraph 29. And
7 that's where he quotes from Crown Arcan2010.

8 Can you see that there?

9 THE WITNESS: I do see it, yes.

10 ARBITRATOR LANDAU: Yeah. And what
11 the -- he's describing there or he's citing to a Court
12 of Appeal description as to its practice, which seems
13 to be, if you look at the third line, premised upon
14 the making of new law.

15 THE WITNESS: So I don't know the context in
16 Arcan, and what was meant by making new law. You'd
17 have to look at the, you know, the rule or -- and then
18 you would need to look to see, you know, what else
19 there are.

20 When I had first looked at this, I thought,
21 oh, new law is maybe an interpretation of a statute
22 that hadn't been interpreted before, not new law like

1 you could say the common law evolves through judicial
2 decisions, and a court is in different situation when
3 it is evolving the common law. In a statutory regime,
4 there is an institutional, sort of separation of
5 powers framework; right? Right.

6 (Overlapping speakers.)

7 (Interruption.)

8 ARBITRATOR LANDAU: So I think what
9 your -- so Hislop and NatWest and Spectrum Plus.

10 THE WITNESS: Exactly.

11 ARBITRATOR LANDAU: Yeah.

12 THE WITNESS: They talk about that, that
13 separation of powers; right? Here making new law. I
14 don't know specifically what it means. I could
15 conjecture that it means an
16 interpretation -- either -- it could be a range of
17 things, could include, you know, some new point
18 that -- let's say if a common law that hasn't yet been
19 decided.

20 For example, if the common law didn't
21 protect privacy and then there was a new tort that was
22 about to be -- to extend the law, which was the case

1 in Ontario, right? Then that could be a new law, in
2 the common law. But I think it could be wide enough
3 to include a situation where it was an interpretation
4 of a statute that hasn't yet been interpreted.

5 ARBITRATOR LANDAU: Right.

6 THE WITNESS: But I'm not an expert on what
7 this means.

8 ARBITRATOR LANDAU: All right. So as I
9 think you've already indicated in your answer, that
10 the reason I'm putting it to you is to test your
11 deployment of Hislop and National Westminster,
12 Spectrum Plus to say that the judicial role, when
13 construing a statute is not making new law?

14 THE WITNESS: That's right.

15 ARBITRATOR LANDAU: So -- but you're not
16 concerned that you have -- about your analysis by
17 reference to how the Court of Appeal addressed it in
18 this case?

19 THE WITNESS: Somehow, I'm not sure
20 whatsoever that the Court that wrote this was meant to
21 be using it in the context of HisLOP or National
22 Westminster or the many other cases that have followed

1 it.

2 ARBITRATOR LANDAU: All right. Thank you
3 very much.

4 PRESIDENT WALLGREN-LINDHOLM: Mr. Gowdy?

5 ARBITRATOR GOWDY: Hello, Professor. I'm
6 trying to square up three different things that maybe
7 you could help me square up: The difference between a
8 mandatory license, a compulsory license, and an
9 implied license.

10 THE WITNESS: So that's a great question.

11 ARBITRATOR GOWDY: What's a great answer?

12 THE WITNESS: So the great answer is there
13 is no recognized interpretation in copyright law for a
14 mandatory license. So in this case I believe it was
15 meant to be used in the context of a license that a
16 person had to agree to, and there is no -- nothing in
17 the Decision, right?

18 When you -- when a Judge uses two words like
19 "mandatory" and "compulsory," generally you might
20 think that there's an intention -- right? For somehow
21 to be different. When a then -- Judge then says "in
22 effect" mandatory, "in effect" compulsory, the Judge

1 is using these terms very loosely.

2 A compulsory license in the very strict
3 sense of the term is often used to connote a statutory
4 regime where a person has a right to do something
5 under the regime without the consent of the copyright
6 holder, sometimes there is compensation. Sometimes
7 there isn't. That's the strict sense of compulsory.

8 In the strict sense of, like when you see
9 the word "implied," in most of the cases outside of
10 the kind of Regulatory Regime situation, an implied
11 license is a license that can be inferred that a
12 person through their actions or conduct has consented
13 to something.

14 So you look at all the circumstances of the
15 case, and a court would decide whether the person
16 implicitly granted a license, whether they intended to
17 or not. It is simply looking at the conduct, would
18 the person be presumed to have granted a license.

19 In the context of these cases that I
20 mentioned to you, like the Catnic Case that deals with
21 a person who files an Application for a patent and is
22 deemed to have agreed that the drawings are available

1 to the public to use, they are licensed, I don't
2 believe the Court uses the word "implied"; right? The
3 Court says that the person, I think, in this one is
4 "taken to have agreed"; right?

5 And so, the nomenclature is not always clear
6 in these deeming cases; right? You don't always see
7 the word "implied." In the Wholesale Travel Case, the
8 Court did characterize these terms as "implied," but,
9 otherwise, you know, you can see different
10 terminology.

11 So I'd love to give you a clear answer, but
12 sometimes Judges don't all use the same terms, which
13 is why in my Expert Report, I wanted to be very
14 careful not to be misleading, which is why I said,
15 look, you can look at all these Decisions. Some of
16 these you could characterize express. Some of these
17 you could characterize as "inferred." Some of these
18 you could characterize as "presumed."

19 Some of these you could characterize as
20 being "deemed" or "voluntarily accepted," and I said
21 in my Report, I'm calling this an "implied license" to
22 deal with that, those different situations where a

1 person is taken to have agreed, voluntarily agreed.

2 And so, I use that term different from sometimes the
3 ordinary "implied" which is much more associated with
4 inferring a consent by conduct.

5 I agree, this is still part and parcel of
6 that. You can infer a consent, but sometimes the
7 Courts call it "deemed."

8 ARBITRATOR GOWDY: Can you appreciate the
9 confusion? Because "mandatory," "compulsory," and
10 "implied," are all used within about a paragraph and a
11 half of one another in the same Opinion.

12 THE WITNESS: I do. And that's why I
13 spent -- I tell you, a considerable amount of time
14 trying to ensure that my Opinion on the kind of
15 license that was granted -- right? -- was consistent
16 with the reasons and the factual findings made by the
17 Judge, which is why I think in this case, based on the
18 factual findings, based on the regime, based on her
19 reference to "implied" and, you know, this could be
20 taken to mean that she was referring to that kind of
21 voluntary license, which, by the way, if you accept
22 that, it is an alternate finding, and it would not be

1 any conflict with the CPRA because it is all
2 consensual.

3 ARBITRATOR GOWDY: If I were to go with your
4 phraseology, an implied license, is "consent" subsumed
5 within an implied license?

6 THE WITNESS: So consent is assumed or is
7 deemed to have been given. So in these situations,
8 what the Supreme Court -- when you look at the
9 Wholesale Travel and the Fitzpatrick Case, they look
10 at the consent from the interior voluntariness.

11 A person has voluntarily agreed to the
12 regime, that voluntariness then carries with it the
13 implied consent to whatever the "rules of the road"
14 are. So, yes, it is a consent. The Agreement is at
15 the time the person agrees to the "rules of the road,"
16 which in this case might be the person gets their
17 authorization or their permit.

18 ARBITRATOR GOWDY: What do you make of the
19 fact that the Trial Judge expressly said, yes, I did
20 not consent?

21 THE WITNESS: So as I said, when I first
22 read it, I was trying to figure out what that all

1 meant in her Decision, but having analyzed the cases
2 she cited and the other text of what she said, my
3 Opinion was that she was referring here too to a
4 voluntary license.

5 ARBITRATOR GOWDY: Do you think there's a
6 difference between "consent" and "compliance"?

7 THE WITNESS: I'd have to think about that.
8 They may not be dealing with the same thing, so I need
9 to know what you're asking, in what context.

10 ARBITRATOR GOWDY: Well, in any context.
11 Can someone comply but not consent?

12 THE WITNESS: So at least in this line of
13 cases, once a person voluntarily accepts to be part of
14 a regime, they have to comply with the regime. They
15 are agreed that they are complying with the regime,
16 and that means if the regime carries with it a
17 license, then that's the rules of the road, and by
18 voluntarily participating, they have agreed to comply.

19 I'll give you a good example, and it's the
20 Fitzpatrick Case. The Fitzpatrick Case dealt with a
21 person that had a fishing license. And the fishing
22 license required the licensed person to keep fishing

1 logs, how much they fished because presumably there
2 are rules about where you can fish, how much you can
3 fish. And then the person was charged under the
4 legislation as having violated it. The person argued
5 that he didn't have to disclose the fishing logs
6 because he had a right against self-incrimination.

7 And the Supreme Court of Canada said, no,
8 no, you agreed to be part of this regime and to get a
9 fishing license. Once you did that, you've basically
10 had to comply and that meant you had to disclose it
11 because you had voluntarily agreed to comply with or
12 to abide by all the "rules of the road." So you can
13 have a situation where there is some voluntary action
14 that triggers an agreement effectively to comply with
15 the rules.

16 I hope that helps, but that's an example, I
17 think, of both "compliance" and a "consent" or a
18 "voluntary consent."

19 ARBITRATOR GOWDY: Two more questions, and
20 I'll let you go.

21 You made reference to the phrase "rules of
22 the road."

1 If we can look at Paragraph 322 of what I
2 call the "Trial Court Decision," but might not be the
3 right way of referring to it. You let me know when
4 you find Paragraph 322. It begins "as pointed out."

5 THE WITNESS: Got it.

6 ARBITRATOR GOWDY: All right. Do you see
7 kind of midway through: "GSI was fully aware."

8 THE WITNESS: I do.

9 ARBITRATOR GOWDY: What happens if the
10 "rules of the road" change? Does that impact consent?
11 Because the Trial Judge seemed to take some time to
12 say it's perhaps true the provisions for submission
13 had become more onerous over time? Quality of the
14 materials submitted had become better, further
15 encroaching on GSI's ability to license its data to
16 others, but the provisions have always been there."

17 If the "rules of the road" change, does that
18 impact consent?

19 THE WITNESS: So that's a really good
20 question, and there are, I think, two thoughts I have
21 about it. So, first, you have somebody who has
22 already got an authorization, done this surveying,

1 lodged the material they have to, and then the rules
2 change. And so there's a question in that case
3 whether or not, by agreeing originally, you've agreed
4 to the rules plus as they'd been amended. I don't
5 know the answer to that.

6 That's a situation, though, where someone
7 has agreed to something and then, you know, you have a
8 rule change. Then you have another situation where
9 the rule has changed, like a disclosure period, for
10 example, and then people do all of the surveying, in
11 which case, that is not an issue because, it changed
12 and then you carry on based on the rule as it was when
13 you did the work.

14 But I think the point that this is getting
15 at is that, while the rules have changed, the core
16 rule was always that there would be disclosure of the
17 data after the end of the confidentiality period.

18 ARBITRATOR GOWDY: I said one more question,
19 and I misled myself.

20 You may not know the answer to this. I
21 don't know the answer to it. But could the
22 copyright -- I assume the copyright law predated the

1 Regulatory Regime that we are making reference to.

2 THE WITNESS: For all intents and purposes
3 it did. Our first Copyright Act was enacted in 1924.
4 The 1924 Act had similar rights. It had a right to
5 reproduce and a right to publicly perform. The Act
6 has been amended over time, but the core aspects that
7 I think you could say would be relevant here long
8 preceded this regime.

9 ARBITRATOR GOWDY: Had the Canadian
10 Parliament amended either the Copyright Act or created
11 a specific exception in this CPRA, I guess we wouldn't
12 be here?

13 THE WITNESS: I suppose we wouldn't.

14 ARBITRATOR GOWDY: All right.

15 PRESIDENT WALLGREN-LINDHOLM: I only have,
16 Professor, two clarifications. One is following up on
17 Mr. Gowdy's question to you, and you may have answered
18 it already.

19 But did I understand you correctly that we
20 don't have an answer to the question that, for
21 example, if the Regulatory Regime would shorten the
22 period of privilege from 15, which I guess is the

1 Regulatory Agency who extended it to 15, and then
2 reverted back to a shorter period of time, that it is
3 in your Opinion, there is no answer exactly to how
4 that would be seen or evaluated.

5 THE WITNESS: I haven't considered that
6 question. There might be an answer. I haven't had to
7 consider it, and it would apply, I presume only in
8 some cases but not to any new activity where that was
9 in place and then an authorization was obtained.

10 PRESIDENT WALLGREN-LINDHOLM: No, no. No.
11 I'm thinking about something that is going on --

12 THE WITNESS: Yeah.

13 PRESIDENT WALLGREN-LINDHOLM: -- and then
14 the rule changed. I think as a copyright lawyer,
15 when, you know, those who are copyright owners and
16 then have a return on the investment, I guess it is
17 relevant whether it goes from 15 to 5 or 10.

18 THE WITNESS: It's a good question. There
19 are usually -- or often Amendments have transitional
20 provisions.

21 PRESIDENT WALLGREN-LINDHOLM: Yeah.

22 THE WITNESS: And there may well be a

1 principle that -- and I can't say this for sure, a
2 principle that an Amendment acts prospectively, but I
3 don't know in this case.

4 PRESIDENT WALLGREN-LINDHOLM: No.

5 THE WITNESS: I can't give an Opinion on it.

6 PRESIDENT WALLGREN-LINDHOLM: No. No.

7 That's what I understood in your answer to Mr. Gowdy,
8 but I just wanted to really confirm that that was your
9 position, that it was a bit -- it was unclear.

10 THE WITNESS: It's unclear to me.

11 PRESIDENT WALLGREN-LINDHOLM: To the best of
12 your understanding. Good.

13 But my -- the question I actually had was
14 one on vocabulary again. We've heard from you. We'd
15 heard from other Legal Experts that Justice Eidsvik
16 that the legal terminology has been loose, and I think
17 that's what you used -- the "loose" usage of terms.

18 THE WITNESS: In relation to the use of a
19 term "compulsory license," that is true.

20 PRESIDENT WALLGREN-LINDHOLM: Okay. I
21 understand. And I think also -- and I cannot pinpoint
22 now, but other Experts here, Legal Experts, as I

1 recall, have indicated that it wasn't always a
2 legalistically specific term that was used, but it was
3 in a more general sense, and I even recall having
4 heard that Justice Eidsvik was a generalist and not an
5 IPR lawyer.

6 So, therefore, my question is that now the
7 Transcript is not clear as of yet. I'm sure it will
8 be, on this point, but I understand that you said
9 relating to Paragraph 317 in Justice Eidsvik's, the
10 Common Issues Decision that also my colleague referred
11 to. Do you -- can somebody pull it up?

12 THE WITNESS: I've got it here in case.

13 PRESIDENT WALLGREN-LINDHOLM: Okay. Now,
14 you say -- I thought you said this -- and this is
15 where I want to have a clarification. On Line 2, she
16 says: "To suggest that it has 'consented' to the
17 disclosure." And I thought that you said that here
18 you think that the word "consent" here is used in the
19 copyrighting sense, which makes me understand that it
20 was then used in an IPR-specific sense.

21 Is that my understanding, correct or
22 incorrect?

1 THE WITNESS: So, first, to back up, I agree
2 that you summarized right when I said it was a "loose"
3 usage of the word "copyright license," which is a
4 compulsory license, which is why I was able to get to
5 a conclusion -- right? -- because it was loose, that
6 she actually didn't mean a true compulsory license.

7 Then here, where I was talking about to
8 suggest that it has consented, right, I was saying
9 that, in my view, she was saying that the -- what you
10 might think of an ordinary consent, an express
11 consent, or a basic implied consent where a person
12 would do something. And you could infer it might not
13 have been intended, but what she was not doing was
14 excluding the possibility that deemed "consents"
15 because of her references to the Sutherland Case, the
16 Catnic Case, the Wholesale Travel Case.

17 And so here the consent, I think it clearly
18 did not expressly consent and she says, you know,
19 doesn't sit well with me and they were forced to grant
20 "in effect" a compulsory license. So, "in effect,"
21 they are granting a license by virtue of participating
22 in the Regulatory Regime. So it is that kind of a

1 license that I believe she was referring to here.

2 PRESIDENT WALLGREN-LINDHOLM: Professor, I
3 understand the concept of "deemed consent," but I
4 thought you related the term "consent" in this
5 particular paragraph to "copyright," and that was my
6 question, that it would be a consent in a copyright
7 meaning.

8 THE WITNESS: I did intend that because
9 absolutely my point was that when you're looking at
10 the framework of the Copyright Act, right, you
11 infringe, unless you've got consent, unless there is
12 an exception. And so there are different ways in
13 which you could get the consent, and when I said there
14 was a deemed consent, I did mean exactly that, which
15 is, for the purpose of the Copyright Act, there was a
16 consent. What kind of consent was it? It is one
17 that, by participating in the regime, you're taking to
18 have consented for a copyright from the copyright
19 purpose. So that is what I was saying. Thank you for
20 clarifying that point.

21 PRESIDENT WALLGREN-LINDHOLM: Thank you,
22 Professor Sookman. I have no further questions. No?

1 Any follow-up questions? No. No.

2 Then, Prof. Sookman, we thank you for
3 appearing today, and thank you for the long hours you
4 have spent here with us. May I ask that you now take
5 a seat if you want to continue sitting in here.

6 (Witness steps down.)

7 PRESIDENT WALLGREN-LINDHOLM: What I would
8 hope is that we could have the symmetrical responses
9 that were brought up yesterday where I understood that
10 Respondent was ready and, for Claimant, this was work
11 in progress.

12 Would you be ready to --

13 MS. LEMMENS: Yes, we are ready.

14 PRESIDENT WALLGREN-LINDHOLM: -- to address
15 the question? Okay. Thank you.

16 MS. LEMMENS: Sorry. You want us to go
17 first?

18 Did you want to go first, Ms. Tabet?

19 MS. TABET: I don't have a particular view,
20 but I am happy to go first.

21 PRESIDENT WALLGREN-LINDHOLM: Why don't you
22 go first?

1 MS. LEMMENS: I think you were ready first,
2 and, frankly, it factors more into your argument than
3 it does ours.

4 MS. TABET: Indeed. Well, maybe that is
5 then a good place to start.

6 (Comments off microphone.)

7 MS. TABET: As I understand it -- and we
8 want to be helpful to Arbitrator Gowdy, but we
9 understand that the Claimants have not alleged a
10 denial of justice, and, in fact, in the context of
11 their Opening Statement, they repeated that. They
12 made it clear that they do not allege a denial of
13 justice, nor do they need to in this case to breach
14 Article 1110.

15 Canada's position is that that is a
16 requirement to find a breach of NAFTA Article 1110, so
17 an expropriation based on a court decision.

18 Because the Claimant did not raise denial of
19 justice and has not alleged it, in our view,
20 respectfully, it is not up to the
21 Tribunal -- apologies -- to consider the issue and we
22 have not fully briefed the issue. However, to be

1 helpful, we'd like to draw the Tribunal's attention to
2 a number of cases that discuss denial of justice in
3 the context of judicial expropriation, and those are
4 cited -- were referred to in my Opening Presentation
5 but also cited at Paragraphs 243 and following of
6 Canada's Counter-Memorial and Paragraphs 37-40 of
7 Canada's Rejoinder.

8 I'll just offer a few brief comments.

9 Perhaps one of the cases that I can draw your
10 attention to is the Lion v. Mexico Case. That is
11 CLA-108. In that case Mexico addressed the content of
12 the standard in its Submissions, and both Canada and
13 the United States made Non-Disputing Party Submissions
14 that addressed the content of the standard.

15 In that case, as I mentioned, it was one of
16 the very few cases finding denial of justice and
17 expropriation on the basis of the Court's conduct.
18 What was at issue was a fraudulent scheme involving
19 the Courts, and the Tribunal found denial of justice
20 because Lion had never been given an opportunity to
21 defend itself. It was denied a right of appeal and
22 the ability to present evidence to prove this claim.

1 I will not draw you to
2 the extensive -- bring you to the extensive discussion
3 of the Tribunal in that case, but you can -- I invite
4 you to consider the Tribunal's comments at
5 Paragraph 199 and following. There's a reference to
6 the esteemed Jan Paulsson that I believe his
7 book -- if I can have the reference, please -- is in
8 the record. And he wrote a whole book on denial of
9 justice.

10 At Paragraphs 218 of his book of the
11 decision, the Lion Tribunal cites to Jan Paulsson, who
12 says basically that the denial of justice concludes
13 that denial of justice is always procedural. You can
14 also find in that case reference to Canada and the
15 U.S. submissions.

16 Oh, thank you. The book -- Jan Paulsson's
17 book on denial of justice is at RLA-048, and it's at
18 Page 5 of his book where he explains some of the
19 issues. I think that's it. Well, maybe one last
20 point. Apologies.

21 Canada's position is that the threshold is
22 obviously extremely high due to the principle of

1 judicial independence and the particular nature of
2 judicial action, of course, the unique status of
3 judiciary in both international and municipal legal
4 system.

5 So Tribunals such as this NAFTA Tribunal
6 should accord a great deference to domestic courts
7 whose judgments should be presumed to be regular under
8 international law at a much higher degree than the
9 State's legislative or administrative branch.

10 Thank you.

11 PRESIDENT WALLGREN-LINDHOLM: Thank you,
12 Ms. Tabet.

13 Mr. Fortier.

14 MR. LANCTÔT-FORTIER: Yes. Thank you,
15 Members of the Tribunal, and thank you for your
16 question, Mr. Gowdy.

17 Your question touches upon one of the key
18 issues in this case, namely the unfairness of the
19 Alberta Decisions, which have issued a compulsory
20 license effectively taking away GSI's intellectual
21 property rights without any compensation whatsoever as
22 well as the unfairness of how the Claimants were

1 treated by Canada's different Boards throughout
2 the years. We, therefore, believe that a short
3 introduction is necessary in order for the Claimants
4 to provide a comprehensive answer to your question on
5 denial of justice in the context of this specific
6 case.

7 As we have explained throughout our
8 submissions, the Claimants were never provided with
9 clarity as to whether their intellectual property
10 rights would be protected by the Boards. Despite
11 their numerous requests to that effect, and it is only
12 once the Alberta Decisions were issued and that they
13 learned that their intellectual property rights had
14 been taken away after the expiration of the Privilege
15 Period without compensation.

16 That is unfairness, and this is why the
17 Claimants seek redress in the context of this
18 Arbitration. As Mr. Gowdy has pointed out, Justice
19 Eidsvik herself has acknowledged the unfairness of the
20 result in her judgment.

21 All that Claimants want is compensation for
22 what has been taken away from them. That unfairness

1 goes to the heart of the limitations issue in this
2 case where it is clear that the Claimants could not
3 have been aware due to the confiscation created by the
4 Boards' conduct that the Disclosure Legislation would
5 trump their rights under the Copyright Act, that until
6 the Alberta Decisions were rendered and became final.

7 That being said, the Claimant's Claim under
8 NAFTA, although it arises from unfairness in the
9 common sense of the term, is not based on the notion
10 of denial of justice, as understood in international
11 law.

12 As you might recall from our Opening
13 Statements, we explained that, pursuant to Azinian,
14 which quotes the former President of the International
15 Court of Justice, there are three distinct scenarios
16 where the responsibility of the State may be found in
17 international law following a judicial decision.

18 Number one, a decision of a domestic court
19 clearly incompatible with a rule of international law.
20 This is the basis on which the Claimants have put
21 forward their claim.

22 Number two, a denial of justice, which is,

1 therefore, a distinct and separate basis on which a
2 judicial decision can engage a State's responsibility.

3 And, number three, in certain exceptional
4 and well-defined circumstances where a judicial
5 decision is contrary to domestic law. And this is
6 CLA-42 in the Authorities at Paragraphs 98 and 99.

7 Here the Alberta Decisions are clearly
8 incompatible with a rule of international law since
9 they constitute a taking of the Claimants' investment
10 without compensation, contrary to Article 1110 of
11 NAFTA, which is inconsistent with Chapter Seventeen of
12 NAFTA relating to a minimum protection of an
13 investor's intellectual property rights.

14 Chapter Seventeen, in turn, incorporates the
15 provisions of an international treaty, the Berne
16 Convention. The NAFTA Tribunal in Eli Lilly -- and
17 this is RLA-25 in this case, confirmed that a judicial
18 act can constitute an expropriation when it
19 crystallizes a taking contrary to Article 1110 NAFTA,
20 and we have provided examples of a judicial taking
21 without denial of justice in our submissions at
22 Paragraphs 373-376 of our Memorial, and Paragraphs

1 213-219 of our Rebuttal Memorial.

2 As you might recall from our Opening
3 Statement, one of these examples was the Tribunal's
4 Decision in Sistem which concluded that the acts of
5 the Kyrgyz judiciary, namely the taking of an
6 investment in a hotel, amounted to a judicial
7 expropriation, without the finding of a denial of
8 justice.

9 Now, with that in mind, in order to provide
10 more clarity on the notion of denial of justice as
11 understood in international law, we have referred to
12 the Decision in Rumeli Telecom v. Republic of
13 Kazakhstan, which is filed at CLA-81.

14 If we can, please, pull that up.

15 So, in that case, the Claimant's Turkish
16 companies Rumeli and Telsim owned a shareholding in a
17 Kazakh company named Cartel. Cartel won a bid to hold
18 a license to operate a mobile telephone network in
19 Kazakhstan. This led to the conclusion of an
20 investment contract between Cartel and the Kazakh
21 State Investment Committee.

22 The local partners' Shareholders of the

1 Claimants, who were Kazakhstan officials, then devised
2 a scheme to orchestrate Claimant's expulsion from the
3 Cartel by arbitrarily terminating the Investment
4 Contract and compulsory transferring the Claimant's
5 shareholding in Cartel for their own benefit.

6 This transfer was confirmed by the Kazakh
7 judiciary and the value of the Claimant's share was
8 set by the Courts at only USD \$3,000. So the ICSID
9 Tribunal, unanimously, found that Kazakhstan had
10 breached its obligation to accord a Claimant's fair
11 and equitable treatment, which the Tribunal noted also
12 includes the standard of denial of justice. And that
13 Kazakhstan had expropriated the Claimant's investment.

14 And the Tribunal discusses the notion of
15 denial of justice as follows:

16 If we can go to Paragraph 651. We are
17 there.

18 So the Tribunal says: "The Parties agree
19 that the duty not to deny justice arises from
20 customary international law and can also be considered
21 to fall within the scope of Treaty provisions provided
22 for fair and equitable treatment.

1 "The Parties also agree that denial of
2 justice is always procedural. However, for Claimants,
3 it also encompasses instances of politically-dictated
4 judgments, corruption, and intimidation and extends to
5 cases where there is a 'clear and malicious
6 misapplication of the law.'

7 "On the other hand, Respondent considers
8 that denial of justice only refers to the failure of
9 the Administration of Justice in a State to meet a
10 certain procedural standard. The substantive outcome
11 is only of relevance when it demonstrates
12 irregularities in the procedure.

13 "So in other words, a court Decision will be
14 considered a denial of justice if it was patently
15 arbitrary, unjust, or idiosyncratic such that it would
16 demonstrate bad faith."

17 And this have is conclusion of the Arbitral
18 Tribunal: "The Arbitral Tribunal does not think that
19 there a major difference in the Parties' understanding
20 of the concept. The standard is indeed of a
21 procedural nature. In that sense, a court procedure
22 which does not comply with due process is in breach of

1 the duty. On the other hand, as pointed out by
2 Respondent, the substance of a Decision may be
3 relevant in the sense that a breach of the standard
4 can also be found when the Decision is so patently
5 arbitrary, unjust, or idiosyncratic that it
6 demonstrates bad faith."

7 So in other words, the Tribunal in Rumeli
8 noted that a denial of justice can be procedural in
9 nature, which is the equivalent of a fundamental
10 defect in judicial proceedings that Mr. Gowdy has
11 alluded to in his question, as well as substantive in
12 nature.

13 However, in such case for a judicial
14 decision to amount to a denial of justice, it must be
15 arbitrary, unjust or idiosyncratic that it
16 demonstrates bad faith. However, again in this case,
17 denial of justice as understood international law is
18 not required for judicial expropriation under NAFTA,
19 although the notion of unfairness and its treatment of
20 Claimants are key in relation to the issue of the
21 jurisdiction and compensation.

22 So in order to provide the Tribunal with

1 additional examples of denial of justice, we performed
2 some research for a legal commentary and have
3 identified an article written by Prof. Jarrod Hepburn
4 of the University of Melbourne, which succinctly
5 provides a series of helpful examples of denial of
6 justice.

7 I should, however, note that this Authority
8 is not in the record. So what we propose is that we
9 pull it up on the screen in order to show the relevant
10 paragraph of the legal commentary to the Tribunal.
11 And if it deems it useful, we could then file it in
12 the record with an Authority number.

13 PRESIDENT WALLGREN-LINDHOLM: Yes. I
14 already had eye contact with Ms. Tabet, and I know
15 that she was going to say something.

16 MS. TABET: Thank you. Again, I wish to
17 emphasize that the Claimants have not pled denial of
18 justice, and it would not be appropriate for the
19 Tribunal to consider the issue or to take in new
20 commentary or new Authorities on this. The issue has
21 not been fully briefed by the Parties. It would be
22 procedurally unfair to do so.

1 ARBITRATOR LANDAU: I'm slightly concerned
2 that this -- I would have thought if a new Authority
3 going to be put in, it would have been given to the
4 other side beforehand or at least there would be some
5 preparation, as I'm not quite sure why it is happening
6 in this way.

7 MS. LEMMENS: Sorry. We had understood that
8 Mr. Gowdy had requested a couple of examples. So we
9 don't need to provide it in any manner at all, other
10 than it was just requested. And we weren't trying to
11 supplement the record by any means. We were just
12 simply trying to respond to the request.

13 So we leave it in your hands as to whether
14 you want to have it or whether you want to think about
15 it or whether Ms. Tabet wants to review the Article.
16 It doesn't really matter to us because we are not
17 making a case of denial of justice, but we wanted to
18 satisfy the question.

19 PRESIDENT WALLGREN-LINDHOLM: So either the
20 Tribunal will sleep on it or then we decide that it
21 will not be presented. We will revert tomorrow.

22 MR. LANCTÔT-FORTIER: Thank you.

1 PRESIDENT WALLGREN-LINDHOLM: So, yes, that
2 was -- that concludes your presentation.

3 MR. LANCTÔT-FORTIER: Precisely. Thank you,
4 Madam Chair.

5 PRESIDENT WALLGREN-LINDHOLM: Thank you. So
6 then we have managed to spend the full day. And, yes,
7 it is exactly 5:15 almost. So we will close for
8 today, unless there is something that the Parties want
9 to raise. I will give you the opportunity, otherwise
10 we will commend the examination of Mr. Uffen and
11 Mr. Hobbs tomorrow.

12 MS. LEMMENS: Yes, we'll do that. I'm sure
13 you will hear too much of my voice tomorrow. So I
14 apologize in advance.

15 PRESIDENT WALLGREN-LINDHOLM: I beg your
16 pardon? What did you say?

17 MS. LEMMENS: I was just saying because you
18 will hear much of my voice tomorrow, so I will
19 apologize in advance.

20 PRESIDENT WALLGREN-LINDHOLM: Okay. We have
21 understood that, but we are starting then again at
22 9:30. And we are assuming, aren't we, that that will

1 be it for tomorrow and then we will break for the
2 weekend. And then we will be discussing quantum as of
3 Monday; right?

4 MS. TABET: Yes, Madam.

5 PRESIDENT WALLGREN-LINDHOLM: Then we shall
6 see you tomorrow. Thank you very much. Thank you
7 very much.

8 MS. LEMMENS: Thank you.

9 (Whereupon, at 5:20 p.m., the Hearing was
10 adjourned until 9:30 a.m. the following day.)

POST-HEARING REVISIONS

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter,
do hereby attest that the foregoing English-
speaking proceedings, after agreed-upon
revisions submitted by the Parties, were
revised and re-submitted to the Parties per
their instructions.

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.

[Signed]

Dawn K. Larson

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

AND

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW, AS ADOPTED IN 1976

- - - - -	x	
In the Matter of Arbitration	:	
Between:	:	
	:	
THEODORE DAVID EINARSSON,	:	
HAROLD PAUL EINARSSON,	:	
RUSSELL JOHN EINARSSON, AND	:	
GEOPHYSICAL SERVICE INCORPORATED,	:	
	:	ICSID Case No.
Claimants,	:	UNCT/20/6
	:	
and	:	
	:	
THE GOVERNMENT OF CANADA,	:	
	:	
Respondent.	:	
- - - - -	x	Volume 5

HEARING ON JURISDICTION, MERITS, AND LIABILITY

Friday, March 7, 2025

Calgary Marriott Downtown Hotel
110 9th Avenue SE
Calgary, AB, T2G 5A6
Canada

The Hearing in the above-entitled matter
came on at 9:30 a.m. before:

MS. CARITA WALLGREN-LINDHOLM, President

MR. TREY GOWDY, Co-Arbitrator

MR. TOBY LANDAU KC, Co-Arbitrator

ALSO PRESENT:

On Behalf of ICSID:

MS. GERALDINE R. FISCHER
Secretariat to the Tribunal

Realtime Stenographer:

MS. DAWN K. LARSON
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
Certified Realtime Captioner (CRC)
Larson Reporting, Inc.
2564 West 280 North Street
Hurricane, Utah 84737
United States of America
+1 720 298 2480
DawnStenosTheWorld@gmail.com
DawnStenosTheWorld.com

APPEARANCES:

Attending on behalf of the Claimants:

**MS. MATTI LEMMENS
MR. VINCENT LANCTÔT-FORTIER
MS. MARIANNE BASTILLE-PARENT
Borden Ladner Gervais LLP
Stikeman Elliott LLP
Bankers Hall, 4200 3 St SW West 888
Suite 14200
Calgary, AB, T2P 5C5**

Party representatives:

MR. HAROLD PAUL EINARSSON

APPEARANCES: (Continued)**Attending on behalf of the Respondent:**

MR. MARK LUZ
MS. SYLVIE TABET
MS. JULIA DEUTSCH
MS. ELENA LAPINA
MS. CAMILLE BÉRUBÉ-LEPAGE (virtual)
Trade Law Bureau
Global Affairs Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada

MS. MOLLY RUMPKE
Core Legal Concepts

MS. DAPHNÉE CAMPEAU
Global Affairs Canada

MR. ALEXANDER BLACK (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada & ISC Legal Services,
Indigenous Rights and Relations Portfolio

MR. PETER WIGEN (virtual)
Canadian Heritage Legal Services

MR. MARK KLAVER (virtual)
Office Legal Services Sector

MR. FRANCO BELLO (virtual)
MS. KIM PHILLIPS (virtual)
MS. JESSICA MACINTOSH (virtual)
MS. JEAN-FRANCOIS ROMAN (virtual)
Natural Resources Canada

APPEARANCES: (Continued)

MR. SÉBASTIEN FOURNIER (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada

MR. SCOTT LITTLE (virtual)
MS. SUSANNA KAM (virtual)
MR. VINCENT BOULANGER (virtual)
Global Affairs Canada

MS. TARA SNELL (virtual)
MS. NATALIE GIASSA (virtual)
MS. PIERRE-LUC RACINE (virtual)
Innovation Science and Economic Development

MS. TIFFANY SANDERS (virtual)
MS. LYNETTE GIBBONS (virtual)
Canada Newfoundland & Labrador Offshore
Petroleum Board

Respondent's Party Representatives:

MR. MARKO VESELY
Canada Energy Regulator

MR. ALEX MILLER
Core Legal Concepts

MR. CHRIS REYNOLDS
Core Legal Concepts

Non-Disputing Parties:

MS. KRISTINA E. BEARD (virtual)
Office of International Claims and
Investment Disputes
U.S. Department of State

MR. ALAN BONFIGLIO RÍOS (virtual)
MS. PAMELA HERNÁNDEZ MENDOZA (virtual)
MR. ALDO GONZÁLEZ ARANDA (virtual)
Secretaría de Economía

C O N T E N T S**PAGE****PRELIMINARY MATTERS.....1057****WITNESSES:****DOUG UFFEN****Direct examination by Mr. Luz.....1061****Direct presentation.....1061****Questions from the Tribunal.....1078****Cross-examination by Ms. Lemmens.....1084****ROBERT HOBBS****Direct presentation.....1149****Cross-examination BY MS. LEMMENS.....1167****CONFIDENTIAL SESSION.....1179-1184**

P R O C E E D I N G S

PRESIDENT WALLGREN-LINDHOLM: Good morning, everyone, on this Friday, 7th March, 2025, the last hearing day of this week. The setting suggests that we are proceeding directly to Expert examination.

Is everybody here? Are you expecting more people?

MS. LEMMENS: No. Ms. Bastille-Parent is not joining us today.

PRESIDENT WALLGREN-LINDHOLM: Okay.

Do we have any new arrivals?

MR. HOBBS: I'm Robert Hobbs. I'll be an Expert Witness after Mr. Uffen.

PRESIDENT WALLGREN-LINDHOLM: Good morning, Mr. Hobbs. Yes.

JOHN DOUG UFFEN, RESPONDENT'S WITNESS, CALLED

PRESIDENT WALLGREN-LINDHOLM: Okay. Then I will welcome our first Expert.

And your name is Mr. Doug Uffen?

THE WITNESS: My legal is name John Douglas Uffen. I go by my middle name, Doug.

PRESIDENT WALLGREN-LINDHOLM: Doug. Okay.

1 Good morning, Mr. Doug Uffen. You have been called to
2 testify in these proceedings by Canada who is the
3 Respondent in these proceedings. And I trust that
4 since you have given two Expert Reports that you are
5 familiar with the subject matter of this dispute.

6 THE WITNESS: Yes, I am.

7 PRESIDENT WALLGREN-LINDHOLM: Yes. This is
8 a NAFTA proceeding, and you will be familiar with
9 Counsel and Parties on that side, representing Canada.
10 Claimants are represented by Ms. Lemmens as lead
11 Counsel and her team and there are also some party
12 representatives from the family Einarsson present.
13 There are also interested Parties online, including
14 a -- representatives of the Governments of Mexico and
15 in the United States.

16 If you have any questions or concerns,
17 Mr. Uffen, in relation to procedure, please address
18 them to the Tribunal. The Tribunal, which I will now
19 introduce consists of Mr. Trey Gowdy, Toby Landau KC,
20 myself as the President, Carita Wallgren-Lindholm,
21 Geraldine Fischer as the Tribunal Secretary, and the
22 Court Reporter Dawn Larson.

1 Before I turn over to Counsel for Respondent
2 to introduce you, I will say that we do not administer
3 oath in international arbitration, but I would ask you
4 to give an affirmation of your independence from the
5 disputing Parties and Counsel and of your genuine
6 belief in the Opinions expressed in your Report.

7 THE WITNESS: I so do declare.

8 PRESIDENT WALLGREN-LINDHOLM: Thank you.
9 Also your testimony will be recorded and transcribed.
10 I'm sure Counsel has told you what will most likely
11 mature today, but they have agreed, among Counsel,
12 that you will first make a presentation of your Report
13 for up to 30 minutes, and we have received that
14 presentation. Whereafter, opposing Counsel, being
15 Ms. Lemmens of Claimants, will cross-examine you
16 followed by a right to redirect and a possible
17 recross. Is this clear?

18 THE WITNESS: Yes, it is.

19 PRESIDENT WALLGREN-LINDHOLM: Everything?
20 Thank you very much, Mr. Uffen, and I will then hand
21 over the mic to Mr. Luz.

22 MR. LUZ: Thank you, Madam Chair. And just

1 before Mr. Uffen starts his direct, maybe just as a
2 point of procedure, there's -- starting at Slide 8 of
3 Mr. Uffen's presentation has got some of the -- one of
4 the confidential information documents on it, so
5 I -- should we just kind of note that once we get to
6 that point we should -- I don't know if there is a
7 public feed or if this matters at this point.

8 (Comments off microphone.)

9 MR. LUZ: Okay. So then maybe what we'll do
10 is just as we go on -- I should ask the Claimants'
11 Counsel, what's your preference on what we should do?

12 MS. LEMMENS: I see that there is reference
13 to exhibits, but the exhibits themselves are not on
14 there.

15 MR. LUZ: They are not.

16 MS. LEMMENS: And are we intending to review
17 the exhibits?

18 MR. LUZ: No, not during the presentation.
19 I just want to make sure that we are not talking about
20 a confidential document. I mean, we can always go
21 back and do redactions later but I just want to make
22 sure it's okay with you.

1 MS. LEMMENS: I think it is probably okay,
2 based on what I'm seeing. Obviously if we were going
3 to get into the details of the exhibits, then that
4 could change.

5 MR. LUZ: Okay. Well, just if there is any
6 concerns or something like that, including during your
7 cross-examination, we'll -- just tell me. Okay.
8 Great.

9 DIRECT EXAMINATION

10 BY MR. LUZ:

11 Q. Good morning, Mr. Uffen.

12 Do you have copies of your Expert Opinion
13 Reports filed in this proceeding, first one dated
14 January 13, 2023, and the second being
15 October 29, 2024?

16 A. I do.

17 Q. Okay. I have no further redirect questions.
18 So you can just go ahead with your presentation.

19 A. Okay.

20 DIRECT PRESENTATION

21 THE WITNESS: I presume everyone can see the
22 Title Slide? Yeah? Very good.

1 I'll just jump right into a bit of my
2 background on the next slide.

3 I'm an independent consultant, geophysical
4 consultant to the oil-and-gas industry. I have been
5 doing this for the better part of 20 years. I have
6 over 40 years of experience here in the Oil Patch.
7 I'm a leader within the geophysical community, in that
8 I have been Vice President, President, and Past
9 President of the CSEG, the Canadian Society of
10 Exploration Geophysicists, Technical Society.

11 I'm formerly a CSEG Foundation Board Member
12 as well heading up the outreach portfolio, and I was a
13 founding Board Member of the Calgary Geoscience Data
14 Manager Society here in Calgary.

15 I co-chaired the National Convention,
16 Geo-Triad '98 -- in 1998, and I was advisor to the
17 2000 Geo-Canada Convention as well.

18 I've created and presented on multiple
19 occasions a course entitled "The Rights, Privileges,
20 Responsibilities and Obligations of Seismic Data
21 Ownership," with the intent of heightening awareness
22 of how the -- to conduct oneself around Seismic Data.

1 I was engaged by the Government of Canada as
2 an Independent Expert in this Arbitration to provide
3 insight about the appropriate methodology to determine
4 the Fair Market Value of GSI's Canadian Seismic Data
5 library. To this Tribunal I've authored these two
6 Reports, these two Expert Opinion Reports, which I
7 believe you have access to.

8 I am going -- very briefly go through
9 Seismic Data on this slide. It is handled in greater
10 detail in my First Report. I've tried to note the
11 citations for you for your reference and convenience.
12 My focus is going to be on this slide about the value
13 of Seismic Data. Seismic Data is a remote sensing
14 technique.

15 We use artificial energy to create acoustic
16 waves that propagate into the Earth, and then they
17 bounce back from various rock formations, and we
18 receive a -- recordings with geophones in an onshore
19 land situation or hydrophones in a marine situation.
20 They are pressure-oriented. The intent is to get the
21 signal reflected back from the rock layers, and then
22 we can -- with the process data, we can interpret the

1 data trying to find where it's maybe the best place to
2 trap hydrocarbons.

3 Seismic Data can be applied in various
4 modes, 2D, 3D, or 4D. 2D is essentially a linear
5 profile. If you imagine a cake, you cut the cake in
6 half, you pull it apart, you look at it sideways, and
7 you see the various layers of filling and cake within
8 it. You get a 2D profile directly underneath where
9 those recordings and sensors were located.

10 3D data is advantaged in that it has
11 geospatial capabilities. You actually end up with a
12 cube of data, a volume of data, and you can cut it
13 many times in this direction, that direction,
14 diagonally, zigzags, even this way (indicating).

15 And so 3D data tends to be more valuable
16 when you're exploring for hydrocarbons because it is
17 easier to track faults, river channels, fine pinnacle
18 reefs that could be small in size. So; hence, the
19 value of 3D data is amplified by the nature of its
20 geospatial capabilities.

21 4D data is essentially two 3Ds that are
22 time-lapsed. There will be a base survey, a 3D volume

1 and then, I don't know, five, ten years later, someone
2 shoots another 3D on top of it. And why would they do
3 that? This is done in the oil sands predominantly
4 when you're injecting steam to liquify the oil to get
5 the oil out of ground because it's got a viscosity
6 where it doesn't flow very well in the oil sands.

7 When you inject the steam, you raise the
8 temperature. You inject pressure, you liberate the
9 oil, and when you compare one 3D to the other, you can
10 actually see the difference and the effectiveness of
11 the sweep. So 4D is really time-lapsed 3D, and they
12 will involve two 3Ds.

13 Seismic Data, Field Data, consists of the
14 raw seismic response recordings for each source point.
15 The navigational data for all source and receiver
16 points, and then there's the metadata, things like the
17 Observer's Notes, the chaining notes, driller's notes,
18 that kind of thing, which is used to help to process
19 the data and know how it was acquired.

20 In a marine setting, you would have
21 Observer's Notes but you would also have cable
22 feathering information and that sort of thing.

1 Stacked Seismic Data is Field Data that has
2 been processed, in a processing center with computers.
3 You first have to sort it. We call that
4 "demultiplexing," and then you have to sum it to
5 create that cross-sectional section that I described
6 when you pulled apart the cake and you looked at the
7 layers.

8 With 3D data in the processing center, you
9 create the volume, that cube of data. So data
10 processing involves accessing the Field Data and the
11 survey information and such and applying various
12 computer algorithms to improve the data quality and
13 create the stack section.

14 Post-stack enhancement -- and I tried to
15 make a concerted effort to make a distinction between
16 "processing" and "post-stack enhancement" here,
17 because post-stack enhancement starts with a stack
18 section as input. You can't change the stack section.
19 It is what it is. It is locked in. And I'll go into
20 this in further detail on the next slide, please.

21 So at the very top of this, you can see the
22 raw Field Data with the information from the

1 Observer's Notes and the navigational data, going into
2 what we call geometry, we sort the data, we do some
3 trace editing, we can scale the data, we do some
4 velocity analysis, and we can create something like a
5 brute stack. You can think of a brute stack, 2D
6 section profile or as a 3D volume as your first sneak
7 peek for data quality. Okay?

8 Then you can refine the processing by adding
9 various other processes, deconvolution tries to
10 increase the frequency content in the data. You can
11 filter out some noise, unwanted signal, and let's say
12 you create a filtered unmigrated stack. And then you
13 could go on and migrate it, and you could filter it
14 some more, do some coherency to it or trace weighting
15 to refine the signal and try to mitigate the noise.

16 Then you might even go into a pre-stack time
17 migration as shown by the arrow there where you take
18 more or less all the dial settings that you
19 established by going through that process, and you're
20 applying it in a pre-stack sense to try to enhance
21 data quality even more so.

22 With the -- that is the process for

1 processing Seismic Data. Now, post-stack
2 enhancements, if you look at the box on the left, I
3 have three things identified there: Brute stack,
4 filtered unmigrated, and unfiltered and filtered
5 migrated section.

6 When you do post-stack enhancements, your
7 take-off point or your starting point would be one of
8 those kinds of products. So then it's impossible to
9 go back to the gatherers or the CDP sorting and any
10 other process that had been applied. Your ability to
11 improve data quality is from the input stack going
12 forward.

13 So I'd like to make a distinction between
14 the data that's licensed by GSI and materials released
15 by the Boards. When you get a license from GSI, you
16 get all the relevant Field Data, various process stack
17 sections, and all navigational data for all source
18 points and receiver points. And when someone accessed
19 data from the Boards, they would receive a paper
20 print, a Mylar or film image processed seismic section
21 of whatever level of maturity that was submitted to
22 the Boards, and then they would receive some survey

1 information so that they would note where that data
2 was collected.

3 What was released by the Boards is not the
4 same product as that that was sold by GSI. GSI gives
5 a higher quality product by nature of having a full
6 survey at its disposal. Paper prints, all processed
7 products in digital form.

8 So what was on file at the Boards may not
9 have been the best quality image that was submitted or
10 capable of that dataset. Some people may have
11 submitted a brute stack. They may have submitted an
12 unmigrated section, or even a migrated section or,
13 perhaps, a pre-stack time-migrated section.

14 And the display of those products may not
15 have been optimal.

16 So in determining the Fair Market Value of
17 the Seismic Database, I feel it's important to conduct
18 an inspection of the actual data in the storage
19 facility. We're doing a database evaluation here, and
20 you need to establish the integrity of the database in
21 terms of recovery and retrieval.

22 Quality inspecting the data, noting the key

1 parameters for acquisition and processing, and
2 assigning an overall data quality rating I feel is
3 very important in the process of determining a Fair
4 Market Value.

5 So to perform a data quality inspection of
6 the processed data, one needs to take into account
7 various factors. I've noted the reference in my
8 Report here for you, but I've cited 12 things here
9 that I would look at.

10 Geographic location, some areas are more
11 expensive or less expensive than others to acquire
12 data.

13 The acquisition parameters: What were they?
14 Are they appropriate for the -- let me take that
15 statement back. The acquisition parameters can vary
16 over time with technology, and the third point is
17 vintage or age of the data: How old is it?

18 The processing run stream, the processing
19 contractor, when was it last processed? Does it need
20 reprocessing?

21 Benchmarking the data to other datasets: In
22 terms of quality and in terms of price, if we're

1 looking at a purchase situation.

2 Sales activity: Has the data been selling
3 recently? Has there been industry activity? In the
4 East Coast of Canada, typically there are bid rounds
5 for acreage that occur in the fall of every year. Has
6 there been -- and that tends to promote industry
7 activity. So; hence, there's a heightened interest
8 for those valuations.

9 And then there's moratoriums. We have a
10 moratorium currently in the Arctic here in Canada.

11 And then there's also the presence of
12 competitor data: More modern data or data of even of
13 higher quality.

14 So when you're doing an inspection, you're
15 trying to take into account all these factors and
16 trying to benchmark things accordingly.

17 Next slide, please.

18 Now, comments on the Claimants' Replacement
19 Cost Valuation approach. GSI did not perform a data
20 quality assessment of its own Seismic Data library,
21 which it has in its possession based on the factors
22 that I just mentioned on the previous slide.

1 The Replacement Cost approach for valuation
2 described by Troika is, in my Opinion, not appropriate
3 for a database that is 30 or 40 years old. If one
4 goes out and acquires new data at current acquisition
5 rates, and processing costs, you would end up with a
6 greatly enhanced product based on the evolution of
7 technology.

8 Interesting to note in the Troika Report,
9 Victor Ancira noted, and he's making this comment
10 about compensating for original investment cost, he
11 said: "This method is flawed, and that does not
12 account for the amount of competition in prime regions
13 that GSI has multi-client data." And that's one of
14 the points that I raised on my prior slide is
15 competitor data, its presence or absence could affect
16 valuation.

17 So comments on Boyd's valuations of GSI's
18 Seismic Database, in the materials that were provided,
19 Boyd apparently conducted valuations in '03, '05, and
20 '09 on GSI's Database. The Boyd Methodology used
21 Discounted Replacement Cost Valuation Method which
22 they claim is used in the NASA Transfer Agreements and

1 discounts older data by Valuation Date, vintage, and
2 data quality.

3 Now, these reports were created, to my
4 understanding, to support GSI financings; hence, I
5 believe GSI must have felt that these were trustworthy
6 enough to be representative and be able to show to any
7 financial institution. So what I did -- and in Bullet
8 Point Number 4 here is -- based upon instructions to
9 apply Boyd's methodology, I age-dated GSI's Seismic
10 Database as of November 30, 2017, a key date, I think,
11 in the proceedings here.

12 What I did is I used, as my starting off
13 point, or my launching pad, the 2009 Report, the
14 latest Report. In that, when I age-dated it, I
15 essentially conducted a mathematical exercise of just
16 trying to age-date their Report using their
17 assumptions. And in so doing, I determined that a
18 Fair Market Value of GSI's Canadian Seismic Database
19 assets as aged to 2017 would be [REDACTED]
20 and the resultant future licensing sales value was
21 calculated to be just [REDACTED] This does
22 not constitute my valuation of Fair Market Value of

1 their Seismic Database. I merely age-dated the Boyd
2 Report from 2009 going forward and used their
3 methodology to do this.

4 Now, I believe these numbers should be
5 considered as a ceiling valuation, as many other
6 factors can affect GSI's valuation, and these were not
7 considered by Boyd. And I'll take you back now, if I
8 may, to Bullet Point Number 3. Boyd did not inspect
9 the data directly for data quality, nor was any
10 benchmarking to other data conducted by Boyd, and fold
11 was used as a proxy for data quality.

12 What is "fold"? Fold is the number of times
13 that you sample any given spot within the Earth. So
14 12-fold data, you would have sampled that spot
15 12 times and had 12 independent readings. 60-fold
16 would be 60 times. Okay.

17 Next slide, please.

18 So here are some comments that I have on the
19 Boyd valuations. The Boyd methodology did not
20 consider the data storage integrity or recovery of the
21 database. It was not tested, that I could tell, from
22 anything that the Boyd Reports noted. They did not

1 inspect the data itself. Datasets of the same vintage
2 could have differing data quality, but they did not,
3 in their approach, make any distinction that datasets
4 of the same age could actually have different data
5 quality.

6 Data quality variations due to weather, sea
7 conditions, more localized situations were not taken
8 into account. In shallow water, you can have
9 water-bottom multiples. The FCs can be removed in
10 great part in the processing center, but it can
11 degrade the data if not addressed properly.

12 Presence or absence of competitor data or
13 more modern data could actually affect valuation.
14 That was not taken into account.

15 Of course, in '09, there was no Arctic
16 exploration moratorium. That came into effect in
17 around 2015 or 2016, and I was age-dating to 2017,
18 November 30, when I was going through this exercise.

19 Offshore is an expensive exploration game.
20 Wells can cost \$50 to \$100 million. There are few
21 companies that can actually muster that kind of
22 capital and play the exploration exercise at that

1 level, and so there, hence, is a limited customer base
2 quite often, when you're dealing with offshore
3 exploration and seismic sales activity.

4 Bid round activity, industry activity can
5 also affect things. There may be areas that are
6 unexplored or underexplored, and it may be for certain
7 reasons.

8 So when I age-dated the Boyd Report from
9 '09, Boyd made reference to a 12-year depreciation
10 curve, which I have in my Report there. I've shown
11 its difference to the 40-year depreciation curve.

12 Boyd noted that it resulted in a lower
13 valuation of GSI's Seismic Database. They had looked
14 at the sales history of -- the more recent sales
15 history that they had at their disposal at that time
16 and applied this steeper depreciation curve.

17 I did not have enough justification to apply
18 that 12-year curve going forward when I age-dated. So
19 I took a conservative approach and used the 40-year
20 curve on the '09 Report going forward. It's for that
21 reason, I feel that this mathematical exercise that
22 I've undertaken, the numbers that I have quoted just

1 previously I feel are a ceiling valuation because
2 there are many factors in the Boyd Report that have
3 not yet taken -- have not been taken into account that
4 I feel could affect Fair Market Value.

5 GSI's primary asset is their Seismic
6 Database library. The only way to accurately evaluate
7 Fair Market Value of the Company, in my opinion, is
8 through a data quality inspection process as outlined
9 in my First Report which GSI did not perform.

10 Applying the Boyd methodology to "age date"
11 GSI's Seismic Data library is an imperfect exercise.
12 It does not consider the numerous factors that would
13 affect Fair Market Value of the database which I've
14 tried to describe here in this presentation.

15 In my opinion, on a risk commercial basis,
16 the Fair Market Value of GSI's Canadian Seismic
17 Database is likely closer to the resultant future
18 sales revenue value.

19 In my approach to going through this
20 mathematical exercise, I discounted data, Canadian
21 data that was in the Arctic because of the moratorium.
22 I also discounted and took out of the equation any

1 international data. I believe there is Moroccan and
2 Falklands' data, things like that, that's not part of
3 the purview of this Tribunal.

4 Thank you very much.

5 PRESIDENT WALLGREN-LINDHOLM: Thank you
6 Mr. Uffen. I believe Toby Landau has a couple of
7 clarifying questions for you.

8 QUESTIONS FROM THE TRIBUNAL

9 ARBITRATOR LANDAU: Good morning. There are
10 a number of -- just a couple of points I just wanted
11 to make sure I've understood it correctly before
12 your -- the examination by Counsel begins, if you
13 wouldn't mind.

14 And this comes with a huge health warning
15 that the questions are going to be simple, at least
16 coming from me, on this topic, so please bear with me.
17 They're basic questions. I just want to make sure
18 I've understood.

19 Just going back to your Slide 4. We've come
20 across, frequently in this case, the term
21 "vectorization" of data. Looking at this slide, what
22 part of this process does that word describe?

1 THE WITNESS: What was supplied to the
2 Boards would have been a paper print, Mylar or film
3 image of the processed section, and that would be in
4 the box that you see on the left-hand side. Those are
5 only three examples. There's a whole multitude of
6 stacked versions that one could create. So
7 vectorization would take that data from the Boards and
8 put it through that process to capture the image and
9 the fidelity of the image so that you could then take
10 that data and load it onto a geophysical workstation
11 and commence interpretation.

12 ARBITRATOR LANDAU: I see. I see. Then I
13 just want to ask you about the expression that you
14 use. As a factor of data quality assessment, you take
15 into account age, and you talk about adjusting the
16 figures for age.

17 What I'm trying to understand is
18 what -- what is encapsulated by the reference to
19 "age"? Is it all the circumstances that would have
20 changed as you've itemized from the date of the data
21 to the current date? Is it changes in technology in
22 the meantime? Changes in market? Changes in other

1 data or other? What --

2 THE WITNESS: Vintage is a starting-off
3 point to how old is the data.

4 ARBITRATOR LANDAU: Yeah.

5 THE WITNESS: And then you can look at the
6 acquisition parameters and determine, you know, were
7 those commensurate with the age of the data. And so
8 when you're going through a data quality inspection,
9 it is somewhat -- beauty is in the eyes of the
10 beholder, but, by capturing the acquisition parameter
11 information, how it was processed, when it was last
12 processed, and those kinds of things, you're trying to
13 add objectivity to a process that is not perfect.
14 It's not cast in stone. There's no perfect formula or
15 recipe to do this. And it adds credence and
16 justification then for the rationale behind declaring
17 a dataset excellent or good.

18 ARBITRATOR LANDAU: So when you're
19 adjusting, for example, the methodology, Boyd's
20 methodology with age as your factor, that
21 is -- everything that has happened in the meantime as
22 well as the quality of the data at the time,

1 presumably. I'm just trying to understand what the
2 impact of time is.

3 THE WITNESS: Yeah. Technology, of course,
4 varies; right? Acquisition technology, processing
5 technology. People who are interpreting Seismic Data
6 will have a tendency to lean towards more modern
7 datasets.

8 ARBITRATOR LANDAU: I see.

9 THE WITNESS: Because it will have less
10 noise, better acquisition, better processing, and so
11 there's that general preference. I won't say it's all
12 the time that way, but there is just that general
13 preference. So what I did in my mathematical exercise
14 of age-dating the '09 Report is I age-dated it another
15 eight years, and in so doing, over that eight-year
16 period some datasets became older than 40 years. And
17 on that depreciation curve, then it has no value in
18 the mathematical exercise, although, to be fair, you
19 never know. There's always some residual value. One
20 day, someone might come along and want a copy of it.

21 ARBITRATOR LANDAU: All right. Thank you.
22 Thank you very much.

1 PRESIDENT WALLGREN-LINDHOLM: Thank you.

2 Mr. Gowdy, to my right here, also has a
3 couple of questions.

4 ARBITRATOR GOWDY: Thank you, Madam
5 President.

6 If you thought Mr. Landau KC's questions
7 were rudimentary, wait until you hear mine. Mine are
8 even more basic.

9 THE WITNESS: That is why I'm here.

10 ARBITRATOR GOWDY: Well, thank you.

11 If I heard you correctly, I think you used
12 the phrase "not optimal." I don't want to put words
13 in your mouth, but the information received from GSI
14 that was publicized or disseminated, I thought you
15 said it was "not optimal."

16 Did I hear you correctly?

17 THE WITNESS: May not have been optimal. I
18 don't know what GSI submitted to the Boards.

19 ARBITRATOR GOWDY: Okay. Well, in light of
20 that, you may not be able to answer the next two
21 questions, and they may not -- if they're not fair to
22 pose to you, you let me know that, okay, and I'll try

1 to pose them to someone else.

2 Who was accessing GSI's information, the
3 public information? Who would have been the market
4 for that?

5 THE WITNESS: I believe the Boards have
6 been -- are capable of telling who you accessed the
7 data. I don't know who did, per se, although I think
8 Maitland, in one of his Reports, noted that oil
9 companies could access the data or other parties who
10 have interest there could access the data through the
11 Boards.

12 ARBITRATOR GOWDY: Again, if you don't know
13 the answer, just tell me you don't know the answer.
14 But who would the other parties be, if they weren't
15 oil companies? Who would the other parties be that
16 would be interested in accessing that information?

17 THE WITNESS: Perhaps academic institutions.
18 I don't know.

19 ARBITRATOR GOWDY: My last question,
20 assuming arguendo that that information was not
21 optimal or may not be optimal, what use would be made
22 of the information that was provided by GSI to the

1 Boards?

2 THE WITNESS: For research purposes, the
3 academic community could try to make use of the data
4 to figure out where to explore, or something like
5 that, to promote activity in their province. Oil
6 companies could also make use of the information when
7 there is bid rounds, and try to figure out, is this
8 block of land and that block of land and that block of
9 land worthy of a bid or something like that.

10 ARBITRATOR GOWDY: All right. Thank you.

11 PRESIDENT WALLGREN-LINDHOLM: Thank you. We
12 now turn to Claimants' Counsel, Ms. Lemmens, please.

13 MS. LEMMENS: Good morning and thank you.

14 CROSS-EXAMINATION

15 BY MS. LEMMENS:

16 Q. Good morning, Mr. Uffen. I am Matti
17 Lemmens. I am Counsel to the Claimants. I'm going to
18 ask you some questions this morning, and, like some of
19 the Members of the Tribunal have already said, I am no
20 geoscientist, so pardon me if I ask something slightly
21 incorrectly. Okay.

22 You were hired by Canada to provide insight

1 about the appropriate methodology that an objective
2 third party would adopt in order to establish a Fair
3 Market Value of GSI's Seismic Data library; is that
4 right?

5 A. Yes.

6 Q. You were not asked in your First Report to
7 conduct a valuation to determine that Fair Market
8 Value of GSI's Seismic Data collection; correct?

9 A. Correct.

10 Q. You were merely asked to comment about
11 factors to consider?

12 A. That is correct.

13 Q. Did you offer to conduct a Seismic Data
14 valuation of GSI's Seismic Data?

15 A. Counsel did not request that of me.

16 Q. I'm asking, did you offer that?

17 A. I can't recall.

18 Q. So then in your Second Report, sir, did your
19 instructions from Canada change?

20 A. How so?

21 Q. Well, in your Second Report, you
22 conducted -- you've noted an extension of the Boyd

1 Valuation Methodology.

2 So did your instructions change?

3 A. They asked me to comment in my First Report
4 on how an independent third party would go about
5 determining Fair Market Value of the database. And
6 then in my Second Report, they requested that I try to
7 age-date the '09 Report from Boyd.

8 Q. Okay. So there were different instructions
9 by the time of the Second Report?

10 A. In that context, yes.

11 Q. In conducting that Boyd extension -- I'll
12 call it, just for short-term -- you did not review any
13 licensing history of the GSI Seismic Data; is that
14 right?

15 A. That's correct.

16 Q. And did you review any of GSI's financial
17 statements in this proceeding?

18 A. I'm trying to recall if I received anything
19 like that. I don't think I did. If I did, I have no
20 recollection of it at the moment.

21 Q. Okay. And so it's fair to say that you're
22 not familiar with GSI's licensing revenues, that it

1 was earning off its Seismic Data collection over
2 the years?

3 A. That's correct.

4 Q. So you do not actually know what GSI's
5 licensing revenues and practices were then?

6 A. Licensing revenues and the other part?

7 Q. Well --

8 A. No, I just ask you to repeat, please.

9 Q. Yep. We can parse it down. So it sounds
10 like you don't know GSI's licensing revenues; correct?

11 A. Correct.

12 Q. And do you also not know GSI's licensing
13 practices?

14 A. Practices, in terms of agreements or sales
15 history or...?

16 Q. Yeah. So when I had asked you about whether
17 you had reviewed any licensing history, I would take
18 that to mean that you, not only did not know about the
19 revenues from GSI's Seismic Data, but, additionally,
20 did you not review GSI's License Agreements with its
21 Licensees?

22 A. Correct.

1 Q. Did you ask to do that?

2 A. I was not requested to perform that task.

3 Q. And so you had said that GSI always licenses
4 its Field Data in your presentation just now, sir?

5 A. Licenses its Field Data with the process,
6 stack, digital and hard copy, if requested.

7 Q. How do you know that?

8 A. How do I know that?

9 Q. Yeah.

10 A. That is a standard industry practice that,
11 whenever anyone purchases Seismic Data, you have
12 access to the Field Data and the stack data. It is
13 just industry general practice.

14 Q. Well, so you're not aware that GSI's
15 licensing practice was not always to license its Field
16 Data.

17 Is that right then?

18 A. If that's the case, then that's correct.

19 Q. And, sir, you are also aware that companies
20 can make allowable expenditure credit applications to
21 the Offshore Boards?

22 A. Yes.

1 Q. And in doing so, they submit a copy of the
2 licensed Seismic Data that they have?

3 A. When they do that, they have already been
4 granted a work bonus commitment towards acreage. And
5 in order to accredit value towards what they have done
6 or promised in the work bonus commitment, they can
7 provide data that they have acquired, data that they
8 have reprocessed, and submit that to the Board. And
9 then get financial accreditation for what they have
10 spent.

11 Q. And so the data they submit as part of those
12 applications, sir, would include the licensed quality
13 data; right?

14 A. If they reprocess data, yes, they would
15 submit then their reprocessed version of it.

16 Q. Sir, you also mentioned that navigational
17 data is not available for the Seismic Data. So
18 navigational data being a different type of
19 information that assists you with spatially locating
20 where the Seismic Data is; right?

21 A. Well, it's two halves. You need to have
22 both parts in order to make use of the data.

1 Q. And -- sorry. During your presentation, I
2 believe you had mentioned that navigational data isn't
3 necessarily available from the Government?

4 A. Well, you need to know where the data is
5 located to make use of it. So the Boards in the past
6 would -- you would have to ask them what shape or form
7 they provided it at any given time. But it could be a
8 shotpoint map. It would be Ends&Bends, who knows
9 what; right? But it is hard to make use of the data
10 if one doesn't know where it's located.

11 Q. And are you aware that the navigational data
12 is actually, in fact, available from the Geological
13 Survey of Canada?

14 A. No, I was not.

15 Q. Sir, have you ever prepared a Fair Market
16 Valuation of Seismic Data?

17 A. I have determined valuation of Seismic Data
18 in corporate mergers & acquisitions. I have also had
19 to deal with transfer fees and determine transfer fee
20 exposure in those situations, as well.

21 Q. And I noted from your CV that you indicate
22 that you have some experience -- if we can just go to

1 the CV for a moment. We'll just pull it up on the
2 screen.

3 This is the CV that is attached to your
4 First Witness Statement, sir?

5 A. Umm-hmm.

6 Q. Oh, but I think you revised it for your
7 Rejoinder Report; is that right?

8 A. I did.

9 Q. Okay. Why don't we use the most recent CV.

10 Sir, you should see on the screen there your
11 CV attached to your Rejoinder Report.

12 A. Yes, I do.

13 Q. And so if we turn down to, I believe, in the
14 experience area, if you just keep going. Here we go.

15 I see that you indicate that you're an
16 expert party third witness for three legal cases
17 including two other National Energy Board, NEB
18 hearings and currently a NAFTA Tribunal?

19 A. Yes.

20 Q. And so do you understand that you were hired
21 by Canada in this Arbitration?

22 A. Yes.

1 Q. Do you understand that Canada is not a third
2 party in this Arbitration but is, in fact, the
3 Respondent in this Arbitration?

4 A. Yes.

5 Q. Okay. And so I'm just trying to understand
6 what you meant by about being an expert party third
7 witness?

8 A. Well --

9 Q. Maybe a typo?

10 A. No. No. I was -- these were legal cases,
11 and I was required to respond to offer my expertise,
12 really.

13 Q. But do you understand that you are an
14 independent expert. I'm just trying to understand
15 what you mean by a third party here. Do you have
16 other interests in mind?

17 A. No. No. I don't. I don't know where
18 you're going with this. I'm trying to understand, and
19 I'm trying to answer to the best of my ability.

20 Q. Yes. I'm just trying to understand the
21 words that you've put here. And so I just want to
22 make clear that you understand your role as an Expert

1 Witness today?

2 A. Yes.

3 Q. And you understand that you are to be
4 independent and neutral?

5 A. Yes.

6 Q. Okay. When you provided expert evidence in
7 an NEB Hearing, were you hired by the NEB?

8 A. No.

9 Q. And did that NEB -- did those two
10 proceedings before the NEB require you to provide a
11 Seismic Data valuation?

12 A. No.

13 Q. Have you previously provided services to the
14 Government of Canada or the Boards?

15 A. No.

16 Q. You were hired by Total E&P, and Total SPA,
17 oil-and-gas oil companies in another GSI case before
18 the Alberta Court of King's Bench; is that correct?

19 A. That is correct.

20 Q. In that case you were instructed to provide
21 a valuation of GSI's Seismic Data; is that correct?

22 A. I was instructed to provide a valuation of

1 materials that were accessed from the Boards.

2 Q. And you did, in fact, conduct such a
3 valuation?

4 A. I did conduct a valuation.

5 Q. You did not merely comment about factors to
6 consider. You performed the exercise of coming up
7 with a number to value?

8 A. Correct.

9 Q. Why didn't you conduct the same exercise in
10 this case?

11 A. I was not requested by Counsel to do so.

12 Q. You were the President of the CSEG, or the
13 Canadian Society of Exploration Geophysicists, for
14 about a year in 2002-2003?

15 A. Yes. Sorry. I had to think about the
16 dates.

17 Q. That one wasn't a skill testing question or
18 a trick question.

19 So that society -- it went on to award
20 Davey Einarsson with an honorary member award in 2004;
21 is that right?

22 A. That is correct.

1 Q. Did you know Davey Einarsson?

2 A. I've never met him.

3 Q. Do you know of Davey Einarsson, other than
4 this case?

5 A. A little bit. One of the pioneers, I
6 believe, in marine data acquisition.

7 Q. Sir, you have done work in the western part
8 of Canada onshore?

9 A. Predominantly, yes.

10 Q. And isn't it correct to say that the western
11 regulators do not disclose onshore Seismic Data like
12 we see with the federal regulators in the offshore
13 Boards?

14 A. The different Boards and offshore regulators
15 have different rules to Western Canada.

16 Q. Isn't it the case that the western
17 regulators do not disclose Seismic Data?

18 A. They do not disclose Seismic Data. I don't
19 believe they even possess the Seismic Data.

20 PRESIDENT WALLGREN-LINDHOLM: Excuse me,
21 Ms. Lemmens, the western regulators then being
22 regulators in Western Canada? Is that -- onshore?

1 MS. LEMMENS: Yes. Exactly. Not at issue
2 in this case but I'm trying to show there are
3 different practices.

4 PRESIDENT WALLGREN-LINDHOLM: I'm just
5 trying to understand what is being said. Thank you.

6 BY MS. LEMMENS:

7 Q. Sir, in your Report at -- I believe it is
8 your First Report, sir, you had a series of figures at
9 Figure G, H, and I?

10 A. Yes. I have them before me.

11 Q. And these are a series of maps of GSI's
12 Seismic Data in the Offshore Areas, sir?

13 A. Well, Map "G" is showing the 2D Seismic Data
14 available in offshore Newfoundland and Labrador. And
15 then "H" is showing 2D and non-GSI 3D Seismic Data
16 offshore Newfoundland Labrador. And then Figure "I"
17 is a map showing Seismic Data available in offshore
18 Nova Scotia.

19 Q. Right. But, specifically, all three of them
20 identify GSI and non-GSI types of data, I think?
21 Well, maybe "I" is just about -- no, it looks like it
22 is also making that dichotomy there.

1 A. That's correct, that distinction is made.

2 Q. Okay. And you relied on those maps from
3 Messrs. Bennett, Makrides, and Dixit's Witness
4 Statements; correct? I believe you cite the source as
5 those coming from those Witness Statements?

6 A. Yes.

7 Q. You did not create those maps?

8 A. No. No.

9 Q. And you did not have input in the creation
10 of those maps?

11 A. Those maps are from the Boards.

12 Q. And if you knew that those individuals do
13 not know whether the maps attached to their Witness
14 Statements are accurate, would that change your
15 reliance on them?

16 A. I just took them at face value what was
17 supplied.

18 Q. Let's talk about data quality factors, sir.
19 And you would agree with me that there are many
20 variables in determining the value of Seismic Data?

21 A. Yes.

22 Q. You described various factors to consider in

1 valuing Seismic Data in your initial Report in this
2 proceeding?

3 A. Yes.

4 Q. The quality of the design for the
5 acquisition and processing, coupled with the available
6 budget are the key terms in terms of value; is that
7 right?

8 A. Where are you referencing that? In my
9 Report?

10 Q. I'm not referencing your Report. I'm asking
11 you a question.

12 A. Okay. Could you repeat that then, please.

13 Q. Yep. So the quality -- for someone that is
14 looking to license Seismic Data or to purchase the
15 Seismic Data for themselves, the quality of the design
16 for the acquisition and processing coupled with the
17 available budget, are the key terms in terms of value?

18 A. Coupled with the budget -- we are all having
19 to work with financial constraints -- but price is
20 always a consideration, as is data quality.

21 Q. And as you say in your Report, whether data
22 is 2D or 3D may factor into the value of that data?

1 A. Correct.

2 Q. But it's not always the case that 3D data is
3 better than 2D data, depending on the exercise that
4 one is looking to use the Seismic Data for; isn't that
5 right?

6 A. The exercise and you include the financial
7 aspects, as well. There may be situations where 2D
8 data is required and others where 3D may be preferred.
9 The 3D may not be optimally positioned because they
10 tend to be more localized.

11 Q. Yes. You tend to do 3D data in a more
12 focused manner because it is so costly to create; is
13 that right?

14 A. That's correct.

15 Q. You often use it subsequent to 2D data in
16 order to sort of hyper-focus on a particular area;
17 correct?

18 A. That's correct.

19 Q. So that price difference can, in fact, make
20 it that 2D is better for some exploration purposes
21 while you are trying to determine a more -- an area of
22 more interest?

1 A. Yes. 2D data starts with the regional
2 reconnaissance program. And then you can infill with
3 more 2D data, be it purchased or acquired or whatever.
4 At some point along the cost benefit curve and risk
5 analysis curve, you come to a point where you make a
6 decision: Do we drill on the 2D data that we have, or
7 do we need to refine things further? And, hence, then
8 you try to access or acquire 3D data in order to then
9 position a drill rig.

10 Q. And so it's the case that 2D data is still
11 used for exploration of hydrocarbons today?

12 A. Absolutely. Absolutely.

13 Q. And you would agree with me that many
14 Canadian offshore discoveries of hydrocarbons have
15 occurred based upon 2D Seismic Data; right?

16 A. Yes. Yes. Historically, that has been the
17 case.

18 Q. And that includes things like Amauligak up
19 in the Arctic and Hibernia offshore Newfoundland and
20 Labrador?

21 A. It has been a long time since I've looked at
22 any maps in those areas. So based on the vintage of

1 some of those discoveries, it was probably done on 2D,
2 but I cannot state to this Tribunal officially if
3 that's the case.

4 Q. So just to some basics about Seismic Data
5 then. Seismic Data is somewhat like an ultrasound in
6 terms of the technology that is used. I understand it
7 is obviously a little bit different, but for some of
8 the lay people in the room, it is often the case that
9 you would use an ultrasound as a common analogy?

10 A. It is remote sensing technique. And yes, as
11 I tried to describe 2D and 3D data with my cake
12 analysis, yes, it is an ultrasound-acoustic wave
13 theory kind of process, yes.

14 Q. And you can also think of 2D imaging
15 somewhat like an x-ray? We're familiar with that
16 technology.

17 A. Yeah, 2D as an x-ray? I don't know if -- I
18 don't know where you're trying to -- it's a remote
19 sensing method without going down a mile or two to see
20 what's there. The seismic method is a remote sensing
21 methodology to understand how things are configured
22 and shaped in the subsurface.

1 Q. Thank you. And the subsurface geology that
2 we're focused on with Seismic Data, obviously, in
3 millions of years that geology can change. But
4 generally speaking, during the course our lifetimes,
5 that geology is fairly static; is that right?

6 A. That is correct. But, just to recap what I
7 went over in my presentation, when you steam-inject a
8 heavy oil reservoir in a period of five to ten years
9 you can have change -- okay? -- because the steam
10 heats the rocks and changes the property of rocks.
11 But in a general sense, what you are saying, is, yes,
12 the geology stays the same for millions of years.

13 Q. And we're not, generally, using a lot of
14 steam-assisted gravity drainage in offshore Canada, to
15 your knowledge?

16 A. None to my knowledge.

17 Q. Right. So the offshore geology is,
18 generally, quite static then?

19 A. Yes.

20 Q. The pricing of competing datasets influences
21 the value of a particular dataset; correct?

22 A. It can, yes.

1 Q. And the current industry activity is -- I
2 believe you mentioned -- in an area can influence the
3 value of Seismic Data?

4 A. Yes.

5 Q. And what about a perspective area being one
6 that is less explored? Does that influence the price
7 of Seismic Data there?

8 A. Yes. Conversely it could. If the area is
9 of interest for exploration, the absence of competitor
10 data, the absence of more modern data could actually
11 enhance the value of some older technology and older
12 data that is available in the region.

13 Q. And also, who created the data can factor
14 into the value of the dataset?

15 A. I don't know if it matters who created it.
16 If it's available to purchase or something like that.
17 It could be data from an oil company or from a
18 nonexclusive spec survey company.

19 Q. Well, does who processed the data sometimes
20 matter to considering the quality of the data or the
21 value of it?

22 A. It can. It is important to keep in mind

1 some processing houses have capabilities that others
2 don't at any given time. And so some processing
3 houses are adept at certain procedures and it's what
4 differentiates them from their competitors.

5 Q. Do the terms to license a particular dataset
6 factor into the value of that Seismic Data set?

7 A. The terms to license? Yes, it can. One of
8 the more obvious ones is transfer fees. Transfer fees
9 are often invoked in some of these agreements so that,
10 if there's a corporate takeover or a change of control
11 or something like that, that then there's a clause
12 that can get triggered. There's some optionality to
13 those clauses, but, nonetheless, those things can
14 affect the price of the data and can provide some
15 unpredictable revenue in the future.

16 Q. And just for the Tribunal's benefit, I know
17 what "transfer fees," you obviously know what
18 "transfer fees" are. So they -- it's a clause and a
19 license agreement in which, if there's a change of
20 control of the licensee, there may be a fee payable to
21 the seismic company that had licensed it in order for
22 that new company, the change of control company, to be

1 able to continue to have the data. Is that right?

2 A. That is correct, but those clauses also have
3 other addendum clauses attached to it, and quite often
4 if Company A took over Company B, Company A would have
5 a time period to react to either relinquish the data
6 and give it back to the data owner, or -- then, if
7 not, pay the transfer fee.

8 Those timeframes tend to be rather tight.
9 They tend to be of the order of two weeks, maybe a
10 month, something like that.

11 Q. And so whether the data is available for
12 free or it's not available for free, does that impact
13 the value of Seismic Data?

14 A. For free, you're referring to accessing it
15 from the Boards?

16 Q. That's right.

17 A. When you access it from the Boards, it is in
18 hard copy form. In order to really make use of it and
19 map it, use it to map, you need to digitize it. You
20 need to vectorize it, okay. And there's a cost
21 associated with that.

22 Q. But that cost is generally much less than

1 licensing it?

2 A. Typically, yes.

3 Q. And so, does that availability of the
4 Seismic Data from the Boards impact the value of the
5 Seismic Data?

6 A. In terms of the value of the database,
7 perhaps not. In the value of resale, perhaps. I
8 don't know. I'd have to speculate, but corporations
9 could access the data from the Boards cheaper than
10 buying a license.

11 Q. Do you know why Canada provides access to
12 Seismic Data at the Boards?

13 A. To my knowledge, it is part of their mandate
14 to promote exploration in the offshore environments.

15 Q. And so, is the idea that, if it's available
16 without a cost at the Board, then you would save the
17 cost of having to pay licensing fees to get access to
18 that same information, and thereby, you're able to do
19 some more exploration offshore without having to pay?

20 A. Correct.

21 Q. And so -- I just want to turn now to -- you
22 had mentioned "fold," sir. And isn't it sometimes the

1 case that, if you have too high of a fold, in fact, it
2 doesn't enhance the data quality because there's maybe
3 too many times that you've sampled the area and now
4 you start to get fuzziness?

5 A. I've not seen that in my career.

6 Q. Okay. And you don't think that by sampling
7 it too many times, that increases some of the noise
8 that can occur because you have multiple samples on
9 perhaps incorrect geology -- sort of, it starts to
10 create a fuzzier image in some ways?

11 A. No. I've not seen that to be the case.
12 Probably for the benefit of this Tribunal, I could
13 discuss fold in another way to try to clarify. I'm
14 going to whisper now, excuse me, for the Court clerk,
15 but when I whisper, I'm going to talk to you in one
16 fold "and you can hardly hear what I'm saying."

17 Now, if you sum that signal 10, 20 times
18 over, now you can really hear me when I'm talking.
19 And then if I had a microphone or a mega-phone, I
20 would be even louder, so that's the effect of fold, is
21 the summation of that signal on top of itself to
22 amplify or magnify.

1 I hope that helps the Tribunal.

2 Q. Thank you, sir.

3 You had mentioned that offshore exploration
4 and development of hydrocarbons is an expensive
5 exercise with individual wells costing \$50 to \$100
6 million each these days.

7 A. Umm-hmm. That's correct.

8 Q. Then you would further agree with me that to
9 deal with those significant costs, it's common for
10 offshore exploration and production projects to often
11 involve multiple partners on a particular project that
12 are meeting and discussing to explore certain areas?

13 A. Yes.

14 Q. Sometimes it is referred to "farm in" or
15 exploration group partners?

16 A. It is to share the risk, financial risk.

17 Q. And that often also includes the sharing of
18 Seismic Data among the group?

19 A. You would have to define "sharing" because
20 some groups that get created will have financial
21 backers and some will have technical teams that can
22 work the data.

1 Q. You're familiar with exploration group fees
2 in licensing agreements?

3 A. Yes.

4 Q. And those are where a fee would be payable
5 to the Seismic Data company to add additional partners
6 to an exploration group?

7 A. That's correct.

8 Q. And so, the existence of those types of fees
9 and transfer fees in license agreements related to a
10 Seismic Data survey might enhance the value of that
11 Seismic Data survey because there are unpredictable
12 further revenues, as you called them, that may arise
13 from that dataset; is that right?

14 A. Yes. It's important to note, though, here
15 for the Tribunal that exploration groups could be
16 three or four companies, let's say, on a parcel of
17 land. You may have only one or two companies that
18 actually interpret Seismic Data and would want to do
19 their own interpretation before they go out and expend
20 the dollars, let's say, to drill a well, something
21 like that.

22 When companies get together for a technical

1 review or to determine, hey, we want to drill a well
2 over here, do you agree, quite often there would be a
3 presentation involved and people would, of course, be
4 in a confidentiality situation under those
5 proceedings.

6 Q. Under that process of reviewing the Seismic
7 Data, you mean?

8 A. No, not just the Seismic Data, no. It would
9 be to: Here's the rationale why we want to drill this
10 well. Here is our map. Here is our economic
11 projections, what the well might produce if
12 successful, that kind of thing.

13 Q. License agreements tend to have very strict
14 confidentiality restrictions in them for Seismic Data;
15 is that right?

16 A. Some of them can, and some of them can be
17 quite liberal. And they vary over the decades, even
18 within the same company. So licensing agreements from
19 Company A versus Company B could be very different.
20 I've seen licensing agreements as small as two pages
21 thick and as thick as 100 pages, and those licensing
22 agreements from the '70s are relatively deemed

1 immature compared to the license agreements that we
2 have today so the ones we have today are more
3 voluminous as nonexclusive companies, or spec survey
4 companies are trying to protect their primary asset,
5 which is the data.

6 Q. Right. So I want to talk about GSI's
7 Seismic Data collection again. Did you inquire with
8 Canada as to whether you could inspect GSI's Seismic
9 Data in this Arbitration?

10 A. I believe -- well, they didn't ask me to,
11 and I don't believe I asked them to. They instructed
12 me to age-date the Boyd Report.

13 Q. Are you aware that Canada did not request
14 for access to inspect GSI's Seismic Data collection in
15 this Arbitration? Did you talk to them about it?

16 A. I believe they did not request access.

17 Q. In your Rejoinder Report at Paragraph 44,
18 sir, you indicate: "While the Claimants have not
19 provided any additional analysis of the data quality
20 factors identified, based on the limited information
21 available on GSI's Seismic Data from the Boards, I
22 conducted a sample data quality inspection of a small

1 sample of GSI's publicly available Seismic Data, 15
2 lines, as supplied by the various Boards as access to
3 GSI's Seismic Data library has not been possible."

4 What did you mean that it was not possible?

5 A. Not possible in my context. I was not
6 granted permission or access to it personally.

7 Q. But you also didn't ask for it?

8 A. That's correct. My First Report outlines
9 how I would go about determining a Fair Market Value
10 for the database.

11 Q. And so, in order to conduct this sample data
12 quality inspection of the 15 seismic lines, did you
13 attend at the Boards to do that?

14 A. That information was provided to me by
15 Counsel.

16 Q. Oh, I see. Okay. And so, they provided you
17 with the sampling of the 15 lines, or did you select
18 the 15 lines?

19 A. They provided me the 15 lines.

20 Q. Did they give you any context as to what 15
21 lines that they decided to select?

22 A. It was just a sampling.

1 Q. And so, you don't know whether those are
2 Secondary Submissions or not? Secondary Submissions
3 being the licensees applying for allowable work
4 expenditure credits?

5 A. I would have to go back to. To be honest,
6 I'd have to go back and review the PDFs of those files
7 and then determine if it was a reprocessing that was
8 done of late, and who did the reprocessing, and I just
9 don't have that information in front of me at the
10 moment.

11 Q. I believe you also don't identify all of the
12 15 lines that you reviewed in your Report?

13 A. That's correct.

14 Q. Was there any reason why you didn't identify
15 the 15 lines?

16 A. I was trying to denote two examples in the
17 Report based on those 15 lines to benefit the Tribunal
18 to show how an older dataset may be deemed poorer
19 quality to a more modern dataset. And in the second
20 example, I was trying to indicate how two different
21 datasets of roughly the same era or vintage had
22 different data quality associated with it.

1 Q. And do you know why only 15 lines were
2 reviewed?

3 A. It was just to have a sampling.

4 Q. Okay. And did you ask for 15 lines, or did
5 Counsel provide you just with 15 lines and that's what
6 you decided to use as your sample?

7 A. That's what I decided to use as my sample.
8 Oh excuse me, Counsel provided the 15 lines and I just
9 worked with that.

10 Q. Okay. And after reviewing the 15 lines, did
11 you ask Counsel to provide you with any more seismic
12 lines to review, or you just simply left it at that?

13 A. I left it at that.

14 Q. And did you inquire with Counsel as to how
15 they selected the 15 lines?

16 A. No, I did not.

17 Q. Have you ever been to the Frontier
18 Information Office at the NEB down the street?

19 A. Yes.

20 Q. Have you reviewed Seismic Data there?

21 A. I did.

22 Q. Have you ever reviewed GSI's Seismic Data

1 there?

2 A. I did for the sake of this Tribunal.

3 Q. Okay. And not in any other --

4 A. Not in any other situation.

5 Q. And have you ever gone to the C-NLOPB's
6 office in Newfoundland to review Seismic Data?

7 A. No, I have not.

8 Q. Have you ever gone to the C-NSOPB in Nova
9 Scotia to review Seismic Data?

10 A. I have not.

11 Q. Since you didn't review GSI's Seismic Data
12 collection, I take it that you also didn't review any
13 of GSI's Field Data?

14 A. That's correct.

15 Q. And you weren't curious about reviewing
16 GSI's Seismic Field Data? You do comment about what
17 might be the maintenance and storage of that data, to
18 some degree. And so I just was wondering why you
19 didn't ask to review it?

20 A. I was not asked to do a full Market Value
21 assessment, and that would have been part of my
22 process to do that.

1 Q. It would have been part of your process to
2 simply comment about market factors and not to
3 actually review the data?

4 A. When you're evaluating a database, it is
5 important to test the recovery and retrievability of
6 the data. And over the years Seismic Data has been
7 stored on many mediums. 1,600 BPI bytes per inch,
8 BPI, tape, 6250. We used 8-millimeter exabytes, which
9 weren't very good. They were flaky, a lot of recovery
10 errors with those, CDs, DVDs, we have used optical
11 WORM technology, disc, and, of course, DLT tape,
12 digital linear tape.

13 So Seismic Data, when it is stored, is quite
14 often stored on the medium of the era, and some
15 mediums have higher fail rates than others. And so
16 more modern medium, or even disc, is often preferred
17 with fewer failures, and it is essentially good
18 corporate hygiene to have a database that has
19 integrity and has retrievability and recovery and that
20 kind of thing.

21 Q. Right. I mean, some of the older formats
22 can actually just get sticky, literally sticky and not

1 work anymore; is that right?

2 A. That's right. With 9-track tape, if you
3 think of those old movie reels where you had the tape
4 spinning on the reel, the magnetic tape backing can
5 actually pull off if it ages, and then the tapes
6 haven't been spun and that kind of thing, so
7 deterioration; hence, recovery could be an issue.
8 That is why some entities, companies have decided to
9 move databases from whatever old medium it is on and
10 move it forward to a more modern medium.

11 Q. Right. And so because you didn't ask to see
12 GSI's Seismic Data, you don't actually know that it's
13 been maintained and put onto modern media?

14 A. I do not know that to be the case.

15 Q. Simply because you can only speculate?

16 You don't know?

17 A. I'm not speculating. I don't know.

18 Q. Yes. Exactly.

19 Data quality can be improved with evolving
20 data processing technologies; right?

21 A. Yes, it can.

22 Q. And so you can actually take an older

1 dataset and use more modern processing technologies to
2 actually improve that older dataset into a better data
3 quality?

4 A. That is the case, but I think it is
5 important for the Tribunal to know, you can only
6 improve it so far. If you think of a quartile
7 assessment, excellent, good, fair and poor. Let's say
8 you start with a fair dataset and you look at the
9 stack section of the era and you now put -- let's say
10 the data is 20 years old. Now you reprocess it, the
11 Field Data and all that kind of thing.

12 In my experience in the industry -- and I've
13 been at this for 40 years -- the best reprocessing
14 effort can move it up a quartile. So "fair" could
15 move to "good," or "poor" could move to "fair." You
16 are never going to take "poor" and make it
17 "excellent." And the reason behind that is, those
18 acquisition parameters, the technology of the data to
19 acquire the data is locked in. There is only so much
20 you can do, right, to improve.

21 So to answer your question, yes, you can
22 improve it, but it is not like you're going to turn it

1 from night versus day. You are going to make
2 incremental improvements that might move it a quartile
3 in quality.

4 Q. Sir, in your Reports you didn't provide any
5 market data regarding pricing for Seismic Data in the
6 offshore areas of Canada; is that right?

7 A. That's correct.

8 Q. You also did not provide any market data
9 regarding the cost to create or reprocess Seismic Data
10 for offshore Seismic Data in Canada?

11 A. That is correct.

12 Q. Why did you not provide that information?

13 A. What I was asked to do in my Second Report
14 was to age-date the '09 Boyd Report, and I was not
15 conducting a Fair Market Valuation of the data myself.

16 Q. Do you have any knowledge of the cost to
17 create Seismic Data in the offshore areas of Canada?

18 A. I have not in my recent years gone out to
19 bid to know what those costs are.

20 Q. Did you previously know those Seismic Data
21 acquisition costs?

22 A. A long time ago.

1 Q. Well, you started in the industry in 1982.
2 How much was it costing in the 1980s to create Seismic
3 Data in the offshore Canada areas?

4 A. At that level of my career, I was just
5 learning how to interpret data, and I wasn't worried
6 about how much it was costing. It was how do I do
7 this?

8 Q. Fair.

9 MS. LEMMENS: Just given where I'm at in my
10 notes, I think that this would be the best time to
11 take a break. I don't anticipate being much longer
12 than 20 minutes after the break.

13 PRESIDENT WALLGREN-LINDHOLM: I
14 think -- thank you, Ms. Lemmens. That's an excellent
15 idea that, given that there is only six minutes left
16 now from 90 minutes. So we will now break until 10
17 past 11:00.

18 And to you, Mr. Uffen, I will ask you not to
19 discuss your testimony with anybody during the break.
20 You are, of course, free to move around, but I think
21 it is preferable that you remain by yourself.

22 THE WITNESS: That would be fine if someone

1 could maybe just get me a glass of water.

2 PRESIDENT WALLGREN-LINDHOLM: No, no. You
3 can go out. Yes.

4 THE WITNESS: Okay. Thank you.

5 PRESIDENT WALLGREN-LINDHOLM: So we shall
6 see you at 10 past. Thank you very much, Mr. Uffen.

7 THE WITNESS: Thank you.

8 (Brief recess.)

9 PRESIDENT WALLGREN-LINDHOLM: So we will
10 resume the cross-examination of Mr. Uffen. I'm sorry.
11 Yes. Please go ahead, Ms. Lemmens. Thank you.

12 MS. LEMMENS: Thank you, Madam Chair.

13 BY MS. LEMMENS:

14 Q. Mr. Uffen, did you review any of GSI's price
15 lists in this Arbitration?

16 A. I did.

17 Q. You did. And did you ask to review them?
18 Is that how that came about?

19 A. I did not ask to review them. They were in
20 the materials provided.

21 Q. Do you know if you were provided GSI's price
22 lists over the years or just a specific year?

1 A. I can't recall, to be honest.

2 Q. The prices that you saw there, did they
3 appear to be in the ordinary-course prices in the
4 market?

5 A. I did not conduct my valuation process, and
6 I would have to benchmark the data against what other
7 parties would be selling data for for similar quality,
8 and, of course, I didn't undertake that exercise.

9 Q. Okay. So you were instructed to provide a
10 Boyd extension valuation in your Second Report. And
11 so do you have any form of audit or accounting
12 experience or any sort of Chartered Business Valuator
13 Certification?

14 A. No. I'm a professional geophysicist.

15 Q. Did you add any interest onto the 2017
16 valuation of GSI's Seismic Data library when you
17 conducted that valuation exercise?

18 A. No, I did not. I just age-dated the '09
19 Report that Boyd authored.

20 Q. And you did that up until November 30, 2017?

21 A. That's correct.

22 Q. So we should take that valuation as being

1 without interest?

2 A. That valuation is just an age-dated thing,
3 yes. It's without interest.

4 Q. You know John Boyd; isn't that right?

5 A. Yes.

6 Q. So John Boyd was the one that had prepared
7 the prior valuation that you were looking to extend?

8 A. His company prepared it.

9 Q. You worked for his company, Boyd PetroSearch
10 for several years?

11 A. Back in the mid-'90s, I think.

12 Q. Into maybe the later '90s?

13 A. I would have to consult my résumé for the
14 exact dates.

15 Q. And you know that the first Boyd valuation
16 was provided for GSI in 2003?

17 A. Yes. And I was no longer employed there.

18 Q. Did you review all three of the Boyd
19 valuations that GSI provided in this case?

20 A. Yes.

21 Q. Did John Boyd teach you how to conduct
22 Seismic Data valuations while you worked at Boyd

1 PetroSearch?

2 A. No.

3 Q. How did you come to learn that?

4 A. Through years of experience in just
5 inspecting data quality, purchasing it on behalf of
6 companies I worked for, clients that I worked for.
7 This is the process, the data quality inspection
8 process is the way to best assess data quality. It is
9 the only way I've really known because it seems to be
10 a very effective way.

11 Q. So when you worked at Boyd PetroSearch with
12 John Boyd, did you conduct any Seismic Data valuations
13 while you were there?

14 A. I did not.

15 Q. Did you consult with John Boyd for the
16 purposes of your work in this Arbitration?

17 A. No, I did not.

18 Q. Have you spoken to him as part of your work
19 in the GSI and Total Case where you were also an
20 Expert?

21 A. No, I did not.

22 Q. Sir, at Paragraph 3 of your Second Report.

1 I'll just give you a moment to get there.

2 If we scroll to the bottom of that
3 paragraph, you indicate in the last sentence there "in
4 the absence of any physical review or analysis of
5 GSI's actual Seismic Data library, I am of the opinion
6 that, at most, Boyd's valuation Methodology should
7 only be considered as establishing a maximum 'ceiling'
8 for potentially valuing GSI's Seismic Data library."

9 Do you see that?

10 A. Yes, I do.

11 Q. But you would agree with me that if you were
12 to conduct a physical review or analysis of GSI's
13 actual Seismic Data library, it is possible that the
14 valuation could go up or down?

15 A. Based on the factors that I presented to the
16 Tribunal here in my Opening Statements, there is many
17 factors that Boyd did not take into account. The
18 collective sum of those factors is likely to be a
19 negative on any valuation; hence, why I felt it was a
20 "ceiling." And that's why I labeled it as such.

21 Q. But it is possible that it would go up after
22 a physical review?

1 A. One would have to conduct the exercise.

2 Q. And in conducting the exercise, I think
3 you've sort of already said this, but I just want to
4 confirm, you were instructed to simply use Boyd's
5 Methodology in the 2009 Report and extend it to
6 November 30, 2017?

7 A. That is correct.

8 Q. Which was now eight years ago, 2017?

9 A. Yes.

10 Q. You indicated further in your Rejoinder
11 Report at Paragraph 27, sir, that -- and it's in the
12 middle of the paragraph. It starts with the words "to
13 date": "To date, no tally of how many kilometers of
14 data has been reprocessed has been reviewed or
15 supplied within the written text of the 2009 Boyd
16 Report or by GSI in any other materials in this
17 Arbitration."

18 A. I see that Statement.

19 Q. And so, did you ask your client, Canada for
20 a copy of the reprocessing list for GSI data?

21 A. Subsequent to writing this Report, I believe
22 I found a document that stated that. I tried to

1 cross-reference mileages against other listings of the
2 data, and sometimes the mileages agreed, and sometimes
3 they were very different.

4 Q. So let's pull up Exhibit C-562. Is this the
5 document that you were referring to, sir? Oh, sorry.
6 Your screen is not on.

7 (Comments off microphone.)

8 PRESIDENT WALLGREN-LINDHOLM: We also have
9 one that is failing. So maybe there's a larger
10 problem.

11 THE WITNESS: Yeah, my screen is in
12 power-saving mode.

13 (Pause.)

14 PRESIDENT WALLGREN-LINDHOLM: We are also in
15 order here.

16 (Pause.)

17 PRESIDENT WALLGREN-LINDHOLM: Apparently, we
18 are now in good order on all flanks here. Okay. Very
19 good. Please proceed.

20 MS. LEMMENS: Thank you. Madam Chair.

21 BY MS. LEMMENS:

22 Q. Sir, so we're now looking at Exhibit C-562

1 now that the screens are functioning. Are you able to
2 see that, sir?

3 A. Yes, I can.

4 Q. Is this the document that you were referring
5 to that you maybe saw after your Rejoinder Report?

6 A. That is correct.

7 Q. And so did you have this before you had
8 written your Rejoinder Report or you were only
9 provided this afterwards?

10 A. I only saw it afterwards. I can't tell you
11 when I was provided it.

12 Q. Okay. And so, because you don't have a
13 listing of the materials that you had reviewed to
14 prepare your Report, are there some materials that you
15 ultimately did identify then in your Reports that you
16 had but you did not end up using or referring to?

17 A. A lot of material was provided, hundreds of
18 documents.

19 Q. I see. Okay. And so this was, perhaps, one
20 of those documents then, sir. And do you understand
21 this to be a listing of the total kilometers of
22 seismic lines in Column C?

1 A. That is a listing of total kilometers, yes.

2 Q. And then, in Column D there, sir, you see
3 kilometers through PSTM, meaning pre-stack time
4 migration, what you had been referring to earlier?

5 A. That is correct.

6 Q. And how many kilometers of the first total
7 kilometers have, in fact, been reviewed
8 through -- sorry, processed through pre-stack time
9 migration, and then Column E being kilometers
10 remaining to be processed through pre-stack time
11 migration.

12 Do you see that?

13 A. Yes, I do.

14 Q. And is that how you understood this Excel
15 spreadsheet to -- is that what you understood to be
16 represented in this Excel spreadsheet when you
17 reviewed it?

18 A. When I reviewed it, I looked at this and
19 it's denoting that about 80 percent of the database
20 has been reprocessed through to a pre-stack time
21 migrated version. And then what I did is I went back
22 to my spreadsheet here that I created when I age-dated

1 the Report, and I was trying to cross-reference some
2 of these mileages in Column C to the mileages that I
3 had over here. And some of them match exactly to the
4 decimal point and some of them are not in agreement.

5 Q. I see. So there is some data that is in
6 Exhibit C-562 that may be missing from the Boyd
7 valuation, or the Boyd valuation maybe has something
8 that's missing in exhibit -- sorry, C-562?

9 A. One of the things that is difficult here is,
10 in my spreadsheet, I would have to say it's
11 Column B -- I break out every survey within a region.
12 The area names here are commensurate with the region
13 names here. I do not know what datasets comprised
14 on -- if we could go back to the prior image.

15 Q. Yeah.

16 A. Yeah. I don't know what datasets are
17 inboard of the label "Nova Scotia." I can only assume
18 that it's the same ones as here. So when you look at
19 Column C -- and I think that's 14, just to the right
20 of the label "Nova Scotia," we have 44,556.977 total
21 kilometers for Nova Scotia. And when I come down to
22 my tally here of Nova Scotia, it's very small print,

1 but it's 33,922.427. Why the disagreement? I don't
2 understand.

3 So I think what I took from this document
4 is, conceptually, it looks like GSI has been, over
5 the years, reprocessing some of its Seismic Data.
6 Most likely it enhanced it to some degree. How much,
7 I cannot testify to, and the actual mileages I can't
8 declare are correct.

9 Q. Right. And that's also because you didn't
10 actually review GSI's Seismic Data collection?

11 A. And go through my process, that's correct.

12 Q. Thank you for that, sir. And thank you for
13 that clarification because I had been wondering why
14 you were saying that there was no information about
15 reprocessing lists, but we agree that Exhibit C-562
16 is, in fact, that kind of information that you were
17 looking for?

18 A. Right. And for the benefit of the Tribunal,
19 when you're looking at line lengths like this, you
20 have to keep in mind that a certain little bit of
21 discrepancy in line lengths is possible in a marine
22 setting. And why is that?

1 Something we call "tail spreads." Because,
2 when you get onto the seismic line, you're trying to
3 tow that boat straight and have the cable straight
4 behind you. Then you go to Shotpoint 101,
5 Shotpoint 102, and so on. So you're actually
6 collecting data behind the boat. And so when people
7 calculate line lengths, sometimes people count them
8 from the first shotpoint to the last shotpoint, and
9 sometimes people will count them from the very
10 beginning of a tail spread to the end of the line.
11 And so, you can end up with a kilometer or two
12 difference on the length of a line. What I cited here
13 as an example when I picked on Nova Scotia, 33,000
14 versus 44,000, that's not a tail spread differential.

15 Q. Thank you, sir.

16 So your extension of the Boyd 2009 Report
17 methodology from 2009-2017 assumes that GSI's Seismic
18 Data collection would remain static and set in place
19 as it was in 2009; correct?

20 A. Yes. If there was some reprocessing done
21 after '09, that would not be included in my Report or
22 my calculation.

1 Q. Right. And, further, it also wouldn't
2 include any additional data if GSI was collecting
3 additional data from 2009 onwards?

4 A. That is correct.

5 Q. I'd like to speak about the Artic area for a
6 moment, sir.

7 You're aware that there has been -- there
8 have been no new licenses being in Artic area since
9 2016?

10 A. Correct.

11 Q. And are you aware that there has been a
12 committee set up to conduct review of the Arctic area
13 and whether to proceed with resource development in
14 that area that meets and reviews this issue every
15 five years?

16 A. I'm aware they last met in 2023. And I
17 believe the moratorium is in effect for five years,
18 til 2028.

19 Q. I had understood them to meet in 2021, just
20 being the five years from 2016, and that the next
21 review would be in 2026. But I don't think anything
22 turns on that at this point?

1 A. I will stand corrected if I have those dates
2 incorrect.

3 Q. And so when a review is conducted, it's, in
4 fact, the case that it is possible that resource
5 development would be something that the committee
6 would decide to proceed with at any one of those
7 five-year reviews?

8 A. Supposedly, that is the discretion of that
9 committee.

10 Q. And I know we're in Canada, but as you know
11 when we turn on the TV, we see a lot of President
12 Trump.

13 Are you aware that President Trump has
14 rescinded former President Obama's agreement with that
15 Arctic ban more recently?

16 A. No. I'm not aware. Many things have been
17 happening.

18 Q. Many things have been happening, of course.

19 And are you aware of President Trump also
20 expressing some interest in the area of Greenland for
21 the purposes of exploring for minerals?

22 A. I've heard that in the news.

1 Q. And so given those sort of changing
2 interests in some of those Arctic areas, it's entirely
3 possible that we will see a change in the bans in the
4 next committee review on the Canadian side?

5 A. We cannot predict the future. And, as such,
6 as you look into the future, how do you provide a
7 value when you don't know the situation; right? So
8 much of the Arctic data when I age-dated it was older
9 than 40 years of age, which gave it on that
10 depreciation value curve a value of zero.

11 Some of the data was in its 30s, in terms of
12 age, and, you know, it's difficult to assign a value
13 when you don't know if there's an opportunity.

14 Q. Of course. Sir, I'd like to now ask you a
15 question about an APEGGA subcommittee that you were
16 on, with respect to developing the Guideline for
17 Ethical Use of Geophysical Data in 2010?

18 A. Umm-hmm.

19 Q. You recall what I'm saying?

20 A. Yes.

21 Q. I'd like to take a look at that guideline.
22 It is at C-084. It should show up on your screen,

1 hopefully.

2 A. My monitor is working.

3 Q. And so just for the benefit of the Tribunal,
4 can you explain what APEGGA is?

5 A. APEGGA is the professional body that
6 licenses me, geologists, engineers, and other
7 geophysicists.

8 Q. And that's the professional body in Alberta?

9 A. That is correct.

10 Q. Are you familiar with the document on the
11 screen?

12 A. Yes, I am.

13 Q. Okay. And so this is a Guideline for
14 Ethical Use of Geophysical Data that was prepared by
15 this subcommittee that you were on in 2010. If we
16 scroll down to the second page, I think we see the
17 listing of the subcommittee members. And there you
18 are, Doug Uffen.

19 That is you; right?

20 A. Yes.

21 Q. Okay. And we also see John Boyd on the
22 list?

1 A. Correct.

2 Q. That's the same John Boyd that was involved
3 with the Boyd valuations; correct?

4 A. Correct.

5 Q. Okay. And so this Guideline was developed
6 in response to issues concerning the business use of
7 licensed geophysical data in the oil-and-gas industry?

8 A. It was created to help professional members
9 to give them guidance as how to act in the presence of
10 licensed data.

11 Q. And so let's turn to Page 4. We see here
12 just the overview, sir.

13 It states: "Geophysical data plays an
14 important role in the discovery of resources in the
15 oil-and-gas industry."

16 Do you see that?

17 A. Yes, I do.

18 Q. And you would agree with that?

19 A. Yes.

20 Q. And then it goes on to state: "To its
21 owners, the data is a major investment and a valuable
22 asset."

1 You would agree with that?

2 A. Yes.

3 Q. And then near the end of the first
4 paragraph, the sort of last sentence there, we
5 see: "Generally, the rule of thumb governing the use
6 of such licensed data is: 'Whatever is not granted by
7 a license or an agreement is prohibited'?"

8 A. That's the statement, yes.

9 Q. And you agree with that?

10 A. "Whatever is not granted by a license or an
11 agreement is prohibited." Many of these agreements
12 have evolved over the years. Okay. The more modern
13 ones get more voluminous in its word count and try to
14 address things. Just because a document does not say
15 you can or can't do something doesn't necessarily give
16 you the right to go do it. All right. So you have to
17 refer back to the license agreements and industry
18 standard practices.

19 Q. And this guideline was intended to
20 encapsulate some of those industry standard practices;
21 right?

22 A. Yes. It was trying to give guidance in the

1 spirit of the essence of what's required in terms of
2 conduct by the professional members. It does not go
3 into the terms, the licensing clauses, and all that
4 kind of thing. That is not the intent of the
5 document.

6 Q. And then at the end of this overview
7 section, sir, we see: "APEGGA members who fail to
8 consider or who disregard the rights and obligations
9 of data owners or licensees could place themselves in
10 a position where their actions might constitute
11 unprofessional conduct or could result in legal
12 liability."

13 A. I see the statement, yes.

14 Q. And that is something that the subcommittee
15 thought was important to identify to the APEGGA
16 members?

17 A. Yes.

18 Q. And so it's very important to let them know
19 what -- to recognize the rights of data owners; right?

20 A. Yes.

21 Q. And it is also important to let the APEGGA
22 members know what could constitute unprofessional

1 conduct that could result in legal liability?

2 A. Yes. It's important, though, to keep in
3 mind that this document is not a standard, that it is
4 a guideline, and as a guideline, it is full of "it
5 should," "you may," "you ought to," "we recommend," as
6 opposed to "thou shalt obey."

7 Q. Of course, I understand that a guideline
8 might not actually be the law. It's a guideline?

9 A. Correct.

10 Q. So I just want to turn now to Section 2.4 of
11 the guideline, sir. In the section called "Publicly
12 Accessible Data." And here it indicates, I think in
13 the next paragraph we see: "For data that is made
14 accessible to the public by a Regulator or Government
15 agency, current practice is to release image copies
16 that may or may not be accompanied by documentation
17 covering restrictions on the use or redistribution of
18 the data. These restrictions may be comparable to
19 those attached to licensed data from an oil-and-gas
20 company. Professional members must understand and
21 follow all such restrictions. In the absence of
22 documentation on the restrictions, professional

1 members are advised to, at the very least, consider
2 that the author may retain the copyright."

3 And you would agree that that's an accurate
4 statement, that that was recommended?

5 A. Yes. Yes, I do agree.

6 Q. And then it goes on to say: "Where publicly
7 accessible data has been scanned, then offered for
8 sale as licensed copies, professional members should
9 be diligent in assuring that any vendor or licensor of
10 such data has been granted the right or license to
11 sell this information."

12 That's an important part of guideline to
13 tell APEGGA members?

14 A. It is an important element, but you have to
15 keep this document in context. This document was
16 authored in 2010. That is seven years prior to the
17 November 30, 2017 date. And so this document was
18 trying to provide guidance for the responsible
19 members, and the issue of copyright was already in
20 existence within the seismic community, and nobody
21 knew the essence, and it wasn't until the ruling in
22 2017 that we managed to establish that, yes, in fact,

1 Seismic Data has copyright. So this document predated
2 by seven years that.

3 Q. Yes, of course. I agree with you on that.

4 And so then just to close the loop on the
5 last part of this section: "Companies that obtain
6 publicly accessible copies of the processed or scanned
7 data have no rights, title, or interest in these data.
8 The owner of these data may retain the copyright."
9 And that's in the context of in 2010 prior to the
10 Decision. I understood your comments. But that was
11 what was being stated to APEGGA members at that time?

12 A. Yes, as guidance.

13 Q. Thank you, sir.

14 MS. LEMMENS: Those are all of my questions.

15 PRESIDENT WALLGREN-LINDHOLM: Thank you very
16 much. Will there be any redirect?

17 MR. LUZ: No, Madam Chair, there won't be
18 any redirect. Thank you.

19 PRESIDENT WALLGREN-LINDHOLM: Okay. And;
20 hence, no recross.

21 Does any member of the Arbitral Tribunal
22 have a question? Also, I don't have one.

1 Then we thank you for having come here
2 today, and thank you for your testimony, and please
3 feel free to take a seat in this row if there is a
4 place and continue following the proceedings, if of
5 interest.

6 THE WITNESS: Thank you very much, Madam
7 Chair.

8 PRESIDENT WALLGREN-LINDHOLM: Thank you. So
9 you may vacate your table. Thank you.

10 THE WITNESS: Thank you.

11 (Witness steps down.)

12 PRESIDENT WALLGREN-LINDHOLM: So the obvious
13 next question is, do we now proceed to direct
14 examination of Mr. Hobbs, or do you wish to break for
15 lunch?

16 MS. LEMMENS: We were speaking about that
17 just before we started up again after -- for the
18 second part of morning, and I believe it would be
19 beneficial for us to take the lunch now.

20 MS. TABET: We're flexible but it is a bit
21 early. So if the Tribunal wants, we can proceed, but,
22 of course, we're in the hands of the Tribunal and

1 Ms. Lemmens.

2 PRESIDENT WALLGREN-LINDHOLM: We can also
3 take a lunch hour of 1.5 hours, and then we will
4 be -- we'll still be reasonably on time. Shall we do
5 that?

6 MS. TABET: Certainly.

7 PRESIDENT WALLGREN-LINDHOLM: So then we
8 will meet back at --

9 MS. LEMMENS: May I suggest 1:15.

10 PRESIDENT WALLGREN-LINDHOLM: 1:15 p.m. You
11 may suggest. That's a good time. Thank you. 1:15
12 p.m.

13 I think there is some consultation going on
14 to my right.

15 (Comments off microphone.)

16 PRESIDENT WALLGREN-LINDHOLM: Okay.

17 1:15 p.m.

18 (Whereupon, at 11:52 a.m., the Hearing was
19 adjourned until 1:15 p.m., the same day.)

20 AFTERNOON SESSION

21 PRESIDENT WALLGREN-LINDHOLM: Welcome back,
22 everybody.

1 We will now proceed to the examination of
2 Mr. Robert Hobbs.

3 MS. LEMMENS: Good afternoon, Madam Chair
4 and Members of the Tribunal. Over the course of the
5 lunch break, at the beginning of lunch break, I
6 proposed to the Respondent that I do not need to
7 proceed with a cross-examination of Robert Hobbs,
8 given the testimony that we have now covered with
9 Mr. Uffen.

10 At that point, I left it with Canada to let
11 me know what their position was, and we liaised later
12 in the lunch break, and it is my understanding that
13 Canada would still like to present Robert Hobbs,
14 despite the fact that we, as the other Disputing
15 Party, said that we do not need to cross him. I
16 advised at that time, if he's getting up to do a
17 presentation, if that happens, I would do a
18 cross-examination because it is only fair if he's
19 doing that.

20 But, again, I reiterate that it is us who
21 calls witnesses. As we have seen many of the
22 witnesses of the Claimants have not been called at the

1 Hearing of this matter, including Chip Gill, who is
2 another Seismic Industry Expert. He was not called as
3 a witness, so he simply doesn't even present Direct
4 Presentation to this Tribunal during the Hearing.

5 I understand that it may be a question about
6 costs later on because obviously Mr. Hobbs has
7 traveled to present in the room, but that's a matter
8 that we could deal with at a later date when we
9 determine what the outcome of this matter is or when
10 we're dealing with costs.

11 So the relevant section, if you're wondering
12 out of the Procedural Order 1 is 12.4, and there is,
13 of course, discretion on the part of the Tribunal and,
14 of course, the other party could still ask to have the
15 witness present. But I think I sort of laid out the
16 state of affairs and obviously my friends on the other
17 side of the table can let you know if I've said
18 anything that they need to supplement. And we have
19 pulled up the Section 12.4 onto the screen.

20 PRESIDENT WALLGREN-LINDHOLM: Thank you very
21 much.

22 So while we revisit that, would you like to

1 say something, Mr. Luz?

2 MR. LUZ: Yeah, thank you, Madam Chair, and
3 appreciate the collegiality that we have had working
4 with Claimants' Counsel on this, and they did let us
5 know ahead of time, and then we went back and
6 considered it.

7 And so, as rightly pointed out, 12.4 says
8 that: "The Tribunal may allow in limited
9 circumstances where it is reasonable and appropriate
10 to do so, a witness offered by that Disputing Party
11 but not called to be cross-examined by the other
12 Disputing Party, or directed by the Tribunal to
13 appear, to testify at the Hearing."

14 Mr. Hobbs is here. His presentation has
15 already been submitted to the Tribunal and to the
16 other side, and he's available here, traveled to come
17 here, so the question is, is this something that the
18 Tribunal would consider being in limited circumstances
19 where it is reasonable and appropriate to do so?
20 Canada would suggest that it is, but we're in the
21 Tribunal's hands.

22 PRESIDENT WALLGREN-LINDHOLM: Thank you very

1 much. I don't think the Tribunal needs to exit to
2 discuss this, but I shall consult my co-arbitrators.

3 (Tribunal conferring.)

4 PRESIDENT WALLGREN-LINDHOLM: So having
5 deliberated and examined the clause in PO1 12.4, we
6 have decided to allow the direct and the ensuing
7 cross-examination. And thank you very much.

8 And we also appreciate the collegiality, and
9 we now ask that the Expert, Mr. Hobbs, that you get
10 seated there. And we will first check that the
11 logistics are in place. Thank you.

12 ROBERT HOBBS, RESPONDENT'S WITNESS, CALLED

13 PRESIDENT WALLGREN-LINDHOLM: Good
14 afternoon, Mr. Hobbs. Good afternoon.

15 THE WITNESS: Good afternoon.

16 PRESIDENT WALLGREN-LINDHOLM: You have been
17 sitting in here, so you've heard the introductions,
18 and the principles applied and all this, so then it
19 only is left for me to ask that you confirm what I
20 shall read to you now.

21 You heard that I explained earlier that we
22 do not administer oath in international arbitration,

1 but I would ask you to give an affirmation of your
2 independence from the Disputing Parties and from
3 Counsel and of your genuine belief in the opinions
4 that you will be expressing?

5 THE WITNESS: I agree. Yes.

6 PRESIDENT WALLGREN-LINDHOLM: Yes. Thank
7 you very much.

8 And then, Mr. Luz?

9 MR. LUZ: Thank you, Madam Chair.

10 DIRECT EXAMINATION

11 BY MR. LUZ:

12 Q. Mr. Hobbs, do you have copies of your Expert
13 Reports with you dated January 14, 2023, and
14 November 1, 2024?

15 A. Yes, I do.

16 Q. Okay.

17 I don't have any other questions for you so
18 actually -- well, you're going to put in your
19 presentation. I was going to say to introduce
20 yourself. So please go ahead.

21 DIRECT PRESENTATION

22 THE WITNESS: Super. Thank you for letting

1 me present today. Just a little bit about my
2 background. I'm a geologist by training, degrees from
3 Baylor University in Texas, and a master degree from
4 University of Southern Cal in Los Angeles. I started
5 my career as an Exploration Geologist with Exxon,
6 pre-ExxonMobil days, and worked -- spent my career
7 working with Seismic Data as an explorationist in my
8 oil-company tenure.

9 Exxon was followed by Union Texas Petroleum,
10 where I worked in Kazakhstan and Indonesia. I then
11 jumped quickly over into the service business working
12 with a full-service geophysical company, and that was
13 my first exposure in developing multi-client surveys.
14 And that was with a company called Veritas; started
15 out in Canada but then was a U.S.-headquartered
16 company.

17 Ended my career with Veritas as President of
18 Europe, Africa, Middle East, out of London. And then
19 went to Marathon Oil as their global manager of
20 geosciences and did that for a year before I was
21 recruited by TGS. You will probably have heard or
22 will hear about TGS several times in the proceedings.

1 It's -- when you think about the multi-client Seismic
2 Data industry, people think of TGS because it is
3 typically the -- thought of as the largest
4 multi-client data investor in the world historically.

5 And I started out as Chief Operating Officer
6 and then went to Chief Executive Officer for
7 seven years before I retired in that role in 2016.

8 I formed my own consulting company, Live Oak
9 Exploration, and then also simultaneously I serve as
10 Chairman of the Board of Shearwater Geoservices which
11 is the largest marine seismic acquisition company in
12 world. It's a Norwegian-based Company, it's a private
13 Company. And I'll be referring to many points made in
14 the two Expert Reports.

15 So, one thing to think about, the seismic
16 industry is just like the oil industry. It's a very
17 cyclical industry, and if you think about what really
18 drives a seismic industry, it is exploration and
19 production spending by the customer base, the
20 oil-and-gas companies, and exploration and production
21 spending is typically highly correlated to Brent oil
22 price or oil price.

1 And you can see on the chart on the right,
2 this is a chart from one of the larger expert seismic
3 industry analysts, instrument analysts, and it shows
4 global offshore seismic spending plotted against
5 offshore E&P spending, E&P being exploration and
6 production spending. And this is data that is
7 obtainable. It's -- these are surveys that are done
8 every year, and so it is pretty easy to track those
9 two trends and seismic spending is highly correlative
10 to exploration spend and to oil price.

11 You can see the impact on the 2008 financial
12 crisis where seismic spending took a pretty big hit in
13 2008.

14 It -- on the recovery from the financial
15 crisis, it increased up to probably, well, what is the
16 high point in 2013, and then, what we had was -- is
17 the Onshore U.S. shale plays came into being, and we
18 had the unconventional plays in the U.S. flooding the
19 market with oil, OPEC, fighting for market share
20 because of that flooding, and the collapse of oil
21 price.

22 And what does that do? It collapsed the

1 seismic industry pretty steeply, and so where we are
2 kind of right -- even still, if you take that chart
3 off to the 2025, where we haven't recovered much from
4 2021. The industry is at pretty much a low point, and
5 the value of a multi-client seismic company is
6 obviously going to be influenced by where you are in
7 this, in these market cycles.

8 There are really two primary commercial
9 models in the seismic industry. There's the contract
10 commercial model, which is where an oil company comes
11 directly to a seismic company and says, hey, I want a
12 survey shot over this particular area, and they do it
13 through a tender process. Several seismic companies
14 will compete for that work.

15 The oil company will deliver -- will award
16 that contract to the seismic company and the
17 surveys -- a survey occurs. The oil company controls
18 and owns that data. That is in contrast to mainly
19 what we've been hearing from and talking about today,
20 which is the multi-client.

21 You'll sometimes hear it referred to as
22 "nonexclusive" or "speculative," and that's where the

1 seismic company acquires the data with its own
2 investment. Now, it may go out and seek prefunding or
3 precommits from oil companies, and that helps reduce
4 some of the financial risk that the seismic company
5 takes, but it's the seismic company taking that
6 proactive investment.

7 They also take the permitting risk and the
8 oil companies get access to this data, not by buying
9 the data; they buy licenses to use the data. And so
10 you've heard a lot about that in the testimony
11 already, I'm sure, this week.

12 The customer obviously realizes savings
13 because they're sharing the costs of these seismic
14 surveys with their peers, or their competitors, and
15 obviously the seismic companies see benefit in this
16 model because they can continue selling licenses to
17 this data over a period of time to companies that
18 continue to be interested in it.

19 Another way to think about the seismic
20 industry as well is "asset-heavy" and "asset-light"
21 companies. The asset-heavy guys are the guys that
22 have vessels like you see on this slide here. This is

1 a slide from Shearwaters' website. This a 3D seismic
2 vessel, requires enormous capital investment.

3 These companies take on debt to be able to
4 build fleets of these vessels. One of these vessels
5 takes -- it costs about 250 million to build and
6 another 50 million to buy all the equipment, or build
7 all the equipment that you see being towed off the
8 back of that vessel. That's the streamer and the
9 seismic source equipment.

10 The guys that own these vessels have
11 capability, not only to answer tenders on the contract
12 business, but they can use their assets, their
13 vessels, to also acquire multi-client data. So they
14 kind of participate on both sides of the contract
15 models or the commercial models.

16 There has been enormous consolidation in
17 this space. You'll recall my previous slide that
18 showed the peak around 2013. There were about 58
19 active seismic vessels like this on the market in
20 2013. It is now collapsed down to about 17 - it's
21 actually 16 now because my company, Shearwater, we
22 took a vessel out of service last week, so down to

1 about 16 active vessels at present.

2 Obviously, you know, if you take on debt,
3 you take on the cost of operating and owning these
4 vessels. You're subjecting yourself to these cycles
5 that we see, these oil-price cycles that inevitably
6 impact the industry. I will make note that GSI did
7 own two of these vessels up until approximately 2011.

8 The asset-light companies, primarily because
9 they don't control and they don't own the vessel, they
10 can't really easily answer the contract tenders. So
11 they participate primarily in the multi-client market.
12 Their asset that they value is data.

13 They don't -- their main asset is not
14 vessels, but this actually gives them the ability to
15 ride these cycles out very rapidly because, if you
16 think about it, you're not tying up all your balance
17 sheet in the cost of the seismic vessels. If the
18 market collapses and demand for Seismic Data
19 decreases, you just stop investing in new Seismic
20 Data, and that's the main cost of these companies is
21 investing in new Seismic Data.

22 The primary revenue comes from licensing

1 that data from the data library. They make investment
2 decisions. I'll talk about in a subsequent slide, but
3 they do -- they build financial models that allow them
4 to forecast the success of a project that they are
5 considering to invest in, and some of the
6 considerations: Is the area I want to invest in going
7 to be geologically attractive?

8 Believe it or not, there are some areas that
9 you -- given information that we already have, you can
10 say, well, probably not likely that I'm going to be
11 successful drilling an oil well and discovering
12 hydrocarbons here. So there's going to be low demand
13 for Seismic Data, and so, therefore, it's not going to
14 be somewhere where you necessarily want to invest.

15 Also the area has to be accessible for
16 exploration and production. There is not going to be
17 a market for your data if the Governments, for
18 example, where this data is being shot is not allowing
19 drilling or allowing hydrocarbon production. And
20 there needs to be a favorable regulatory regime which
21 gives you the ability to continue to sell licenses to
22 your data.

1 So the most successful companies in this
2 space build investment portfolios. It's not unlike a
3 401(k) plan, for example. If your savings are in a
4 retirement plan where you're investing in equities,
5 you want to have a diverse portfolio of investments
6 typically is most successful, and that's what the most
7 successful geophysical or multi-client companies do.
8 They spread their risk and make diverse investments.

9 There are several ingredients for a
10 successful multi-client survey. First of all
11 favorable commodity pricing because, as I showed
12 before, high oil price means higher demand for Seismic
13 Data. You need a favorable location for your
14 investment. We already mentioned attractive geology,
15 but we need to make sure that there is, you know,
16 enough customer interest in the area to allow you to
17 sell licenses to your data.

18 There needs to be a favorable regulatory
19 environment from the Government. The data sales
20 triggers that I briefly mentioned, there is nothing
21 better for a multi-client dataset but to have regular
22 Government-driven license rounds because what that

1 does is you have acreage turnover and you have oil
2 companies continuing to be more interested in
3 licensing data.

4 Gulf of America is the perfect example for
5 that where you have hundreds and hundreds of
6 individual blocks. You have surveys, you know,
7 multi-client surveys when, when you cover hundreds of
8 these blocks. And back before the Biden
9 Administration, we had license rounds two times every
10 year. So you had multiple opportunities within a year
11 to sell licenses to interested oil companies.

12 You need to have the ability to conduct
13 drilling and production, plus, you need to have
14 reasonable confidentiality periods so that you can
15 realize your expected rate of return on your
16 investment.

17 And most -- in fact, all that I can recall
18 of the major multi-client regions around the world,
19 including Norway, the U.K., Brazil, Australia, and, in
20 in particular, the Gulf of America where the
21 multi-client model was most effective, or has been
22 most effective historically, have confidentiality

1 periods that vary. Gulf of Mexico -- Gulf of
2 America -- I should say, of course, is a period that's
3 longest, 25 years, before data is released to the
4 public. And that's largely because of the maturity
5 and the prospectivity of the Gulf of America. The
6 knowledge that we have that's a very prolific basin,
7 and the Government obviously, therefore, does not have
8 the need to promote that particular basin to the
9 public because it's -- there's already a good market
10 for exploration there.

11 And as I mentioned, successful multi-client
12 companies have high-quality diverse portfolios. You
13 want to make sure you don't put all your eggs in one
14 basket so that you might be subject to moratoriums and
15 items like that.

16 There are a couple of different types of
17 sales that we see from in the multi-client business.
18 You have prefunding, which is the precommits you get
19 from oil companies before you start your investment,
20 and then you have late sales. This is sometimes
21 called "after sales."

22 And the late sales come after you started

1 acquisition of the project, and the largest part of
2 the revenue stream that you see from these
3 multi-client projects comes very early in their
4 history, typically over 80 percent actually. And I'll
5 show you an example in the following slide, but
6 typically over 80 percent of multi-client sales come
7 within that first five-year period after you've
8 started making your investment.

9 And so, what's important for these
10 multi-client companies to be successful is to continue
11 to invest because you have a decline rate. You're
12 seeing all your revenues in those first few years, and
13 then your revenues decline. So you need to make sure
14 you continue to invest to keep that revenue stream
15 going over -- as long as you want to remain a going
16 concern as a multi-client company.

17 These are just three charts from Annual
18 Reports from TGS. I included just these three Annual
19 Reports because they happen to be included in the case
20 work, and so you guys have copies of this. But these
21 are charts that show vintage of TGS's multi-client
22 data library, and it shows the revenue per vintage

1 that is seen in each year, and I show 2009, 2012, and
2 2017. And you can see in all those you have over
3 80 percent within those years -- over 80 percent of
4 your revenue is achieved in the first four years of
5 any particular vintage.

6 This is a common pattern that's seen
7 globally in the industry.

8 One reason is to -- is there's a limited
9 customer base, as I believe Mr. Uffen described,
10 particularly in areas that are frontier, that are
11 high-cost like off the east coast of Canada, and those
12 limited customers that are going to be able to explore
13 there are going to be the customers that get that data
14 first and start exploring first. And then, of course,
15 over time, you may sell, continue to sell licenses to
16 the data. And don't get me wrong -- there could
17 be -- I had a survey in the Gulf of America that sold
18 over, you know, continued selling for 20 years, but,
19 as a whole, on average, the bulk -- the vast bulk of
20 the revenues come in the first five years.

21 We've already talked about the limited
22 customer base, particularly in frontier regions like

1 offshore Canada. Continued investment is not only
2 needed to maintain that revenue stream for these
3 multi-client companies, but, also, it's kind of like
4 real estate, too. Once you establish a presence in a
5 particular basin, you want to make sure your
6 competition doesn't come and acquire data over you
7 with the same kind of technology.

8 Where we do see overlap in surveys is
9 typically where you have an older survey and another
10 company comes in with newer technology and acquires
11 data on top, and, of course, that diminishes the value
12 of the older data because you have newer, presumably
13 better data that is acquired over the previous data.

14 Technology advances significantly over time
15 in our industry. All the major geophysical companies
16 do R&D, particularly in the processing part of our
17 business, and as well as acquisition, and there are
18 specific types of technology that need to be used and
19 specific geologies. So it's not just a global
20 situation where you have a certain type of geophysical
21 acquisition that is particularly useful, but there are
22 certain geological settings, complex geological

1 settings around the world that take certain
2 specialized technologies that get developed.

3 So a couple of comments on, my perception,
4 my view of a GSI's position in this industry. The GSI
5 portfolio is quite focused, and it's relatively small
6 to most global multi-client companies. It's less than
7 5 percent of TGS's library size, for example. It's
8 very focused, predominantly in offshore Canada, but it
9 was clear that, at some point, GSI had the motivation
10 to invest internationally. In fact, their largest 2D
11 dataset and their data library is offshore Falklands.
12 So there was clearly a motivation to go global outside
13 of Canada at some point.

14 Much of their library is in areas that are
15 currently off limits to exploration, and I learned
16 this morning through an exchange that that's reviewed
17 periodically, so that was good to hear. But, for
18 example, there's certain areas that are currently in
19 moratorium, like the Artic. There are areas that are
20 very frontier, and there has not been a lot of recent
21 exploration interest like offshore Labrador, and also
22 in areas of significant competition like Newfoundland

1 and Nova Scotia.

2 The age of the library is quite old, over
3 50 percent of the library was acquired in the late
4 1970s and 1980s with -- and this was the part of the
5 library that was acquired from the Old GSI, or
6 Halliburton, and it was with older technology. It's
7 not clear, as was talked about earlier today, too,
8 it's not clear what the condition of the original
9 Field Data is in the material that I viewed, and there
10 doesn't seem to be, particularly in Ancira's
11 Report -- he's with Troika, but he doesn't seem to
12 independently verify how much of that original Field
13 Data is suitable for reprocessing.

14 GSI's competition has been very active in
15 Canada and the areas in which they've invested.

16 It has been active since the late 1990s.
17 There had been actually companies acquiring offshore
18 data in Canada since the 1970s, but especially since
19 2011, new acquisition has occurred with new
20 technology. That's not only 2D surveys, but also a
21 lot of 3D surveys over the same area in which GSI has
22 dominated for many years. This competition has moved

1 in quite aggressively over the past 20 years, I would
2 say, certainly since the late 1990s.

3 The valuations that are considered for this
4 library need to account for the cycles I have already
5 described. They need to account for age and quality
6 of the library. I believe next week you're going to
7 hear testimony from PwC. They did a valuation on the
8 GSI library. I think, you know, it needs to be
9 recognized that depreciation, as I've already
10 described, how revenues typically trail off very
11 quickly over a period of time, that needs to be taken
12 into account in any valuation. Competitive pressures
13 need to be taken into account when you're looking at
14 a -- valuing a data library. Any exploration
15 restrictions or moratorium areas need to be taken in
16 account, and areas with limited exploration interest
17 need to be considered as well.

18 Also, fundamentally, I mean, our -- the '27
19 offshore seismic spending -- or the 2017 offshore
20 seismic spending is half of what it was in 2009. So I
21 know GSI ceased any kind of meaningful investment in
22 new Seismic Data in 2009, and, in my previous slide,

1 you saw how the market has significantly declined
2 since that period and even more so since 2013.

3 That's all I have to present today. Thank
4 you.

5 PRESIDENT WALLGREN-LINDHOLM: Thank you very
6 much, Mr. Hobbs.

7 So, then, Ms. Lemmens.

8 MS. LEMMENS: Thank you, Madam Chair.

9 CROSS-EXAMINATION

10 BY MS. LEMMENS:

11 Q. Thank you for your presentation, Mr. Hobbs.
12 So because you have presented, I am going to
13 cross-examine you. I just want to start with some
14 basics. You did not provide a valuation of GSI's
15 business in your Reports; correct?

16 A. That's correct, yeah.

17 Q. And you did not provide a valuation of GSI's
18 Seismic Data collection? I use the word "collection"
19 rather than "library."

20 A. That's correct.

21 Q. Do you believe that you have the expertise
22 to do either of those types of valuations?

1 A. I have not done a detailed valuation in my
2 career, so probably not.

3 Q. Did you ask your client, Canada, to review
4 GSI's Seismic Data for the purposes of your Report?

5 A. No. I was not asked to review their data
6 specifically.

7 Q. And I asked that question because you had
8 made some comments about potentially the maintenance
9 and storage of the data and maybe the quality of the
10 data, but you do not actually know any of those
11 factors with respect to GSI's data collection;
12 correct?

13 A. That's correct.

14 Q. How did you come to be hired by Canada in
15 this Arbitration?

16 A. I think Canada were looking for an
17 independent Expert that knew the business, the
18 multi-client business, and they reached out to me to
19 see if I'd be interested in testifying as an Expert
20 Witness.

21 Q. And do you know any Canadian Government
22 officials in the Newfoundland area?

1 A. No.

2 Q. Okay. Sir, you made a comment during your
3 presentation about how PwC, Paul Sharp, did not appear
4 to look at certain factors in valuing GSI's Seismic
5 Data library -- I think is what you had said,
6 something like that -- but you realized that PwC, in
7 fact, did not provide a valuation of GSI's Seismic
8 Data collection?

9 A. No. They provided a valuation on the
10 company itself and on the business itself. And,
11 again, as I presented, the real value of these
12 asset-light multi-client companies is the value of
13 their library.

14 Q. But it could also include the value of their
15 processing center or the value of their seismic
16 vessels if they have those things?

17 A. Certainly. Yes. Absolutely.

18 Q. Sir, you are familiar with volume discounts
19 being applied to the licensing of Seismic Data?

20 A. Yes.

21 Q. And volume discounts are applied to
22 licensing Seismic Data when you're licensing

1 significant volumes of Seismic Data?

2 A. Yes.

3 Q. Volume discounts would be applied based on
4 licensing all or most of a survey or maybe, perhaps,
5 many surveys?

6 A. It could probably be both, and if you're a
7 publicly traded seismic company like I ran, you may
8 really need to make a quarter, so you do a volume
9 discount really quick on really anything.

10 Q. But, generally speaking, in practice, you
11 would try to avoid doing a volume discount on small
12 portions of many surveys because that would be
13 considered cherry-picking?

14 A. I think -- I can't say yes or no about that
15 because, in my experience, I know many examples where
16 oil companies have bought portions of
17 global -- portions of surveys from a global library,
18 and they will get a discount.

19 Q. But it's not necessarily a common practice
20 that you would be allowed to, as a licensee,
21 cherry-pick from a bunch of surveys when you're
22 licensing and also ask for a big discount?

1 A. I would push back on that in running a
2 seismic company, yeah.

3 Q. Yeah.

4 A. Yeah.

5 Q. In your initial Report, you discuss the
6 model MDLA, or Master Data License Agreement?

7 A. Yes.

8 Q. I'm sure you're very familiar with it?

9 A. Yes.

10 Q. And isn't it true that the business
11 model -- and I think you even have said this in your
12 presentation, but I just want to confirm -- it's the
13 business model of a multi-client seismic company to
14 license a Seismic Data set more than once?

15 A. Yes.

16 Q. It's good business of a multi-client seismic
17 company to license the same dataset to more parties
18 than just one then?

19 A. Absolutely.

20 Q. You're making more money on the same data
21 set. You're getting more of a profit there?

22 A. Sure. Yeah.

1 Q. And so, you're familiar also with the
2 concept of exploration groups or "farm-in" agreements
3 whereby, if parties are looking to split the risk on a
4 specific opportunity, they will potentially have
5 clauses in their license agreements that require their
6 partners to pay for a license?

7 A. Yeah. But, in my experience, what
8 we -- what I have most often encountered is, when you
9 make an investment decision in licensing a survey to
10 an oil company as a prefunder, you may make that
11 decision knowing or speculating that there are going
12 to be additional partners coming into the lot. So you
13 mainly, in my experience you're expecting another
14 customer to come in and actually license the data
15 independently.

16 Q. Yes, of course.

17 A. Buy their own license, yeah.

18 Q. You want to get as many licenses as you can
19 to the data?

20 A. Correct. Right.

21 Q. And this is no criticism, but if you could
22 just wait until I end my question and then answer,

1 because our friend in the corner has to transcribe all
2 of this.

3 A. Okay.

4 Q. Thank you.

5 And so, exploration groups can involve two
6 partners, they can involve four partners, they could
7 even involve more than that?

8 A. Yes.

9 Q. And so, I just wanted to look at
10 Paragraph 71 of your Report because I think you
11 confirm what I'm saying here, sir. Other revenue
12 streams may come from the activity of customers that
13 have already licensed the data. In most high-cost
14 offshore regions, it is quite rare that an oil company
15 will drill an exploration well and develop a
16 discovered field without attracting partners to help
17 fund the project called a "farm-in." As discussed
18 earlier, the Licensee may be allowed, under the MLA,
19 or the Master License Agreement, to show the data,
20 under limited conditions, to potential partners in
21 order to attract interest in the asset covered by a
22 survey. If a farm-in occurs, the new company entering

1 the partnership will be required to buy a license to
2 the Seismic Data if they wish to use the data. This
3 farm-in activity can result in a significant revenue
4 stream for the multi-client Seismic Data company.

5 And I think that's confirming what we were
6 just discussing?

7 A. Yes.

8 Q. Transfer fees are also a common term in
9 seismic license agreements?

10 A. Yes.

11 Q. And other common terms relate to the ways in
12 which the Licensee can show the data to third parties?

13 A. Yes.

14 Q. In your initial Report, you had suggested
15 that TGS is often thought of as the company that was
16 primarily responsible for the inception of
17 multi-client seismic business model?

18 A. Yes.

19 Q. And you say that TGS has also been the
20 largest consistent investor in the multi-client
21 business?

22 A. Yes.

1 Q. But isn't it true that Old GSI, or
2 Halliburton GSI and CGG were licensing Seismic Data
3 before TGS was founded in 1981?

4 A. I'm not sure when CGG or GSI got into the
5 multi-client business. So I can't answer that
6 question. I'm not sure when they entered the
7 business.

8 Q. Okay. But would you agree that Old -- or
9 Delaware GSI and CGG were around before 1981?

10 A. Oh, yeah. They were around in -- 1930s is
11 when they started.

12 Q. And, in fact, CGG and GSI were quite
13 dominant in the Seismic Data market in those times?

14 A. Yes.

15 Q. You would agree with me that, if there is
16 interest in exploring in a particular area in the
17 offshore for oil and gas, that the Seismic Data in
18 that area may have some value?

19 A. Yes.

20 Q. And if there was a lot of exploration
21 interest in the Canadian offshore, then a multi-client
22 seismic company operating in the Canadian offshore

1 region could have a lot of value?

2 A. Can you repeat that question again?

3 Q. If there was a lot of exploration interest
4 in the Canadian offshore, then a multi-client seismic
5 company operating in the Canadian offshore could have
6 a lot of value regardless of what they own in other
7 areas?

8 A. Yes, but as long as they have a uniquely
9 superior copy of data in that particular area from
10 their competition.

11 Q. And you would agree with me that 2D Seismic
12 Data is more prevalent globally than 3D Seismic Data?

13 A. Yes, but primarily because of history and
14 because the 2D data is a much -- that technology is
15 back from the early days. And 3D data, 3D
16 multi-client really didn't come in to play until
17 probably the early 2000s in the Gulf of Mexico.
18 That's when we first started seeing 3D multi-client
19 being acquired.

20 Q. Are companies still exploring in Canada's
21 offshore regions?

22 A. Well, I can say that my company, Shearwater,

1 we just acquired a survey for Exxon over Hibernia. So
2 I know they're doing still work off the east coast of
3 Canada. Correct.

4 Q. And given you are from the United States,
5 and I heard you say the Gulf of America -- we aren't
6 necessarily saying that in Canada, but that's okay.
7 So you have said that the U.S. uses a 25-year
8 confidentiality period for its offshore Seismic Data
9 because that term -- and this is coming from one of
10 your Reports -- reflects the exploration and
11 production maturity of the most prolific basin in the
12 U.S., the Gulf of Mexico?

13 A. Yeah.

14 Q. Before it became the Gulf of America?

15 A. I wrote the Report prior to November of
16 2024.

17 Q. Right. But the 25-year confidentiality
18 period that the U.S. Government uses, with respect to
19 its Seismic Data, is in order to protect the Seismic
20 Data for a period of time in which it might be
21 anticipated that there would be a return on
22 investment?

1 A. I think any confidentiality period -- that's
2 the reason for the confidentiality period is to
3 protect the investor from exposure of the data. So
4 that they can continue to see revenue during that
5 confidentiality period of time.

6 Q. And I just wanted to turn to
7 Paragraph 76(4)(c) of your initial Report. And here
8 you say, part way through your paragraph there,
9 sir: "After expiration of the applicable
10 confidentiality period for the multi-client survey,
11 when information submitted to the Government is
12 available for general release to the public, it will
13 generally no longer carry any significant value to the
14 multi-client seismic company unless what is publicly
15 released is of inferior quality to what is still
16 exclusively available under license from the
17 multi-client seismic company. For example, digital
18 SEG-Y or raw Field Data, or if the data can be
19 subsequently reprocessed and resold to new customers
20 without immediate public disclosure."

21 And so you would agree that, in fact, there
22 is a loss of significant value to the multi-client

1 seismic company after a period of confidentiality
2 expires?

3 A. Yes.

4 Q. Sir, I'd like to turn to Figure 1 in your
5 Report.

6 Oh, my colleague here Ms. Lyseng is
7 identifying that it is marked as confidential.

8 Figure 1. There's a couple figures in
9 Mr. Hobbs' Report that are marked confidential.

10 A. This is the original Report?

11 MS. LEMMENS: It is.

12 SECRETARY FISCHER: Our Zoom operator has
13 moved the officials that don't have access to
14 confidential into a waiting room.

15 MS. LEMMENS: Thank you.

16 (End of open session. Confidential
17 information follows.)

18 CONFIDENTIAL SESSION

19 [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

22 Q. Sir, in your First Report, you had a graph

1 at Figure 3.

2 You should be able to see that on the screen
3 now, sir.

4 A. Yes, I do.

5 Q. And this graph was intended to display the
6 international seismic vessels in the world?

7 A. Yes.

8 Q. Did you --

9 A. Yes. Yes. Total global fleet, yeah.

10 We'll say 3D fleet. It does not include 2D
11 fleet.

12 Q. Okay. And I think that's probably where my
13 questions were geared because I don't see GSI's two
14 seismic vessels counted in this chart, which were
15 available in the earlier years of this chart.

16 A. You will see that I have a category called
17 "Other." So they are probably in that "Other"
18 category.

19 Q. I see the category "Other," but when I look
20 at 2006 and I look at the light gray, which is
21 "Other," it appears that there would only be one. And
22 GSI had two seismic vessels.

1 A. Yeah. I can't quantify that number from
2 this graph right here, but -- I have to say, I'm not
3 positive that GSI was included in "Other" in this
4 graph because it's not my graph. The analyst made the
5 graph.

6 Q. Right. And it maybe doesn't focus on all of
7 the 2D seismic vessels. It is maybe only 3D?

8 A. It focuses on 3D, yeah.

9 Q. Right. Okay. So this is not necessarily a
10 full and accurate account of the global potential or
11 available seismic vessels in the world when we talk
12 about 2D and 3D?

13 A. Can you scroll down to the caption. Is
14 there a caption below that?

15 Q. Yes. Of course.

16 A. Yeah, he says active marine vessels. I
17 believe it is just 3D. But I will say I thought one
18 of the, the GSI claimed that one of their vessels
19 could acquire 3D data.

20 Q. That is right.

21 A. Yeah. So presumably they're either in
22 "Other" or they are not in this chart.

1 Q. But you didn't create the chart?

2 A. I didn't create the chart, no.

3 Q. So pricing for licensing Seismic Data is
4 typically determined from a price list built and
5 maintained internally by the seismic company and only
6 discounted if the customer is purchasing a license
7 with other projects owned by the seismic company;
8 right?

9 A. Or if you need sales at a particular time,
10 as I mentioned before.

11 Q. About the volume discounts?

12 A. No. I'm just saying, you have price lists,
13 but there's a lot of negotiation in our business.
14 There are a lot of times when, in my experience, where
15 the seismic companies deviate from those price lists.

16 Q. Did you review GSI's price lists in this
17 proceeding?

18 A. I only saw a couple of them. I didn't study
19 all of them in detail.

20 Q. Okay. And did you ask to review them or how
21 did that go?

22 A. No. I wasn't asked to do that and I didn't

1 ask to do that.

2 Q. Okay. But you were provided a handful of
3 some?

4 A. I ran across some, yeah.

5 Q. Yeah.

6 A. I did see, when I ran across them, it was in
7 the context of seeing that they did have volume
8 discounts built into their price list, the ones that I
9 saw.

10 Q. But otherwise the prices -- did you notice
11 that they appeared to be out of the ordinary, or were
12 they sort of what you would expect on a price?

13 A. To be able to answer that, you have to know
14 the region. You have to know the dataset. You have
15 to know the investment, and I'm -- because I don't
16 know those things, I can't really answer that
17 question.

18 Q. Okay. So, sir, you've talked about there
19 being less seismic vessels available in the industry
20 in more recent times, yes?

21 A. Yes.

22 Q. And so when there's less seismic vessels

1 available, there is higher demand for the use of those
2 seismic vessels because there is just not as many
3 available? It's a supply and demand?

4 A. No, not necessarily. In fact, there is
5 quite a bit of oversupply now, even though we have
6 less vessels in the global fleet. So, for example,
7 Shearwater, they are only using half their vessels
8 that they have in their fleet right now. The rest are
9 stacked. So just because you're seeing -- you've seen
10 a consolidation, you've seen a lot of bankruptcies,
11 you've seen a lot of scrapping of vessels, but there
12 is still oversupply in the market.

13 Q. Now, I think you also noted in your First
14 Report that the seismic vessels can cost 250 million
15 U.S. dollars these days?

16 A. Your high-end 3D seismic vessel around about
17 that much. PGS has a specific design that they use
18 which is probably more expensive than that, closer to
19 300 million.

20 Q. Those are staggering numbers.

21 So those are -- there is obviously a
22 significant value in those assets themselves, the

1 seismic vessels?

2 A. Yes. And these companies often take on
3 quite a bit of debt to be able to build those fleets.

4 Q. Now, you spoke in your presentation, sir,
5 about asset light multi-client seismic companies. And
6 so, just to recall, those are the types of companies
7 that have little to no equipment such as seismic
8 vessels and they, instead, charter vessels or they
9 rent equipment?

10 A. Correct. Yeah.

11 Q. But it is obviously possible to have a
12 seismic company with both the seismic acquisition
13 assets and licensing multi-client seismic surveys?

14 A. Yes.

15 Q. You mention in your Reports that TGS was one
16 of those multi-client asset light businesses?

17 A. I did, but they no longer are because they
18 have now bought PGS in the summer of -- well, the deal
19 closed in August of 2024.

20 Q. Right. So last year TGS bought PGS who had
21 some seismic vessels, about seven of them?

22 A. PGS were an integrated seismic company, so

1 they had both vessels and a multi-client data library,
2 and TGS bought the whole thing and so now TGS is a
3 full service -- what we call a full-service
4 geophysical company.

5 Q. And that was considered to be a significant
6 shift in the business strategy of TGS from chartering
7 seismic vessels to actually owning them?

8 A. Correct.

9 Q. That's because the market has shifted in the
10 past decade to be one that relies on more of a
11 complementary approach to seismic acquisition and
12 seismic licensing?

13 A. Probably more due to the fact that oil
14 companies are focused on paying back dividends and
15 buying back shares versus exploring new basins doing
16 frontier exploration, which is where the multi-client
17 business model really thrives where you are doing
18 frontier exploration.

19 The companies lately have been focusing on
20 what we call infrastructure-led exploration where
21 they're drilling wells off of their existing platforms
22 for new pockets of oil, or they are focused on the

1 onshore, the shale plays of the U.S., which doesn't
2 benefit this industry whatsoever.

3 Q. The offshore, you mean?

4 A. The onshore U.S. production doesn't benefit
5 the offshore.

6 Q. Right.

7 A. And so we have seen a severe decline in
8 exploration spending because of that, and so the
9 traditional multi-client business has not been
10 successful recently. There has been little investment
11 in traditional multi-client projects.

12 Q. Sir, you were the Chairman of the
13 International Association of Geophysical Contractors,
14 I think just after Chip Gill --

15 A. Yes.

16 Q. -- left that post?

17 A. No. Chip Gill was President while I was
18 Chairman.

19 Q. Okay.

20 A. In fact, I was there when Chip left. I was
21 Chairman when Chip left the organization.

22 Q. And in that role, with that association, you

1 advocated for the industry of geophysical contractors?

2 A. Yes.

3 Q. The IAGC is concerned with advocating for
4 Seismic Data companies' rights in the oil-and-gas
5 exploration industry?

6 A. Yes.

7 Q. And what issues would you advocate about?

8 A. Spent most of our time advocating on the
9 right to explore in certain countries, working with
10 governments, lobbying with government. I spent a
11 considerable amount of my time in Washington, D.C.,
12 lobbying for the opening of the Atlantic to
13 exploration.

14 We also, as probably has been described in
15 the case here, we design sort of the templates for the
16 MLAs, the Master License Agreements and the Supplement
17 Agreements, and so, the cooperating -- you know, the
18 member companies sort of agreed upon general templates
19 for those, but for the most part, it was lobbying with
20 governments on access.

21 Q. On access to exploring in certain areas?

22 A. Correct. Yeah.

1 Q. But in that industry association, they also
2 work to protect the value in their Seismic Data
3 investments?

4 A. Sure. Yeah.

5 Q. And they also look to protect it using
6 things like copyright or confidentiality in the MLAs?

7 A. That was integrated in the MLA templates,
8 yeah. The confidentiality was. We didn't use the
9 word "copyright" very much interestingly enough in the
10 IAGC.

11 Q. Did you know that Seismic Data was
12 copyright?

13 A. I'm not a copyright lawyer, so I can't say
14 that. And again, we don't use the word "copyright"
15 that much.

16 Q. Did you learn of the first court decision to
17 recognize copyright in Seismic Data in 2016?

18 A. No. I'm not familiar with that.

19 Q. You were the CEO of TGS from 2008 to 2016?

20 A. '16, yes. Yeah.

21 Q. And you mentioned throughout your Reports
22 TGS's business practices and revenues?

1 A. Yes.

2 Q. Do you hold shares in TGS as part of your
3 retirement package?

4 A. No longer, no.

5 Q. When did you stop holding them?

6 A. Probably 2017, shortly after I retired.

7 Q. TGS did significant work in the Canadian
8 offshore during your time with the company?

9 A. Yes.

10 Q. TGS was creating 2D seismic surveys offshore
11 Newfoundland from the early 2000s until even after you
12 left the company up until 2019?

13 A. I can't speak to after I left for the
14 company, but, yes, we were in -- I believe we didn't
15 really start investment in that 2D data until probably
16 around 2011, to my recollection.

17 Q. TGS was conducting much of the offshore
18 seismic work in Canada's market while you were with
19 the company?

20 A. I don't know volume wise, but I know TGS was
21 acquiring data in offshore Canada from 1998, so there
22 had been a considerable amount of data that was

1 acquired prior to my tenure at TGS.

2 Q. And that was a significant proportion of the
3 Seismic Data that was being created at those times in
4 Canada?

5 A. I don't know what competition was doing, so
6 I can't really comment on that.

7 Q. You do call throughout your Reports that GSI
8 was a competitor of TGS in the Canadian offshore
9 areas?

10 A. Not while I was -- not during my tenure.
11 But I assume they were competitors before my tenure at
12 TGS. If TGS were acquiring data in the late 1990s.

13 Q. Well, in your Second Report -- we can take
14 you there -- to Paragraph 6. You were aware of some
15 litigation between GSI and TGS?

16 A. Yes.

17 Q. And were you told the quantum at stake in
18 that litigation as part of the financial reporting,
19 given that you were the CEO?

20 A. I don't recall being informed about the
21 quantum. If I was informed, I don't recall what that
22 was.

1 Q. And so if TGS was no longer a competitor of
2 GSI in the Canadian market, that would have been good
3 for TGS's business; right?

4 A. Repeat that question again.

5 Q. If GSI [sic] was no longer a competitor of
6 GSI, that would have been good for TGS's business in
7 the Canadian Offshore?

8 A. If TGS were no longer competitors against
9 GSI would be good? Not necessarily, but it is always
10 good to be operating in an area where you have less
11 competitors, yes.

12 Q. Do you believe that TGS took over some
13 market share from GSI, after GSI stopped creating new
14 Seismic Data in Canada?

15 A. TGS continued to invest in Canada, and GSI
16 stopped investing, so my conclusion would be, yes,
17 market share was taken by TGS.

18 Q. And so TGS has also done some work for the
19 Canadian government?

20 A. Directly for the Canadian Government, I
21 don't know. I don't know. I don't recall any work
22 directly for the Government.

1 Q. And maybe I should be more clear. With the
2 Newfoundland Government? Did it partner with the
3 Newfoundland Government with respect to acquiring new
4 Seismic Data offshore there?

5 A. Well, I think certainly TGS would have had
6 to get permits to acquire new Seismic Data anywhere
7 where they would be acquiring data, but -- they would
8 be just working with the Newfoundland Government like
9 we worked -- like TGS works with any government when
10 they are getting a permit to invest there.

11 Q. Well, in fact, didn't TGS partner with the
12 Newfoundland Government to have the Newfoundland
13 Government also partly invest in the multi-client
14 seismic surveys that TGS was making there?

15 A. I'm not aware of that, no.

16 Q. Did TGS use any of GSI's Seismic Data that
17 was available at the Boards to plan its own seismic
18 surveys in offshore Newfoundland areas?

19 A. Not that I'm aware of.

20 Q. And what was your awareness of Canadian
21 operations of TGS?

22 A. In 2011, our project developers came to me

1 with some ideas to invest in 2D and 3D and
2 offshore -- off the east coast of Canada. There was a
3 need from a geologic standpoint to have a specific
4 type of technology, which TGS did not own and did not
5 operate with. And in order to get access to that
6 technology, we were forced to partner with one of our
7 competitors, which was PGS, which aggravated the heck
8 out of us.

9 And so we jointly invested with TGS -- well,
10 TGS jointly invested with PGS from 2011 until the time
11 I left. In both new 2D and new 3D in Newfoundland,
12 Labrador, I think just Newfoundland and Labrador. I
13 don't think we were acquiring anything in Nova Scotia
14 at the time.

15 Q. Right. Okay. And so TGS has over
16 270,000 kilometers of 2D Seismic Data in the Canadian
17 offshore that it acquired between 1998 to 2003 and
18 2011 to 2019?

19 A. I don't know those numbers specifically,
20 but, yeah, they acquired a lot of data during those
21 periods.

22 Q. Okay. It was actually in your Report --

1 A. Okay.

2 Q. -- the Rejoinder Report at Paragraph 22?

3 A. Well, then I agree with it.

4 Q. Okay. Just at the very end there, you cited
5 that information that I was just stating.

6 A. Okay. Good.

7 Q. So TGS clearly believed that the Canadian
8 offshore seismic market was a good one to be involved
9 in to obtain that much data in that area?

10 A. Yes.

11 Q. And TGS, just to clarify, as you say, it was
12 creating 2D data and not 3D data in that offshore
13 area?

14 A. I think we acquired in our partnership -- in
15 our partnership with PGS, I do think we acquired 3D
16 data during the period of 2011 and 2019.

17 Q. Okay. But is the 270,000 kilometers --

18 A. That's just 2D.

19 Q. That's just 2D?

20 A. Yeah.

21 Q. Okay. So that's quite a bit of data in that
22 area?

1 A. Yes.

2 Q. And TGS was creating 2D data in offshore
3 Canada up until 2019?

4 A. I can't speak from after 2016, but, yes,
5 2019. Yes.

6 Q. I'm just taking your word for it, sir.

7 A. Yes. Yes. I understand.

8 Q. So how much did it cost to create 2D in
9 offshore Canada during that timeframe?

10 A. Gosh, I don't remember the investment
11 numbers. I'm sorry, yeah.

12 Q. Okay. And you don't have a rough estimate
13 or ballpark of that number?

14 A. No. it's been too long ago.

15 Q. Are we talking in the order of magnitude of
16 hundreds of dollars per kilometer?

17 A. I'm sorry. I can't answer that question. I
18 don't recall the numbers.

19 Q. Okay.

20 A. We're talking, you know, of an overall
21 investment during that overall period, you're talking
22 tens of millions of dollars.

1 Q. Okay. Great. Thank you.

2 And do you understand that it was GSI's
3 accounting practice to expense Seismic Data in the
4 year it was created so that they did not need to
5 amortize it over years?

6 A. Canadian Counsel informed me of that, yes.

7 Q. And I think you sort of spoke to this when
8 you were making your presentation, sir, but it seems
9 clear that Seismic Data does not become obsolete at
10 any specific year. It is always possible to have
11 sales for several years, many years, depending on the
12 area and the interest?

13 A. Yes.

14 Q. Are you aware of Exxon and Imperial's mega
15 merge 3D reprocessing project in Newfoundland in 2013?

16 A. No.

17 Q. Okay. I just thought you might have known
18 about it, given that you were at TGS and TGS was
19 working in the Newfoundland area.

20 A. Yeah, I don't recall that specific one.

21 Q. Sir, you had commented in your Second Report
22 about PwC -- you had suggested that they overestimated

1 the revenues on the Valuation Dates of 2017 and 2022
2 by at least two times, and you based that on TGS's
3 revenues declining by 50 percent in that timeframe.

4 Do you recall that?

5 A. If you can pull that Report up there,
6 please.

7 Q. Yeah. Paragraph 77 of his Second Report.
8 Then if you see at Paragraph 78.

9 A. Hang on. Let me read 77 real quick. Okay.

10 Q. And so that is just simply a comparison to
11 TGS's revenue there?

12 A. It is, but it is also referring back to
13 overall E&P spending and offshore seismic spending, as
14 I discussed in my First Report.

15 Q. But, as we know, TGS was still collecting 2D
16 data in the Newfoundland area up until 2019?

17 A. Yes.

18 Q. So this isn't a comment necessarily about
19 the Canadian offshore space; it's a comment comparing
20 about global?

21 A. Correct.

22 MS. LEMMENS: If I could have just a short

1 break to liaise with my colleagues, that would be
2 beneficial.

3 PRESIDENT WALLGREN-LINDHOLM: Does that mean
4 five minutes about? Okay. Thank you.

5 MS. LEMMENS: Thank you.

6 (Brief recess.)

7 PRESIDENT WALLGREN-LINDHOLM: So,
8 Ms. Lemmens?

9 MS. LEMMENS: Thank you.

10 BY MS. LEMMENS:

11 Q. Those are all my questions for you,
12 Mr. Hobbs.

13 A. Thank you.

14 PRESIDENT WALLGREN-LINDHOLM: Thank you very
15 much.

16 And will there be any redirect from Canada?

17 MR. LUZ: Thank you, Madam Chair. There
18 will be no redirect.

19 PRESIDENT WALLGREN-LINDHOLM: Okay. Then we
20 will thank you, Mr. Hobbs, for having come here today.
21 Traveled apparently.

22 THE WITNESS: Yes.

1 PRESIDENT WALLGREN-LINDHOLM: And if you
2 wish to sit in during the continuation, you are
3 obviously very welcome, but you shall need to vacate
4 your seat. Thank you.

5 (Witness steps down.)

6 PRESIDENT WALLGREN-LINDHOLM: So it now
7 seems that we have reached the end of this week. I
8 trust that the Counsel may be eager to get to another
9 place for this weekend. The Tribunal has one matter
10 to discuss, and then I will just look briefly at the
11 schedule for next week, but before doing that, I'll
12 ask Claimants if there is anything you had in mind.

13 MS. LEMMENS: No. I don't think so. We had
14 not intended -- we didn't know how today would go, and
15 so we had not asked for PwC to be present to start
16 this afternoon, and I hope that that's probably a
17 welcome thing for everybody in the room.

18 PRESIDENT WALLGREN-LINDHOLM: I will say as
19 much, that it is at least okay. Thank you.

20 And Respondent?

21 MR. LUZ: Nothing from us, Madam Chair.

22 PRESIDENT WALLGREN-LINDHOLM: Nothing from

1 us.

2 Then, let's look just quickly then at the
3 next week. We will start 9:30 a.m. on Monday,
4 10 March, and we will have PwC, and then The Brattle
5 Group -- we have Monday, Tuesday, and then we will
6 have a break day, and then we will have Closing
7 Presentations and further Tribunal instructions on
8 Thursday. So Wednesday will be a free day.

9 The Tribunal will assume that the schedule
10 stands, but we will obviously be reading emails over
11 the weekend if there are any changes or if the parties
12 have had further discussions which are obviously
13 always welcome. So we will be reading you in case.

14 MS. LEMMENS: In the event that the Tribunal
15 was wondering what has happened with respect to the
16 question raised about whether Brattle would have a
17 further submission, Mr. Luz and I have spoken and we
18 disagree about whether there can be a Brattle further
19 submission at the time that the written closing
20 occurs. So we are well aware of each other's
21 position, and I think we have just left it at that.

22 PRESIDENT WALLGREN-LINDHOLM: So should we

1 assume that you might continue, or would you like to
2 tell us what the positions are? Do you want our
3 position on it or shall we leave it as it is?

4 MR. LUZ: I think it is fine to leave it as
5 it is, Madam Chair. Yeah.

6 PRESIDENT WALLGREN-LINDHOLM: Good. Okay.

7 So then -- yes, Ms. Tabet.

8 MS. TABET: Madam President, I don't want to
9 interrupt if you have other things. So it can go on
10 later, I think it -- just for the schedule, we were
11 wondering -- and for our own preparation, we were
12 wondering if we could expect any questions over the
13 weekend from the first part of this week.

14 PRESIDENT WALLGREN-LINDHOLM: Over the
15 weekend? I speak under the control of my
16 co-arbitrators, but, no, I do not think so. But you
17 will get one now, but we had not planned to send you
18 any questions over the weekend, no. Okay.

19 So now, as I just flagged, the Tribunal has
20 identified a few Authorities that we believe are not
21 on record and that could be added for completeness.
22 And the parties are, therefore, invited if they wish

1 to address those Authorities that Mr. Landau will give
2 you when I have finished saying what I have to say,
3 either in their Oral Closings or in the PHBs, the
4 Post-Hearing Briefs, as may be applicable.

5 What we thought is that you could choose
6 whichever realizing of course that, if you
7 choose -- one party chooses to do it only in the
8 Post-Hearing Briefs, then we will be discussing, of
9 course, rebuttals also for them, but this having been
10 said in the vein of there is no urgency, but if
11 possible, you can also take them up in your Oral
12 Closing presentations. So this was Part 1.

13 Part 2 is that the Tribunal does not request
14 the Authority to be submitted that Mr. Fortier showed
15 yesterday on the screen. So are there any questions
16 on this? No? No?

17 Then I wish you a good weekend.

18 ARBITRATOR LANDAU: Do you want me to give
19 you the list of Authorities?

20 PRESIDENT WALLGREN-LINDHOLM: Yes. If you
21 must. No. No. Sure. Please go ahead.

22 ARBITRATOR LANDAU: We could have left it

1 there. But --

2 PRESIDENT WALLGREN-LINDHOLM: No. No, no,
3 of course not.

4 ARBITRATOR LANDAU: Yeah. So I suppose,
5 just to be clear, there is no indication from the
6 Tribunal that these are relevant. It is for the sake
7 of completeness in order that everybody has an
8 opportunity of considering the full field of
9 Authorities on this particular issue, and then you can
10 consider whatever you want to do with them and then we
11 can consider afterwards to make sure that we can
12 consider them.

13 The first one is the ICJ case in certain
14 Iranian assets, which is at the ICJ judgment of 30th
15 of March 2023. This is all on the issue of judicial
16 expropriation, and what are the ingredients for
17 judicial expropriation.

18 Then there are just four other Authorities.
19 Some of these are pretty limited on the topic, but
20 just address it in the course of analysis. The first
21 one is the Vöcklinghaus, Czech Republic Case. That is
22 V-ö-c-k-l-i-n-g-h-a-u-s, Czech Republic, that's the

1 UNCITRAL Award of 19th September 2011.

2 There is the MNSS Montenegro ICSID Case.
3 It's the Additional Facility Award 4th of May 2016.
4 And there's the Frontier Petroleum Services, Czech
5 Republic Case, UNCITRAL Final Award 12th of
6 November 2010.

7 There is also -- and I'm not quite sure
8 whether this is on the record. My understanding is it
9 is not, and that's Zach Douglas's ICLQ 2014 Article,
10 International Responsibility for Domestic
11 Adjudication, which is focused on denial of justice.
12 It is so-called Denial of Justice Deconstructed. I'm
13 not sure that is on the record, actually. A lot of
14 his -- Douglas's other writing is, but that was one
15 that we had in mind.

16 That's it.

17 MS. TABET: Thank you very much. Well
18 noted.

19 PRESIDENT WALLGREN-LINDHOLM: So, now, it's
20 on me to wish you happy travel by air or on wheels, as
21 the case may be. And we shall see you Monday.

22 MS. LEMMENS: Thank you.

1 **MS. TABET: Thank you.**

2 **(Whereupon, at 2:46 p.m., the Hearing was**

3 **adjourned until 9:30 a.m. Monday, March 10, 2025.)**

POST-HEARING REVISIONS

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter,
do hereby attest that the foregoing English-
speaking proceedings, after agreed-upon
revisions submitted by the Parties, were
revised and re-submitted to the Parties per
their instructions.

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.

[Signed]

Dawn K. Larson

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

AND

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW, AS ADOPTED IN 1976

- - - - -	x	
In the Matter of Arbitration	:	
Between:	:	
	:	
THEODORE DAVID EINARSSON,	:	
HAROLD PAUL EINARSSON,	:	
RUSSELL JOHN EINARSSON, AND	:	
GEOPHYSICAL SERVICE INCORPORATED,	:	
	:	ICSID Case No.
Claimants,	:	UNCT/20/6
	:	
and	:	
	:	
THE GOVERNMENT OF CANADA,	:	
	:	
Respondent.	:	
- - - - -	x	Volume 6

HEARING ON JURISDICTION, MERITS, AND LIABILITY

Monday, March 10, 2025

Calgary Marriott Downtown Hotel
110 9th Avenue SE
Calgary, AB, T2G 5A6
Canada

The Hearing in the above-entitled matter
came on at 9:33 a.m. before:

MS. CARITA WALLGREN-LINDHOLM, President

MR. TREY GOWDY, Co-Arbitrator

MR. TOBY LANDAU KC, Co-Arbitrator

ALSO PRESENT:

On Behalf of ICSID:

MS. GERALDINE R. FISCHER
Secretariat to the Tribunal

Realtime Stenographer:

MS. DAWN K. LARSON
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
Certified Realtime Captioner (CRC)
Larson Reporting, Inc.
2564 West 280 North Street
Hurricane, Utah 84737
United States of America
+1 720 298 2480
DawnStenosTheWorld@gmail.com
DawnStenosTheWorld.com

APPEARANCES:

Attending on behalf of the Claimants:

**MS. MATTI LEMMENS
MR. VINCENT LANCTÔT-FORTIER
MS. MARIANNE BASTILLE-PARENT
Stikeman Elliott LLP
Bankers Hall, 4200 3 St SW West 888
Suite 14200
Calgary, AB, T2P 5C5**

Party representatives:

MR. HAROLD PAUL EINARSSON

APPEARANCES: (Continued)**Attending on behalf of the Respondent:**

MR. MARK LUZ
MS. SYLVIE TABET
MS. JULIA DEUTSCH
MS. ELENA LAPINA
MS. CAMILLE BÉRUBÉ-LEPAGE (virtual)
Trade Law Bureau
Global Affairs Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada

MS. MOLLY RUMPKE
Core Legal Concepts

MS. DAPHNÉE CAMPEAU
Global Affairs Canada

MR. ALEXANDER BLACK
Crown-Indigenous Relations and Northern
Affairs Canada & ISC Legal Services,
Indigenous Rights and Relations Portfolio

MR. PETER WIGEN
Canadian Heritage Legal Services

MR. MARK KLAVER (virtual)
Office Legal Services Sector

MR. FRANCO BELLO (virtual)
MS. KIM PHILLIPS (virtual)
MS. JESSICA MACINTOSH (virtual)
MS. JEAN-FRANCOIS ROMAN (virtual)
Natural Resources Canada

APPEARANCES: (Continued)

MR. SÉBASTIEN FOURNIER (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada

MR. SCOTT LITTLE (virtual)
MS. SUSANNA KAM (virtual)
MR. VINCENT BOULANGER (virtual)
Global Affairs Canada

MS. TARA SNELL (virtual)
MS. NATALIE GIASSA
MS. PIERRE-LUC RACINE (virtual)
Innovation Science and Economic Development

MS. TIFFANY SANDERS (virtual)
MS. LYNETTE GIBBONS (virtual)
Canada Newfoundland & Labrador Offshore
Petroleum Board

Respondent's Party Representatives:

MR. MARKO VESELY
Canada Energy Regulator

MR. ALEX MILLER
Core Legal Concepts

MR. CHRIS REYNOLDS
Core Legal Concepts

Non-Disputing Parties:

MS. KRISTINA E. BEARD (virtual)
Office of International Claims and
Investment Disputes
U.S. Department of State

MR. ALAN BONFIGLIO RÍOS (virtual)
MS. PAMELA HERNÁNDEZ MENDOZA (virtual)
MR. ALDO GONZÁLEZ ARANDA (virtual)
Secretaría de Economía

C O N T E N T S

PAGE

PRELIMINARY MATTERS.....1218

WITNESSES:

PAUL SHARP

Direct presentation.....1221
Cross-examination by Mr. Luz.....1249
Redirect examination by Ms. Lemmens.....1397
Questions from the Tribunal.....1401

P R O C E E D I N G S

PRESIDENT WALLGREN-LINDHOLM: Well, good morning, everyone. We will this morning proceed to the examination of the Financial Expert Mr. Paul Sharp, but before we go there, I'd like to inquire whether there is anything that needs to be raised at this time.

MS. TABET: Not for Canada. Thank you.

MS. LEMMENS: Good morning, Madam Chair, Members of the Tribunal. Not from us either.

PRESIDENT WALLGREN-LINDHOLM: Very good.

So good morning. And, Mr. Sharp, you have been called as Expert in this NAFTA Arbitration by Claimants at the -- to your right, and you have given two Expert Reports, and one update in these proceedings, and we have received your presentation for this morning. If there is anything you wonder about your testimony, please address your questions to us, the Tribunal, and I will introduce us in a while.

So to my right is Trey Gowdy, arbitrator from the U.S.; and to my left, Toby Landau KC from the U.K. and Singapore. I am Carita Wallgren-Lindholm,

1 and I am from Finland. We have the Secretary to the
2 Tribunal, Geraldine Fischer, to my right; and to my
3 very right is the Court Reporter, Dawn Larson.

4 Canada is sitting to your left, and then we
5 also have parties. We have some members of the
6 Einarsson family here and other parties as also online
7 we have the Governments of Mexico and the USA.

8 In international arbitration we do not
9 administer oath, but I would like for you as an Expert
10 to give an affirmation of your independence from the
11 Disputing Parties and Counsel and of your genuine
12 belief in the opinions expressed in your Report.

13 THE WITNESS: I do.

14 PRESIDENT WALLGREN-LINDHOLM: Thank you,
15 Mr. Sharp. And as you probably are expecting, your
16 testimony will be recorded and transcribed. You are
17 presumably also briefed that you have the opportunity
18 to first make a presentation of your Report as a
19 direct examination, and after some adjustments, you
20 will have 35 minutes, not 30, and thereafter you will
21 be cross-examined by Canada and followed by your right
22 to redirect and possible recross.

1 You have access, I presume to the computer
2 screen there and you have a mouse. So I think that
3 concludes what I had to say to you this morning, and I
4 will now ask Counsel for Claimants to make your
5 introduction properly. Thank you.

6 MS. LEMMENS: Good morning. Thank you.

7 DIRECT EXAMINATION

8 BY MS. LEMMENS:

9 Q. Good morning, Mr. Sharp. I just want to
10 confirm that you have tendered two Reports in this
11 matter, but now that I'm looking at your table, I see
12 that they are not sitting before you, or are they?

13 A. Two Reports are. I brought the Amended
14 Report from February of 2025 and our Reply Report.

15 Q. Thank you, sir. And you can confirm that
16 those are your Reports in this matter that you have
17 tendered. I think there is one other one.

18 A. Yes. The First Report, which we've amended.
19 I do not have a copy of that with me.

20 Q. Okay. Thank you.

21 I don't have any questions.

22 MS. LEMMENS: I think we should just proceed

1 with his Direct Presentation at this time. And so, I
2 think we just need to get access to load that on to
3 the screen. There we are.

4 THE WITNESS: Perfect.

5 DIRECT PRESENTATION

6 THE WITNESS: Thank you. Good morning. My
7 name is Paul Sharp. I'm a partner at
8 PricewaterhouseCoopers LLP. I practice in the area of
9 valuations and disputes and lead our prairies'
10 practice here in Canada. I have a Bachelor of
11 Commerce with distinction, I have my CPA from 2001, as
12 well as my Chartered Business Valuator designation. I
13 have 27 years in public practice, including 25 years
14 focused on business valuation.

15 I have extensive experience in providing
16 business and asset valuation in the context of
17 disputes, loss quantification, and other matters.
18 I've been qualified as an Expert Witness in the Courts
19 of Alberta, Saskatchewan, the Alberta Utilities
20 Commission and the International Chamber of Commerce,
21 International Court of Arbitration.

22 I'm well-versed in the valuation of

1 companies and assets in the oil-and-gas industry.

2 (Interruption.)

3 THE WITNESS: I'm well-versed in the
4 valuation of companies and assets in the oil-and-gas
5 industry, including upstream, midstream, downstream,
6 and service companies.

7 During my time, I would have prepared well
8 over 100 valuation -- or hundreds of valuations.

9 On screen is an agenda for today's
10 presentation in which I will quickly go over the
11 summary of our conclusions in our Report, outline the
12 scope and mandate of our Report, talk about the
13 methodology by which I valued GSI, talk about the
14 analysis and, then again, bring up our conclusions.

15 As the Tribunal would have seen, our
16 conclusions in this matter in our amended Report, we
17 calculate the Lost Equity Value of GSI as of
18 November 30, 2017, and as of June 30, 2022. For
19 November 30, 2017, we arrive at a Lost Equity Value of
20 \$266.7 million at the low end and \$335.3 million at
21 the high end. We were then also asked to calculate
22 interest on that, which we have calculated as between

1 \$28 and \$60 million, depending on the rate of interest
2 that is applied.

3 We've also calculated the Lost Equity Value
4 as at June 30, 2022, as instructed by Counsel. That
5 value on the left is \$225 million to \$282 million.
6 The other calculations that we have made include the
7 losses of shareholder loans from both Mr. Davey
8 Einarsson, Mr. Paul Einarsson, and the shareholder of
9 an affiliate company. They are outlined in the table
10 on the top right of this slide.

11 We have also quantified lost employment
12 earnings as of April 18, 2016, as requested by Counsel
13 for Mr. Davey Einarsson, Mr. Paul Einarsson, and
14 Mr. Russell Einarsson. They are outlined in the
15 table, but for Mr. Davey Einarsson range from
16 \$1.02 million to \$1.06 million. For
17 Mr. Paul Einarsson they range from \$7.5 million to
18 \$10.2 million; and for Mr. Russell Einarsson, they are
19 \$4.5 million to \$6.1 million.

20 As mentioned, this presentation is a summary
21 of our February 28, 2025, Amended Report. Under our
22 mandate and scope, we were asked to prepare an Expert

1 Report that includes an estimate-level valuation of
2 GSI in a But-For Scenario as at November 30, 2017, and
3 June 30, 2022.

4 We also quantified other alleged economic
5 losses, as I previously went through on the previous
6 slide, including loss of employment earnings, loss of
7 amounts lent to GSI, and interest accrued on those
8 amounts.

9 As I mentioned, the value of GSI was done in
10 a But-For Scenario and it is an estimate-level
11 valuation as defined and prepared in accordance with
12 the Canadian Institute of Chartered Business Valuators
13 Practice Standards. Estimate-level valuations are
14 commonly submitted as expert evidence in the Canadian
15 Courts and they are used for arbitrations, mediations,
16 and dispute settlement.

17 Our Report does include a scope limitation.
18 Due to the inherently hypothetical nature of the
19 But-For Scenario, we felt this was unavoidable.

20 To talk a little about the But-For Scenario,
21 as we understand that the Alleged Breaches comprise
22 certain Canadian Court Decisions, I'll refer to them

1 as the "Decisions" throughout this presentation that
2 resulted in GSI being unable to enforce its
3 intellectual property rights.

4 We have been informed that these Decisions
5 had both direct and ancillary effects that predate the
6 Decisions, which, together, include: One, the
7 invalidation of the Copyright Claims that GSI had with
8 respect to the access of the Board data and Secondary
9 Submissions, and also the nonpayment of certain normal
10 course transfer and Equalization Fees by GSI's former
11 customers.

12 The But-For Scenario assumes that, had GSI
13 been able to successfully enforce its copyrights, it
14 would have been compensated in such a manner as to put
15 it back in the place it would have been if not for the
16 alleged copyright breaches that gave rise to this
17 litigation. That's a key point.

18 As such, the value of GSI in this But-For
19 Scenario reflects a GSI after having the ability to
20 enforce its copyrights preserved in the litigation
21 settled in its favor. This Scenario brings renewed
22 marketability for its data collection, its business,

1 and brings the financial resources available to the
2 Company to allow it to continue investment and to
3 salvage the relations with its customers.

4 Accordingly, the Company is a going concern
5 in the But-For Scenario and would be expected to
6 generate profit in the future. These future earnings
7 are precisely what has been lost and quantified by us.

8 I'll point a little bit to what the But-For
9 Scenario is not. It does not consider the impact of
10 the Decisions in isolation without considering those
11 preceding ancillary effects that I spoke about. In
12 our view, a quantification that views it in its actual
13 state immediately prior to the Decisions would not
14 capture the ancillary effect of those Decisions.

15 Also, the But-For Scenario doesn't limit
16 revenue normalizations to instances of just Canadian
17 data, although I will point out that GSI was almost
18 exclusively focused on the Canadian market. Due to
19 the pervasive impact of the breaches on its business,
20 which resulted in a completely undermined business,
21 non-Canadian data must be considered in a
22 normalization adjustment as well for completeness.

1 But again, this a very minor component of
2 the value of GSI. It was almost exclusively focused
3 on the Canadian market.

4 Lastly, the But-For Scenario and the
5 valuation is inherently forward-looking. It's not a
6 quantification of claim for past losses relating to
7 disclosures and Unpaid Invoices. To say it another
8 way, the Claims for past damages and GSI's But-For
9 Value are entirely distinct. My valuation only
10 captures the But-For Value going forward. It does not
11 award any amount for the past invoices or past
12 disclosures.

13 In arriving at our value at GSI in a But-For
14 Scenario, we have used a Capitalized Cash Flow
15 approach. As I mentioned in the But-For Scenario, GSI
16 is a going concern. To use an asset-based approach
17 where value is based on proceeds from a liquidation is
18 inappropriate and at odds with the assumption that it
19 is a going concern. As mentioned, we've used an
20 Income Approach and the Capitalized Cash Flow Approach
21 specifically was used to value GSI.

22 Capitalized Cash Flow is based on an

1 estimate of maintainable earnings that is determined
2 with reference to a company's past normalized
3 operating history and its earning potential in the
4 future. It's a measure of the average earnings level
5 that a business can maintain in the future.

6 It is not a Discounted Cash Flow Approach
7 whereby you have a specific forecast that would go
8 forward from the Valuation Date and have discrete
9 forecast amounts for future years. Given the
10 hypothetical nature of the But-For Scenario, it would
11 be unrealistic and there would be no practical benefit
12 to creating such a forecast.

13 Furthermore, in a capitalized cash flow
14 analysis one determines the maintainable level of
15 earnings that can be expected to occur in the future.
16 They do not represent a forecast or a prediction of
17 earnings in every single year in the future. It
18 reflects a long-term average. Actual results will
19 fluctuate, particularly with economic cycles and the
20 low and high selection of our maintainable earnings
21 levels, attempts to capture that cyclicalality.

22 Valuation Methods like the Capitalized Cash

1 Flow and Multiple of EBITDA Approach that are based on
2 one specific earnings or cash flow multiple are very
3 common and accepted in the oil-and-gas service
4 industry.

5 In the case of our mandate, the Capitalized
6 Cash Flow Approach is particularly useful because it
7 allows us to normalize historical revenues and
8 earnings to reflect the But-For Scenario. This
9 informs our selection of Maintainable Revenues into
10 the future at the valuation dates.

11 So here I'll talk a little bit of our
12 analysis and speak to the starting point for the
13 analysis which is arriving at selected Maintainable
14 Revenues. So we start with looking at historical
15 revenues of the Company, which we have from Financial
16 Statements, and we adjust or normalize them to reflect
17 the level of revenues more representative of the
18 But-For Scenario.

19 As mentioned previously, the normalization
20 adjustments that we consider would be revenues that
21 they would have earned associated with accesses of
22 disclosed data, and revenues for Unpaid Invoices from

1 clients who were under contract but refused to pay.

2 Based on the availability of known
3 disclosures of the Board data, we consider a
4 Normalization Period of 2000 to 2012. The reason we
5 don't go beyond 2012 is we understand that the
6 availability of known disclosures of poor data
7 drastically declines after that. We don't have
8 meaningful data to know what disclosures were made in
9 '13, '14, '15, '16, and beyond. So we have to stop at
10 2012.

11 Once we make those two normalizations to the
12 historical period from 2000 to 2012, we are still
13 trying to value this entity at 2017 or 2022, but we
14 only have revenues up until 2012.

15 We then extend those revenues that have been
16 normalized from the 2000 to 2012 period to the
17 Valuation Dates using an observable data point that is
18 correlated with historical normalized revenues in U.S.
19 dollars.

20 We use U.S. dollars because the Company
21 actually operates and functions and does business in
22 U.S. dollars. So based on those normalized revenues

1 from 2000 to 2012, and what we'll call the illustrated
2 extend of revenues, which are revenues from '13 to
3 '17, we then judgmentally select normalized revenues.

4 So, now, I'll talk about the two key
5 normalization adjustments which we have previously
6 introduced. So our starting point for disclosed
7 data -- so as mentioned, as we know that there were
8 certain data that was disclosed and made available.
9 We have that information provided by Counsel and their
10 client. That's our starting point is those
11 disclosures that are made.

12 We apply multipliers based on those
13 disclosures and a price list. These Board data
14 disclosure access -- Board data or accesses of
15 disclosed data, they mean the same thing -- they were
16 provided by GSI management and relied upon by us. We
17 apply these multipliers to the prices based on
18 management's experience running the business, and we
19 view them to be logically sound.

20 Just for clarity, those multiples, we know
21 who accessed the Board data from 2000 to 2012. If it
22 was accessed by a Government or not-for-profit

1 industry, we use a multiple of zero essentially saying
2 that would not have led to licensed data. If it is
3 accessed by an exploration production company, we use
4 a multiple of two times.

5 This was provided by management. We
6 understand this reflects the actual occurrences when
7 an E&P company licenses data, there are often future
8 licenses that are paid based on perhaps transfers or
9 equalizations or as they enter into joint venture with
10 other groups and exploration groups.

11 For copy or seismic companies, a multiple of
12 three times the license fee was used. This reflects
13 the fact that if a seismic company has data, it is
14 likely their intent to license it to multiple parties,
15 thus, resulting in multiple issuances of licenses.

16 These multiplied revenues which, again, are
17 the amount of data that was disclosed, times the price
18 list, times the multiples are then spread over a
19 three-year period. This was based on a discussion
20 with GSI management.

21 This three-year period would start in the
22 year of the disclosure. That would be Year 1. Year 2

1 and 3 would be the next two following years.

2 This was selected by management and, as we
3 understand, reflects the actual expectation of when
4 the licenses would be occurred with those multiples.

5 The pricing we used, we used price lists
6 from a more current date, 2013, to price those
7 disclosures. Again, our goal here is not to claim for
8 past losses. If we were attempting to claim for a
9 past loss in 2000, using the price list from 2000
10 would make sense. We are not attempting to claim for
11 past losses. What we are trying to do is understand
12 what level of revenue this Company could have earned
13 as of 2017, when we are valuing it.

14 Therefore, using a more current price makes
15 sense. We are trying to reflect the reality the
16 Company would have been in at 2017. So we want to
17 understand its history of the licenses it would have
18 earned.

19 The chart at the bottom right of my slide
20 shows those revenues associated with the accesses of
21 disclosed data. What I'll call the "normalized"
22 normalizations to revenue based on the Disclosures.

1 As we can see from the period from 2007 to 2006, they
2 are quite significant, and then decline in years after
3 that.

4 Based on certain -- so still speaking to the
5 disclosed data. Based on certain comments raised in
6 the Brattle Group's November 1st Rejoinder Report,
7 we've performed additional tasks to determine if those
8 comments warranted a reissue of the Report.

9 The Brattle Rejoinder Report raised
10 instances where the data that we relied upon may have
11 errors in it. The Brattle Rejoinder Report raised
12 instances where data was requested by the same entity
13 multiple times, and they would suggest that perhaps
14 that does not result in a license in each occurrence.

15 We reviewed the disclosed data provided by
16 GSI management and inquired with management regarding
17 all such instances and those not raised by The Brattle
18 Group. As a result, GSI management indicated there
19 were four instances of redundant data accesses that
20 should have been included in the -- should not have
21 been included in the disclosed data. We've corrected
22 that, and that's resulted in the issuance of our

1 February 25, '28 [sic], Report.

2 Furthermore we made one additional
3 adjustment for the disclosed data in our May 30, 2024
4 Reply Report, we acknowledged an instance where the
5 Board data was erroneously priced by management. We
6 relied on it from management. The correction in our
7 May 30th Report in 2024 did not result in us changing
8 our conclusion. We examined it and analyzed it at
9 that date, and there was no change to our conclusion
10 as a result. So we didn't issue a correction to that
11 Report.

12 Now, because we want to capture all of these
13 and this would be additive to the other issues, we
14 have considered it now.

15 We have reviewed the entire Brattle
16 Rejoinder Report, and in our view, these are the only
17 required revisions to the normalization for disclosed
18 data.

19 Moving on to the second normalization
20 adjustment, which is that associated with Unpaid
21 Invoices. As mentioned, these are data Transfer Fees
22 and Equalization Fees from customers under contract

1 who refused to pay. The Unpaid Invoices were dated
2 from 2011 to 2016 and due to spreading, which I'll
3 talk about the spreading for these invoices in a
4 moment, they impact normalized revenues in the years
5 from 2007 to 2012.

6 The amounts have been spread, so when GSI
7 issues an invoice for an Unpaid Invoice, GSI
8 management has advised that they don't necessarily
9 relate to instances that gave rise to that invoice,
10 just in the year of the invoice. It would be over a
11 period of time leading up to that.

12 We were advised by GSI management that it
13 would be that year and the preceding four years. So,
14 for example, that's a five-year period. So for
15 example, if the invoice is for \$1 million, we would
16 normalize revenue for \$200,000 per year in the year of
17 the invoice and the preceding four years.

18 We do note that there's a conflicting
19 statement in Mr. Einarsson's Witness Statement, which
20 suggests that the invoice should be spread over that
21 year and the preceding five years, so a total of six.
22 We understand that to be a typo. And the correct

1 spread period should remain the year of the invoice
2 and the four preceding years.

3 We did look at volume discounts or discussed
4 volume discounts with GSI. We have used the price
5 list that GSI used for the Unpaid Invoice, which do
6 not reflect volume discounts. GSI advised us that
7 they don't offer standard volume discounts across
8 datasets. Any instances where there was a discount
9 would be a one-off and not expected to continue per
10 GSI.

11 The chart in the bottom right summarizes the
12 unpaid revenue that was adjusted associated with the
13 Unpaid Invoices.

14 Again, we had a revision to the
15 normalization related to the Unpaid Invoices. As
16 raised in the Brattle Group's November 1, 2024 Report,
17 they made note of an instance of a potentially invalid
18 transfer fee and equalization that was charged to
19 Plains Midstream.

20 They also made note of a few invoices that
21 were in U.S. -- we assumed. Sorry.

22 We assumed all invoices were in U.S.

1 dollars. The Brattle Group made a suggestion that
2 some of which were in Canadian dollars, so we
3 investigated that.

4 There were also instances in the Unpaid
5 Invoice Listing where Brattle suggested that an entity
6 was invoiced more than once for the same transfer fee
7 or equalization fee or instances where two entities
8 were invoiced for the same transfer or equalization
9 fee. We had relied upon that Unpaid Invoice listing
10 provided by management.

11 As result of the November 1st Brattle Report
12 and these comments, on the Plains Midstream matter, we
13 discussed that matter with Counsel, and that we
14 understand Counsel reviewed the relevant Court
15 Decision and advised us these invoices do not appear
16 to be enforceable based on the Decisions, and we,
17 therefore, removed that normalization and adjusted for
18 it.

19 For the -- we reviewed the invoices
20 underlying the Unpaid Invoice Listing, for instances
21 where the invoices were already in Canadian dollars.
22 We noted five such instances, we confirmed them with

1 GSI, and we corrected these. This resulted in very
2 minor corrections due to currency. At that the date
3 the currency was very close to par.

4 Lastly, we discussed the alleged instances
5 of replacement invoices being improperly included in
6 the Unpaid Listing with management and we made the
7 appropriate adjustments. We also reviewed the Unpaid
8 Invoices and the Unpaid Invoice Listing for any other
9 indications of a replacement invoice for a previously
10 issued invoice, and we found no additional replacement
11 invoices.

12 Lastly, in our May 30th Report, we
13 acknowledged an instance where an amount for the
14 Unpaid Invoice Listing did not match the underlying
15 Unpaid Invoice.

16 As we stated in our May 30th Report, this
17 did not impact our conclusion. Accordingly, we did
18 not reissue a report at that time. It would have been
19 a correction, but it would not have changed our
20 conclusion at all. However, given the above
21 adjustments, we're now correcting normalized revenues
22 for this error.

1 Lastly, we reviewed the entire Brattle
2 Rejoinder Report and, in our view, these are the only
3 required revisions to the normalization for Unpaid
4 Invoices.

5 So, now, having gone through those
6 normalization adjustments, we now have normalized
7 revenues which are the Actual Revenues that the
8 Company incurred, plus the revenues they would have
9 incurred from the disclosed data, plus the revenues
10 they would have incurred from the Unpaid Invoices. So
11 now we have normalized revenues from 2000-2012. As
12 mentioned before, we're valuing this Company at 2017
13 or 2022, so we need to somehow arrive at what revenues
14 and earnings would have been at those dates.

15 To do this, we look what observable market
16 data is out there that's most strongly correlated with
17 normalized U.S. dollar revenues. We examined eight
18 different metrics in the oil-and-gas industry, and the
19 one with the strongest correlation was Global Offshore
20 Rig Count. It had an R-squared of .47, which means a
21 correlation coefficient of .69. It was the strongest
22 correlated industry statistic from the Normalization

1 Period of 2000-2012. Accordingly, we extended
2 normalized revenues from 2012-2017, and '22, of
3 course, for the '22 valuation, but onscreen we are
4 showing 2017. We extended those revenues from 2012 to
5 the subsequent years using the changes in worldwide
6 rig count.

7 The results of those normalized revenues in
8 both U.S. dollars and Canadian dollars are shown
9 onscreen in the bottom right of Slide 16.

10 From that data, we then select what a
11 maintainable level of revenues at the Valuation Date
12 would be. For the purposes of this slide, we're
13 speaking to 2017, the same thing was done for 2022.

14 The chart on the right shows those
15 normalized revenues. In the jagged bar line -- or,
16 the jagged graph shows what those normalized revenues
17 would have been. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The

1 average of those historical normalized revenues was
2 [REDACTED] which is at the upper end
3 of the range that we picked. We actually picked a
4 range that was -- with a midpoint that was lower than
5 that. Again, this is not just a pure mathematical
6 exercise, it involves professional judgment and the
7 outlook for the industry. Based on that and these
8 normalized revenues, we picked Maintainable Revenues
9 [REDACTED]

10 Now, we have a level of Maintainable
11 Revenue, next in the capitalized cash flow is to
12 deduct off Direct Costs. Our basis for Direct Costs,
13 we used Actual Direct Costs from 2000-2008. As most
14 of these normalized revenue adjustments relate to
15 sales from existing seismic collection data, there
16 would not be a significant increase in Direct Costs
17 incurred.

18 In our February 28, 2025 Report, Direct
19 Costs based on 2000-2008, divided by normalized
20 revenues, results in a 20.6 percent of revenue as the
21 measure of Direct Costs.

22 Now, so we would direct -- we would deduct

1 those Direct Costs of 20.6 percent from revenues. We
2 also need to deduct for G&A expenses. For G&A, we
3 have deducted GSI's highest period of expenses, which
4 is from 2006-2008. A key reason why we stop in 2008
5 for both of these measures is, after 2008, GSI was
6 significantly impacted by the litigation associated
7 with the Decisions, and its operations after that were
8 not all that representative. Had we gone beyond that
9 date, frankly, we would have used a lower amount of
10 Direct Costs, making the Company look more profitable.
11 We didn't think that was appropriate. We thought, in
12 2008, we needed to stop there.

13 In the G&A adjustment, we also considered a
14 marketed level of executive compensation. As is often
15 the case with private companies, individuals are
16 not -- ownership individuals are not always paid at
17 market rates. We have adjusted to reflect what the
18 market rates would be; hence, that's how the Company
19 would be valued. So we've made that adjustment.

20 Based on deducting those Direct Costs and
21 G&A, we arrive at a maintainable EBITDA number of
22 [REDACTED] as described at the bottom of

1 this slide. This implies an EBITDA margin of
2 73-75 percent.

3 As discussed, the primary method for
4 selecting that level of EBITDA was the actual results
5 of GSI. We feel that GSI is the perfect comparable in
6 this instance. That said, we do do a test of
7 reasonableness, and we look to other public companies
8 and their EBITDA margins. We compared GSI's implied
9 EBITDA margin, which was 74 percent from the prior
10 slide, to those of its most comparable peers. We
11 noted Pulse, in 2017, which was one of our Valuation
12 Dates, had an adjusted EBITDA margin of 85 percent.
13 We make that adjustment because Pulse capitalizes its
14 acquisition costs of seismic, whereas GSI actually
15 deducts them as an expense. Public companies can do
16 any -- do either of those. We do see a variability
17 between that. However, Pulse definitely capitalized
18 theirs, GSI always expensed theirs. So we need to
19 compare apples-to-apples. And we noted, in 2017, they
20 were at 85 percent, a much higher margin than what we
21 were at.

22 Also, what's important to note is our

1 capitalized cash flow does not assume growth for GSI,
2 real growth for GSI, beyond the Valuation Date. And
3 I'll just distinguish between real and nominal growth.

4 Nominal growth would be growth due to
5 inflation. So we do anticipate that inflation will
6 occur. However, we do not assume any real growth. We
7 do not assume they'll be gaining more market share.
8 We do not assume that the market itself will be
9 growing significantly. It's only inflationary growth.

10 So we do want to make sure we compare GSI's
11 EBITDA margin to companies who did not have
12 significant levels of growth in the Normalization
13 Period.

14 In the chart to the right, we have also
15 plotted the selected GSI maintainable EBITDA of
16 74 percent against both Pulse Seismic and TGS, two of
17 the more comparable companies, and we've plotted the
18 solid line, the line we selected relative to the
19 historical maintainable EBITDA percentage of those
20 entities.

21 So now we've arrived at maintainable
22 discretionary cash flows, which, again, is revenues,

1 less Direct Costs, less G&A.

2 And apologies. We also have to deduct
3 Capital Expenditures to arrive at maintainable
4 discretionary cash flow. We've selected 9 percent,
5 based on information from GSI management. GSI
6 actually incurred 10.2 percent as an average between
7 2000-2008. 9 percent, and -- sorry, a median of
8 9.4 percent. 9 percent approximates this, so we felt
9 it was a reasonable assumption to take guidance from
10 management on the 9 percent.

11 Now we have maintainable discretionary cash
12 flow. We need to capitalize that, which means
13 multiply that rate by a cap rate. We've performed a
14 weighted average Cost of Capital and arrived at a Cost
15 of Capital of 15.5-18.5 percent. We divide the cash
16 flows by the cap rate to calculate Enterprise Value.

17 Enterprise Value is the value of the entire
18 business that must be allocated amongst its
19 shareholders and those debtholders. So from
20 Enterprise Value, we deduct third-party debt of
21 13.4 million, related-party debt, affiliate loans, and
22 shareholder loans to calculate GSI's Equity Value at

1 our Valuation Dates. It's this value that was lost.

2 As stated in the bottom right corner of this
3 slide, that results in an equity value of
4 \$266.7 million-\$335.3 million at November 2017.

5 We also do a test of reasonableness on that
6 Equity Value, and we look to the Enterprise Value
7 dividable by maintainable EBITDA, which we have
8 selected, and we compare that to certain
9 publicly-available information. This tests our
10 valuation conclusion, given the level of EBITDA we
11 selected is our ultimate value reasonable. In our
12 instance, we have an EV to maintainable EBITDA,
13 multiple of four times -- we're valuing at four times
14 EBITDA.

15 If we look to trading multiples of certain
16 comparable companies, we see that those trading
17 multiples, on an EV to trailing 12 months EBITDA,
18 range from approximately one-times EBITDA to six-times
19 EBITDA -- this is the graph on the left and the red
20 dots -- with a median of approximately 5.5 times. So
21 our four-times multiple is actually a lower multiple
22 applied than what those comparable companies -- we

1 feel this is reasonable for the differences between
2 the comparable companies and GSI, but do note that we
3 are lower than comparable companies. We also looked
4 at an -- on an Enterprise Value to adjusted EBITDA
5 basis. Again, adjusted EBITDA reflects the further
6 reduction of EBITDA by acquisition cost of seismic.

7 Here, we can see those multiples range from
8 four times to 10 times, with a median of approximately
9 six times. Again, we're at four times maintainable
10 EBITDA or below that level.

11 Lastly, we looked to precedent transactions.
12 So these are transactions that actually occurred in
13 the marketplace where buyers and sellers disclosed the
14 Enterprise Value and the trailing 12 months EBITDA.
15 Those transactions range from four to 10 times, with a
16 median of approximately six times. Again, our four
17 times is slightly lower than that.

18 In summary, I'll bring up our conclusions
19 again, which provide the Lost Equity Value at both
20 November 30, 2017, and June 30, 2022, as well as the
21 loss of the loans, the shareholder loans and the
22 shareholder, the affiliate, and, lastly, the loss of

1 the employment earnings for Mr. Davey Einarsson,
2 Mr. Paul Einarsson, and Mr. Russell Einarsson.

3 That concludes the presentation.

4 PRESIDENT WALLGREN-LINDHOLM: Thank you,
5 Mr. Sharp.

6 We will now proceed to cross-examination.

7 Will that be Mr. Luz?

8 MR. LUZ: It will be, Madam Chair.

9 PRESIDENT WALLGREN-LINDHOLM: Thank you.

10 CROSS-EXAMINATION

11 BY MR. LUZ:

12 Q. Good morning, Mr. Sharp.

13 A. Good morning.

14 Q. My name is Mark Luz. I represent the
15 Government of Canada in this Arbitration. I don't
16 think I need to go through the ground rules. I'm sure
17 you've done this many times before. I'll ask for a
18 little bit of patience in -- as we're going to be
19 pulling up exhibits, references from your Reports and
20 so on, and if there's any, you know, issues that we
21 can take our time -- go through the various documents
22 and the things that we put up on the screen so that

1 you can take a look at them and everyone else can have
2 a chance to read it.

3 A. Appreciate that. I will like that time as
4 well, too, yeah.

5 Q. Great. So before we look at the Reports, I
6 just want to make sure we're sharing an understanding
7 of what the Claim is in this case. Let's pull
8 up -- and our tech guy's all the way down at the end,
9 so I'll refer to Chris. If he can pull up, from the
10 Claimants' Reply Memorial, Paragraph 48, where they
11 say: "The Claimants do not allege that the submission
12 and public disclosure of the Seismic Works under the
13 Regulatory Regime breached the NAFTA."

14 So you understand that that is not the
15 breach in this Claim?

16 A. Correct. I understand that.

17 Q. Okay. And then we'll go to the next
18 paragraph, where it says: "The Canadian Courts
19 rendered GSI's intellectual property rights
20 unenforceable and which crystallized into an illegal
21 expropriation on November 30, 2017."

22 So you understand that the alleged breach is

1 the unenforceability of GSI's copyright after 2017; is
2 that right?

3 A. I understand that it was a Decision on
4 November 30, 2017 -- is the breach.

5 Q. Right. But they're saying it's the
6 unenforceability of GSI's copyright?

7 A. Correct.

8 Q. Okay. And that, as you mentioned, the
9 Decision, that allegedly arose from the Alberta Court
10 Decisions, and that's the only measure alleged to
11 breach the NAFTA in this case. Is that your
12 understanding?

13 A. Yes, but with a caveat that we'd been
14 instructed that there were ancillary effects of that
15 Decision, which limited its -- in those ancillary
16 effects, the preceding litigation that led to those
17 Decisions.

18 Q. Okay. We'll get to your -- the term
19 "ancillary effects."

20 A. Okay.

21 Q. But the Claimants are saying that the only
22 alleged breach -- well, I'll withdraw that. We'll

1 just go through it.

2 Just getting back to the Alberta Court
3 Decisions and GSI's copyright over Seismic Data, you
4 acknowledge that the Decisions only impacts GSI's
5 copyright over the Seismic Data for the time period
6 after the 10 or 15-year confidentiality period, during
7 which there was no copying allowed; right?

8 A. Could you repeat that, please.

9 Q. The Alberta Court Decisions only impacts
10 GSI's copyright for the period that comes after the 10
11 or 15-year confidentiality period, during which
12 there's no copying because it's confidential and can't
13 be accessed?

14 A. I'll take your word for that.

15 Q. Okay. So just to confirm, you didn't
16 measure how much of GSI's copyright value was lost
17 because GSI's data was available to be copied after 10
18 or 15 years, versus the amount -- versus the full term
19 available under the Copyright Act. That's not your
20 damages analysis?

21 A. So my damages analysis quantifies what the
22 value of GSI would have been had it been able to

1 enforce the disclosures and the Unpaid Invoices from
2 2000-2012.

3 Q. So the answer is no? You didn't value the
4 difference, the delta between the copyright, if it was
5 enforceable for 50 years, versus 10 years of
6 confidentiality?

7 A. Correct. I assumed they can enforce those
8 disclosures that occurred, and what would the business
9 be like at 2017, for example.

10 Q. Right. The delta -- the loss of value of
11 copyright is not your analysis?

12 A. It's the value of the business that was
13 expropriated. That's my analysis, is the value of the
14 business.

15 Q. Okay. Let's pull up Claimants' Reply
16 Memorial, Paragraph 108.

17 And the Claimants say: "Had the Alberta
18 Decisions had the opposite outcome, this Arbitration
19 would have been unnecessary as there would not have
20 been any breach of NAFTA, and GSI's copyright in its
21 Seismic Works would be enforceable to protect its
22 intellectual property rights. GSI would have won

1 immense Damages Awards against all of the parties
2 copying the Seismic Works."

3 You didn't try to value or estimate the
4 value of what those Damages Awards would have been
5 But-For for the Alberta Court Decisions; is that
6 right?

7 A. I have -- I hope this answers your question.
8 I have assumed that they would have been able to
9 successfully defend those copyright violations and
10 they would have been put back in a position, had they
11 been paid for those disclosures.

12 Q. But you didn't try and value what the
13 immense Damages Awards would have been?

14 A. Well, our analysis assumes that GSI would
15 have been put back in a position. So I guess they
16 would have had been successful in those Awards, and
17 those Awards would have been equal to the disclosures
18 times the Price List.

19 Q. So is that to say - because if I go back to
20 your Second Report, Paragraph 24, you say that it
21 would have been too speculative to try and predict
22 what the outcome of the litigations would have been.

1 A. I'll have to see Paragraph 24 of my Report
2 to see what I was making reference to.

3 Q. Sure. We can pull it up.

4 A. I'm going to look in my paper copy, just
5 because I -- versus just the paragraph for context.

6 Q. Sure. Yeah. Yeah.

7 Have you read it?

8 A. Yes.

9 Q. Okay.

10 A. So we have valued the business as if it was
11 able to successfully defend those copyrights. So
12 inherently, we have assumed -- so we have not
13 attempted a valuation of those litigation amounts;
14 right? It is premised on the fact that that amount
15 would be recovered. So they would successfully win
16 those litigations.

17 Q. On what basis do you assume that the value
18 of what they would have won in litigation is the same
19 as what the value is of what you use as a basis here?

20 A. Can you just say that again. I just
21 couldn't follow the question.

22 Q. Sorry. On what basis -- so you said they

1 would have been successful in those Awards, and those
2 Awards would have been equal to the disclosures times
3 the Price List.

4 So on what basis do you assume that the
5 future Damages Awards is the same as the value as what
6 you've done here with the Equalization Fees and so on?

7 A. So at Paragraph 45 of our Report -- I can
8 read it aloud for you.

9 Q. Sure.

10 A. It follows that a But-For Valuation would
11 reflect a set of circumstances where GSI would have
12 been able to uphold its intellectual property rights.
13 Such an ability would result in a remedy that would
14 allow GSI to protect its copyrights and consequently
15 the income-producing properties, capability of the
16 disclosed Seismic Data. So we're assuming they're put
17 back in a position, had they been paid for those
18 disclosures.

19 Q. But you're assuming that they would have
20 been successful in those litigations?

21 A. Correct.

22 Q. Okay. When do you assume that they would

1 have been successful in those litigations?

2 A. I assume that, at the valuation at
3 November 30th, they would have been in that position.

4 Q. If we go to your Second Report,
5 Paragraph 29, you say -- actually, I'm just going to
6 go -- it's actually the cover page to your First
7 Report, but I think it just reflects kind of what you
8 said here. You describe the assignment as valuing GSI
9 in a But-For Scenario: "Assuming a scenario wherein
10 certain actions on the part of the Government of
11 Canada did not occur." Certain actions; right?

12 A. That's what it says, yes.

13 Q. Okay. So if we go Sharp 2, Paragraph 29,
14 you make a similar statement. Yeah, if we go to
15 Sharp 2, Paragraph 29, you say: "We're determining
16 the But-For value of a company where certain alleged
17 breaches have pervasively impacted the Company."

18 What exactly do you understand are the
19 "certain actions" or "certain Alleged Breaches" are in
20 this case?

21 A. I understand the breaches would be the
22 Decisions.

1 Q. Okay. What are the other certain Alleged
2 Breaches or other certain alleged actions?

3 A. Well, I believe it's the Decisions, but
4 there were also ancillary effects.

5 Q. Okay. So you said "ancillary effects" a
6 couple of times. And in fact, if we pull up
7 Paragraph 151 of your Second Report, you say: "During
8 the 2008-2010 period, the ancillary effects of the
9 Alberta Court Decisions were being felt."

10 So I want to understand exactly what you
11 mean by the "ancillary effects."

12 What "ancillary effects" of a 2017 Judgment
13 did you conclude were being felt nine years before the
14 Decisions were actually rendered?

15 A. Well, the litigation was ongoing, as I
16 understand it; right? So the effect of the litigation
17 was being felt.

18 Q. But that predates the Alleged Breach.

19 A. It does.

20 Q. By almost a decade?

21 A. Yes.

22 Q. Okay. So, again, so Paragraph 150, you say

1 something similar.

2 ARBITRATOR LANDAU: Sorry to interrupt. Can
3 I just quickly ask, when you say the "litigation,"
4 what do you mean?

5 THE WITNESS: So the litigation surrounding
6 the Decisions. They were attempting to enforce their
7 copyright over that period, as I understand it.

8 ARBITRATOR LANDAU: I see. Okay.

9 BY MR. LUZ:

10 Q. Thank you.

11 So Paragraph 150, you say something similar
12 where you say: "The 2008 financial results" -- I
13 think it says -- yeah -- "included the ancillary
14 effects of the alleged expropriation as it falls in
15 the litigation period. GSI had commenced legal
16 actions against certain customers in the pursuit of
17 enforcing its copyrights and confidentiality. In so
18 doing, those relationships were harmed."

19 So is the decision to commence those legal
20 actions one of the ancillary effects of the Alberta
21 Court Decisions?

22 A. Can you just repeat that last sentence.

1 Q. Is the decision to commence legal actions
2 one of the ancillary effects of the Alberta Court
3 Decisions?

4 A. Whose decision?

5 Q. GSI's.

6 A. GSI's. Well, I think I would -- yes, I
7 think it would be, right? They determined that they
8 needed to pursue litigation to try and collect.

9 Q. Okay. So that's one of the ancillary
10 effects.

11 And as - well as we've heard, as
12 Mr. Einarsson has testified, once GSI commenced
13 litigation against a licensee, they never did business
14 with GSI again?

15 A. I don't know that testimony, but, yeah.

16 Q. Okay. Okay. So let me follow the logic
17 here. The litigations that GSI commenced
18 in -- starting in 2007, which you say had financial
19 impacts in 2008 through 2010, and thereafter, but
20 those litigations were a preexisting fact regardless
21 of how the Alberta Court Decisions turned out; is that
22 not right?

1 A. The Decision resulted in GSI not being able
2 to pursue that litigation further, as I understand it.

3 Q. Right. But my question was, the litigations
4 that led to the Decisions were a preexisting fact,
5 regardless of whether GSI won or lost the Alberta
6 Court Decisions?

7 A. Well, they were preexisting, but the
8 Decision rendered that litigation not able to be
9 pursued.

10 Q. But the litigations still happened, even if
11 GSI had won the Alberta Court Decision?

12 A. Yes. They would have been able to pursue
13 that further, yes, and I've assumed there would have
14 been a successful defense of that.

15 Q. I'm talking about the preexisting
16 litigation?

17 A. Yes. Well, the litigation around the
18 copyright, yes.

19 Q. Okay. So let me follow this. If GSI had
20 won the Alberta Court Decision in 2017, the Decision
21 to have sued its customers, starting in 2007, would
22 not have been any different; right?

1 A. Correct. They still would have been in a
2 lawsuit and they would have been able to pursue it.

3 Q. And the other ancillary effects of the
4 Alberta Court Decisions. So if GSI had won the
5 Alberta Court Decision in 2017, GSI still would not
6 have had any -- still would have not invested in new
7 seismic surveys after 2008; is that right?

8 A. They wouldn't have, but our Report is
9 premised under the fact that they would have won
10 those. As a result of the Decision not being there,
11 they would have been successful in pursuing those, and
12 they would have been put back in a place that would
13 have allowed them to have made that investment, made
14 whole for that.

15 Q. Sure. But just follow me here. If GSI had
16 won the Alberta Court Decisions, the lack of
17 investment in new seismic surveys since 2008 still
18 would be there; is that right?

19 A. Yes, but the Decision would have -- they
20 would have been awarded something that would have put
21 it back in the place as if it had been there. I
22 acknowledge the Decision in '17 cannot have gone back

1 and made them invest in 2007 in Seismic Data.

2 However, an award could have put them in a position as
3 if they had invested, and that's the premise of my
4 valuation.

5 Q. Okay. I'm just going to follow this through
6 again.

7 A. Okay.

8 Q. So if GSI had won in 2017, GSI still would
9 not have any employees, 90 percent of which were lost
10 around 2010?

11 A. They would not have at that date. However,
12 the same answer -- they would have been put back in a
13 position had they had those employees, and their award
14 would have equated to that.

15 Q. Again. Just bear with me here.

16 A. Yeah.

17 Q. Just following through; right?

18 So if GSI had won the Alberta Court
19 Decisions in 2017, it still would not have the ships
20 that it sold in 2011 and 2012?

21 A. Understood. And I won't repeat my same
22 answer but, yes, they would have been put back in a

1 position as if they had them.

2 Q. Sure. Got it.

3 And if GSI had won in 2017, the customer
4 relationships that had been broken, starting in 2007,
5 would still be broken as of 2017?

6 A. Correct. Same answer on my end, as well.

7 Q. Okay. So let me give you a scenario.

8 Assume GSI won the Alberta Court Decisions
9 in 2017; hence, there's no NAFTA breach. I hire you
10 as a business valuator to advise me on the value of
11 GSI's business. You would not assume that GSI had
12 employees that it did not have, would you?

13 A. I've been instructed to assume that they
14 would be put back in a position that they would have
15 been in position had they had those employees, had
16 they made that capital investment, had those customer
17 relationships been repaired.

18 Q. But I'm just talking about GSI wins in 2017,
19 and you're asked to value the Company.

20 You wouldn't assume that GSI had employees
21 that it didn't have?

22 A. Without that instruction, you're correct.

1 Q. Okay. And you would not assume that GSI had
2 ships that it didn't have?

3 A. Same answer. Yes, without that instruction,
4 correct.

5 Q. And you wouldn't assume that GSI had grown
6 its Seismic Data library since 2008?

7 A. I mean, I'm not -- my only comment there
8 would be, I'm not sure I've anticipated that they've
9 grown their library. I've anticipated they have been
10 able to maintain their library, which they were not
11 able to do as a result of the ancillary effects.

12 Q. Sure. Fair enough. And you would, valuing
13 GSI -- winning GSI in 2017, you would still have to
14 recognize that GSI had sued its customers, and with
15 all the consequences thereof, since 2017 -- 2007? I'm
16 sorry.

17 A. Without the instruction, you're correct,
18 yes.

19 Q. Okay. Great.

20 I'll move on just to sort of practical kinds
21 of issues rather than the logical games that talk
22 about the breach.

1 You agree that the Valuation Date that's
2 required by the NAFTA is immediately before the date
3 of the alleged expropriation; is that right?

4 A. I understand that, yes.

5 Q. And you agreed -- and I think it's in
6 Paragraph 143 of your Second Report -- that,
7 immediately prior to the alleged expropriation, GSI
8 was not a going concern?

9 A. Correct. If one does not consider the
10 ancillary effects, yes, you're right.

11 Q. Okay. Great.

12 I just want to ask -- I just need to clear
13 up a couple of things what led to -- about your First
14 Report and the amended Report.

15 A. Okay.

16 Q. And so on. I think this is -- yeah, the
17 Second Report is as is.

18 And if you don't mind, I know you don't have
19 a hard copy, but if you don't mind, I'm going to pull
20 up some of the references from your First Report, and
21 then we'll go through it, if that's okay. Oh, do we
22 have a hard copy -- of the First Report?

1 A. Yes, I have that.

2 Q. Oh, you do have it. Okay. Great. Thank
3 you.

4 A. Thank you.

5 Q. So at Page 37 of that First Report,
6 Paragraph 7 -- it's on the screen, but take your time
7 to look at the hard copy. No problem. If you need a
8 highlighter, I can toss one to you.

9 A. I'm okay. Thank you. I see that.

10 Q. Okay. That you "reserve the right, but will
11 be under no obligation to make revisions to the
12 Report, should we be made aware of facts existing at
13 the Valuation Date which were not known to us when we
14 prepared the Report"; right?

15 A. I see that.

16 Q. Okay. And then in your Second Report, you
17 conceded the validity of the some of the factual
18 errors that Brattle had brought up, brought to your
19 attention; is that right?

20 A. Correct, in the underlying data we relied
21 upon, yes, you're correct.

22 Q. But in your Second Report, you didn't make

1 the corrections because you didn't think that they
2 were material and that wouldn't change your judgmental
3 selection of revenues; is that right?

4 A. I think a bit of clarification would help
5 there.

6 Q. Sure.

7 A. So there were two instances of errors
8 identified in what I'll call Brattle 1, the First
9 Brattle Report. We examined those in detail for the
10 purposes of our Second Report, our Reply Report. And
11 we acknowledged that there would have been an
12 adjustment to certain numbers within our analysis, but
13 it would not have altered our conclusion at all;
14 right?

15 We were picking a level of maintainable
16 revenue as of 2017. I'm making an example, but
17 adjusting maintainable revenue in 2002 by a small
18 amount would not have impacted that. So we examined
19 them, and then we reported back in our Second Report
20 that it would not result, those two instances would
21 not result in a changed conclusion. So there was no
22 point in reissuing a report.

1 Brattle in its Second Report continued to
2 make comments on our First Report, which we had not
3 seen in Brattle 1. Those, in our view, necessitated
4 the requirement to make a change to advise the
5 Tribunal of what our opinion is, given those errors.

6 Q. Okay. We'll get to that eventually. But
7 just to go back to the errors that Brattle 1 noted.
8 You could have just made the corrections in your
9 Second Report. And if it's true as you had said that
10 they were not material, it would be evident from the
11 corrections; is that right?

12 A. We acknowledged the amount of the correction
13 and described them in our PwC Reply Report and said
14 they don't change our conclusion. Our PwC Reply
15 Report doesn't include the entire analysis of PwC 1,
16 again. It responds to Brattle 1 as it is intended to
17 do -- right? -- because PwC 1 did not need to be
18 changed, we didn't reissue it.

19 Q. Okay. And then in your Second Report, you
20 made a similar disclaimer as before that you were
21 under no obligation to make revisions that were not
22 known to us when you prepared the Report?

1 A. Well, I think we're saying we reserved the
2 right to make revisions, yes, is what we're saying.

3 Q. Sure. And I think you were in the room on
4 Monday when Ms. Lemmens said that the reason for the
5 issuance of the amended Report is that you had a
6 professional obligation to do so; is that right?

7 A. Yes.

8 Q. I may be paraphrasing the language. I'm not
9 sure but I think it was along those lines?

10 A. I mean I can give my answer. I can't say
11 what Ms. Lemmens would be intending to say.

12 Q. Please.

13 A. I feel my duty here is to the Tribunal. And
14 I need to put forth what I feel my opinion is. The
15 errors noted in the data that we relied upon that were
16 pointed out in Brattle 2, necessitated us to alter the
17 opinion. And I wanted to put forth that opinion to
18 the Tribunal.

19 Q. Okay. And giving the corrected version a
20 couple of days before the Hearing, it -- Brattle had
21 filed its Second Report in November. You couldn't
22 have filed it more than three days before the Hearing

1 started?

2 A. We didn't complete the analysis until then.

3 Yeah. We weren't sitting on it, I assure you.

4 Q. Okay. And you say -- and so when you
5 submitted it, the letter at the front of your amended
6 Report describes the changes that they were made and
7 then you said that you had highlighted all the -- that
8 you highlighted and underlined the changes in the
9 Report, so that we could all see what it was?

10 A. Correct. That's the intent.

11 Q. Okay. So again, I'm going to -- you have
12 your First Report, and there's one of the things I
13 want to go through and it is Pages 22-23 of your First
14 Report, of your original First Report. I'm going to
15 go along slowly and we are going to pull it up because
16 it has to do -- and I think you talked about it in
17 your first -- in your presentation this morning about
18 one of the variables that you used.

19 So let's just -- again, we're going to go
20 through this kind of slowly.

21 So Paragraph 100, you say: "As our
22 Valuation Dates are after the period of normalization

1 (2000 to 2012), we extrapolated normalized revenues in
2 order to understand how revenues may have moved
3 between the end of 2012 and our Valuation Dates."

4 I'm just going to read it into the record so
5 we can also follow along as to what this is. So: "In
6 order to perform this extrapolation, we examined
7 several industry activity indicators in order to
8 understand which metric had the strongest relationship
9 with normalized revenues over the 2000 to 2012
10 period"; is that right?

11 A. Yeah. I see that on screen, yes.

12 Q. Okay. And then we can skip Paragraph 3
13 because it's not totally relevant, but "The following
14 table summarizes the metrics we examined and the
15 judgmentally-selected shift that we applied."

16 And then under Paragraph 104, there's a
17 table. Yeah, so it goes on to Page 23. And there's a
18 table with the eight metrics that you describe; is
19 that right?

20 A. Correct.

21 Q. Okay. So Canadian rig count, Canadian
22 offshore rig count, comparable company revenues, spot

1 price, et cetera?

2 A. Correct.

3 Q. Okay. And then Paragraph 105, you explain
4 how you figured out the statistical relationship
5 between normalized revenues by calculating the
6 R-squared value of the metrics and the normalized
7 revenues between 2000 and 2012; right?

8 A. Correct.

9 Q. Okay. And this explains -- because you used
10 a tool called a "regression analysis," which is to see
11 whether there's an objective observable variable that
12 can be used to bridge, as you said, the normalized
13 revenues from 2012-2017 Valuation Dates; is that
14 right?

15 A. Correct.

16 Q. Okay. And this brings back nightmares to,
17 you know, my graduate school when I decided I could
18 not do a Ph.D. and so I went to law school instead.
19 But I was really glad to see in your footnote to
20 Paragraph 105. It is something that is really helpful
21 because it describes what the R-square is and how the
22 regression analysis works.

1 And I won't go through it all, but it is
2 really helpful because it says at the end of it, it
3 says: "In other words, an R-squared value of 0.9
4 indicates that the dependent variable is 90 percent
5 explained by the independent variable. An R-squared
6 of 0.3 indicates that the dependent variable is
7 30 percent explained by the independent variable."

8 So just in plain English, the closer the
9 R-squared number is to 1, the higher the correlation;
10 is that right?

11 A. Agreed. To go a bit further I'd
12 like -- that's the square of the correlation, but,
13 yes, the greater the correlation, the -- the closer to
14 1, the more the correlation, yes. I mean there could
15 be instances of negative but we have examined for
16 that. Yeah.

17 Q. Sure. Okay. And then Paragraph 106
18 says: "The observed R-squared for each of the eight
19 shifted indicators compared to both normalized
20 revenues in Canadian dollars and normalized revenues
21 in U.S. dollars is presented in the following table."

22 And then you've got that table that has the

1 R-squared for all the indicators for the normalized
2 revenues, both in Canadian and U.S. dollars; is that
3 right?

4 A. That's correct.

5 Q. Okay. And then you highlighted the highest
6 R-squared, which is global offshore rig count with an
7 R-squared in U.S. dollars of 0.50. You so you
8 highlighted that one to show that's the highest
9 R-squared?

10 A. Correct.

11 Q. Okay. And then at Paragraph 107, you
12 say: "We noted that the statistically strongest
13 predictor of normalized revenues in a given year was
14 the following year's annual global offshore rig count
15 when compared to normalized U.S. dollar revenues;
16 here, we noted an R-squared value of 0.5."

17 And that was what you used -- and
18 because -- so that 0.5 was the statistically strongest
19 predictor, that's what you relied on to forecast
20 normalized revenues from 2012 to the Valuation Dates?

21 A. Correct, to illustrate what revenues would
22 have been in 2013 to '17, yes. Strongest correlation

1 was global offshore rig count, which had an R-squared
2 of .5; and, therefore, when we have illustrated
3 revenues going forward, we have used that offshore rig
4 count and moved revenues in the same percentage.

5 Q. Okay. So in plain English, you project
6 GSI's But-For revenues in U.S. dollars from 2012 to
7 your Valuation Dates by growing each year's revenues
8 by the percentage change following the global rig
9 count?

10 A. Yes. Yes. And we assume an exact change
11 equal to global rig count.

12 Q. Great. Okay.

13 So now, let's turn to your second -- your
14 amended Report.

15 A. Yes.

16 Q. And I think it is important we take the old
17 Report and the new Report and put them kind of side by
18 side. And we have hard copies if anyone wants to take
19 a look.

20 A. So I can speak to this. I think I know
21 where you're going here.

22 Q. The missing paragraphs --

1 A. Yeah, go ahead. Please.

2 Q. Let's put them up on the screen, so that
3 everyone can see that there were two deleted
4 paragraphs.

5 A. Inadvertently deleted, yes.

6 Q. With no changes indicated?

7 A. It was a complete error on a formatting
8 issue. We had header issues. As you can see the
9 Report on the left, there is not a header on the top.
10 So we were fixing the headers, and we realized this
11 late last week that those two paragraphs got
12 inadvertently deleted. So what I would suggest is
13 those paragraphs belong in the amended Report, as
14 well.

15 Q. Okay.

16 A. And the footnote. Apologies.

17 Q. Okay. And the footnote. So those two
18 paragraphs -- because when we started looking at that
19 methodology, and if you apply that methodology, and if
20 you apply the new numbers in your Report, it actually
21 changes the outcome.

22 So let's walk through this and we'll see.

1 Because if we go to your new Report, and look at the
2 statistically -- the R-squared -- sorry. If we go to
3 the new Report, Page 25.

4 Chris, are you able to pull up the chart
5 that is R-squared? It is on Page 25 of the new
6 Report. Go to the next page. That's it. Yeah.
7 Right there. Okay.

8 You notice that the number of the most
9 statistically strongest predictor is no longer the
10 global offshore rig count; is it?

11 A. I disagree. In U.S. dollars, it is the
12 strongest predictor.

13 Q. But that's not how you did it last time.
14 The number -- sorry.

15 A. We've used the strongest predictor in
16 U.S. dollars as the predictor. We don't, as I
17 mentioned in the presentation, we don't feel Canadian
18 dollars are relevant. This business operates in U.S.
19 dollars. Looking for a correlation between Canadian
20 dollar revenues then takes into account foreign
21 exchange, which is not relevant in terms of the
22 business activities. So the correlation has always

1 been on the strongest U.S. dollar predictor.

2 Q. The methodology that you applied said that
3 it would use the strongest predictor with the highest
4 R-squared. And the R-squared with the highest, with
5 the new numbers, it is only the fourth highest.

6 A. I would disagree, that that's what how
7 you're stating our methodology.

8 Q. So let's look -- so the R-squared of global
9 offshore rig count, which is highlighted, is 0.47; is
10 that right?

11 A. Correct.

12 Q. And that is 0.3 less than the 0.5 R-squared
13 that was in your original Report?

14 A. That's correct.

15 Q. And the Canadian dollar rig count is higher
16 than that. So that is a statistically stronger
17 predictor by that number. If you look at 0.5, that is
18 stronger than global offshore rig count?

19 A. But that is in Canadian dollars. Again, as
20 stated in our Report, as stated in my presentation, as
21 stated right now, we believe that it's the U.S. dollar
22 correlation that matters. Global offshore rig count

1 has a .47 correlation factor, R-squared factor.

2 Q. Okay.

3 A. Canadian rig count had .28 to U.S. dollars.

4 It still the strongest indicator.

5 Q. Okay. Let's put that aside for a second and
6 go to what is on the R-squared, what is the strongest
7 predictor?

8 The highest number R-squared here is the
9 spot price, the oil price, 0.53?

10 A. To Canadian dollars, which is not relevant.
11 Again -- it's spot price may have a better correlation
12 to any other -- the relevant factor here is revenues
13 in U.S. dollars; right? We are trying to find a
14 correlation to revenues in U.S. dollars. That's why
15 we have continued to use global offshore rig count.
16 The Canadian column there, frankly, is not relevant.

17 Q. You said that you found the error late last
18 week. And is this just now the first time that we are
19 going to bring up the paragraphs and the differences
20 in numbers?

21 A. The numbers have not changed at all. Just
22 to be clear, what numbers have changed, I guess, I

1 would ask?

2 Q. Well, you mentioned in your Opening
3 Presentation on Page 16, where you say that the
4 strongest correlation to normalized revenues R-squared
5 of 0.47, correlation coefficient of 0.69, where are
6 those calculations?

7 A. Well, .47 is in the table that you just had
8 on the screen.

9 Q. Right.

10 A. The square root of .47 is .69. That's how
11 .69 is derived.

12 Q. And so you say that it's still the
13 statistically strongest correlator -- predictor in
14 U.S. dollars?

15 A. Yes.

16 Q. I'm sorry. I'm jumping a lot around. So I
17 know that you had your first one, the R-squared. Take
18 your time.

19 A. Go ahead with your question. I'm listening.

20 Q. Sorry. If we can go back to the chart.
21 Yeah.

22 Now that with the adjusted numbers, the

1 statistically highest or the statistically strongest
2 predictor is just, according to this chart -- I
3 understand your view about U.S. dollars versus
4 Canadian dollars and so on -- is the spot price. Did
5 you actually do the math to make sure that it actually
6 still is the statistically strongest predictor, even
7 if you take into account exchange rate based on oil
8 prices?

9 A. The math is done in the table. So if we
10 thought that picking an industry factor, and picking
11 it to the one that was most correlated in Canadian
12 dollars was relevant, you are correct. The spot price
13 would have been that. But as we've said in the Report
14 and in the presentation and I'm saying now, we want to
15 correlate to U.S. dollars.

16 We feel that reflects the best correlation.
17 What this company earns in U.S. dollars, it bills in
18 U.S. dollars, it remains the best factor. It was .5
19 before for global offshore rig count. It is .47 now.
20 It remains the best factor.

21 Q. Okay. Sorry. I want to make sure I get
22 this. Where in your First Report did you say that

1 GSI's Canadian dollar normalized revenues were not
2 relevant?

3 A. We wouldn't say those exact words. But what
4 we've said at Paragraph 107: "We noted that the
5 statistically" -- I'm struggling with it, as
6 well -- "strongest predictor of normalized revenues in
7 a given year was the following year's annual global
8 offshore rig count when compared to normalized U.S.
9 dollars."

10 We are saying there, is the U.S. dollars are
11 the ones that are important, it's the strongest one
12 related to U.S. dollars.

13 Q. Can you explain why?

14 A. Because the Company earns revenues in
15 U.S. dollars. It bills in U.S. dollars. What we are
16 trying to evaluate is what sort of business level
17 activity and revenues and profit the Company would
18 have earned in 2017? They bill and earn in
19 U.S. dollars; therefore, we are looking for the
20 correlation that most closely ties to how they bill.

21 To do it in Canadian dollars or Mexican
22 pesos or some other currency introduces noise that is

1 not necessary. It's a U.S. dollar correlation we are
2 looking for; hence, we continue to rely. Hence, we
3 relied on U.S. dollars and we continue to rely on
4 U.S. dollars.

5 Q. Okay. I think there was a couple of last
6 questions on this. Why would you present the Canadian
7 dollar correlation if you didn't think it was
8 relevant?

9 A. Yeah. It begs the question. The most
10 important one -- the important one is the U.S. one.
11 We didn't necessarily have to present it. Often
12 throughout our Report, we list both Canadian and
13 U.S. dollars. We've listed both there. But I'm
14 hoping I'm clear that we rely upon the U.S. dollar
15 correlation to predict future revenue.

16 Q. Okay.

17 ARBITRATOR LANDAU: Can I ask one quick
18 question? I'm going to ask a really stupid question.
19 So I haven't quite -- I understand that the global
20 offshore rig count would be the total number of active
21 drilling rigs, basically, offshore globally.

22 This is a really stupid question, but I

1 would have thought -- so that is one figure. And when
2 you're comparing U.S. dollars and Canadian dollars,
3 why have you got two figures? Is that just a
4 conversion? Is that just assessing that one metric
5 either in dollars or assessing it in Canadian dollars?

6 THE WITNESS: That is correct. Maybe I'll
7 elaborate a bit. So we have the rig count listed.

8 ARBITRATOR LANDAU: It doesn't change.

9 THE WITNESS: It doesn't change, exactly.
10 And then we have revenues. And revenues are either in
11 U.S. or Canadian, we feel like looking for the best
12 correlation with U.S.

13 ARBITRATOR LANDAU: All right. Thank you.

14 BY MR. LUZ:

15 Q. Okay. We can move away from regression
16 analysis and R-squared.

17 THE WITNESS: Okay.

18 [REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

1 PRESIDENT WALLGREN-LINDHOLM: Okay. Thank
2 you. See you back at 11:15.

3 (Brief recess.)

4 PRESIDENT WALLGREN-LINDHOLM: So we will now
5 continue the cross-examination of Mr. Paul Sharp, and
6 we will continue -- or at least their scheduled time
7 until lunch at 12:45. And then before we break for
8 lunch, I will ask Counsel to introduce any new persons
9 that are attending the Hearing in person. Thank you.

10 Mr. Luz, you may continue.

11 MR. LUZ: Thank you, Madam Chair. I will
12 just organize my papers again.

■ ████████████████████

■ ■ ██

■ ■ ████████████████

■ ■ ██

■ ██

■ ██

■ ██

■ ██

■ ██

■ ██

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

_____, _____, _____

██████████

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] So all of these invoices

13 which, if they were to be declared or have been
14 declared invalid by a court, their removal would
15 actually impact your revenue normalization and; hence,
16 the damages?

17 A. Correct. We assume -- and I think we've
18 stated this earlier today, but the Unpaid Invoices are
19 legitimate charges; right? If it's ruled that they
20 are not legitimate charges, then, yes, it would impact
21 things. Right?

22 Q. And you -- I'm sorry. I interrupted you.

1 A. No, not at all. Yeah.

2 Q. Okay. And you assume that they're
3 legitimate because the invoices say they're
4 legitimate?

5 A. Yeah. We don't have the ability to assess
6 that as valuers. We are not Seismic Experts. We
7 have relied upon on that data.

8 Q. Okay.

9 ARBITRATOR LANDAU: Can I -- sorry for
10 interrupting.

11 MR. LUZ: Please.

12 ARBITRATOR LANDAU: And I just -- again, I
13 have got another stupid question but I just
14 want -- just so I can understand this a little bit.

15 I'm following this as sort of as CCF rather
16 than DCF essentially, so you're -- and I understand
17 you're not valuing this as loss, which is to be
18 recovered.

19 I know you are using it to normalize
20 revenue, but analogous to what one might be doing in a
21 DCF exercise, when you're looking to normalize based
22 upon factors such as this list that have in it -- have

1 in them contingencies such as whether or not there
2 will be a recovery, whether or not a claim will be
3 held valid, is there no process within a CCF analysis
4 for discounting or for dealing with that accounting
5 for that risk factor?

6 THE WITNESS: We've assumed that they would
7 be collected, right? I don't have the ability --

8 (Overlapping speakers.)

9 ARBITRATOR LANDAU: I understand that's the
10 instruction.

11 THE WITNESS: Yeah.

12 ARBITRATOR LANDAU: So I'll ask you a
13 question then which is outside your instructions. So
14 your instructions were to accept this?

15 THE WITNESS: Yes.

16 ARBITRATOR LANDAU: But asking you just in
17 your capacity as an expert in valuation, when you're
18 conducting a CCF analysis, wouldn't there be scope to
19 build in some sort of discounting factor for -- or
20 "discounting" may be the wrong word but a factor to
21 account for the risk of nonrecovery or the uncertainty
22 of a contingency?

1 THE WITNESS: Yes. There could be.

2 ARBITRATOR LANDAU: There would be a
3 mechanism to do that?

4 THE WITNESS: I don't think it would differ
5 in a CCF or a DCF.

6 ARBITRATOR LANDAU: It's the same idea.

7 THE WITNESS: Yeah. Same idea. You're
8 trying to forecast the future earnings potential of
9 the entity.

10 ARBITRATOR LANDAU: Yeah. While I've got
11 the mic -- forgive me. When one is looking at this
12 also, this goes beyond what we're looking at here.
13 It's also a question in my mind just about the value
14 of the copyrights themselves. You've, you've, as
15 you've explained, assumed that all the copyrights are
16 enforceable and would have been enforced and there
17 would have been recovery on them. Again, another
18 approach, when you're dealing with something which may
19 be subject to court determination and subject to
20 possible defenses, would be a kind of loss of
21 opportunity analysis which would bring in, then,
22 percentages in order to assess the value.

1 THE WITNESS: Can you just elaborate on what
2 you mean by "bring in percentages"?

3 ARBITRATOR LANDAU: Well, you
4 would -- instead of just assuming that a copyright has
5 a value of X, because there is a contingency, there's
6 a risk that you may not get a court to uphold it. You
7 would say X minus a certain amount in order to account
8 for what is in a sense -- you're valuing a loss of
9 opportunity that you will get your copyright rather
10 than the actual copyright value?

11 THE WITNESS: I think you're correct, yes.
12 If there is that risk, one could potentially try to
13 evaluate its impact on it. I mean -- but you're
14 correct, we --

15 (Overlapping speakers.)

16 ARBITRATOR LANDAU: I understand. So the
17 question I have, then, is that something that
18 theoretically, aside from your instructions, might
19 feature in a CCF analysis?

20 THE WITNESS: I think it could feature in a
21 CCF or any analysis. If you had the ability and
22 requirement, like, to assess that that would not be

1 upheld, you're correct. Yeah.

2 ARBITRATOR LANDAU: All right. Thank you.
3 Sorry.

4 MR. LUZ: No apologies. I was grateful for
5 the break for a moment.

6 BY MR. LUZ:

7 Q. To get back to -- I'm going to --

8 Chris, can you pull up Mr. Sharp's Second
9 Report, Paragraph 66. Yeah. I just want to get to
10 the sentence that says: "Some of the charges appear
11 to have been dismissed by the Courts, as referenced by
12 The Brattle Group. The fact that claims related to
13 certain invoice charges were dismissed by Courts is
14 not a reliable indication that those invoice charges
15 are not valid."

16 I assume now you're in the position to say
17 that, if the Court rules that the charges are not
18 valid, that is a reliable indication that the charges
19 are not valid?

20 A. I think that requires elaboration. I mean,
21 in this instance, Counsel has advised us that they
22 were dismissed by the Courts and that it was a

1 reliable indication that they're not valid. I didn't
2 make that assessment. As I understand it, they could
3 have been dismissed for other reasons, like time
4 limitations or something like that. In which case,
5 I'm not sure if that would be a valid reason to
6 exclude them or not.

7 Q. Okay.

8 So let's go back to C-112. And -- actually,
9 before we go back, so we talked before, you had not
10 been advised whether or not any of the other claims
11 involving the invoices on this list had previously
12 been dismissed by the Courts; is that right?

13 A. Yeah, I don't want to say something that's
14 not true. I don't know the answer to that, other than
15 we were told to remove this one. I don't believe
16 there were other Decisions, but I don't know that;
17 right? This is something we deferred to Counsel on to
18 advise which of these should be normalized.

19 Q. Fair enough. Okay.

20 So I'm going to pull up Exhibit R-014, which
21 is a letter from Claimants' Counsel to Canada dated
22 July 15, 2019. And if we just scroll down to the

[illegible]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[illegible]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9 ARBITRATOR LANDAU: Sorry. I'm unclear
10 about that answer because the question put to you, in
11 your Expert capacity, is whether or not removing it
12 would impact your revenue assessment. And your answer
13 is: "If I'm instructed that it would impact, I would
14 remove it." But what's your Expert view?

15 THE WITNESS: I misunderstood the question.
16 Removing it would certainly impact normalized. I
17 don't know whether there's -- it would be proper to
18 remove it, based on the Decision, but you're correct,
19 removing it would impact the number.

20 ARBITRATOR LANDAU: Thank you.

21 THE WITNESS: Yes.

22 BY MR. LUZ:

[illegible]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[illegible]

□ □ □

Year	2010	2011	2012	2013
Q1	10	12	15	18
Q2	15	18	22	25
Q3	20	25	30	35
Q4	25	30	35	40
Q5	30	35	40	45
Q6	35	40	45	50
Q7	40	45	50	55
Q8	45	50	55	60
Q9	50	55	60	65
Q10	55	60	65	70
Q11	60	65	70	75
Q12	65	70	75	80
Q13	70	75	80	85
Q14	75	80	85	90
Q15	80	85	90	95
Q16	85	90	95	100
Q17	90	95	100	105
Q18	95	100	105	110
Q19	100	105	110	115
Q20	105	110	115	120
Q21	110	115	120	125
Q22	115	120	125	130
Q23	120	125	130	135
Q24	125	130	135	140
Q25	130	135	140	145
Q26	135	140	145	150
Q27	140	145	150	155
Q28	145	150	155	160
Q29	150	155	160	165
Q30	155	160	165	170
Q31	160	165	170	175
Q32	165	170	175	180
Q33	170	175	180	185
Q34	175	180	185	190
Q35	180	185	190	195
Q36	185	190	195	200
Q37	190	195	200	205
Q38	195	200	205	210
Q39	200	205	210	215
Q40	205	210	215	220
Q41	210	215	220	225
Q42	215	220	225	230
Q43	220	225	230	235
Q44	225	230	235	240
Q45	230	235	240	245
Q46	235	240	245	250
Q47	240	245	250	255
Q48	245	250	255	260
Q49	250	255	260	265
Q50	255	260	265	270
Q51	260	265	270	275
Q52	265	270	275	280
Q53	270	275	280	285
Q54	275	280	285	290
Q55	280	285	290	295
Q56	285	290	295	300
Q57	290	295	300	305
Q58	295	300	305	310
Q59	300	305	310	315
Q60	305	310	315	320
Q61	310	315	320	325
Q62	315	320	325	330
Q63	320	325	330	335
Q64	325	330	335	340
Q65	330	335	340	345
Q66	335	340	345	350
Q67	340	345	350	355
Q68	345	350	355	360
Q69	350	355	360	365
Q70	355	360	365	370
Q71	360	365	370	375
Q72	365	370	375	380
Q73	370	375	380	385
Q74	375	380	385	390
Q75	380	385	390	395
Q76	385	390	395	400
Q77	390	395	400	405
Q78	395	400	405	410
Q79	400	405	410	415</

[illegible]

██████████

_____, _____, _____

[REDACTED]

[REDACTED]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

1 PRESIDENT WALLGREN-LINDHOLM: Mr. Luz, sorry
2 for the interruption, but may I just check that you
3 have ensured that there is not such information in
4 this part that should result in the Zoom being cut
5 off.

6 MR. LUZ: I don't think so.

7 MS. LEMMENS: C-112 is a confidential
8 exhibit. So if we're on Zoom, we shouldn't be.

9 PRESIDENT WALLGREN-LINDHOLM: Just a moment,
10 please.

11 (Pause.)

12 Apparently, nobody is now on Zoom that
13 shouldn't be. I also -- nobody on Zoom is a person
14 who cannot have access to Confidential Information, as
15 I am now informed. So please, proceed and apologies
16 for the interruption.

17 MR. LUZ: No apologies needed for that, and
18 I apologize -- I had assumed that we were actually in
19 the confidential session. So I apologize. I'm just
20 glad it seems to be okay.

21 BY MR. LUZ:

22 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

8 MR. LUZ: Madam Chair, I think this is
9 actually probably a good interlude for a break. I
10 don't know what time we are supposed to have -- I
11 don't know how long I've actually gone.

12 PRESIDENT WALLGREN-LINDHOLM: We are
13 supposed to break for lunch at 12:45, which means in
14 30 minutes.

15 MR. LUZ: Okay.

16 PRESIDENT WALLGREN-LINDHOLM: So I guess
17 there's no point in taking a break now. Either we
18 should break for lunch or then continue another little
19 while.

20 MR. LUZ: If it's okay with the Tribunal and
21 my friends across the aisle, I think this is actually
22 probably a good interlude in which to have a break. I

1 mean, I could go on for another half hour, but then it
2 is going to kind of break up the flow. So if it's
3 okay if we take a lunch break now, the normal lunch
4 break, then we will be able to launch back in. And I
5 should be able to maybe even finish before the next
6 break.

7 PRESIDENT WALLGREN-LINDHOLM: What does
8 Claimant think about an interlude at this point?

9 MS. LEMMENS: Hi. So we can certainly take
10 a break right now. I would just like to get an
11 understanding about the rest of the day.

12 So are we intending -- if it's the case that
13 we will be finishing before the afternoon break, are
14 we going to proceed with having Brattle do its Direct
15 Presentation at that time?

16 MR. LUZ: No. I think I've got a fair
17 amount. Like, I don't think we're going to be able to
18 get to Brattle today by the time we get through
19 everything.

20 MS. LEMMENS: Okay. So it's fine to take a
21 break. No problem with that. It's your
22 cross-examination, so I'll let you conduct it as you

1 see fit. Maybe while we are just talking about sort
2 of logistics for these last couple of days -- nothing
3 about the cross-exam -- the five Authorities that
4 Mr. Landau had mentioned at the end of Friday, do you
5 want those submitted into the Authorities in the
6 record? And, if so, how would you want them marked?
7 Because they came from neither party.

8 PRESIDENT WALLGREN-LINDHOLM: Yes.

9 Ms. Lemmens, we will add them to the record as a
10 Tribunal exhibit. So we will add them and you do not
11 need to. And then we have them on the record.

12 MS. LEMMENS: Very good. Thank you for
13 clearing that up.

14 And then if we're not intending to get to
15 Brattle today, I just note that Brattle's two Reports
16 in this matter were jointly authored. And so it's our
17 belief that Brattle is going to do one Direct
18 Presentation because there is only one accounted for
19 in the schedule. And that we would expect that the
20 two Experts for Brattle would not be speaking to one
21 another once they both enter that phase of being
22 examined, but I just wanted to make that clear that

1 that's our belief and see if there were any issues
2 with that.

3 PRESIDENT WALLGREN-LINDHOLM: Thank you for
4 raising that.

5 I also had the question about, since we have
6 two authors, how both the Direct and the
7 Cross-examination would roll out. So we will note
8 this also to be discussed.

9 But before we get there, I will say
10 something, not trivial but small, and that is if in
11 the break the mikes could be checked, it would
12 probably be -- thank you. It would be more orderly.
13 And then regarding introductions, I look at Claimant
14 now. I believe that I see a new face, and maybe an
15 introduction would be appropriate.

16 MS. LEMMENS: So Mike Dutka of PwC is with
17 us. He was here on the first day, as well and I think
18 I introduced him on that day. In any event, you
19 haven't seen him since that day.

20 PRESIDENT WALLGREN-LINDHOLM: You may have,
21 but I think he's moved up. That's why I put the
22 question.

1 And on Canada's side?

2 MR. LUZ: Thank you, Madam Chair, we share
3 the same understanding as Ms. Lemmens. Brattle will
4 present the Direct Presentation, and then we had
5 already informed Ms. Lemmens of the particular
6 sections of the Report to which everyone will be
7 speaking or we haven't heard.

8 MS. LEMMENS: Sort of. So noting that the
9 Brattle Report is jointly authored and doesn't provide
10 for any attribution as between the two authors, we
11 requested that Canada provide us with that attribution
12 information. I have some attribution information, but
13 there are some portions that remain unattributed in
14 the Report such as the Executive Summary and other
15 aspects of the Report.

16 I have advised Canada that we intend to
17 cross-examine Mr. Darrell Chodorow and then Mr. Alexis
18 Maniatis after that. So that's the order that we
19 would seek to cross-examine them in, based on the
20 information that we have we do have about attribution.
21 But we will have some questions, as a result of the
22 fact that we have some parts of report that are not

1 attributed to either of them at this time.

2 PRESIDENT WALLGREN-LINDHOLM: Maybe
3 Respondent would like to supplement here, Mr. Luz, how
4 you had conceived of the Brattle Report Direct and
5 Cross-examination would roll out. How did you --

6 MR. LUZ: Well, very much in the manner that
7 Ms. Lemmens had advised. But if there are any other
8 parts that you're wondering about, we're happy to
9 answer. I just -- I thought we had provided a full
10 list. So if you have any other questions about it,
11 let us know and we will provide that information for
12 you.

13 PRESIDENT WALLGREN-LINDHOLM: May I propose
14 that during the lunch break that you go through this
15 step by step so we don't need to debate it then who is
16 where, when and response. So that would be
17 appreciated.

18 And then, finally, do you have persons you'd
19 like to introduce, Mr. Luz? Yes, I thought so.

20 MR. LUZ: My apologies, Madam Chair. They
21 have been here and so I just assumed that they were in
22 here.

1 Yes, from The Brattle Group, Darrell
2 Chodorow and Alexis Maniatis are here, as well. I
3 apologize I didn't introduce them right from the
4 beginning.

5 PRESIDENT WALLGREN-LINDHOLM: It is good to
6 have our guests confirmed. Thank you very much.

7 So now maybe we will meet at -- shall we
8 take a little bit longer? Yeah, okay, good. So then
9 we take 1 hour and 15 minutes plus, which means that
10 we will meet back at 2:00 p.m.

11 MS. LEMMENS: Okay. That will be an hour
12 and 38 minutes.

13 PRESIDENT WALLGREN-LINDHOLM: Thank you for
14 correcting me.

15 MS. LEMMENS: Perhaps 1:45.

16 PRESIDENT WALLGREN-LINDHOLM: Yes. Thank
17 you.

18 (Whereupon, at 12:26 p.m., the Hearing was
19 adjourned until 1:45 p.m., the same day.)

20 AFTERNOON SESSION

21 PRESIDENT WALLGREN-LINDHOLM: So we will now
22 continue the cross-examination of Mr. Paul Sharp.

1 Mr. Luz, please.

2 MR. LUZ: Thank you, Madam Chair.

3 BY MR. LUZ:

4 Q. Mr. Sharp, welcome back.

5 A. Thank you.

6 ■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ ■ [REDACTED] ■

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[illegible]

[illegible]

[illegible]

© 2006 Pearson Education, Inc. All rights reserved. Printed in the United States of America. This publication is protected by copyright. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or by any information storage or retrieval system, without permission in writing from Pearson Education, Inc.

[REDACTED]

[REDACTED]

[illegible]

[illegible]

[illegible]

[illegible]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

1 Q. Right. But you're assuming that Revenue
2 Normalization is reflective of what that outcome of
3 the 2013 price is?

4 A. Yes, because I'm looking at a more current
5 date to see what business levels and volumes the
6 Company could achieve.

7 Q. Okay. Did you -- so again, I think you
8 confirmed, but you didn't go back to actually test the
9 reasonableness of whether using a 2013 price versus a
10 2004 price resulted in a major discrepancy that would
11 affect the assumption that it would necessarily have
12 resulted in a license?

13 A. I think it's reasonable to use a more
14 current price. We're trying to see what sort of
15 revenue this Company could have earned as of 2017 or
16 as of '22, so, hence, why the 2013 price was used. I
17 agree it could be different from the price in 2004.

18 Q. Sorry, just to go back. You said: "What
19 kind of revenue the Company could have earned as of
20 2017 or as of 2022." But, if what --

21 A. Well, if they had been able to successfully
22 enforce their copyrights. So we're looking at

1 business volumes that they potentially would have done
2 from 2000-2012, and saying, okay, those business
3 volumes, they would have been paid for those, so
4 that's their volume of business. But then when we're
5 valuing it a 2017 Valuation Date, obviously pricing
6 has changed to that date.

7 ARBITRATOR LANDAU: Sorry, can I ask
8 one -- if you're moving on to something else.

9 MR. LUZ: Yes. Please do.

10 ARBITRATOR LANDAU: I'm struggling at the
11 moment to understand exactly how this normalization
12 process works, in the sense that, if you're
13 looking -- I can understand the theory behind it, that
14 you are looking at business volumes and, in a sense,
15 you're looking at, kind of, market behavior, actually,
16 historically, and you're normalizing it to be able to
17 predict going forward in terms of revenue stream. But
18 where I'm struggling is, in order to look at how
19 business volumes work and how the market is behaving,
20 how can one do that by taking a market demand at one
21 date and applying a price which is almost a decade
22 later to that? That's what I can't understand

1 what -- to me, as a non-expert, it would seem more
2 sense to say -- I look at -- let's take 2004, and I
3 look at the demand in a sense, the people who are
4 accessing, and I look at all the conditions at that
5 moment, and I look at the price they would have paid,
6 and that's where I've got now a coherent, logical
7 universe from which I can then regularize, normalize
8 to go forward. But it seems to me you are
9 cherry-picking from different moments.

10 THE WITNESS: Yeah, I would say, if you did
11 the former, your description of using an '04 price and
12 '04 number, then when one picked maintainable revenues
13 in 2017, one would need to further adjust for the fact
14 that prices had gone up.

15 ARBITRATOR LANDAU: Sure. Yes. But you'd
16 be adjusting from something which itself has got an
17 internal logic because it's what was happening at one
18 moment in time that you then extrapolate forward.

19 THE WITNESS: Yeah. In this instance, I
20 don't make that adjustment, but, instead, I'm using a
21 more current price list.

22 ARBITRATOR LANDAU: But wouldn't it be more

1 logical, at that point, if you're looking at a 2013
2 price list, if you could have, it would have been
3 better then, I suppose, to be looking at what was the
4 state of access in 2013?

5 THE WITNESS: I mean, we know it was
6 accessed. We know there was demand in '04, so we're
7 using that instance. I think I'm answering your
8 question but, if I'm not, please correct me.

9 We know there was demand for the service or
10 for the product in '04, so we know the instance
11 occurred then. I don't think we could look -- like,
12 if we only looked at 2013 instances, we'd be
13 disregarding all the previous.

14 ARBITRATOR LANDAU: I suppose that -- maybe
15 that goes back to the same question of whether or not
16 demand itself is affected by price?

17 THE WITNESS: I think you're correct in that
18 we assume that demand would lead to licenses; right?
19 Yes, you're correct. We're not adjusting demand
20 because price was higher. We're assuming a market
21 price in '13 would still generate the same amount of
22 revenue.

1 ARBITRATOR LANDAU: Same amount.

2 THE WITNESS: Yes. Right. You're correct.

3 ARBITRATOR LANDAU: Thank you.

4 MS. LEMMENS: Mr. Landau, I'm not sure if
5 this is an appropriate time to get back to you about
6 the question that you were asking, and I'm not sure if
7 I'm the right person to answer it because I had to
8 consult with my client just to make sure I had the
9 right answer. And so, if you look at Exhibit C-111,
10 you have the column for, I believe it was date of
11 request. I don't have it open. So my understanding
12 from Mr. Einarsson is that that is the date upon which
13 the data was accessed by that party, and that the date
14 of AIA Letter Column is the date that the Accessed
15 Information Act response was coming back to GSI about
16 that information. GSI would receive it shortly after
17 that because they seem to always be dated and then
18 come about a month or two later. But around that
19 time.

20 ARBITRATOR LANDAU: Thank you. So am I
21 right in understanding that the date of request is the
22 actual disclosure is made? And the time at which GSI

1 would have known about it is the subsequent date it
2 gets a response to its AIA?

3 MS. LEMMENS: Yes. That is my
4 understanding.

5 ARBITRATOR LANDAU: Yeah. Thank you.

6 BY MR. LUZ:

7 Q. Okay. So given the conversation that we
8 just had about the value and how it is calculated and
9 so on, that gets factored into the direct expense
10 ratio that you used for the normalized revenues; is
11 that right?

12 A. Yes.

13 Q. All right. So because GSI's direct expenses
14 are those incurred to acquire and create new Seismic
15 Data.

16 Is that your understanding?

17 A. There would be a small component that's in
18 there to acquire and create new data. But for the
19 most part, there would be other expenses.

20 Q. Okay. Let's go to Schedule B2.2, which is
21 Page 79 of the PDF in your Amended Report.

22 A. Right.

1 Q. Okay. So there's the Table. So this is the
2 direct expenses for the year. Sorry -- it's the year
3 direct expenses normalized revenue, and your valuation
4 assumes that direct expenses after the Valuation Date
5 is equal to 20.6 percent of revenues; is that right?

6 A. Yep. The maintainable level would be 20.6.
7 They could vary in any given year, but on an overall
8 basis, it would be 20.6.

9 Q. Okay. And you came up with the ratio by
10 looking at GSI's Actual Direct Costs as a percentage
11 of its normalized revenues from 2000-2008; is that
12 right?

13 A. That's correct.

14 Q. Okay. And again, the normalized revenues in
15 the third column, that's, again, calculated using the
16 2013 prices?

17 A. Correct.

18 Q. Okay. But had you used contemporaneous
19 price lists that coincided with the date of access by
20 the Company listed here, that would be lower; is that
21 right?

22 A. Assuming prices increased over time, yes,

1 they would be.

2 Q. Right. Assuming that, yes.

3 So because normalized revenues are the
4 denominator of the ratio, if one were to conclude that
5 the estimate of normalized revenues from 2000-2008 was
6 too high, the calculation of 20.6 percent of direct
7 expenses, that would be too low; is that right?

8 A. Yeah, I agree with the math on that. Yes,
9 if we reduce the denominator, the percentage increase
10 would increase, yes.

11 Q. Okay. Okay. So again, if we go back to
12 that example that we used before with West Canadian,
13 that's a 2004 access, based on 2013 prices which,
14 assuming they are much higher than the 2004 prices,
15 that would have an impact on the direct expense ratio;
16 is that right?

17 A. I think so. You're saying --

18 Q. If the 2004 prices were lower than 2013
19 prices, the direct expense ratio would go up?

20 A. Had we changed the denominator to reflect
21 2004 prices, yes, you're correct.

22 Q. Right. Okay.

1 And do you know what that direct expense
2 ratio would be if you were to use the contemporaneous
3 prices?

4 A. No, I do not.

5 Q. You don't know?

6 A. No, I do not.

7 Q. And you never did the calculations to try to
8 see if there's a big discrepancy between that?

9 A. You're correct. I did not.

10 Q. Okay. Just before we leave this topic, is
11 the assumption that you are making that, if there's a
12 demand for a particular dataset in 2004, there would
13 be a similar demand in 2017 for the same data?

14 A. Not exactly. We're saying that there was a
15 demand for the data in 2000 through 2012, so not just
16 specifically 2004. And that we want to understand the
17 level of demand that existed in the
18 past -- right? -- and using the Company's Actual
19 Revenues, we can't do that because they weren't able
20 to earn, based on these disclosures.

21 Q. Okay. I'm sorry. So if there's demand for,
22 say, data in the Arctic in 2004, which I believe this

1 Amauligak data is for, you're assuming that that same
2 demand would exist in 2017?

3 A. I'm evaluating the level of demand that
4 existed in the past to then assess what demand would
5 exist in the future. It may not be in this exact same
6 dataset. They may need to reinvest. As you
7 mentioned, some of that direct expense of 20.6 percent
8 is the investment in the processing of data. So they
9 would be able to do that in that area, other areas.
10 But, no, I'm not, specifically, saying that this
11 instance will be perpetually licensed, I'm saying.

12 Q. Okay. But wouldn't real-world market
13 factors also impact that? Again, I bring up,
14 specifically, this one of demanding -- accessing
15 Arctic data in 2004 doesn't necessarily mean the same
16 demand would be there in 2017.

17 I don't know if you're aware, but there's a
18 moratorium on exploration in the Arctic. So wouldn't
19 that ignore all the market factors that exist -- that
20 would have existed prior to 2017?

21 A. But, again, they would have -- they would be
22 put back in a position had these been properly

1 licensed. We have assumed they would get a License
2 Fee for these, and they would be continually
3 reinvesting. So if the Arctic was, in fact, a
4 moratorium in 2016, they would be reinvesting
5 elsewhere; right? It's a functioning company. They
6 would pivot and move around.

7 Q. But reinvesting -- sorry. I'll scratch that
8 and just leave it for a second. I'm assuming you're
9 not an expert in the Seismic Data industry?

10 A. That's correct.

11 Q. Do you know - Or is it a reasonable
12 assumption that the prices would be increasing during
13 the time that you were doing these Revenue
14 Normalizations in the Seismic Data industry?

15 A. I would think so, but I can't testify to
16 that being the case, frankly. Or, if you're asking me
17 to guess, but, yes, I would think they would be
18 increasing slightly but I don't know.

19 Q. And you don't know by how much?

20 A. Correct.

21 Q. I'm going to turn to a different topic.

22 You explained your approach to the valuation

1 was done -- you considered three approaches: The
2 Income Approach, the Market Approach, and the Asset
3 Approach; is that right?

4 A. Yes. We would typically look at those three
5 in a valuation, yes.

6 Q. Okay. And you selected the Income Approach,
7 which is the Capitalized Cash Flow method that we
8 talked about earlier?

9 A. Correct.

10 Q. And then you say in your Report, as a test
11 of reasonableness, we considered the Market Approach
12 where you reviewed somewhat - and we can pull it up if
13 you want, but correct me -- I have it as your First
14 Report, Page 17, Paragraphs 72-77.

15 Again, I'm assuming this is the same number
16 in your Amended Report. In Paragraph 76: "As a test
17 of reasonableness, we considered the Market Approach
18 where we reviewed somewhat comparable public company
19 multiples and somewhat comparable transaction
20 multiples."

21 Is that right?

22 A. That's correct.

1 Q. So again, the test of reasonableness is like
2 a sanity check on your primary valuation approach?

3 A. Correct.

4 Q. Okay. And considering another methodology
5 to test your preferred approach makes sense because it
6 tells you whether or not it is reasonable or not?

7 A. Yes, if it's -- I agree.

8 Q. Okay. You agree that -- so you chose to,
9 but there are circumstances when incorporating all
10 three approaches as a test of reasonableness would be
11 appropriate; is that right?

12 A. There could be.

13 Q. Okay. Let's go to -- it's on Page 17,
14 Paragraph 77. It is actually the next paragraph on
15 this slide: "We also considered an asset-based
16 approach, which would consider, as part of it, a
17 standalone value analysis for GSI's Seismic Data
18 collection. Our research did not yield sufficient
19 independent data points in order to facilitate a
20 robust analysis and, accordingly, this analysis has
21 not been included in this Report."

22 So that was your First -- that was in your

1 First Report; is that right?

2 A. First and Third, correct, yes.

3 Q. Okay. First and Third. But, at any time
4 did you become aware that GSI had previously obtained
5 three independent Fair Market Value Assessments of its
6 Seismic Data library?

7 A. Yes. We're aware of those Reports, yes.

8 Q. Okay. Let's pull them up. It is
9 Exhibit 560. Okay.

10 Were you aware that GSI had obtained these
11 Fair Market Value Reports at the time you wrote your
12 First Report?

13 A. Yes. I believe we were aware. I can't
14 remember the exact, but I believe so, yes. Yes.

15 Q. And you chose not to mention them or include
16 them in your First Report?

17 A. Yes. I think they are valuing a completely
18 different thing.

19 Q. But they fit your Market Value -- your
20 market-based assessment that you could have used as a
21 test of reasonableness.

22 Is that right?

1 A. I would disagree, yeah. This is a value of
2 the Seismic library. Not the business; right? The
3 business was what was expropriated; right? So this is
4 just the value of the library, not the business.

5 Q. Okay.

6 A. That's a big thing.

7 Q. Can we go back to the previous paragraph,
8 77? Right.

9 You said you also considered "a standalone
10 value analysis for GSI's Seismic Data collection. Our
11 research did not yield sufficient independent data
12 points in order to facilitate a robust analysis."

13 Is GSI's own valuation not a sufficient
14 independent data point to, at least, point out the
15 valuation that GSI had itself obtained?

16 A. Well, it was done as of 2003, the one you
17 brought up on screen. So 14 or 19 years earlier, so
18 that certainly lacks relevance in my world.

19 Secondly, it would have only considered the
20 collection or the library at that date, not the
21 overall value of the business. The business would
22 have other drivers and assets of value, like customer

1 relationships, things like that.

2 So it was also prepared, I believe -- and
3 again, we didn't rely on them, but it was prepared, I
4 think, for bank financing, but I don't recall what
5 exactly they were prepared for. But for a variety of
6 those reasons, or for each of those reasons, we
7 determined that it is not a relevant indicator. It is
8 19 years old or 14 years old -- someone else's view.

9 Q. Okay. Let's go back to the Boyd Report and
10 blow it up. So you say the first one was June 2003;
11 is that right?

12 A. I don't recall the dates. I see the date of
13 June 2003, though.

14 Q. Okay. And if we skip through a few
15 pages -- again, I don't have a hard copy, I wish I
16 did. If you can just skip through, keep going. Keep
17 going. Okay. Next page. Next. Next. Okay. Right
18 there.

19 So there is a -- it's one page and it's from
20 July 2005. So we're getting closer to the time period
21 where you start to do the valuation; is that right?

22 A. No, I do the valuation as of November 30,

1 2017.

2 Q. Okay.

3 A. Right. So we are getting closer, but I
4 would say we are still 12 years away.

5 Q. Okay. Let's go to the next one. Okay. So
6 let's blow this up a little bit.

7 In this is August 4, 2009. So this is in
8 the ancillary effects period that you describe?

9 A. We consider ancillary effects, yes, it is.
10 But the date is still eight years prior, yes.

11 Q. Eight years prior. But this is GSI's own
12 internal Fair Market Value valuation of a Seismic Data
13 library as of August 4, 2009. And it explains what
14 its numbers are.

15 Did you not feel that you could just
16 replicate this data and bring it forward to 2017 and
17 then use that to test the reasonableness of your
18 income-based approach?

19 A. No, I did not. This is based on a
20 Depreciated Replacement Cost approach. So going
21 out -- and I'm going by memory here; right? This was
22 four years ago, sorry, three years ago, 2.5 years ago.

1 We did not rely on this. But I don't feel
2 that -- it's not GSI's own value. They hired somebody
3 else to do the value, so -- but, no, I did not feel
4 that a Depreciated Replacement Cost-based approach,
5 prepared for a different purpose at a significantly
6 different time in a different environment was
7 appropriate to value the Company eight years later.

8 Q. And you -- but you didn't even explain that
9 in any of your Reports, as to why GSI's own
10 contemporaneous documents hired by an independent
11 valuator should be disregarded?

12 A. I didn't believe it was relevant for my
13 valuation. So if something wasn't relevant for my
14 valuation, I don't cite it in my valuation.

15 Q. Have you ever attempted to reconcile the
16 difference between the income-based approach and your
17 resultant damages valuation with the value of an
18 independent and contemporaneous valuation of GSI's
19 Seismic Data library?

20 A. Can you describe exactly what you mean by
21 "contemporaneous"?

22 [REDACTED]

[illegible]

20 MR. LUZ: Madam Chair, I think I only have a
21 little bit longer. Could I just have five minutes to
22 consult with my team to see how much longer we are

1 going to use?

2 PRESIDENT WALLGREN-LINDHOLM: Of course.

3 MR. LUZ: Thank you.

4 PRESIDENT WALLGREN-LINDHOLM: Do you want to
5 exit or will you just whisper here?

6 MR. LUZ: If the Tribunal doesn't mind, a
7 brief exit.

8 PRESIDENT WALLGREN-LINDHOLM: Yes. Of
9 course. Thank you.

10 If Claimants want to exit too. I
11 expect this to take about 5 minutes. Ten at
12 most I hear.

13 MR. LUZ: Thank you.

14 (Brief recess.)

15 PRESIDENT WALLGREN-LINDHOLM: So, Mr. Luz, I
16 trust we will hear the outcome of the consultation?

17 MR. LUZ: Yes, Madam Chair. Just some very
18 brief questions, and then we should be done.

19 (Comments off microphone.)

20 PRESIDENT WALLGREN-LINDHOLM: Then you have
21 completed your cross-examination.

22 MR. LUZ: Yes. Yes. Exactly.

1 PRESIDENT WALLGREN-LINDHOLM: Okay. Thank
2 you very much.

3 BY MR. LUZ:

4 Q. I'm just going to go back -- again, sort of
5 going back to the beginning with respect to the
6 R-squared regression analysis and the paragraphs that
7 were omitted from the First Report?

8 A. Mistakenly, yes, from the Second -- Third
9 Report. Yes.

10 (Overlapping speakers.)

11 Q. So based on what you had explained, we
12 thought about it, and I'd like to pull up again those
13 paragraphs, Paragraphs 105, 106, and 107 in your
14 Report. Because you said this morning that the
15 intention was to look at the U.S. dollar R-squared.

16 MR. LUZ: Can we pull it up, Chris. It's
17 Mr. Sharp's Third Report.

18 BY MR. LUZ:

19 Q. Okay. So let's look at Paragraph 105 and
20 106 first.

21 So again -- okay. So let's read
22 Paragraph 105: "In order to evaluate the potential

1 relationship between normalized revenues and the
2 shifted metrics, we calculated the R-squared value
3 looking at normalized revenues and each of the shifted
4 metrics between 2000 and 2012, the last year for which
5 we have Board data."

6 But there is nowhere in the paragraph that
7 says you are only looking at the statistics for GSI's
8 U.S. dollar revenues; is that right?

9 A. Not in that paragraph. I think
10 Paragraph 107 might help clarify, but we can get
11 there. I assume you'll take me there.

12 Q. Sure. Yeah. Yeah, we'll get there in a
13 second.

14 And again -- so Paragraph 106: "The
15 observed R-squared for each of the eight shifted
16 indicators compared to both Normalized Revenues in
17 Canadian dollars and Normalized Revenues in U.S.
18 dollars is presented in the following table." So in
19 your First Report you made the active decision to show
20 results for both Canadian and U.S. dollars.

21 A. I would say we ran it for both and then we
22 left them both in there. However, I stand by my

1 previous comment that it makes sense to do it in U.S.
2 dollars. But you're correct, they are both in the
3 Report.

4 Q. Okay. But there's nowhere in here that says
5 that the Canadian dollar revenues is irrelevant to
6 that exercise?

7 A. It's not explicitly stated that it's
8 irrelevant, you're correct.

9 Q. Okay. And given the fact that you've got it
10 in the Table, you're suggesting that both the
11 U.S. Canadian -- the U.S. and Canadian dollars are
12 relevant metrics?

13 A. I would say no, they are there because we
14 ran them both. I think the U.S. is the relevant one.

15 Q. Okay. So let's look at Paragraph 107. You
16 say: "We noted that the statistically strongest
17 predictor of Normalized Revenues in a given year was
18 the following year's annual global offshore rig count
19 when compared to the Normalized U.S. dollar Revenues."

20 You don't say here that "We noted that the
21 statistically strongest predictor of U.S. dollar
22 Normalized Revenues." Like that's where it would say

1 it if what you're saying is the only factor that
2 matters.

3 A. I would agree that it is ambiguously worded
4 there. I'm just reiterating the intent was for the
5 best U.S. dollar normalization, and I've explained why
6 that was the case because the Company does all its
7 business in U.S. dollars. As I've said earlier, we
8 wouldn't do it in another currency either, Canadian
9 dollars or any other currency wouldn't make sense.
10 U.S. dollars is what makes sense.

11 Q. And the fact that both Brattle and -- I
12 don't know if you read the Expert Reports of
13 Mr. Robert Hobbs. Both pointed out that the -- that,
14 in their view, the best prediction -- statistically
15 strongest predictor is actually the oil spot price.

16 Does that not suggest that there's a
17 dissonance between the -- your selection of global
18 offshore rig count versus oil spot price?

19 A. Well. I recall them saying that. Certainly
20 recall Brattle saying it, the Brattle Report.
21 However, I would say that was not borne out by the
22 analysis we ran. It is one thing to say something

1 that spot price should be the number, but when we
2 actually ran the numbers, as we can see, spot price,
3 depending on which report you're looking at, has a
4 much lower R-squared than to U.S. dollars than the
5 R-squared for global offshore rig count.

6 So it turned -- we weren't judgmentally
7 picking which of these indicators worked. We were
8 picking the one that suggested the highest
9 correlation, and we ran with that to U.S. dollars.

10 Q. Okay. But again, in your First Report it
11 wasn't specific as to U.S. dollar revenues. It is
12 only now that we are --

13 A. It does say in Paragraph 107, "when compared
14 to U.S. dollar revenues." The intent was that we
15 wanted to compare it to U.S. dollar revenues. I agree
16 that it's ambiguously worded there.

17 Q. Okay. Mr. Sharp, just to clarify, you
18 said -- when did you notice that these paragraphs had
19 been missing?

20 A. Late last week. And it -- yeah, they were
21 deleted like -- not intentionally.

22 Q. Okay. And you didn't bring them up in

1 your -- as a correction in your Opening Presentation?

2 A. I didn't believe they were significant.

3 Q. Okay. I'll just close off with one last
4 issue. You had said that the Brattle Rejoinder Report
5 and not the First Brattle Report raised issues that
6 led to your Amended Report for the first time; is that
7 right?

8 A. Yes. It was the Brattle Rejoinder that led
9 to the amendment of the Report.

10 Q. Which of the changes in your Amended Report
11 could you not have identified had your verification
12 procedures been more rigorous in the first place?

13 A. I would say none of them; right? I could
14 have identified any or all of them. The fact is, I
15 relied upon C-111 and C-112. It was clear in my
16 scope, we rely on certain things from clients. This
17 is not a forensic analysis. I didn't forensically
18 audit the Financial Statements either. But I'm just
19 giving that context. I think it is helpful for the
20 Tribunal, but had I done these procedures, you're
21 correct, I would have identified the same issues.

22 Q. Okay.

1 Thank you, Mr. Sharp. I appreciate it.

2 MR. LUZ: Madam Chair, we don't have any
3 other questions.

4 PRESIDENT WALLGREN-LINDHOLM: Thank you,
5 Mr. Luz.

6 Redirect?

7 MS. LEMMENS: Yes, Madam Chair, just a few
8 questions.

9 PRESIDENT WALLGREN-LINDHOLM: Yes. And you
10 will go --

11 MS. LEMMENS: Right now.

12 PRESIDENT WALLGREN-LINDHOLM: Right now.
13 Thank you very much.

14 MS. LEMMENS: Thank you.

15 REDIRECT EXAMINATION

16 BY MS. LEMMENS:

17 Q. Sir -- sorry about the table. If you want
18 to move it, you're welcome to do that if you need to.

19 A. I'm fine. Thank you.

20 Q. Okay. Sir, you were asked some questions
21 regarding the outcomes of various lawsuits and
22 settlements related to the Unpaid Invoice Listing.

1 Do you recall that?

2 A. I do.

3 Q. And if you were to consider the valuation
4 based on your same Normalized Revenues Methodology but
5 attributing 0 percent chance of success to recovery on
6 the Unpaid Invoices, what order of magnitude would the
7 valuation be in?

8 A. So I just want to make sure I'm answering
9 the right question. If we removed the impact of the
10 Unpaid Invoices as a normalization.

11 Q. Yes.

12 A. I don't have the number, but it would be a
13 very significant adjustment to the value, very, very
14 significant.

15 Q. Okay. And do you know if the result would
16 be in the order of tens of millions of dollars?

17 A. So the loss would go from like \$300 million.
18 It would go down into the tens of millions, yes. So
19 it would be a significant reduction.

20 Q. Okay. But it's not a reduction to 0?

21 A. Correct.

22 Q. Why did you not apply a Discount Rate to the

1 Unpaid Invoices?

2 A. We were in -- our premise is that they would
3 be collectible where our premise is that they were
4 harmed by the Decision in the litigation that preceded
5 it, and therefore, people were not paying those
6 invoices.

7 Q. You were also asked some questions about the
8 use of the GSI Price Lists from 2013 with respect to
9 the Accessed Data List in Exhibit C-111.

10 Do you recall that?

11 A. I do.

12 Q. And if we turn back to Exhibit C-111, you'll
13 note the column relating to the -- we'll just pull it
14 up for you.

15 A. Okay.

16 Q. Yeah. So we have the column related to the
17 date of AIA Letter there, sir?

18 A. Yes, I see that.

19 Q. And so, based on most of the dates there,
20 what is the -- what would have been the applicable
21 price list at the dates that you see there?

22 A. Yeah. I'm just scanning the list, but it

1 appears that 2012 to -- yeah, most of them are 2012 or
2 '13. Most of them are '13.

3 Q. And, sir, I just want to clarify what, if
4 any, interest was charged with respect to accessed
5 data charges in your normalization analysis?

6 A. There were -- sorry, I want to clarify. On
7 Unpaid Invoices or disclosed data or either?

8 Q. Disclosed data, access to data charges?

9 A. Yeah. No interest.

10 Q. Why was that?

11 A. We're trying to determine the business as it
12 would have existed and the revenue levels that it
13 would generate, right. To include penalty interest on
14 that wouldn't make any sense because it would assume,
15 on a go-forward basis, that they would be able to
16 fight with their customers and be able to generate
17 penalty interest.

18 Q. And, sir, with respect to the GSI Price
19 Lists, what, if anything, is assumed in the GSI Price
20 Lists with respect to license agreements?

21 A. It would follow the terms of the GSI's
22 License Agreements.

1 Q. And to your understanding, when a party
2 accesses GSI's data, as we see in Exhibit C-111, what,
3 if any, license terms apply to that access?

4 A. I don't think there were any specific terms
5 surrounding them accessing Board data. They wouldn't
6 have been entered into a contract.

7 Q. Thank you, sir.

8 MS. LEMMENS: Those are my questions.

9 PRESIDENT WALLGREN-LINDHOLM: Thank you,
10 Ms. Lemmens.

11 Is there a request for recross, or shall I
12 give the mic to my co-arbitrators?

13 MR. LUZ: Nothing further from Canada, Madam
14 Chair.

15 PRESIDENT WALLGREN-LINDHOLM: Thank you very
16 much.

17 QUESTIONS FROM THE TRIBUNAL

18 ARBITRATOR GOWDY: I usually defer to the
19 KCs, but I will go first and I will tell you,
20 Mr. Sharp, I have spent most of my life assiduously
21 avoiding anything that involves the words "squared,"
22 "R-squared," or anything else squared, so forgive me

1 if these questions are elementary. And speaking of
2 which, you can help me by understanding the category
3 of people who may have accessed GSI's information. I
4 know there's academia, there are oil companies. Were
5 there competitors? What's the full panoply of who
6 accessed the information?

7 THE WITNESS: You're headed right down the
8 correct path. There were academics or government
9 institutions. That's the one category. Those have
10 the 0 multiplier applied to it. There were
11 exploration and production companies, so exactly as
12 you said it, oil companies. And then the last
13 category would be Seismic Data companies, or copy
14 companies.

15 ARBITRATOR GOWDY: All right. How did GSI's
16 competitors navigate the Alberta Decisions? Or did
17 they?

18 THE WITNESS: I don't know that they would
19 have any differently. The only thing I would know is
20 that GSI was more pervasively impacted by it because
21 all their data focused in these areas, but I don't
22 think they would have been impacted differently. I

1 didn't analyze that though.

2 ARBITRATOR GOWDY: You said "more
3 pervasively." In what way? Help me understand that.

4 THE WITNESS: So if we would pick another
5 company, TGS, for example, they have Seismic Data all
6 over the world, so Canada would represent a much
7 smaller portion of their business, so this disclosure
8 would have impacted them in a similar aspect.

9 ARBITRATOR GOWDY: All right. There's a
10 clause, I think, in the last sentence of the Common
11 Issues Decision, leaving open other contractual issues
12 in each case.

13 Did you -- and I read that to mean that, if
14 there's a contract between two entities, this
15 preserved the right to pursue whatever rights you may
16 have under that contract.

17 Did you evaluate whether or not there were,
18 pending or in the past or could in the future be,
19 contract litigation between GSI and other entities?

20 THE WITNESS: So I think, with respect to
21 the Unpaid Invoices, we certainly would say that, yes,
22 there are contracts out there and we understand that

1 GSI is free to pursue those claims, as I understand
2 it. So they could pursue them.

3 Now, that would just recover the amount that
4 was due as a result of those Unpaid Invoices. It
5 wouldn't restore the relationship and allow them to be
6 generating income again.

7 ARBITRATOR GOWDY: Explain that part of it
8 to me.

9 THE WITNESS: So I think the Decision has
10 happened which has said that GSI cannot pursue its
11 copyright from those companies for accessing Board
12 data. So they've, potentially, in those customers'
13 minds, has been said, "look, you were wrong coming
14 after us for this. The Decision is there that says
15 you cannot come after us for that." This doesn't mean
16 they can't go after them for the Unpaid Invoices. But
17 I think they could potentially recover the Unpaid
18 Invoice, but I think that relationship has been harmed
19 such that it's not going to be repaired into the
20 future.

21 ARBITRATOR GOWDY: Right. I'm not an
22 intellectual property lawyer. I was a pretty mediocre

1 prosecutor before all this, so I don't know anything
2 about intellectual property, except I think there are
3 defenses to copyright actions.

4 So how would you have evaluated the
5 defensibility if GSI were to bring a copyright action?
6 How would you evaluate whether or not the defendant in
7 that action had any defenses?

8 THE WITNESS: I think it would be very
9 difficult and outside my area of expertise.
10 Potentially, there would be other Experts who could
11 provide me input into that to suggest what the
12 probability of success in defending or not defending
13 that claim would be. But it would be extremely
14 difficult, I think, in my experience, when parties are
15 in a dispute, I don't think either of them know, with
16 any certainty, what the outcome of that will be, or
17 what, between the two goal posts, it could potentially
18 be.

19 ARBITRATOR GOWDY: For purposes of your
20 Report, did you just assume success in that
21 litigation?

22 THE WITNESS: That is correct. We've

1 assumed that all these disclosures would be licenses.

2 ARBITRATOR GOWDY: And you would not have
3 factored in any defenses for what reason? Just
4 because it's outside your area of expertise?

5 THE WITNESS: We were instructed to do so,
6 to assume that they would be successful in their
7 defense.

8 ARBITRATOR GOWDY: That's a high success
9 rate, 100 percent, in court.

10 THE WITNESS: It is a high number, yes.

11 ARBITRATOR GOWDY: All right. I need you to
12 help me with two more things. How can a settlement
13 not impact damages?

14 THE WITNESS: So I think you're referring to
15 settlement of Unpaid Invoices; is that correct?

16 ARBITRATOR GOWDY: Yes. Yeah.

17 THE WITNESS: So my response there was
18 intending to suggest that, just because there was a
19 settlement is not the same thing as a case being
20 dismissed; right? If one is dismissed, like the
21 Plains Case was, and we were told that, yeah, those
22 are for grounds that do not warrant a normalization,

1 that's one aspect. I think my distinction was for a
2 settlement. If one settled for the same amount as the
3 lawsuit or marginally less than the lawsuit, it might
4 warrant that that was, in fact, a real and legitimate
5 normalization. Somebody could have settled for other
6 reasons. Perhaps there could have been
7 time-limitation events coming forward. Perhaps they
8 were in financial difficulty. So I don't know that
9 the settlement automatically warrants saying you
10 should not be normalizing for the amount. One would
11 have to analyze that settlement in significant detail.

12 ARBITRATOR GOWDY: I think -- and if I'm
13 asking you a question outside of your area of
14 expertise, you just tell me, because I don't want to
15 ask you an unfair question. But there are multiple
16 reasons for an adverse adjudication. It could be that
17 one of the parties cited to the Common Decisions'
18 opinion. It could be a failure on the merits. It
19 could be a statute of limitations issue. It could be
20 a standing issue. There are a thousand reasons that
21 you can lose a court case.

22 Did you assume success in all the litigation

1 as part of your damages analysis?

2 THE WITNESS: We have assumed success based
3 on instruction.

4 ARBITRATOR GOWDY: All right.

5 I've said two more, and I misspoke. I
6 actually now have two more.

7 THE WITNESS: Okay.

8 ARBITRATOR GOWDY: How can a decision to
9 file a suit, prior to the Alberta Decision, be an
10 ancillary effect of the Alberta Decision? Just from a
11 philosophical standpoint, I'm struggling to understand
12 how something done before the Decision can be an
13 ancillary effect of the Decision.

14 THE WITNESS: Well, in my mind, I view it as
15 the Decision was resolving or determining the outcome
16 of all that litigation; right? That litigation, there
17 was a significant period of time that covered that,
18 and I think they're related. It's the same matter at
19 hand. Those customers weren't paying for those
20 disclosures. Those customers weren't paying for those
21 Unpaid Invoices over that period. Once the Decision
22 happened, it crystallized that, but I think it's the

1 event. I mean, I was instructed to ignore or to
2 consider those ancillary events, but that's my logic
3 in my head on why they're related.

4 ARBITRATOR GOWDY: And if I'm following your
5 logic, that means that there were no prior
6 adjudications of any GSI-related cases prior to the
7 Alberta Decision?

8 THE WITNESS: I can't speak to that. I
9 don't know that.

10 ARBITRATOR GOWDY: If there were prior
11 adjudications, would that impact your damages
12 analysis?

13 THE WITNESS: To the extent it would
14 prohibit GSI from being put back in that place had the
15 Decisions gone another way, yes, it would, but I don't
16 know that that's the case.

17 ARBITRATOR GOWDY: All right. This really
18 is my last question. I'm trying to understand the
19 Falkland Islands Damages. Help me there.

20 THE WITNESS: So a few points there. I
21 think the Falklands represented about 1.2 percent or,
22 perhaps, 1.3 or 1.4 percent of the overall business.

1 So it's very small. It doesn't mean it's not
2 meaningful for our discussion here, but it's a very
3 small component of value. It's an unpaid invoice
4 associated with those oil companies, as we understand
5 it. GSI's name was mud, was tarnished by the fact
6 of -- by this litigation that was going on. Companies
7 stopped paying for the terms of their contracts.

8 We understand the Decisions would have
9 rectified that. The Decisions were so large, and all
10 that litigation was so large in Canada, that it
11 dragged the entire Company down. Having the Falklands
12 there was pulled down with it.

13 ARBITRATOR GOWDY: This may be the only time
14 it benefits me to be an American. "Mud" was the name
15 of the doctor who took care of John Wilkes Booth after
16 he shot Abraham Lincoln, that's where that expression
17 comes from, "your name is mud."

18 But there are a number of ways that your
19 reputation can be impacted.

20 Did you consider any possible other
21 explanations for what you described as a diminished
22 reputation?

1 THE WITNESS: No, I did not.

2 ARBITRATOR GOWDY: Thank you, Madam
3 President.

4 PRESIDENT WALLGREN-LINDHOLM: Thank you,
5 Mr. Gowdy.

6 Before I turn to my co-arbitrator on the
7 left, I would have one clarification to one of the
8 responses you gave to Mr. Gowdy. And when you said
9 that or confirmed that GSI was more pervasively
10 impacted by the Judgment, then you answered with
11 reference to the competition, that they were global
12 players.

13 Now, would there have been any other reasons
14 why, in your view, GSI was more severely impacted?

15 THE WITNESS: I can't think of any, no. I
16 don't believe so.

17 PRESIDENT WALLGREN-LINDHOLM: What about the
18 fact that the percentage of nonexclusive activities,
19 as compared to exclusive activities? Could this have
20 been one?

21 THE WITNESS: Yes, now that you state that,
22 it would be, if one was out there just shooting

1 seismic for specific customers and handing it over to
2 them more. Yes, you're correct. GSI being one who
3 focused on the licensed data, it would be more
4 impacted by those licenses being disclosed.

5 PRESIDENT WALLGREN-LINDHOLM: Thank you very
6 much, Mr. Sharp.

7 And I'll now turn to my left.

8 ARBITRATOR LANDAU: I just have one question
9 I want to ask you.

10 You have testified that as of the date of
11 the Alberta First Instance Decision, GSI was no longer
12 a going concern; is that correct?

13 THE WITNESS: Yes. We were -- that was part
14 of an instruction, but we looked at it. And that
15 seems very reasonable, based upon the financial state
16 it was in.

17 ARBITRATOR LANDAU: Presumably, you would
18 have looked at that in the course of considering
19 whether to do a market analysis?

20 THE WITNESS: Can you just elaborate on
21 that?

22 ARBITRATOR LANDAU: You would have looked

1 into whether or not it was a going concern in
2 assessing what approach to take in valuing?

3 THE WITNESS: Yeah. We were valuing it but
4 for the Decisions. So it was a going concern but for
5 the Decisions. But without that, it was not.

6 ARBITRATOR LANDAU: It was not. And do you
7 have a date or approximate date where you would say it
8 was no longer a going concern?

9 THE WITNESS: Oh, I do not, no. That would
10 be a detailed analysis. Yeah. I don't have a date.

11 ARBITRATOR LANDAU: A range?

12 THE WITNESS: Things started to really go
13 bad in 2008, I would suggest. And by -- I'd have to
14 look -- by 2012, it was in rough shape, yeah. I don't
15 have a date, though. I would not want to testify to a
16 date and when it flipped.

17 ARBITRATOR LANDAU: All right. Thank you.
18 I have no other questions.

19 PRESIDENT WALLGREN-LINDHOLM: Thank you,
20 Mr. Sharp.

21 I think that we have indicated that we would
22 allow necessary follow-up questions after Tribunal

1 questions, if the Counsel are minded to follow up.

2 MR. LUZ: Canada does not, Madam Chair.

3 MS. LEMMENS: We do not have any further
4 questions.

5 PRESIDENT WALLGREN-LINDHOLM: Thank you very
6 much.

7 Now, Mr. Sharp, before I say that thank you
8 for coming and you are now released or excused, I
9 would like to ask you, will you be here tomorrow?

10 THE WITNESS: I'm not sure. I potentially
11 can be, but I will have to cancel some things.

12 MS. LEMMENS: It is possible that Mr. Sharp
13 or Mr. Dutka will be here with us tomorrow.

14 PRESIDENT WALLGREN-LINDHOLM: Because, and
15 this is not a declaration of an intent hereunto for
16 undisclosed that we will conduct a conferencing, but
17 we think it would be valuable to have both Damages
18 Experts in the same room. And then, if ever, we feel
19 that there is one question that something in our mind
20 that turns around it, we could ask both Experts.

21 Would the Parties find this acceptable?

22 MS. LEMMENS: So long as Mr. Sharp is

1 available tomorrow, he will be here.

2 PRESIDENT WALLGREN-LINDHOLM: That's
3 appreciated. Thank you.

4 And I trust there is nothing against this?
5 We were not planning a formal conferencing, which I
6 know was not a favorite of Counsel, but if ever there
7 is a question.

8 MR. LUZ: Absolutely, no problem with that,
9 Madam Chair.

10 PRESIDENT WALLGREN-LINDHOLM: Thank you very
11 much.

12 Then, Mr. Sharp, I thank you for your visit
13 and I'll see you tomorrow.

14 THE WITNESS: Thank you.

15 PRESIDENT WALLGREN-LINDHOLM: Thank you.

16 (Witness steps down.)

17 PRESIDENT WALLGREN-LINDHOLM: You can take a
18 seat on one of the legs. Thank you. Thank you.

19 We had one thing regarding tomorrow's tandem
20 examination. And the first question is, have you
21 agreed now about the protocol that will be followed?
22 And we understood the response already that Respondent

1 had agreed to a proposition of attribution and
2 questioning, but if there's anything else for us to
3 know, it would be good to know.

4 MS. LEMMENS: We have not had further
5 discussions about the process for tomorrow with the
6 Brattle Group. As I mentioned earlier, we have some
7 indication of the attributions, but things like the
8 Executive Summary of the Reports remains unknown to
9 us.

10 Obviously, that is intended to be a summary
11 of other things in the Report. It is just not very
12 clear to us exactly where some of that lies. But I
13 think that that can come out in the course of
14 cross-examination. At least, that is how I've
15 prepared for it at this time.

16 But we had indicated that we would be
17 examining Mr. Chodorow followed by Mr. Maniatis. So
18 in other words, we wouldn't be examining them at the
19 same time. We would be examining them separately.

20 PRESIDENT WALLGREN-LINDHOLM: But will we
21 seat them both up there? I don't mean to micromanage
22 this, but I really think it is better that we have the

1 logistics in place, so we don't start arguing then
2 when the Experts have taken their seat.

3 Is there any reason why they cannot both be
4 there?

5 MS. LEMMENS: I would think that I would be
6 examining one person at a time. And so one would be
7 at the table at one time.

8 PRESIDENT WALLGREN-LINDHOLM: So that is a
9 gentle way of saying no thank you?

10 MS. LEMMENS: Correct.

11 PRESIDENT WALLGREN-LINDHOLM: Mr. Luz, I
12 just also want this to be practical. I mean, it makes
13 sense.

14 MR. LUZ: Oh, absolutely. If that's
15 Ms. Lemmens' preference and the Tribunal is okay with
16 that, that's fine with us.

17 PRESIDENT WALLGREN-LINDHOLM: So then,
18 Mr. Chodorow, you take a seat when you arrive in the
19 morning.

20 (Comments off microphones.)

21 ARBITRATOR LANDAU: They do the presentation
22 together and then there will be cross.

1 PRESIDENT WALLGREN-LINDHOLM: And then okay.
2 I see.

3 And then Mr. Maniatis will exit from the
4 front seat. I understand. Okay, very good. Then I
5 guess we've exhausted this issue.

6 And if there's nothing else for now --

7 MS. LEMMENS: Only that we are at 3:30, and
8 I don't want to lose time if the Tribunal wants to
9 proceed. I mean, we could do the Direct Presentation
10 now and then get into cross first thing in the
11 morning.

12 PRESIDENT WALLGREN-LINDHOLM: So as not to
13 change seats in the midst of it.

14 I understand that Respondent was not very
15 happy with that proposition.

16 MR. LUZ: No, Madam Chair. We are not ready
17 to be able to go today.

18 PRESIDENT WALLGREN-LINDHOLM: I think I
19 would normally respect the schedule, if in doubt.

20 (Comments off microphone.)

21 PRESIDENT WALLGREN-LINDHOLM: In all events,
22 then, we will adjourn for today and we shall meet

1 tomorrow at 9:30 in the seating order and the protocol
2 that has been established. Thank you. Thank you.

3 MS. LEMMENS: Thank you.

4 (Whereupon, at 3:29 p.m., the Hearing was
5 adjourned until 9:30 a.m. the following day.)

POST-HEARING REVISIONS

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter,
do hereby attest that the foregoing English-
speaking proceedings, after agreed-upon
revisions submitted by the Parties, were
revised and re-submitted to the Parties per
their instructions.

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.

[Signed]

Dawn K. Larson

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

AND

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW, AS ADOPTED IN 1976

- - - - -	x	
In the Matter of Arbitration	:	
Between:	:	
	:	
THEODORE DAVID EINARSSON,	:	
HAROLD PAUL EINARSSON,	:	
RUSSELL JOHN EINARSSON, AND	:	
GEOPHYSICAL SERVICE INCORPORATED,	:	
	:	ICSID Case No.
Claimants,	:	UNCT/20/6
	:	
and	:	
	:	
THE GOVERNMENT OF CANADA,	:	
	:	
Respondent.	:	
- - - - -	x	Volume 7

HEARING ON JURISDICTION, MERITS, AND LIABILITY

Tuesday, March 11, 2025

Calgary Marriott Downtown Hotel
110 9th Avenue SE
Calgary, AB, T2G 5A6
Canada

The Hearing in the above-entitled matter
came on at 9:30 a.m. before:

MS. CARITA WALLGREN-LINDHOLM, President

MR. TREY GOWDY, Co-Arbitrator

MR. TOBY LANDAU KC, Co-Arbitrator

ALSO PRESENT:

On Behalf of ICSID:

MS. GERALDINE R. FISCHER
Secretariat to the Tribunal

Realtime Stenographer:

MS. DAWN K. LARSON
Registered Diplomat Reporter (RDR)
Certified Realtime Reporter (CRR)
Certified Realtime Captioner (CRC)
Larson Reporting, Inc.
2564 West 280 North Street
Hurricane, Utah 84737
United States of America
+1 720 298 2480
DawnStenosTheWorld@gmail.com
DawnStenosTheWorld.com

APPEARANCES:

Attending on behalf of the Claimants:

**MS. MATTI LEMMENS
MR. VINCENT LANCTÔT-FORTIER
MS. MARIANNE BASTILLE-PARENT
Stikeman Elliott LLP
Bankers Hall, 4200 3 St SW West 888
Suite 14200
Calgary, AB, T2P 5C5

Canada**

Party representatives:

MR. HAROLD PAUL EINARSSON

APPEARANCES: (Continued)**Attending on behalf of the Respondent:**

MR. MARK LUZ
MS. SYLVIE TABET
MS. JULIA DEUTSCH
MS. ELENA LAPINA
MS. CAMILLE BÉRUBÉ-LEPAGE (virtual)
Trade Law Bureau
Global Affairs Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada

MS. MOLLY RUMPKE
Core Legal Concepts

MS. DAPHNÉE CAMPEAU
Global Affairs Canada

MR. ALEXANDER BLACK (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada & ISC Legal Services,
Indigenous Rights and Relations Portfolio

MR. PETER WIGEN (virtual)
Canadian Heritage Legal Services

MR. MARK KLAVER (virtual)
Office Legal Services Sector

MR. FRANCO BELLO (virtual)
MS. KIM PHILLIPS (virtual)
MS. JESSICA MACINTOSH (virtual)
MS. JEAN-FRANCOIS ROMAN (virtual)
Natural Resources Canada

APPEARANCES: (Continued)

MR. SÉBASTIEN FOURNIER (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada

MR. SCOTT LITTLE (virtual)
MS. SUSANNA KAM (virtual)
MR. VINCENT BOULANGER (virtual)
Global Affairs Canada

MS. TARA SNELL (virtual)
MS. NATALIE GIASSA (virtual)
MS. PIERRE-LUC RACINE (virtual)
Innovation Science and Economic Development

MS. TIFFANY SANDERS (virtual)
MS. LYNETTE GIBBONS (virtual)
Canada Newfoundland & Labrador Offshore
Petroleum Board

Respondent's Party Representatives:

MR. MARKO VESELY
Canada Energy Regulator

MR. ALEX MILLER
Core Legal Concepts

MR. CHRIS REYNOLDS
Core Legal Concepts

Non-Disputing Parties:

MS. KRISTINA E. BEARD (virtual)
Office of International Claims and
Investment Disputes
U.S. Department of State

MR. ALAN BONFIGLIO RÍOS (virtual)
MS. PAMELA HERNÁNDEZ MENDOZA (virtual)
MR. ALDO GONZÁLEZ ARANDA (virtual)
Secretaría de Economía

C O N T E N T S

PAGE

PRELIMINARY MATTERS.....1426

DARRELL B. CHODOROW and M. ALEXIS MANIATIS

Direct presentation.....1432

Questions from the Tribunal.....1464

Cross-exam. of Mr. Chodorow by Ms. Lemmens.....1472

Cross-exam. of Mr. Maniatis by Ms. Lemmens.....1588

PAUL SHARP

Further direct presentation.....1628

P R O C E E D I N G S

MS. LEMMENS: Good morning, Madam Chair,
Members of the Tribunal.

(Discussion off the record.)

MS. LEMMENS: And just for the record, the
person's name is Lucas Duffield.

PRESIDENT WALLGREN-LINDHOLM: Okay.

Canada, is there anything you would like to
share regarding people present or regarding the new
arrival on the other side? No. You're fine.

MR. LUZ: No, Madam Chair. We do have
another issue to raise, but we'll just wait until
you're ready to go.

PRESIDENT WALLGREN-LINDHOLM: Until?

MR. LUZ: Until the Tribunal is ready to
hear -- we just have a request to make to the Tribunal
before the cross-examination begins.

PRESIDENT WALLGREN-LINDHOLM: Before the
cross-examination. Okay. Well, shouldn't we take it
maybe now? Yes, thank you.

MR. LUZ: Thank you, Madam Chair, Members of
the Tribunal. Before we call Mr. Maniatis and

1 Mr. Chodorow to testify, we would like to make a
2 request with respect to an issue that arose out of
3 Mr. Sharp's testimony yesterday.

4 On the first day of the Hearing, Ms. Lemmens
5 had mentioned, and I quote, from the Transcript, the
6 methodology has not changed, so the regression
7 analysis that was conducted by PwC has not changed.

8 It was curious that the regression analysis
9 was mentioned specifically, and we came eventually to
10 discover that it was about the two missing paragraphs
11 in Mr. Sharp's amended Report, which discuss, as you
12 remember, the R-squared numbers, and how the Amended
13 Report now no longer shows that the
14 statistically-strongest predictor is the global rig
15 count but is the oil spot price.

16 The missing paragraphs were not mentioned
17 last week and not mentioned during Mr. Sharp's direct
18 testimony, even though Slide 16 specifically talks
19 about this issue.

20 And then so it wasn't until yesterday's
21 cross-examination that the issue -- that the
22 implications of those missing paragraphs and this

1 issue became clear.

2 Canada submits that the methodology has
3 changed and does have a significant impact on the
4 Revenue Normalization that PwC has adopted. And this
5 morning -- or today one of Canada's Damages Experts,
6 Mr. Chodorow, would like to demonstrate to the
7 Tribunal the substantial impact it has on the
8 implication so that we can avoid the need for a
9 Post-Hearing Submission on the issue.

10 You'll see that the Brattle presentation has
11 a placeholder slide in it that Mr. Chodorow will
12 explain during his presentation, and the placeholder
13 slide does not contain any information in there, but
14 we would like the Tribunal to see a very simple
15 calculation that shows the impact of this changed
16 methodology,
17 we have already provided the proposed slide to the
18 Claimants this morning so, that they could take a look
19 at it, discuss with Mr. Sharp, and if they would
20 like -- if they want, cross-examine Mr. Chodorow
21 today.

22 And we do think that it's an important issue

1 for the Tribunal to take a look at, and we would like
2 to propose it, but we didn't put it actually in the
3 slide deck until we could hear from the Claimants on
4 the issue and for the Tribunal to consider it.

5 Thank you.

6 PRESIDENT WALLGREN-LINDHOLM: Thank you,
7 Mr. Luz.

8 Let's hear from Claimants.

9 MS. LEMMENS: So we have received this
10 proposed slide that would go in the slide deck. We
11 also were unaware of the missing paragraphs from the
12 Report.

13 That was news to us yesterday as well on the
14 Counsel's side of things. So what I would suggest is
15 that, if the additional slide is to be inserted into
16 the presentation, that Mr. Sharp be given an
17 opportunity to also comment on it because we've just
18 received it this morning, and obviously he's not on
19 the stand at this point. And so I think it is only
20 fair that he would be able to also take the stand and
21 comment on it.

22 PRESIDENT WALLGREN-LINDHOLM: Apparently it

1 is okay with Respondent.

2 MR. LUZ: That would be absolutely fine.

3 Yes, of course.

4 PRESIDENT WALLGREN-LINDHOLM: Yes. So then
5 we have nothing to decide. Thank you very much. That
6 is a good outcome. So we can then proceed to hear
7 today's Experts.

8 MR. LUZ: Yes. Just to clarify, so can we
9 put the slide in the presentation and distribute it
10 now, or what would you --

11 MS. LEMMENS: Yeah. I'm not sure
12 logistically how you want to deal with it. Whatever,
13 I have the slides and I have the other parts of the
14 slide deck. I'm not sure how you have it together,
15 but if you have it in one piece, obviously I think you
16 would just present it as such.

17 MR. LUZ: Yeah. We printed the hard copy of
18 the slide that we can distribute now, and then when it
19 comes to that point, we can just pull it up on the
20 screen as a separate one.

21 ARBITRATOR LANDAU: Can you circulate it by
22 email?

1 MR. LUZ: Yes, we can do that as well.

2 (Overlapping speakers.)

3 MR. LUZ: Yes, of course.

4 PRESIDENT WALLGREN-LINDHOLM: Thank you.

5 DARRYL CHODOROW AND ALEXIS MANIATIS,

6 RESPONDENT'S WITNESSES, CALLED

7

8 PRESIDENT WALLGREN-LINDHOLM: So then,

9 gentlemen, Mr. Maniatis and Mr. Chodorow, welcome.

10 You were here yesterday, so I think you know by now

11 who is who, so I don't need to make further

12 introductions. And you will also know that there are

13 people online by Zoom listening in.

14 You also heard me say that we do not

15 administer oath in international arbitration, but I

16 want both of you separately to give an affirmation of

17 your independence from the Disputing Parties, from

18 Counsel, and of your genuine belief in the Opinions

19 expressed in your Reports. Mr. Maniatis?

20 THE WITNESS: (Mr. Maniatis) I so affirm.

21 THE WITNESS: (Mr. Chodorow) I affirm as

22 well.

1 PRESIDENT WALLGREN-LINDHOLM: Thank you.
2 And you will also know that you will be recorded and
3 transcribed. You have now 45 minutes for the Direct
4 Presentation. You will be aware of this, and you also
5 heard that we may hear also Mr. Sharp later on. I
6 now, without further ado, I will ask you to commence
7 your presentation. Thank you.

8 DIRECT PRESENTATION

9 THE WITNESS: (Mr. Maniatis) Thank you,
10 Madam President, and good morning to the Tribunal.
11 We're going to -- my name is Alexis Maniatis, I'm
12 joined by my colleague Darrell Chodorow. We are
13 principals of the Brattle Group each with more than
14 30 years of experience on valuation and damages.

15 Much of that is in the context of
16 international disputes, and most of that is in the
17 context of investment arbitration.

18 (Interruption.)

19 THE WITNESS: (Mr. Maniatis) We will present
20 to you today four major conclusions from our two
21 Expert Reports. First, we will explain why the
22 Claimants fail to apply the correct damages analysis,

1 and by "correct," I mean fitting with the Claim and
2 the Treaty Standard. I will explain why the analysis
3 presented by PwC is not fit for purpose because it's
4 conceptually incoherent and uses assumptions that are
5 inconsistent with the Claims.

6 And then Mr. Chodorow will explain that that
7 analysis is also not fit for consumption because it is
8 unreliable and continues to contain numerous flaws,
9 even in its third iteration.

10 And then he'll address that at the relevant
11 Valuation Date, GSI was not a going concern, and that
12 it was not worth more than the Market Value of its
13 data library.

14 So let's turn to the correct analysis. I
15 think the damages standard and the date of the alleged
16 expropriation are clear. The Claimants state that
17 NAFTA specifies that the compensation shall be
18 equivalent to the Fair Market Value of the
19 expropriated investment immediately before the
20 expropriation took place.

21 That will be a familiar standard to the
22 Tribunal, I'm sure. And as to the date, it is the

1 Common Issues Decision in November of 2017 that was
2 the First Instance in which the Claimants' copyright,
3 they say, was confiscated.

4 So the damages question then is: What was
5 the value of the expropriated asset? And I'll come
6 back to what the expropriated asset might have
7 been -- in November of 2017, immediately before the
8 Alberta Decisions.

9 That exercise is forward-looking, taking GSI
10 as it existed just before the Alberta Decisions. And
11 nothing about the past changes. I should say it is
12 not but for the Alberta Decisions, it is really
13 immediately before the second question is answered in
14 the Alberta Decisions. In other words, the Claim is
15 based on a different Alberta Decision, not a new
16 Alberta Decision.

17 The Claimants say had the Alberta Decisions
18 had the opposite outcome, this Arbitration would have
19 been unnecessary. There would have been no breach of
20 NAFTA and GSI would be able to continue to pursue
21 enforcement to protect its intellectual property
22 rights.

1 So that means their forward-looking analysis
2 evaluates what's the impact of the breach on those
3 Claims where it was trying to enforce its property
4 rights. And Mr. Gowdy asked some questions about this
5 the other day that the forward-looking analysis is
6 essentially a litigation-risk analysis. Had the
7 Common Issues Decision been decided differently, GSI
8 would have continued to pursue its individual
9 litigation.

10 And it may have succeeded or not in those
11 individual cases. It may have been dismissed on
12 defenses or not. If they had not been dismissed,
13 they -- GSI may or may not have won damages, and if it
14 was awarded damages it might have been awarded the
15 claimed amount or a lesser amount. And there is some
16 likelihood of each of those. There is risk involved
17 and that risk is illustrated in the Calwest Decision.

18 In that case GSI had alleged Calwest
19 accessed Board data, violated copyright, and sought
20 damages of between 236,000 and \$8.5 million.

21 That case didn't have to conclude damages,
22 but the Judge noted that, if she had to just assess

1 damages in that case, she would have had to resort to
2 nominal or statutory damages, and with regard to
3 defenses, she said that: "On the evidence, it is
4 likely, in my view, that this defense could have
5 succeeded." So that's not to say that any particular
6 outcome would be realized in the litigations but that
7 the risk was genuine.

8 Now the problem is that the Claimants have
9 admitted that such an analysis, at least in their
10 view, is highly speculative. So that means the
11 damages for the alleged breach are highly speculative.
12 They haven't been proven. But before we turn to the
13 PwC analysis, it is worth noting that Mr. Sharp also
14 explained that his "But-For Scenario does not consider
15 the impact of the Decisions in isolation."

16 And I would suggest to the Tribunal that is
17 precisely the objective of the correct analysis. So
18 let's discuss the PwC analysis now.

19 PwC does not value GSI immediately before
20 the breach as it existed and then forecast future cash
21 flows after the breach, assuming different Alberta
22 Decisions. Instead, Mr. Sharp's analysis attempts to

1 value GSI in a But-For Scenario that imagines a
2 completely different past, for almost two decades
3 before the Alberta Decisions.

4 And it is unsurprising, therefore, that
5 Mr. Sharp cautioned the Tribunal that he relies on
6 assumptions that are "difficult or impossible to
7 validate, corroborate, or verify."

8 Now, PwC's analysis ignores GSI's reality.
9 I'll give you three examples. Mr. Sharp assumes that
10 GSI would have had good customer relationships but for
11 the Alberta Decisions, but Claimants admit, those were
12 destroyed years before. The Claimant's Rebuttal
13 Memorial notes that once GSI commenced litigation
14 against a Party, that Party never entered into any
15 further licensing arrangements with GSI, noting one
16 exception.

17 Mr. Sharp assumes that GSI had continued to
18 invest in data acquisition, but he recognizes that by
19 2011 "GSI had both ceased investment in new data
20 acquisition and sold its fleet."

21 And Mr. Sharp assumes that GSI was a going
22 concern, but he agrees that it was not immediately

1 prior to the alleged expropriation a going concern.

2 I'll draw the Tribunal's attention to the
3 figure on the right which shows GSI's Actual Revenues
4 compared to its investment and in new data. And I'll
5 draw just a couple of observations about that, maybe
6 three.

7 One is that, even early on in the period,
8 you'll see when it had a large data library, it's
9 revenues were very closely related to its new data
10 acquisition activity. And, in fact, you'll see over
11 time that the revenues closely tracked investment
12 activity. So when investment fell, it's unsurprising
13 that the revenues followed soon thereafter. And by
14 2017, there was no -- there had been no investment
15 for years, and revenue had fallen to near zero.

16 Now, you heard yesterday about the Unpaid
17 Invoices, the Contract Claims, and PwC confirmed that
18 they assumed large contract fees would be collected
19 with certainty that customers have challenged and
20 never paid. Now, first of all, that revenue is almost
21 entirely -- has proven to be almost entirely
22 uncollectible, but, more importantly, it has nothing

1 to do with the Alberta Decisions. The Claimants say
2 that the domestic proceedings regarding the Unpaid
3 Invoices are not with respect to the Measures at issue
4 in this case, but the domestic claims are purely
5 contractual or in tort, and that those proceedings do
6 not concern the implications of the Alberta Decisions
7 under international law.

8 So this figure summarizes the effects of
9 PwC's instructions, assumptions, and analysis, and
10 what you can see is that the -- in the lighter color
11 are the revenues from the PwC Report, the But-For
12 revenues, the dark blue are the Actual Revenues, and
13 you can see that the PwC analysis essentially assumes
14 that GSI could have earned multiples of its revenue in
15 the past, multiples of the highest revenue it ever
16 achieved in the past, would continue to do so and then
17 brings those Volumes forward to 2017 and assumes that
18 starting -- at the time of the alleged breach, GSI
19 would be earning more than \$100 million and would
20 continue to grow that amount with inflation in
21 perpetuity.

22 Let's come back now and look at what was

1 GSI's reality at the time immediately prior to the
2 alleged breach. And before I do that, let me remind
3 the Tribunal of why that's the Relevant Date in the
4 treaties, and many treaties. We look at the value of
5 the expropriated asset immediately before the breach
6 or the expropriation because, unlike the ancillary
7 effects, time moves forward, not backward, and so the
8 consequences of a breach follow the breach. They
9 don't precede it. So we look at the value immediately
10 before the breach to isolate that value from any
11 impacts of the breach.

12 So let me address what it is that might have
13 been expropriated, looking at GSI as it existed
14 immediately prior to the breach.

15 It's common ground between the Experts that
16 it was not a going concern, so the going-concern value
17 can't have been expropriated. GSI did not have the
18 capacity to create new Seismic Data because it had
19 sold its fleet years before. That can't be what was
20 expropriated. The value of an assembled workforce
21 can't be what was expropriated because GSI had
22 terminated its employees years before, and it cannot

1 be customer goodwill that was expropriated because
2 that had been lost also years before, either by the
3 fact or the manner in which GSI pursued litigation
4 against its customers.

5 So what did GSI have that might have been
6 expropriated? First, there are the Contract Claims,
7 but those wouldn't have been expropriated because
8 they're not affected by the Alberta Decisions.

9 Second are the copyright claims. And if the
10 Tribunal finds there was a breach, certainly those
11 were expropriated, but they remain subject to the
12 litigation risks we've discussed.

13 Third is the Seismic Data library itself.
14 Now, its value would have been impacted by the breach
15 because it would affect GSI's ability to pursue future
16 copyright litigation if the circumstances arose. But
17 the data library itself was not expropriated. GSI
18 still has it, and it continues to have some value, and
19 that's for three reasons.

20 First, it includes foreign data. You heard
21 about the Falkland Islands, and that data is not
22 subject to the Regulatory Regime.

1 Second, there is Canadian data that remained
2 at the Valuation Date under the confidentiality or
3 exclusivity period under the Regulatory Regime. And
4 there also may be data that has -- I understand there
5 may be data that has not been submitted to the Boards.

6 And then, finally, the data in the Seismic
7 Data library is of a higher quality and I'll say wider
8 scope, includes information that's not the subject -
9 or has not been disclosed under the Regulatory Regime,
10 and that would have value.

11 So if the Tribunal were to award damages on
12 the basis of the value of the Seismic Library, the
13 remaining value would have to be subtracted to get the
14 correct damages.

15 So I'll stop there and turn the presentation
16 over to my colleague.

17 THE WITNESS: (Mr. Chodorow) Thank you and
18 good morning.

19 As Mr. Maniatis has testified, we do not
20 believe the PwC analysis is measuring the effects of
21 the alleged breach, but now we're going to turn to
22 discuss the reliability of that analysis if the

1 Tribunal were to find otherwise. And to start with,
2 I'm going to just walk through briefly what the PwC
3 analysis is.

4 It starts with the Actual Revenues that GSI
5 earned from 2000-2012, and those are the dark blue
6 part of the graph that we were just looking at. And
7 then it applies the following steps: The first is it
8 adds lost revenue of approximately a little more than
9 a billion dollars to get the But-For revenue from
10 2000-2012. This is the so-called "normalization" that
11 Mr. Sharp was referring to. Once he has those
12 normalized revenues, he takes the 2012 But-For revenue
13 and uses that as an anchor point to forecast that 2012
14 revenue forward to his Valuation Dates.

15 The next step is that Mr. Sharp -- I think
16 his quote was that he judgmentally selects the
17 maintainable revenue. So what he does is he looks at
18 the revenue from 2000 to his Valuation Dates, this
19 But-For revenue that he's normalized, in his term, and
20 decides what GSI's revenue could reasonably be going
21 forward.

22 The next step is he asks the question about

1 Costs. He comes up with a Cost ratio, and he does
2 that by looking at GSI's Actual Costs from 2000-2008
3 and asking what fraction those are of the normalized
4 revenues he estimates in those same years.

5 And, finally, he takes the revenue and Cost
6 ratio and a couple of other small items and
7 incorporates it into his Capitalized Cash Flow model.
8 And as I'll discuss, we find each of those steps to be
9 unreliable.

10 So, to start with, I think it's important to
11 understand, as I mentioned, there's more than a
12 billion dollars of revenue that gets added through
13 Mr. Sharp's normalization adjustments, and those come
14 primarily from lost revenue due to Board access, which
15 we were talking about yesterday, which is from C-111.

16 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

22 So that's an awful lot of additional revenue

1 that gets added in, and it's important, I think, to
2 understand that the analysis is very sensitive to this
3 additional revenue. So in Mr. Sharp's Third Report,
4 he reduced the revenue, the roughly 1.1 billion, by
5 about \$80 million, and that had the effect of wiping
6 out roughly \$100 million in damages, I believe
7 Claimants' Counsel said on the first day.

8 And additionally, yesterday, Mr. Sharp was
9 asked what the effect would be if the remaining Unpaid
10 Invoices were removed from his analysis. And, in
11 total, those remaining amounts are about 212 million,
12 and he said that, if that happens, that the damages
13 would decline into the tens of millions of dollars.
14 And that actually makes sense. When you look at the
15 relationship of the impact on damages of removing
16 80 million, you lost about 100 million in damages, and
17 if you remove 100, 212 million more, you would expect
18 something that sounds similar to the value that
19 Mr. Sharp discussed yesterday.

20 And the sensitivity is really important
21 because, as I'm going to explain, there are
22 significant concerns about either the speculative

1 nature or effects that overstate this But-For revenue.

2 So I'm going to start with the Unpaid Invoices.

3 So Mr. Sharp's Reports says that he assumes
4 that GSI was entitled to this revenue, and as has been
5 discussed, these are contract claims. We understand
6 that they are not affected by the Alberta Decisions.
7 In fact, these invoices, I believe, all of them, if
8 I'm remembering correctly, were issued before the
9 Alberta Decisions. And so the nonpayment does not
10 seem to be due to the Alberta Decisions.

11 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3 In addition, Mr. Sharp uses these Invoices
4 in a way that is incorrect. There are continued
5 errors in Mr. Sharp's Third Report that are not
6 corrected, and it includes fees related to data from
7 outside of Canada.

8 So I'll briefly cover the point about the
9 verifiability of the invoices. So Mr. Sharp said that
10 he performed certain verification procedures on those
11 amounts, and those invoices totaled -- I believe it
12 was about 475 million. And what he found is that he
13 was unable to verify 63 percent of those. And you can
14 see his quote from the footnote where he discloses
15 this fact.

16 And the inability to verify the information
17 in these invoices is important because we know that,
18 for invoices that we do have information from, there
19 is double-counting. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] And so having access

1 to that underlying information is essential to
2 ensuring that there is no double-counting going on.

3 Next, there's the question of the validity
4 of the Unpaid Invoices. In our First Report, we
5 indicated that there was evidence suggesting that
6 courts had viewed those fees in some cases as being
7 invalid and that it was appropriate to exclude them.
8 Mr. Sharp's Second Report said that the validity of
9 those fees was irrelevant for his damages analysis,
10 something that we disagree with. But, in his Third
11 Report, Mr. Sharp received an assumption that it was
12 appropriate to exclude the Plains Midstream fees
13 because the Court had found them invalid.

14 And there are some other important things to
15 understand aside from that. Again, he continues to
16 assume all of the remaining invoices, other than
17 Plains, are valid and collectible.

18 Next, when we looked at his Third Report, it
19 doesn't say that he looked to determine if there
20 were -- to determine what fees had been ruled invalid
21 by the Court. He simply points to our Report, which
22 mentions Plains Midstream and says he asked about

1 that. So we don't know what analysis was done of the
2 validity of fees that remain in his analysis.

3 And, finally, during the cross-examination
4 yesterday, he confirmed that the details of the
5 settlements could matter with respect to assessing the
6 validity of those fees, and he doesn't know the
7 details, but he recognized that -- say, a claim that
8 is settled at close to its full value suggests the
9 fees are valid, and I think that's probably a fair
10 statement. But I think the inverse is also true, that
11 a settlement that is very low may be an indicator that
12 the fees themselves were subject to significant
13 litigation risk. And we don't have those settlements.
14 They were withheld under confidentiality, I
15 understand, but we attempted to get a sense as to how
16 big the settlements were. So we knew, from the
17 confidentiality list, which claims appeared to have
18 been withheld, and we went through and we summed up
19 the total amount on the Unpaid Invoices, and this
20 includes both the Transfer and Equalization Fees as
21 well as other contract claims. And then we went to
22 the Financial Statements which don't disclose the

1 details of the settlements, but we did our best to
2 identify the revenue that might have been associated
3 with those settlements. And based off of those
4 assumptions, what we found is it appears that the
5 settlements were done for pennies on the dollar for
6 the amount claimed in those invoices.

7 So the next concern we have is that -- is
8 the way that Mr. Sharp implements those revenues. You
9 heard yesterday that he takes the revenues from those
10 Unpaid Invoices and he spreads them over time. In our
11 First Report, we noticed there was a contradiction
12 between Mr. Einarsson's Witness Statement which says
13 that it should be spread over the year of the invoice
14 plus the next -- plus the preceding five years,
15 whereas Mr. Sharp's Report said it was the year of the
16 invoice plus the four preceding years.

17 And so we pointed this out. And, in fact,
18 in our Reports, we showed that this assumption of
19 spreading over five versus six total years could have
20 a material impact on the forecast of normalized
21 revenues from 2012 all the way to his Valuation Dates.

22 Mr. Sharp, yesterday, said that, when

1 Mr. Einarsson typed the word "five," he meant to type
2 the word four, and that it was a typo. We don't know.
3 What we can say is that there was not a revised
4 Witness Statement issued, and I was here for his
5 testimony and heard no correction of that point.

6 Now I'm going to turn to the Lost Revenues
7 for Board access, and this is the data from C-111.

8 So this analysis is built on two key
9 assumptions: The first is that everybody who wanted
10 to look at the free version of the data, if that
11 hadn't been available to them, they would have gone
12 and they would have purchased a license. This
13 contradicts basic economics, as well as common sense
14 because it's well understood in economics that, when
15 something is free, people will consume more of it. I
16 will note that this week I've had access to the lounge
17 over there and I've eaten a lot of that candy that's
18 inside the door, perhaps too much, and -- but, if I
19 had to pay for it, I probably wouldn't have gone and
20 eaten all of that candy. And the same applies here,
21 which is that people that were willing to look at the
22 free version of the data would have, perhaps, raised

1 questions if they knew they were going to have to pay
2 millions in License Fees to see the data. And the
3 second is that past interest in the free versions of
4 this data that were disclosable doesn't mean that
5 there would be future interest in licensing that data.

6 The second crucial assumption relates to the
7 multipliers. So Mr. Sharp was instructed that, for
8 each private entity that accessed the data, he should
9 apply a multiplier, either two or three, depending
10 upon the type of company. And the concept underlying
11 the multiplier is that a license could generate future
12 Transfer Fees and future Equalization Fees for GSI.
13 And that's probably true, but the numbers that he uses
14 have a significant impact of doubling or tripling the
15 revenue for each license to a private entity, but
16 these were not tested in any way against GSI's
17 historical data. You could have gone back into their
18 financial details and said, "okay, let's take a look,
19 how much of our revenue comes from original licenses
20 and how much is coming from the transfer and
21 Equalization Fees on top?" That wasn't done, and so
22 that raises concern about the multipliers.

1 And in addition, the Unpaid Invoices
2 themselves suggest that there, perhaps, is a
3 difference of opinion as to whether the Transfer Fees
4 that Mr. Einarsson was thinking were due when he came
5 up with those multipliers are really due.

6 And then, finally, we have concerns with
7 other parts of the analysis of C-111, even after
8 Mr. Sharp's comparisons. And so one example of that
9 that we heard discussed yesterday is the 2013 Price
10 List. Every instance in C-111 was priced using the
11 prices in effect at 2013, and there are a couple of
12 concerns with that.

13 The first is that those prices are largely
14 untested. By the time that Price List was issued, GSI
15 moved from focusing its business on selling of data to
16 litigation. And in litigation, perhaps it makes sense
17 to have higher prices, and here's an example that we
18 identified in our Report where a company called KP
19 Seismic accessed some data in 2002. And this gives
20 you a sense this is really important. If you take the
21 2013 Price List, there would be a charge of \$8 million
22 for the License Fee. But, if you use the 2002 Price

1 List, it would have been only about \$1.5 million. And
2 that difference is large, and then it gets multiplied
3 by 3 because of the multiplier that is relevant for KP
4 Seismic. And so this error affects every line item in
5 C-111.

6 Another example is related to the
7 correctness of the prices used to determine the
8 license value. And we raised an example of this in
9 our Report which was an invoice for a company called
10 Murphy Oil -- I'm sorry, a hypothetical License Fee to
11 a company called Murphy Oil, which accessed the 1972
12 East Coast data from the Boards. So we tried to
13 ask -- we looked at a few of the different datasets
14 and tried to ask ourselves, all right, for those that
15 are commonly accessed, does it seem like the prices
16 are right? And we had to do that because Mr. Sharp
17 claimed to have verified them but he didn't provide
18 any evidence of that analysis, and we did not want to
19 just trust that it was done correctly.

20 So we went in and said, all right, where
21 does this 3.9 million come from? And we were able to
22 determine it exactly. It comes from taking the number

1 of kilometers of data for the 1972 East Coast dataset
2 and multiplying it by the price for the East Coast
3 dataset that was applicable to Licenses for data
4 collected between 1997 and 2008. And that's how we
5 replicated the 3.9 million.

6 If you used the Actual Prices from the 2013
7 Price List that were applicable, the License Fee would
8 have been less than half. And this is an error that
9 exists, despite the purported verification procedures,
10 and it's repeated multiple times in Sharp --
11 Mr. Sharp's Third Report.

12 Next, you heard discussion about potential
13 double-counting among instances in C-111. And we
14 provide a couple of examples here. The first one is
15 ExxonMobil accessing the East Coast 1971 data. They
16 accessed two -- the Anco Exploration Secondary
17 Submission, and it appears twice, Request Number 47
18 and 48, each time with a License Fee of \$2.2 million.
19 And again, that fee would have been multiplied. And
20 there is no apparent answer as to why there would have
21 been two licenses issued for what seems to be the same
22 data on the same day.

1 And we provide another example, with respect
2 to the High Arctic dataset, where the License Value in
3 each of the two cases was close to 7 million.

4 An example that we found that is
5 particularly telling is Anadarko. So in 1998 -- and
6 this falls into Mr. Sharp's Revenue Normalization
7 because of the way he allocates the License
8 Fee -- Anadarko accessed two Second Submissions of
9 data that GSI had collected in the Jeanne D'Arc area.
10 In each case, there was a \$5.6 million License Fee.

11 Now, we had an Unpaid Invoice for Anadarko.
12 And so we went to that Invoice, and we looked to see
13 what GSI had actually invoiced when it knew that this
14 data had been accessed. And what we found was a
15 single charge for one license being included in the
16 Invoice, not two.

17 In our Appendix, we've identified many
18 different examples of potential double-counting that
19 you can see for yourself. And we don't know what
20 Mr. Sharp talked about with GSI's management when he
21 says that he spoke to them to conclude that they were
22 not double-counting. So we can't test it, and there

1 is no evidence that allows us to understand what is
2 going on here. But it raises the concern about
3 double-counting.

4 Next, I'd like to turn to the issue where
5 PwC's 2012 normalized revenue is taken and projected
6 forward to the Valuation Dates. So as you heard
7 yesterday, that is done based off of the historical
8 relationship between GSI's U.S. dollar revenue and the
9 rig count.

10 Now, we explained in our report, and I
11 believe Mr. Hobbs also explained, why there was good
12 reason to believe that that was not an appropriate
13 metric to forecast Seismic Revenues. But, beyond
14 that, there is some serious concerns associated with
15 this analysis.

16 The first is it relies on all of this
17 normalized GSI revenue from 2000-2012, which we have
18 explained we have serious concerns with, not just the
19 amount, but the arbitrary timing associated with
20 allocation of it over time. Which means that, even if
21 the amounts were real, which we don't agree, you don't
22 know really when this revenue would have been

1 realized. And so assuming a statistical relationship
2 exists between when you're using kind of arbitrarily
3 allocated revenues, that's a pretty questionable
4 assumption.

5 The next is Mr. Sharp's original Report said
6 that the rig count was the most -- I think it was the
7 strongest statistical predictor or something like
8 that. And in the new Report filed, we discovered just
9 recently that, in fact, it was inferior to three other
10 predictors.

11 Then, finally, Mr. Sharp purports to have
12 used regression analysis. But regression analysis
13 produces a formula that one should use to plug rig
14 count into, and that will tell you what the predicted
15 But-For revenue would be. But Mr. Sharp ignores that.
16 He just said a 1 percent increase in rigs equates to a
17 1 percent increase in revenue. And that's not what
18 regression does.

19 And we show that if you actually projected
20 forward, based on the regression analysis, our Report
21 shows you get nonsensical results. Because shortly
22 after 2012, GSI's revenue would go negative. And that

1 just tells you that rig count is not a reliable
2 metric.

3 Next, we'll talk about what we did. So when
4 we saw in his Report that the spot price was the
5 statistically strongest predictor, we asked the
6 question of, well, what does it predict? And so using
7 the PwC methodology, we said, okay, let's take the
8 But-For revenue in Canadian dollars because it's a
9 Canadian-dollar regression -- and that comes right
10 from Mr. Sharp's Schedule B2.1 in his Third
11 Report -- and then we looked at the spot prices.

12 Now, Mr. Sharp did his regression with a
13 one-year lead. And so what matters in projecting
14 revenues from 2012 to 2013 is what happens between for
15 the oil prices between 2011 and 2012. And we shortcut
16 that by just looking at the revenues over the whole
17 period from 2011 to 2016, which is the one-year lead
18 for his 2012 to 2017 revenue. And you can see that
19 spot prices decline by 54 percent. And so the
20 prediction that would come out of that is that the
21 But-For revenues in Canadian dollars would be
22 56 million.

1 That compares with the 112 million that
2 comes from using the global rig count that is no
3 longer the strongest predictor among his factors
4 considered. And the result is it's overstated by
5 roughly 100 percent.

6 Can we go back to the next slide. Thank
7 you.

8 So now, let's talk briefly about the Cost
9 ratio. So yesterday, there was discussion about
10 Mr. Sharp's 20.6 percent Cost ratio. And it was
11 confirmed that in calculating this Cost ratio, he
12 takes the Actual Costs in each year that are in
13 dollars from 2000-2008 and he divides them by his But-
14 For revenue in each year, and then averages from 2000
15 to 2008.

16 Now the key is, there is a mismatch. The
17 Costs are in dollars in 2000-2008, but the But-For
18 revenues are in roughly contemporaneous dollars with
19 his Valuation Date. And so you can't compare amounts
20 in different years' dollars to come up with a ratio
21 that is reliable.

22 And as a result of the mismatch, just due to

1 inflation alone, we know that that would make the rate
2 too low. And we can confirm that it's an unreasonably
3 low rate because we know what the comparable companies
4 identified by Mr. Sharp are spending. And they are
5 spending about 55 percent of their revenue on data
6 acquisition.

7 So it just doesn't match market evidence, as
8 to what that ratio should be.

9 And one way to evaluate the reasonableness
10 of those data acquisition Costs is asking what are the
11 right margins? And EBITDA margins can be compared
12 either on an adjusted basis, meaning that you deduct
13 all the data acquisition Costs, or on an unadjusted
14 basis, where you don't deduct them.

15 So yesterday, Mr. Sharp showed this curve.
16 And it's important to understand this curve compares
17 adjusted GSI margins to unadjusted TGS and Pulse
18 margins. And TGS and Pulse are his comparable
19 companies.

20 And he didn't mislead about what this graph
21 was, but he did say he wanted to present a balanced
22 view to the Tribunal with respect to the different

1 margin calculations. But the graph that he didn't
2 show you, and which is not in his Reports, we put into
3 our Second Report, which is what happens when you
4 compare them on a like-for-like basis.

5 And what you see is the GSI margins, they
6 are little or no resemblance to the margins of
7 competitors. The GSI margins that Mr. Sharp uses are
8 similar to those of the very best years of Pulse and
9 higher than those ever achieved by TGS over the period
10 where we were able to obtain data for them.

11 Finally, I'd like to discuss the last step,
12 so the Capitalized Cash Flow methodology. This method
13 can be used and it can be reliable, but it depends on
14 the circumstances of the Company or asset you're
15 valuing. And in this case, we looked to the Valuation
16 Authority that Mr. Sharp himself referenced in his
17 Report. And it says that the CCF method is
18 appropriate when there are "relatively consistent
19 discretionary cash flows."

20 And here I draw your attention to the chart
21 on the lower right. We present two things: In the
22 dark blue, we have Mr. Sharp's But-For GSI revenue.

1 And in the light blue, we have the Offshore Seismic
2 Industry Revenue over the same time period from an
3 analyst report.

4 And I think, just looking at this, it
5 becomes abundantly clear that they are both highly
6 volatile. And so we would not say these meet the
7 condition of being relatively consistent over time.
8 And as Mr. Hobbs testified, during the period leading
9 up to the Valuation Date, the Offshore Seismic
10 Industry was effectively in free fall. So that also
11 would not meet the standard suggested by Mr. Sharp's
12 valuation reference.

13 We are out of time, but the remaining two
14 slides, I think, really repeat items that Mr. Maniatis
15 discussed already. So we don't need to go over those.

16 Thank you for your time. And we would
17 welcome any questions that you have.

18 PRESIDENT WALLGREN-LINDHOLM: Thank you,
19 sirs.

20 When do you propose that you want to hear
21 Mr. Sharp?

22 MS. LEMMENS: I would think that we wouldn't

1 break through what we are doing with Brattle, and we
2 would do it at the end of the day.

3 PRESIDENT WALLGREN-LINDHOLM: Yes. I think
4 that that is a -- What?

5 (Tribunal conferring.)

6 PRESIDENT WALLGREN-LINDHOLM: So we will
7 then hear Mr. Sharp after we have completed the
8 Brattle testimony.

9 And now Mr. Landau has a question.

10 QUESTIONS FROM THE TRIBUNAL

11 ARBITRATOR LANDAU: Thank you. There was
12 just one point I just wonder whether one of you could
13 address, and that is going back to Slide 26, and
14 looking at the different predictors, global offshore
15 rig count.

16 (Comments off microphone.)

17 (Interruption.)

18 THE WITNESS: (Mr. Chodorow) Sorry about
19 that. Yes.

20 ARBITRATOR LANDAU: Global offshore rig
21 count against spot price. I just wonder whether you
22 could address the explanation that we heard yesterday

1 of the decision to choose to maintain global offshore
2 rig count premised upon the different currency?

3 THE WITNESS: (Mr. Chodorow) Yes. Yes. So
4 undoubtedly, GSI collected revenues in U.S. dollars.
5 But one of the points that we highlighted in our
6 Report identifying an error made by Mr. Sharp, was
7 that some of those revenues - some of those Invoices
8 are also issued in Canadian dollars, which he
9 corrected. And, I think, we would say there are a few
10 responses to that.

11 The first is that there is sort of a
12 circular method that gets incorporated because GSI has
13 its financial statements and calculates its net income
14 in Canadian dollars. So the process used by Mr. Sharp
15 is to use the whole normalization process to predict
16 2012 But-For GSI revenues in Canadian dollars.

17 He takes those, he converts them into U.S.
18 dollars at the time. Then he applies the rig count to
19 move them forward in time. And then he converts them
20 back into Canadian dollars because he wants to conduct
21 the valuation in Canadian dollars because that's
22 relevant.

1 And so we would say it's appropriate that
2 this convoluted process you have to go through
3 actually suggests that it is quite reasonable to
4 consider Canadian dollars. I would say another
5 important factor is that we are looking at the quality
6 of the statistical relationship. We are not trying to
7 constrain it by saying we are only going to look at
8 U.S. dollars or we are only going to look at Canadian
9 dollars.

10 Mr. Sharp, himself, looked at both. And we
11 would, as Experts ourselves, we don't normally put
12 extraneous analysis into our Reports. We focus on
13 what we think is relevant. And in this case, the
14 results shown on this Table from Mr. Sharp's Third
15 Report, they actually tell us what is relevant, which
16 is that there are -- among the four highest
17 R-squareds, meaning the strongest predictive
18 capability among these, the number one relationship is
19 Canadian dollar revenue versus spot price.

20 The number two relationship is Canadian
21 dollar revenue versus comparable company revenue.

22 The number three relationship is the

1 Canadian rig count versus Canadian dollar revenue.

2 And so the fact that three out of the four
3 are top R-squareds are tied to Canadian dollars, that
4 suggests to us that, even if Mr. Sharp believes
5 U.S. dollars might be the right thing, he may be
6 wrong.

7 ARBITRATOR LANDAU: Thank you.

8 PRESIDENT WALLGREN-LINDHOLM: Thank you.

9 And Mr. Gowdy also has a question.

10 ARBITRATOR GOWDY: Just a couple. And the
11 first one is going to sound facetious but is not.
12 I'll offer you full use immunity no matter what your
13 answer is.

14 If you, indeed, did eat too much candy from
15 the M lounge, would the Valuation Date for that
16 expropriation be the day you checked in, the day you
17 checked out, or does the value of what you ate
18 fluctuate on a daily basis?

19 THE WITNESS: (Mr. Chodorow) I would say it
20 fluctuates on a daily basis. Because each day I would
21 have said, I can eat this candy or I can go downstairs
22 and can I buy a candy bar in the little shop. And the

1 candy in the lounge is always free, but imagine the
2 prices of the candy downstairs change from day to day.

3 Maybe I'm already downstairs in the lobby
4 and I'm too lazy to walk upstairs. And if the candy
5 bar is there for a dollar, I'll do it. But the next
6 day, I'm equally lazy and also in the lobby, but the
7 candy bar is \$2. Maybe then I'll walk upstairs and
8 get the free candy.

9 ARBITRATOR GOWDY: The reason I ask is
10 because I think there's a split or potentially a split
11 among Authorities on the Valuation Date. So assume,
12 just for the sake of this question, this notion of a
13 creeping or cumulative expropriation. Why is it the
14 date of the Alberta Decision and not an earlier date,
15 if you are assuming this notion of a creeping
16 expropriation?

17 THE WITNESS: (Mr. Maniatis) A creeping
18 expropriation is not what has been claimed. Let me
19 start there. In a creeping expropriation, you have a
20 series of breaches that culminate in expropriation.
21 Here, the Claim is there was no expropriation until
22 the moment of the Alberta Decision, and it's the

1 Decision that is the expropriation. It's not the
2 disclosure of the data in the Regulatory Regime.
3 That's the Claim. I'm not analyzing it. I'm reading
4 it.

5 ARBITRATOR GOWDY: Well, indulge me. If
6 there were a creeping expropriation, how would you
7 value that?

8 THE WITNESS: (Mr. Maniatis) In a creeping
9 expropriation, what you are trying to do is to figure
10 out the, essentially, effect of each creep but control
11 for everything else that changes in between. So how
12 much was expropriated at each creep, essentially.

13 ARBITRATOR GOWDY: All right.

14 THE WITNESS: (Mr. Maniatis) Because you
15 want to exclude, for example, a decline in the value
16 of the business due to other reasons.

17 Does that make sense?

18 ARBITRATOR GOWDY: It does. And I have one
19 more question I want you to help me with.

20 Assume that you are correct or poor customer
21 relations, can copyright law survive poor customer
22 relations? How does the fact that you have a poor

1 relationship with your customers at the present impact
2 how you value copyright protection?

3 THE WITNESS: (Mr. Maniatis) Again, here the
4 issue is we are valuing it prior to any breach. The
5 breach came later. Poor customer relations are a fact
6 claimed by the Claimants. And what I was saying is
7 that, if the objective is to value it prior to the
8 breach, you can't ignore the fact that it had poor
9 customer relations before the breach. The breach is
10 not what expropriated good customer relations. They
11 are there in the Actual and the But-For world.

12 ARBITRATOR GOWDY: But copyright protection
13 lasts for how long?

14 THE WITNESS: (Mr. Maniatis) I think in
15 Canada it might be life of author plus 50 years, but
16 don't quote me on that.

17 ARBITRATOR GOWDY: So if we're in the 49th
18 year and someone had poor customer relations 49 years
19 earlier, why would that impact valuation?

20 THE WITNESS: (Mr. Chodorow) PwC is arguing
21 that GSI would have had that this enormous prospective
22 value as a business. It matters because, if you have

1 no customers, it is hard to believe you have
2 prospective future value.

3 It is not about valuing the copyright. They
4 are valuing the business under a set of assumptions,
5 but poor customer relations were a fact. Think of it
6 this way: If the Alberta Decisions had gone the way
7 the Claimants want, they agree there would be no
8 breach, there would still be bad customer relations.

9 ARBITRATOR GOWDY: And that would impact
10 your rights under copyright law in what way? That's
11 what I'm trying to get at.

12 THE WITNESS: (Mr. Maniatis) Again, the
13 copyright claims -- we agree the copyright claims if
14 they are found to be a breach, are expropriated. What
15 is not expropriated is all the future potential
16 business of those customers who don't want to do
17 business with you.

18 ARBITRATOR GOWDY: Okay. Thank you.

19 PRESIDENT WALLGREN-LINDHOLM: Thank you.
20 Shall we now proceed to cross-examination?

21 MS. LEMMENS: Yes, Madam Chair. Thank you.

22 THE WITNESS: (Mr. Maniatis) I'll go sit

1 elsewhere.

2 MS. LEMMENS: Yes, thank you, Mr. Maniatis.

3 CROSS-EXAMINATION OF DARRELL CHODOROW

4 BY MS. LEMMENS:

5 Q. Mr. Chodorow, when I look at your CV, it is
6 my understanding that you're trained as an economist;
7 is that right?

8 A. I have an undergrad degree in economics, but
9 I have an M.B.A., where I focused on finance and
10 valuation issues, as well.

11 Q. Okay. And so are you a Chartered Business
12 Valuator?

13 A. I'm not.

14 Q. You're not certified to value businesses
15 then?

16 A. I don't have a particular certification from
17 an organization like the CBV, but I do have an M.B.A.
18 And I learned about valuing assets in the context of
19 that training at Yale University.

20 Q. And so you're not governed by the rules of
21 the Canadian Chartered Business Institute of Valuators
22 like Mr. Sharp from PwC?

1 A. Correct. I'm governed by my honor.

2 Q. And you understand that GSI is a business
3 that was operating in Canada?

4 A. Yes.

5 Q. And you don't have any specific training in
6 Seismic Data; is that right?

7 A. That's correct, but a business -- where a
8 business is located is a factor that one might
9 consider in a valuation, but it's not a driving
10 factor. What you care about are the cash flows. And
11 the jurisdiction of the location can affect the cash
12 flows. But the principles for valuation apply
13 regardless of the country that your asset is located
14 in.

15 Q. Right. But you do not necessarily focus on
16 the oil-and-gas industry like in Calgary Canada; is
17 that right?

18 A. That's correct. Although, you'll see in my
19 CV I've done an awful lot of work including valuation
20 for advisory purposes and disputes related to the
21 oil-and-gas sector.

22 Q. You've previously worked for the Government

1 of Canada in another NAFTA case; is that right?

2 A. That's correct.

3 Q. That was the Bilcon of Delaware case?

4 A. It was.

5 Q. And Mark Luz was the lead Counsel in that
6 case; is that right?

7 A. No.

8 Q. Was Mark Luz on the team?

9 A. No.

10 Q. Mark Luz did not interact with you on the
11 Bilcon of Delaware Case?

12 A. I don't think I ever met him before this
13 case.

14 Q. And in the Bilcon of Delaware Case, it was
15 found that there was \$7 million awarded to the
16 Claimant; is that right?

17 A. I don't remember the outcome of the case. I
18 know there were some damages, and they were relatively
19 low.

20 Q. But there were some damages?

21 A. I believe there were.

22 Q. Yeah. And Brattle in that case, it did not

1 present a valuation?

2 A. I don't think I agree with that.

3 Q. Did it present a valuation number?

4 A. Yeah. We provided guidance on a cap to the
5 valuation.

6 Q. But you did not actually provide a valuation
7 quantum? You provided commentary?

8 A. I don't think I would characterize it that
9 way. I think what we did is we said you can run a DCF
10 and you can come up with a value, and the value from
11 that DCF would reflect the value assuming that the
12 quarry received its permits. But there was an
13 outstanding legal question, which is what was the
14 likelihood that, but for the breaches, the permits
15 would have been received. And that's a legal question
16 and perhaps in some ways an engineering question that
17 we couldn't answer.

18 So what we did is we told the Tribunal, here
19 is the value assuming -- that we think you should use
20 assuming the quarry is permitted. And as you go
21 through your deliberations, you should ask the
22 question of what is the likelihood that that permit

1 would be received, and you can then take that
2 valuation and you can multiply it by the likelihood of
3 receiving a permit to come up with an estimate of the
4 value.

5 Q. The Brattle Group also worked for the
6 Government of Canada in the NAFTA case in Windstream;
7 is that right?

8 A. I certainly didn't. I don't -- I'm not
9 aware of Brattle working on that.

10 Q. You're not aware of Brattle Group providing
11 a report in the Windstream Energy NAFTA case?

12 A. I don't know if they did or not.

13 Q. How long have you been with The Brattle
14 Group?

15 A. About 30 years.

16 Q. And so, when it comes to NAFTA cases, do you
17 keep track of that or does Mr. Maniatis keep track of
18 that?

19 A. I mean, we know our own cases. I don't know
20 that I know everybody else's cases, whether NAFTA or
21 otherwise. I mean, I've got -- I have a number of
22 them for both -- what I've worked on for both

1 Claimants and Respondents, including a case against
2 Canada where I worked, although I was not the
3 testifier.

4 But I don't know all of Alexi's cases. He
5 doesn't know all of mine, likely. There is a standard
6 conflicts database that we consult when questions
7 arise about whether we can take a case or not.

8 Q. Let's find out a little bit more about your
9 instructions here, sir. You were contacted by Mr. Luz
10 to prepare the First Brattle Report; is that right?

11 A. I don't remember who contacted Brattle, and
12 I don't remember if it was me or somebody else that
13 was contacted.

14 Q. How did you come to work on this case?

15 A. I was either contacted or somebody else was,
16 and -- and talked to me about it, and then we probably
17 put in a proposal identifying the relevant information
18 that -- and qualifications that we thought would be
19 relevant for them to make a decision about whether we
20 could do a good job of assessing damages here.

21 Q. And in your instructions for this case, sir,
22 you were asked to comment on the Expert Report

1 prepared by PwC in early 2023; is that right?

2 A. I'm sure we were. I don't remember where
3 the list of instructions is, but, yes, that was
4 certainly one of them.

5 Q. Did you have other instructions?

6 A. I'm sure we were asked to think about
7 whether we could provide a reliable valuation.

8 Q. And what was your answer?

9 A. Well, we didn't know at the time, and we
10 came to investigate this and concluded that it would
11 not be reasonable to conduct a going concern
12 valuation. And at the time that we filed our First
13 Report, there was significant information that we
14 didn't have. And so what we did is we -- I believe we
15 described a methodology that could be used to conduct
16 a valuation, but we did not prepare a valuation.

17 And then ultimately, we didn't prepare a
18 valuation because we didn't view there to be a
19 reliable way for us to do that. And one of the
20 reasons is that when it comes to conducting this
21 valuation, there are a lot of very specific questions
22 that arise with respect to things like what is the

1 demand for data series in the High Arctic at a time
2 when there's a moratorium? And how much cash flow can
3 that generate?

4 Or what is the distinction between -- that
5 you have when you're trying to calculate damages in
6 the But-For Value of the library versus one in the
7 actual world where the data is still available for
8 licensing, according to Mr. Einarsson, but is,
9 perhaps, less valuable.

10 And so there are a lot of things that are
11 very specific to the industry that are used in such a
12 valuation. And those went a little bit beyond our
13 expertise.

14 Q. And so, ultimately you did not prepare that
15 valuation because it was beyond your expertise?

16 A. Given the circumstances in this case, that
17 is correct.

18 Q. In your Second Report you were asked to
19 comment on the second PwC Report; is that right?

20 A. That's correct.

21 Q. In the Second Brattle Report, you commented
22 that there were duplicates of accessed data entries in

1 Exhibit C-111.

2 Do you recall that?

3 A. I do.

4 Q. But you actually had Exhibit C-111 when you
5 prepared your First Report, didn't you?

6 A. So it's correct that we had Exhibit C-111,
7 but we didn't have any of the necessary information in
8 order to try and look back at C-111 and assess its
9 reliability. So, for example, we didn't have any
10 Price Lists, and so there was no way for us to
11 actually provide any kind of comment on the
12 reliability.

13 So what we did is we, in that case -- I
14 believe in our First Report we warned of the fact that
15 there was -- I think more than 900 million Canadian
16 dollars of revenue being added from this exhibit, and
17 there was no support, and we specifically warned that
18 there was the potential for double-counting in the way
19 that C-111 was used. And if you'll give me just a
20 moment, I'll find -- see if I can find where we said
21 that.

22 So if you go to our First Report, RER-4, on

1 Page 25, and you look at Paragraph 67, and the section
2 is specifically about C-111. We say: "Mr. Sharp does
3 not indicate that he checked to avoid possible
4 double-counting." And we provide an example of how
5 such double-counting might happen.

6 And, in fact, Mr. Einarsson, because of this
7 warning, went and identified one instance of
8 double-counting, but it's a different kind of
9 duplication then we were talking about in our Second
10 Report.

11 So if you're saying could we have checked
12 for the duplicates we identified in our Second Report,
13 sure? But we didn't have the underlying information
14 to really understand at the time what C-111 was,
15 whether it was reliable, and so we wanted to wait
16 until after document production to conduct a full
17 assessment.

18 And I can promise you that we did not go
19 through looking for duplicates and somehow sandbag
20 Mr. Sharp. The reason the corrections were required
21 is because Mr. Sharp said he performed verification
22 procedures. He didn't provide any evidence of what he

1 did, and because we were concerned still about C-111,
2 we did our own checks when he failed to provide his,
3 and that's what led to the discovery of the
4 duplicates.

5 Q. But you would agree with me that in your
6 slides this morning, you actually only refer to
7 Exhibit C-111 to say that there is duplicates there.

8 Do you see that?

9 A. Yes.

10 Q. Right.

11 A. Because now we understand more about C-111,
12 and as I said, we could have identified it. It is not
13 impossible that we could have, but we wanted to
14 reserve our judgment on whether C-111 was reliable
15 until we actually had the underlying information,
16 which I understand Claimants could have put into their
17 initial submission but decided not to.

18 Q. In the Second Brattle Report, you also
19 commented that there were potential duplicate Unpaid
20 Invoices due to replacement of certain invoices as
21 identified in Exhibit C-112; is that right?

22 A. That's correct.

1 Q. And you had Exhibit C-112 when you wrote
2 your First Report?

3 A. We did.

4 Q. But you chose not to present any of those
5 comments in your First Report when you responded to
6 the first PwC Report?

7 A. Well, I think for the same reasons that I
8 just mentioned, we were presented a one-page exhibit
9 that had [REDACTED] that fed into
10 Mr. Sharp's Report, and we had no copies of the
11 Invoices, we had no Price Lists, and without any of
12 the detail, we could have checked to see, oh, is there
13 double-counting.

14 I think we probably didn't do that with
15 either C-111 or C-112 because we figured they were
16 probably put together in a reliable manner and used by
17 Mr. Sharp in a reliable manner, but we just didn't
18 know. And so we waited until we had the relevant
19 information to try and assess this.

20 Q. How did you anticipate that PwC would
21 respond to those comments, if your comments had any
22 validity, when you are presenting them in the

1 Rejoinder report?

2 A. So I don't think we were expecting
3 necessarily that it would be PwC. It could have been
4 PwC that confirmed somehow -- put something in to
5 confirm the validity. It could have been
6 Mr. Einarsson or some third Expert or fact witness
7 that provided the support.

8 What we highlighted is that there was more
9 than -- in the First Report, there was more than
10 [REDACTED] coming from these two exhibits
11 that had no support. And so, you know, as an expert,
12 we like to try and be sure that the information that
13 we are using is reliable, and sometimes we can assess
14 that. Sometimes we are not the right people to assess
15 it, and we ask for either another Expert or another
16 fact witness to be the person that can testify to the
17 reliability of key inputs to our analysis.

18 And it doesn't seem like that was done by
19 anybody here, and the verification procedures
20 conducted by Mr. Sharp simply missed what we see as
21 crucial errors, the exact types of things that we
22 would ourselves have wanted to take a look at.

1 Q. So, sir, I asked you how did you anticipate
2 PwC would respond to those comments if it was
3 presented in your Rejoinder report?

4 A. Oh, I'm sorry. I misinterpreted the
5 question.

6 Well, I don't know how I would expect them
7 to respond. I think I would have expected them to
8 consider them. I would have expected them to
9 investigate, not just specific instances that were
10 raised in our Report, but categories of instances and
11 say -- so, for example, not just asking the question
12 of was the Plains Midstream fee ruled invalid, but
13 were all of the court cases -- were any of the other
14 court cases to the point where one could rule that the
15 fees were invalid.

16 Or similarly, I would have expected that he
17 would file an errata and would provide detail
18 explaining, not just the reasoning for the errata, but
19 also the reasoning why certain things, for example,
20 duplicate charges, were not corrected.

21 And, finally, I would have expected him to
22 conduct this in a timely manner because I believe

1 there were three or four months between the time he
2 received our Report and the time that we received the
3 corrected version of his Report.

4 Q. So it wasn't surprising that you received an
5 amended Report from PwC; is that right?

6 A. It was surprising because we had to wait so
7 long, and so we didn't think one was coming.

8 Q. So it was simply the timing of it as opposed
9 to the fact that it actually responded to some of your
10 comments?

11 A. Perhaps. But again, these -- I think that
12 Mr. Sharp confirmed yesterday that if he had done
13 these checks himself, he could have identified every
14 one of the items that was raised in our Second Report.

15 So I don't view these at all as new issues.
16 I think each category of Item was specifically
17 highlighted as a potential issue in our First Report,
18 and I think that whether it was Mr. Sharp himself or
19 some other witness, that it would have been reasonable
20 and appropriate by the time these went into the Second
21 Report to verify that this \$1.1 billion of revenue was
22 reasonable because, as we showed in our slides, it has

1 a huge impact on the damages.

2 And so I think that the concept of asking a
3 tribunal to just take the word that these are all
4 okay -- actually, not even really somebody's word, but
5 just to have them put in the record and assume
6 everything is fine about them is not appropriate.

7 Q. Your opinion, sir.

8 But would you agree with me that, if your
9 comments had validity, it would have been helpful for
10 the Tribunal to have revised calculations before it?

11 A. Of course.

12 Q. And did you provide those?

13 A. Oh, no. One of the reasons that we didn't
14 do it is that when Mr. Sharp filed his First Report,
15 he did not provide an electronic copy of the
16 spreadsheets, as we did in our Report, and is pretty
17 standard in almost every case that I work on.

18 And I believe that it was requested and that
19 we were told that -- this is a representation that I
20 believe we heard from Counsel. So I can't verify this
21 myself, but I believe we heard that somehow the
22 spreadsheets contained proprietary PwC intellectual

1 property and so they couldn't be turned over.

2 Q. But you didn't bother to try and recreate
3 the spreadsheets or conduct the calculations yourself?

4 A. That's correct because we didn't feel that
5 it's appropriate to actually conduct a valuation in
6 this manner. And so correcting it, in our Opinion, is
7 not going to help the Tribunal to find damages for the
8 alleged breach that we have.

9 Q. Sir, the Reports are signed by both you and
10 Mr. Maniatis; right?

11 A. That's correct.

12 Q. And the Reports do not indicate which parts
13 are authored by you or Mr. Maniatis?

14 A. I believe that's correct.

15 Q. And are you aware of the requirements under
16 the IBA Rules on the Taking of Evidence that you did
17 have to signify which portions were authored by which
18 author?

19 A. I'm not an expert on the IBA Rules.

20 Q. Did you draft The Executive Summary of the
21 Brattle Reports?

22 A. It was a combination of Mr. Maniatis and me.

1 Q. Okay. And so how did you two decide to
2 divide the sections in the Brattle Reports? How did
3 that work?

4 A. You mean for today?

5 Q. No, I meant writing them.

6 A. Oh, we both contributed to the writing of
7 the sections of the Report.

8 Q. Of all sections?

9 A. Yes. So I wrote some sections, largely the
10 sections that I discussed today. Mr. Maniatis wrote
11 the sections that were consistent with what he wrote,
12 and we both commented on each other's work because our
13 practice is to do that to make sure that what we're
14 doing and saying is reliable and we served as a check
15 on each other.

16 Q. So how am I to understand whose Opinion is
17 in there when I'm looking at any part of your Reports?

18 A. So I believe we provided Counsel for Canada
19 a list of sections of the Report that we would both
20 agree to be -- that we would both agree to be
21 cross-examined on, and so I think that's a way that
22 you could do that.

1 Q. But you both authored all sections in the
2 Reports?

3 A. Yes. I think that is probably fair to say,
4 but that's because I wouldn't sign a report where
5 there was something that I didn't agree with, and I
6 suspect the same is true for Mr. Maniatis.

7 Q. Did you both conduct all of the exercises to
8 come up with all of the comments made in the Reports?

9 A. No, I don't -- I think it was, for example,
10 the sections that I talked about, all of the
11 implementation issues, that was an area that I had a
12 much greater focus than Mr. Maniatis, and he spent
13 more time on the conceptual things that he testified
14 to. I certainly received comments from him on the
15 sections that I discussed today, and I provided him
16 comments on the sections that he discussed.

17 Q. And when providing comments between one
18 another's sections, then, sir, did any of the
19 conclusions change based on those comments?

20 A. I'm sure that over the course of writing the
21 Report, as we tested our theories and tested our
22 analyses, that things changed. And that's -- our

1 practice is that, first, as we learn more information,
2 our Preliminary Opinions change, and then we like to
3 poke and prod at analyses or Opinions that somebody
4 else has and find out which ones we think are the most
5 appropriate and reliable.

6 Q. So how do I today determine who came up with
7 each Opinion in the Reports?

8 A. Well, you have a list of who it is that you
9 can cross-examine on each, but I think that Alexi
10 would probably hold all the same opinions as me
11 because he signed the Report and didn't dispute
12 anything in the sections that I testified on. And it
13 was the same with respect to the sections that he
14 testified on.

15 Q. But you would agree with me that it was
16 after the fact that you decided who would get
17 cross-examined about which section?

18 A. Yes, that's correct. And, you know, it is
19 pretty standard practice that Tribunals will come up
20 with a decision about how they would like Joint Expert
21 Reports to be handled because these Joint Expert
22 Reports are pretty common in international

1 arbitration, particularly investor-State cases.

2 Q. Well, we'll see how this goes today then.

3 MS. LEMMENS: I think it is probably time
4 for the morning break.

5 PRESIDENT WALLGREN-LINDHOLM: Yes, please,
6 in 2 minutes, so we are happy to break now. And then
7 we will see you back at 11:15. And may I remind both
8 Experts of what you already know, that you are under
9 testimony and please don't discuss your testimony with
10 anybody. Thank you very much. See you back at 11:15.

11 THE WITNESS: Thank you.

12 (Brief recess.)

13 PRESIDENT WALLGREN-LINDHOLM: We will now
14 continue the cross-examination of Mr. Chodorow.

15 Ms. Lemmens, please.

16 MS. LEMMENS: Thank you.

17 THE WITNESS: May I just raise
18 question -- or make one quick note? I realized that
19 one of the things I didn't get to in the Direct
20 Presentation is we had in the Appendix a short list of
21 some errata, that I wanted to point out. There is
22 nothing that I consider to be material in there, but I

1 just wanted to make sure that you're aware of that.

2 PRESIDENT WALLGREN-LINDHOLM: Thank you very
3 much. This is noted. Thank you.

4 BY MS. LEMMENS:

5 Q. Sir, in your Reports, you suggested that GSI
6 was making bad business decisions.

7 Do you recall that?

8 A. I don't remember if I characterized them
9 that way, but I did highlight the concerns that GSI
10 was expending substantial funds to invest in the ships
11 as they were moving into the Global Financial Crisis
12 as well as concerns about what it means in what
13 Mr. Einarsson characterized as a relatively small
14 market to be suing many of -- maybe even all of his
15 customers.

16 Q. Okay. Well, let's take this bit by bit. I
17 just wanted you to recall that that had been
18 mentioned.

19 Did Canada instruct you to assume the
20 alleged bad business decisions made by GSI?

21 A. I don't believe so.

22 Q. So how were these allegedly bad business

1 decisions identified?

2 A. We looked at the historical Financial
3 Statements and we looked at the facts as we understood
4 them from things like Mr. Einarsson's Financial
5 Statements. I think we were aware of some of
6 the -- some of the things that were discussed in
7 the -- in both the Claimant's and Respondent's
8 Memorials, and these guided us on the types of things
9 that we thought it would be appropriate to look for.

10 Q. Did you inquire with Canada about any good
11 business decisions made by GSI?

12 A. No.

13 Q. And you did that because you don't include
14 extraneous information because you consider that not
15 relevant for your Reports?

16 A. No.

17 Q. I think that's what you said earlier.

18 A. That is probably an accurate
19 characterization of my earlier statement. I think
20 what we were doing is we weren't trying to identify
21 specific bad business decisions. We were trying to
22 understand why it is that GSI was not a going concern

1 as of the -- as of the moment immediately prior to the
2 alleged breaches. And so, that's why we investigated
3 this. We were trying to understand what was the cause
4 of the state of GSI at that time.

5 Q. But isn't it true that GSI was making
6 revenues in the tens of millions of dollars,
7 throughout the 2000s at least?

8 A. Prior to the Global Financial Crisis? I
9 think that's an accurate characterization.

10 Q. It was a fairly good going concern at that
11 time, wasn't it?

12 A. I would have to go back and look. I don't
13 seem to recall any particular concerns about the
14 financial state of the Company other than I think
15 there were some discussion in the early 2000s that I
16 understand was related to Claims made in some lawsuit.

17 Q. Right. And how did you come to know about
18 the Sable Mary lawsuit that you're referring to?

19 A. I suspect somebody from the Respondent's
20 Counsel told us.

21 Q. And you understand that that was a lawsuit
22 that GSI had with respect to somebody that was

1 defrauding GSI, and so that was the concern being
2 raised by the Controller at the time, that there was a
3 crisis related to a fraud being perpetrated on GSI?

4 A. I don't remember the details. I remember
5 there were some financial concerns, financial
6 condition concerns that were raised. And so we looked
7 into those. And I think one of the things we saw is
8 that GSI was relatively thinly capitalized throughout
9 the 2000s leading up to the time when it stopped being
10 a going concern.

11 Q. Well, in fact, I think what you were doing
12 was referencing the case and the testimony about the
13 fraud and not in fact anything other than that when
14 you made the comment that in the early 2000s there was
15 a crisis at GSI?

16 A. I have to take a look. I'm not sure that we
17 characterized it as a crisis. I think we probably
18 said somebody was characterizing the crisis. I don't
19 think we reached an independent conclusion on that.

20 Q. Okay. Well, thanks for clarifying that
21 because I think it is worded a little bit differently
22 in your Report, sir.

1 A. Would you like me to --

2 Q. Let's talk about the ownership of the
3 seismic vessels because you raised that as one of the
4 alleged bad business decisions.

5 Isn't it true that GSI's ownership of
6 Seismic Vessels enabled it to avoid rental fees for
7 vessels it didn't have to charter?

8 A. Yes. There's a benefit to that, but there
9 is also a Cost.

10 Q. But, in fact, GSI had its Seismic Vessels in
11 the early 2000s when it was making the tens of
12 millions in revenues; isn't that right?

13 A. I don't want to characterize the numbers
14 because -- but I think they are probably right, but,
15 yes, they owned the vessels.

16 Q. And you also had commented that GSI had made
17 a bad business decision by creating Seismic Data in
18 the area of the Falkland Islands.

19 Do you recall that?

20 A. I don't think I ever characterized that as a
21 bad business decision, and I'm -- but since you keep
22 referring to the "bad business decision" term, I want

1 to just go back and check the terminology that I used.

2 PRESIDENT WALLGREN-LINDHOLM: Maybe,
3 Ms. Lemmens, you could help the Expert.

4 MS. LEMMENS: No, the computer is frozen.

5 PRESIDENT WALLGREN-LINDHOLM: Oh, the
6 computer is frozen. I see. Okay.

7 MS. LEMMENS: Neither paper nor digital is
8 working at the moment.

9 PRESIDENT WALLGREN-LINDHOLM: Thank you.

10 THE WITNESS: So I can go back if you'd like
11 and check on a break. I certainly see that we say
12 there were business decisions that were made that went
13 wrong. I don't know that we would necessarily
14 characterize -- I don't think we'd necessarily
15 characterize them as "bad business decisions," with
16 the possible exception of deciding to sue all of their
17 customers in a small market.

18 BY MS. LEMMENS:

19 Q. Right. So, sir, you had commented if -- in
20 your words, you're saying it's a business decision
21 gone wrong, if that's the words you want to use today,
22 but you had commented on the Falkland Islands dataset

1 because you thought that GSI had lost money on the
2 Falkland Islands work; is that right?

3 A. That's correct. We had documentation that
4 talked about that. It's referenced in -- I believe
5 it's referenced in BR-28. And I think, again, we
6 wouldn't necessarily characterize this as a bad
7 decision. Sometimes the decision to collect data in a
8 certain area will work out, and sometimes it might
9 not. At this time GSI had, we understood, invested a
10 lot of money, and it took time to recover it.

11 And it may have eventually recovered it, but
12 in the process of waiting, you have concerns about the
13 financial condition of the Company that can arise
14 because, if I make an investment today and I can only
15 recover it 10 years from now, that can have liquidity
16 implications that could affect the state of the
17 business.

18 Q. Okay. But I wanted to clarify that you, in
19 fact, did see the information that GSI had produced
20 after this comment was made in your Report that
21 indicated that it, in fact, had recouped and made some
22 money on the Falkland Islands dataset.

1 Did you see that in the production?

2 A. I do recall seeing that.

3 Q. Okay.

4 A. But I believe it was much later that they
5 recovered it.

6 Q. But you didn't revisit your Report to
7 comment on that in your Rejoinder Report, to say that
8 you had, in fact, seen information that GSI had
9 recouped the money that it had spent on the Falkland
10 Islands dataset and, in fact, had made some money on
11 it?

12 A. So we didn't go back to revisit it, but
13 we're talking about what's happening in this time
14 frame where these concerns about GSI's financial
15 condition are being raised.

16 Q. Sir, do you know what the Coasting Trade Act
17 is in Canada?

18 A. Roughly.

19 Q. Okay. You just tell me if this is outside
20 of your expertise.

21 Do you understand that GSI used to have the
22 only Canadian-flagged Seismic Vessel in Canada which

1 meant that it was given a priority for Seismic Work in
2 Canada?

3 A. I believe I heard that. I just don't know
4 the details.

5 Q. And do you also recall hearing that Canada
6 had eliminated the priority system under the Coasting
7 Trade Act after GSI began suing the Canada Government
8 related to copyright infringement in the 2000s?

9 A. I don't know about the timing of those two
10 things, but I do recall that something changed with
11 respect to the Coasting Trade Act at some point.

12 Q. And so, as a result of the Coasting Trade
13 Act change and not having priority for Canadian
14 vessels in the seismic surveying field, that resulted
15 in increased competition in the Canadian market.

16 Do you understand that or do you recall
17 hearing that?

18 A. I don't recall hearing that. I do -- you
19 know, I understood that there were competitors to GSI,
20 even as far back as the late '90s. We haven't
21 had -- we haven't done a full assessment of the extent
22 of that -- no, competition at any point in time.

1 Q. Okay. But you would agree with me that GSI
2 doesn't make the legislation in Canada and had no
3 control over the change in the Coasting Trade Act that
4 came around in 2011-2012 time frame; right?

5 A. That seems like a fair statement.

6 Q. And so, in fact, that was not anything to do
7 with a GSI business decision when that legislative
8 change was made?

9 A. Correct. And, as I said, we're not
10 characterizing all of the things that are discussed in
11 our Report as "bad business decisions." Some of them
12 are things that were bad for GSI but not necessarily
13 bad decisions by GSI.

14 Q. You would agree with me, I think, on this
15 one, giving out data for free does not enhance
16 customer relationships for GSI?

17 A. I don't know if giving out data for free
18 enhances them. I can envision a situation where --

19 Q. Why don't we talk about --

20 (Overlapping speakers.)

21 Q. Oh, sorry.

22 A. I could envision a situation where it could

1 lead to additional sales. It may have adverse impacts
2 as well, but...

3 Q. Let's talk about the candy example that we
4 heard from Tribunal Member Mr. Gowdy.

5 So if you're picking up free candy down the
6 hall, it's not enhancing your relations with the store
7 with the candy bar downstairs; right?

8 A. With the candy bar downstairs? Sure. But
9 I'm more likely to come back to Marriott if I can get
10 into the lounge and get access to it.

11 Q. Right. But the people that sell the candy
12 bars in the store aren't getting your sales?

13 A. In that situation, correct.

14 Q. And so, when the store is having to compete
15 with the free candy bowl, it actually is having an
16 adverse impact on the store's sales?

17 A. It could.

18 Q. So if GSI is competing with free data and
19 charging a price for the data, it is not enhancing
20 GSI's customer relationships, is it?

21 A. I don't know it's harming them. It may
22 affect their sales, but I don't think it necessarily

1 makes their customer relationships worse.

2 Q. Well, it is certainly not enhancing them, is
3 it?

4 A. I don't know. I could envision sometimes
5 companies would go to look at the data available from
6 the Boards and decide: "This looks interesting.
7 Let's go access a License."

8 Q. Sir, you're aware of Secondary Submissions?

9 A. Yes.

10 Q. Do you know that licensees were providing
11 the Boards with copies of the -- I think you had
12 referred to it in your presentation this morning as
13 "the higher-quality stuff"?

14 A. I don't remember referring to it like that,
15 but I understand that the Secondary Submitters were
16 providing data to the Boards. I haven't evaluated the
17 quality of that.

18 Q. I think it was, in fact, referred to as
19 higher-quality data in your presentation, but,
20 perhaps, it was Mr. Maniatis that had said it. I
21 don't know which one of you were -- are saying certain
22 things.

1 A. Okay. I will tell you; I did talk about
2 quality because as we discussed in our Report, we
3 understood that the data that was available from the
4 Boards was generally not the level of data that would
5 have been available if somebody had licensed it from
6 GSI.

7 Q. But are you now aware that Secondary
8 Submissions, in fact, did include that higher quality
9 data that was licensed from GSI and was submitted to
10 the Boards and available for access and copying?

11 A. I understand that -- I don't know what was
12 available from the Boards. We haven't specifically
13 evaluated that. There may be different quality for
14 what's available from the Boards for Secondary
15 Submissions versus initial submissions. We -- I can't
16 comment on that.

17 Q. Are you aware that the NEB believed that
18 seismic companies should enforce their property
19 protections?

20 A. I haven't studied that.

21 Q. Okay. So you're not familiar with that?

22 A. Correct.

1 Q. Okay. And so, do you understand that GSI
2 was investing in its Seismic Data business by
3 enforcing the copyright in its Seismic Data?

4 A. I don't know that I would characterize it
5 like that. If you're referring to suing of its
6 customers.

7 Q. Well, isn't it an investment to protect
8 one's property rights in an asset?

9 A. It could be, but there's the offsetting
10 piece of it which is you anger your customers. So it
11 could be an investment, or it could be detrimental.

12 Q. But if it simply did not protect its
13 investment, then it would be seen as abandoning its
14 investment and not actually have any investment at all
15 in its property?

16 A. That sounds like -- that's a legal issue. I
17 can't comment on it.

18 Q. You suggest that GSI suffered significant
19 losses on its investments in its ships.

20 Do you know how much GSI actually made from
21 its Seismic Vessels while it owned them?

22 A. No.

1 Q. I think you would agree with me in these
2 times of inflation that generally speaking, inflation
3 occurs year over year?

4 A. Yes. Much more now than it would have at
5 the valuation dates, but, you're correct.

6 Q. And the foreign exchange rate between the
7 U.S. dollar and Canadian dollar also fluctuates every
8 day?

9 A. It does. It does.

10 Q. Did you conduct any analysis of whether the
11 2013 Price List of GSI accounted for inflation from
12 prior Price Lists?

13 A. We didn't do a thorough review. We looked
14 at a few of them, and we noted that there were
15 substantial increases. Certainly those increases were
16 much higher than the rate of inflation over that time
17 period, which was, if I recall it correctly,
18 relatively low.

19 Q. And did you compare those Price Lists with
20 any other seismic companies' Price Lists at all?

21 A. No.

22 Q. So you didn't conduct a market analysis to

1 compare the GSI Price Lists?

2 A. That's correct, although, as we stated in
3 our Report, we are not sure that it's accurate to
4 characterize Price Lists issued after customers have
5 largely stopped buying data from GSI as a market Price
6 List.

7 Q. But you don't know whether the market was
8 actually paying prices similar to those prices in
9 GSI's Price List because you didn't conduct the
10 analysis?

11 A. That's correct.

12 Q. The 2012 Price List was in Canadian dollars?

13 A. I don't remember. There were some in
14 Canadian and some in U.S.

15 Q. Do you understand why there were a few
16 Canadian-priced Invoices issued by GSI in or around
17 that 2012 time frame?

18 A. I haven't looked into it.

19 Q. Okay. And so do you understand that, other
20 than the 2012 GSI Price Lists, that the Price Lists
21 were listed in U.S. dollars, or did you not look?

22 A. I did look, I believe many of the earlier

1 Price Lists were also in -- were in Canadian dollars.
2 In fact, in one of the analyses we have in our
3 Appendix, I think as early as maybe 2002 or 2003, we
4 had to take the price in Canadian dollars and convert
5 it into U.S. dollars for purposes of a comparison that
6 we were making to the License value contained in
7 C-111.

8 Q. Sir, between 2012 and 2013, what was the
9 Canadian-U.S. dollar exchange rate at?

10 A. I would have to go back and look. I don't
11 recall. I believe Mr. Sharp said yesterday it was
12 about parity in 2012. I don't remember what it was in
13 the earlier years.

14 Q. So do you understand why the 2012 GSI Price
15 List was in Canadian dollars and not U.S. dollars,
16 that it was because of the parity between the dollars
17 at that time?

18 A. I have no idea why we have Price Lists in
19 both currencies, other than to say that GSI must have
20 deemed it relevant to have in -- Price Lists in U.S.
21 dollars and Canadian dollars at various times.

22 Q. And you also understand that the Valuation

1 Date being at 2017 is several years after 2013.

2 Would you agree with me that there was
3 inflation between 2013 to 2017?

4 A. There would have been, but relatively low.

5 Q. And, given that you didn't actually provide
6 a valuation, you wouldn't have factored in the
7 inflation into that valuation, or what am I to
8 understand? Should we apply inflation?

9 A. I think it's reasonable to consider the
10 inflation rate. So if, say, we're comparing a
11 License, I think I gave an example of the License that
12 was in 2002 and had one License Fee and another
13 License that was valued based off of the 2013.

14 And I think it had gone up by roughly
15 400 percent, and certainly it would be reasonable to
16 take that 2002 and adjust it for inflation, but
17 inflation would be nowhere near the increase in that,
18 in the price of the License between the 2002 date and
19 the 2013 date.

20 Q. I'm not familiar with the example that
21 you're talking about.

22 Do you have any evidence that the 2013 Price

1 Lists were not accepted by any customers?

2 A. We don't have access to -- I don't believe
3 we've had access to all of the detailed licensing that
4 was happening but, when you look at GSI's Financial
5 Statements, I think it makes it pretty clear that
6 there is not much licensing going on.

7 Q. But you don't actually have any information
8 that the Price Lists were not accepted by third
9 parties?

10 A. I can tell you that it seems unlikely that
11 some of the particularly high license rates were
12 licensed in material quantities just because, for
13 example, I think the -- some of the datasets were
14 \$8 million, which I believe was probably more than
15 GSI's revenue in many of the years following 2013,
16 although I could go back and check.

17 So they may have been licensing data. We
18 don't know where those revenues come from, but they
19 weren't licensing much of it.

20 Q. Well, sir, do you know how much it costs to
21 license Seismic Data in the market?

22 A. We've seen GSI's Price List, but we haven't

1 conducted an independent analysis.

2 Q. Are you aware that this is expensive stuff
3 to license?

4 A. Sure. You can see that from the Price
5 Lists.

6 Q. Okay.

7 A. But the question is not whether it's
8 expensive or not. The question is whether the prices
9 that were being posted by GSI on its 2013 Price Lists,
10 and I believe were being incorporated into the Unpaid
11 Invoices, were prices that users interested in
12 licensing the data would have found palatable.
13 That's -- I think those are two separate questions,
14 and we don't know the answer to whether they were
15 palatable other than knowing that there wasn't a lot
16 of licensing of GSI data going on. And so -- so
17 there's no way to say that many of those Price Lists
18 would have been marketed-tested.

19 Q. But we also have no information that they
20 weren't acceptable or comparable to market
21 competitors?

22 A. That's correct.

1 Q. You would agree with me that the 2013 Price
2 Lists were the closest in time to the 2017 Valuation
3 Date; right?

4 A. Yes. My understanding is that they remained
5 in effect through 2017.

6 Q. Did you review GSI's revenues in their
7 Financial Statements through the 1990s and 2000s?

8 A. We certainly looked at them.

9 Q. Many revenues were generated from Seismic
10 Datasets created in the 1970s and 1980s during that
11 time; isn't that right?

12 A. My understanding is that GSI didn't start
13 collecting data until the late 1990s, and so the
14 earlier revenue seems most likely to be coming from
15 those older datasets.

16 Q. And, for instance, I believe you noted in
17 your Rejoinder Report that the 1972 East Coast Dataset
18 was licensed by several oil producers from 2000-2014.

19 Do you recall that?

20 A. Yes.

21 Q. And so, in fact, licensing revenues were
22 being generated from GSI's older Seismic Data from the

1 1970s and 1980s, well into the 2000s?

2 A. I would have to look at the individual dates
3 associated with those, but what we did note is that
4 there were many licenses. I just can't tell you the
5 timing of those licenses. They may have been in the
6 '90s, they may have been in the 2000s, or some mix.

7 Q. Are you aware that GSI was reprocessing some
8 of its older datasets throughout the 2000s and 2010s,
9 up until the time of the Decision?

10 A. I haven't independently seen that, but I do
11 understand that to be the case.

12 Q. And so -- do you understand that
13 reprocessing is an investment in the business?

14 A. It can be, yes.

15 Q. You don't actually have any information that
16 GSI would not have continued to invest in new data
17 acquisition or reprocessing after 2009 if it had
18 turned out that it could enforce its copyright?

19 A. I would be speculating.

20 Q. Right. You just don't have that
21 information?

22 A. Yes.

1 Q. And you actually also don't know and
2 probably don't have the information about what GSI
3 would have used its copyright infringement Damages
4 Awards for, including whether it would use it to
5 invest in new Seismic Data or reprocessing, if it had
6 won the ability to enforce its copyright in its
7 Seismic Data?

8 A. I don't know, but I will say, if your
9 customers are not willing to license your data, that
10 it seems like it would be an unreasonable investment
11 to make if you've made them -- if you've destroyed
12 your relationships with them through lawsuits.

13 Q. Well, we'll get to that in a moment, here,
14 sir.

15 Do you know that West Canadian is a copy
16 company?

17 A. I believe that's correct.

18 Q. Do you know that it has accessed and copied
19 Seismic Data for customers, being oil companies, that
20 use the Seismic Data?

21 A. I don't know who they're doing it for.

22 Q. And so, then, do you understand that

1 West Canadian is unlikely to use the Seismic Data
2 because it's just simply a copy company?

3 A. It seems like it would be using it for other
4 purposes, yes.

5 Q. Right. West Canadian is not out in the
6 Offshore of Canada exploring and producing oil and
7 gas?

8 A. I agree.

9 Q. And so, when West Canadian accesses GSI's
10 Seismic Data that was submitted to the Canadian
11 Boards, do you have any understanding of whether it
12 was accessing different versions, being the original
13 submitted version or Secondary Submissions?

14 A. Yes. We provided an example of the -- of
15 original versus Secondary Submissions in our
16 presentation earlier, I believe.

17 Q. Right. You pointed to an example of
18 West Canadian accessing the same Seismic Dataset, but
19 do you know whether it was the same version or whether
20 it was different versions being the original version
21 and maybe a Secondary Submission?

22 A. I would have to go back and look, but this

1 is where I turn to the evidence about what GSI does
2 when somebody accesses both an original submission and
3 the data, and that's the example that I provided of
4 Anadarko, where they were actually getting -- I
5 believe it was two different Secondary Submissions,
6 but GSI, when they billed Anadarko under their
7 contract claim against them for those two accesses,
8 billed only one License Fee.

9 Q. But, sir, the two Secondary Submissions may
10 have, in fact, been the exact same processed version
11 that GSI licensed to two different customers. So, in
12 fact, it would be the same version.

13 Do you have any information about that?

14 A. No.

15 Q. And I think I've already confirmed this, but
16 you don't have any legal training; is that right?
17 You're not a lawyer?

18 A. That's correct.

19 Q. And so, when you make comments with respect
20 to various Court Decisions of the Canadian Courts, you
21 are not actually an expert on those subjects; is that
22 right?

1 A. Correct. We're giving a lay reading.

2 Q. And so I think you even conceded that you
3 were instructed about the Plains Midstream Decision,
4 just like PwC was instructed?

5 A. That's correct, but we also did read it, to
6 be clear.

7 Q. Very good. You said this morning that the
8 Anadarko Case ruled that GSI's invoices were invalid
9 in your presentation this morning.

10 A. I believe that was the case. I would have
11 to go back and check specifically, but I believe I did
12 say that.

13 Q. Are you aware that, in fact, the Anadarko
14 Case settled for millions of dollars?

15 A. The settlements were withheld, so we didn't
16 see any details of the settlement amount, and we
17 couldn't compare the amount that it settled for
18 against the amount that was claimed in the original
19 Unpaid Invoice in order to do as Mr. Sharp suggested
20 of finding out whether there might be some information
21 in there about the views of the legal strength
22 regarding the validity of claims.

1 Q. But you would agree with me that, if the
2 Anadarko Case was settled, in fact, it wasn't ruled
3 that GSI's invoices were invalid in that case?

4 A. I believe maybe there was an appeal. I'm
5 not sure. I would have to go back and check.

6 Q. Sir, do you understand that, that when a
7 case is settled, it sometimes is dealt with by the
8 Courts by having a consent dismissal?

9 A. Roughly.

10 Q. And so, in fact, the consent dismissal is
11 just part of the larger package of the settlement of
12 the lawsuit and does not concede that there is no
13 invalidity or there is invalidity?

14 A. That sounds reasonable. I think the
15 important thing that we're raising is, again, not
16 specific examples to say, okay, here is one you should
17 exclude. We're saying that there are important
18 questions to be asked, and, based off of the way
19 Mr. Sharp wrote his Third Report where he says he
20 only -- it only references inquiring what Counsel
21 Plains Midstream -- it suggests that, perhaps, those
22 questions were not asked.

1 Q. But, sir, you simply raise questions and
2 don't give any answers to these questions in your
3 Reports, do you?

4 A. That's correct, because we don't believe
5 that this kind of analysis is valuable, and we are of
6 the understanding that it's not Canada's
7 responsibility to prove damages. And we have raised
8 legitimate questions in our First Report that we think
9 were not addressed in the Second Submission by the
10 Claimants.

11 Q. Did Canada give you that instruction?

12 A. Sorry. Which instruction?

13 Q. Your understanding of that -- the fact that
14 Canada doesn't have to prove damages, did Canada's
15 Counsel tell you that?

16 A. I've heard that from Counsel in many
17 different cases, that Claimants are required to prove,
18 and, you know, we try to be helpful and, if there's a
19 reasonable correction that we can make to a
20 calculation, we are happy to do that. But, as I
21 mentioned, we don't have the Claimants' electronic
22 models, and we also think that the errors or

1 unreasonable assumptions are sufficiently -- they're
2 sufficiently large that we can't provide a reliable
3 valuation. And so an example of that is the
4 assumption that every customer that was listed on
5 C-111, that was a private entity, would instead
6 of -- in the absence of seeking data through the
7 Boards, would instead have licensed; right? That is a
8 purely speculative assumption. I don't think there's
9 any real way to analyze that, but I think it's
10 certainly unfair to assume that 100 percent of those
11 accesses would translate into License Fees. But if
12 you said, is it 50 percent? Is it 20 percent? Or
13 10 percent? I don't know the answer to that. And we
14 can't -- I think there's not a good way to test it in
15 this case.

16 Q. And just for the benefit of the Tribunal,
17 when I was referring to the Anadarko settlement and
18 Mr. Chodorow was saying that the settlements were
19 withheld, I just wanted to draw to your attention the
20 privilege log of the Claimants in this matter, and
21 you'll see listed in that that there is a Settlement
22 Agreement between Anadarko and GSI listed at 1.14

1 there, so that you see that that does, in fact, exist,
2 but it was not produced.

3 MR. LUZ: Excuse me. Would you just mind
4 noting the exhibit number for the record because it
5 just popped up.

6 MS. LEMMENS: I'm not sure that the
7 privilege log is marked as an exhibit.

8 MR. LUZ: It was, yeah.

9 MS. LEMMENS: Oh, is it?

10 MR. LUZ: It just popped up.

11 MS. LEMMENS: No. No. We brought it onto
12 the screen, but I don't think it's marked as an
13 exhibit in this proceeding.

14 MR. LUZ: It was put in an excerpt
15 from -- it's R -- I'm sorry. I don't want to
16 interrupt. We'll just note it later for the record.
17 It was put in as a separate exhibit.

18 MS. LEMMENS: Okay. I wasn't aware of that.

19 THE WITNESS: By the way, I hope the
20 Tribunal didn't think I was implying some kind of
21 adverse assumption about what was disclosed and what's
22 not because I understand these are generally

1 confidential in many cases.

2 BY MS. LEMMENS:

3 Q. Not a problem. I was just letting them know
4 where it's located because we were just talking about
5 it. C-525 is what I've been told is the privilege
6 log.

7 Okay. In your Report, you also relied on a
8 Statement of Defense of ConocoPhillips in a claim by
9 GSI to argue that the Claim is invalid. This was at
10 Paragraphs 94 and 95 of your Rejoinder Report.

11 A. Oh, sorry, Rejoinder. I apologize. I was
12 in the wrong -- it's on the screen. Yes. I see that.

13 Q. And do you know what the legal significance
14 of a pleading is?

15 A. I do, or at least I can characterize it from
16 a layperson's perspective.

17 Q. Yeah. And so you understand that a
18 Statement of Defense is a pleading?

19 A. Yes.

20 Q. And that, in fact, it's not something that
21 is proven yet?

22 A. Correct. But the point of our Report is

1 that Mr. Sharp assumed with 100 percent certainty that
2 each of these invoices was valid and could be
3 collected, and, if that were true, it seems to me
4 unlikely that you would have so many lawsuits claiming
5 the charges were invalid. And we actually saw, in the
6 case of Plains Midstream, that there was a ruling that
7 the fees were not valid under the -- I believe it was
8 under the License Agreement, but I would have to go
9 back and check.

10 Q. Right. But not with respect to Anadarko, as
11 we just talked about, because of the settlement?

12 A. Well, I think there's still a question about
13 the validity of the fees. You know, oftentimes, we
14 have done litigation risk analyses for clients and the
15 type of analysis we do is similar to the one that is
16 in our Report. And Mr. Maniatis presented this
17 morning where there are questions about the validity
18 and collectability of the fees. And if you assume
19 100 percent, that seems unreasonable in situations
20 where you -- where there seems to be a strong position
21 that GSI is wrong and -- in fact, at least one proven
22 position through a court decision.

1 Q. But you were pretty clear in your Rejoinder
2 Report that you're expressing no Opinion on legal
3 matters. Are you changing that?

4 A. It's not a legal matter to say that, when
5 there's a dispute in court, there's oftentimes a
6 legitimate basis. Not always, but oftentimes there
7 is, and that there's risk about whether those revenues
8 could ever be collected. And so assuming a guaranteed
9 collection of those revenues is very aggressive, I
10 would say.

11 Q. But you also didn't offer any sort of
12 Discount Factor to be applied to the Unpaid Invoices;
13 isn't that right?

14 A. That's correct.

15 Q. So what is the Discount Factor that you
16 think should be applied?

17 A. I don't know. I haven't analyzed the legal
18 merits, and I don't think I'm qualified to do so.
19 But, to be clear, if I was going to include it in an
20 analysis, I would either seek outside guidance or I
21 would ask for an instruction that would be supported
22 by somebody else at the Hearing.

1 Q. Sir, did you review Canada's privilege log
2 in this Arbitration at all?

3 A. I don't believe that I did.

4 Q. Okay. So you don't actually know what
5 documents were withheld by Canada?

6 A. I don't.

7 Q. And so, we talked about Secondary
8 Submissions a little bit already, but are you aware
9 that Canada has a process whereby third parties that
10 have licensed GSI's Seismic Data, or other parties'
11 Seismic Data, can submit that licensed data to the
12 Boards in exchange for Allowable Expenditure Credits?

13 A. That's my understanding, but I don't know
14 all the details.

15 Q. And do you understand that those credits can
16 be in the millions of dollars? Do you know anything
17 about that?

18 A. I haven't analyzed that.

19 Q. And you didn't ask Canada about what it was
20 paying for the Secondary Submissions of the data, when
21 you were conducting any of your valuation analysis
22 here?

1 A. No. But I worked on leases related to oil
2 and gas, and I think that those are not necessarily
3 deemed to be Market Values, in my experience.

4 Q. Are they deemed to be less?

5 A. I don't know how they're determined, but
6 it's not reasonable to assume that it's necessarily a
7 Market Value of data that would be submitted.

8 Q. And sorry. I'm just trying to understand
9 what point you're trying to make. You're saying that
10 the amount that Canada was paying for the Seismic Data
11 when Secondary Submissions was made is not a data
12 point that you may have looked at?

13 A. I would say it's not a fair market
14 transaction. You know, it's -- yeah. I think that's
15 probably the way that I would characterize it.

16 Q. And just for the benefit of the Tribunal,
17 because, again, we're talking about a document that
18 hasn't necessarily been raised before, I just wanted
19 to share with you Canada's privilege log in this
20 proceeding. You may recall it from the Compel Motion
21 that we did. And there were, I think, 67 entries
22 related to Allowable Expenditure Credits that were not

1 provided, and so we don't have access to the
2 information related to what Canada paid in those
3 Allowable Expenditure Credits for some of this data,
4 and neither does this Expert?

5 A. Correct.

6 Q. Mr. Chodorow, did you look at any of the
7 geophysical authorizations in this proceeding?

8 A. Are you referring to the instances where GSI
9 submitted a request to collect data? Is that what --

10 Q. Yes.

11 A. No, I don't believe we looked at it.

12 Q. Okay. And you didn't ask about any of the
13 information on any of those authorizations related to
14 Costs to acquire Seismic Data?

15 A. No.

16 Q. Okay. Just for the benefit of the Tribunal
17 here, I'd like to -- maybe you saw some of these. Why
18 don't we just pull up R-202 as an example.

19 Sir, did you see anything like this when you
20 were conducting any of your analysis?

21 A. I don't think so.

22 Q. Okay. And you also didn't inquire with

1 Canada about how much it would cost to create Seismic
2 Data?

3 A. No. I don't think that's a relevant measure
4 of the Market Value, how much it costs to initially
5 create. There are many other factors that go into it.
6 So knowing what it originally costs to collect a
7 dataset is not a measure of the Market Value of it,
8 particularly as of the later date.

9 Q. But it is a measure of how much it costs to
10 invest. It's an investment Cost.

11 Did you consider whether an investment Cost
12 should be analyzed in this case, sir?

13 A. The answer is, if we had done something like
14 a Replacement Cost analysis, then it's something that
15 we would have considered, but we don't consider a
16 Replacement Cost analysis that is just based off of
17 the original Cost of collecting things to be a
18 reasonable reflection of the Market Value of that
19 data. And that was the problem that we saw with the
20 Troika analysis.

21 It tried to measure the Cost of collecting
22 new data, but it ignored the well-recognized

1 depreciation factor that has to be incorporated into
2 that kind of analysis.

3 Q. But, sir, you did comment on the Cost that
4 GSI had paid to acquire the older dataset from
5 Halliburton.

6 Do you recall that?

7 A. I do, but that's not a measure of the Cost
8 of acquiring it. So what we talked about in our
9 original Report -- I think it was something that said
10 that it was -- I think it was \$450,000 to acquire what
11 I think is more than half of the total volume of data
12 that GSI owned at the time.

13 And we thought that would be a relevant
14 piece of market information. It was noted in the
15 response that the settlement included things other
16 than just the transfer of the data. And so that
17 450,000 didn't necessarily represent the Market Value.

18 But I do work in transfer pricing and for
19 cross-border transactions. To avoid tax evasion,
20 Governments generally require cross-border
21 transactions, such as the sale of data library from, I
22 think, what was a U.S. entity to a Canadian entity to

1 be done on arm's length terms.

2 And I believe that price was slightly
3 higher. I want to say 475,000, but not materially
4 higher. If the data was worth hundreds of millions of
5 dollars, I think the transfer price that we understood
6 was paid would have been completely inconsistent with
7 the transfer pricing rules.

8 Q. But you didn't conduct a pricing analysis
9 here; did you?

10 A. No. Because we had an actual -- when you're
11 doing a transfer pricing analysis, one of the things
12 that you always do is you look for market evidence at
13 the time. And in this case, we didn't actually look
14 for market evidence, but we had a standard that
15 applied at the time. And I believe we cited that.
16 That said under the transfer pricing rules, that such
17 a transfer would have to be consistent with Fair
18 Market Value.

19 Q. Are you aware that the Canadian Seismic Data
20 collection of Halliburton resided in Calgary?

21 A. I'm not, but the -- I believe that the
22 ownership of it, prior to it being taken over by GSI

1 Canada, was by a U.S. entity. And so a U.S. entity
2 that owns something that may reside in Canada, if they
3 sell the ownership of that to a Canadian company that
4 is affiliated, would still have to comply with the
5 rules of a transaction being priced at Fair Market
6 Value.

7 Q. And are you aware that GSI, current GSI,
8 reprocessed the older Seismic Data library and then
9 started licensing it?

10 A. I understand that happened. I don't know
11 the extent of it.

12 Q. Right. So I'm not sure of the relevance of
13 this transfer pricing comments. You didn't conduct
14 the analysis.

15 A. The transfer pricing analysis?

16 Q. Correct.

17 A. We didn't have to because there was
18 something that would have been declared a Fair Market
19 Value already. So we didn't have to go through,
20 unless we were suspecting that there was tax cheating
21 goes on. Then it would be reasonable to look at it
22 and question it, but I think it was probably validated

1 as a Fair Market Value transaction at the time.

2 And I think you're right that, to the extent
3 it was further processed down the line, that that
4 could add value to the dataset. But if you're talking
5 about the Fair Market Value at the time that the
6 library was licensed, any Fair Market Value analysis
7 would consider the ability to generate revenues
8 through future reprocessing. And so that should
9 already be rolled into the 475,000 or so valuation
10 that was used for tax purposes.

11 Q. But you do understand that there were other
12 elements to that transaction? It wasn't simply just
13 the sale of the data?

14 A. Oh. So you mean the transaction between the
15 U.S. GSI entity and the Canadian GSI entity?

16 Q. I'm talking about GSI current entity
17 acquiring it, the older data library.

18 A. If there was additional consideration paid,
19 then that number could be higher, but I think you
20 would still have to go through and conduct a valuation
21 that might separate out those two things.

22 So if, for example, they acquired more than

1 just the data from U.S. GSI, then it would be relevant
2 to consider. In that case, it would reduce the value.
3 But if there were additional things -- if there were
4 somehow compensation that was nonmonetary back to the
5 U.S. entity, it would be appropriate to include that
6 and come up with a somewhat higher value. I don't
7 know how much higher.

8 Q. So, sir, you didn't inquire about the Costs
9 because you believed it to be irrelevant to your
10 analysis, but you see that there was information with
11 respect to the estimated expenditures of fieldwork
12 data processing included on geophysical
13 authorizations. And we see that it is -- I'm just
14 doing rough math here, but it looks like it is well
15 into the \$5 million category just for the survey.

16 A. It looks -- it's hard to read, but maybe. I
17 just can't read that. It is written over.

18 Q. But you simply didn't inquire about the
19 investment Costs to create because you didn't view it
20 as relevant?

21 A. It's not relevant if we are not doing a
22 Replacement Costs less depreciation analysis. And we

1 did not do that, so this was not relevant for us.

2 Q. Sir, you were instructed that it
3 is -- "incorrect" is the word you used. At
4 Paragraph 113 of your Rejoinder Report, you were
5 instructed that it is incorrect that GSI's License
6 Agreements are governed by the laws of Alberta,
7 including data licensed in areas outside of Canada.

8 Do you see that, sir?

9 A. Just a moment. I'm reading what we were
10 instructed. So yes, we received those legal
11 instructions. I apologize. If you want to ask your
12 question about a specific one, again, I can respond to
13 that.

14 Q. Did you review GSI's License Agreements for
15 Falkland Island Seismic Data?

16 A. No.

17 Q. Okay. So you didn't actually check whether
18 that instruction was reasonable?

19 A. Correct.

20 Q. So you're also then not aware that those
21 License Agreements are, in fact, governed by Alberta
22 law?

1 A. So I don't think we were disputing whether
2 or not they were governed by Alberta law.

3 Are you referring to the fourth bullet?

4 Q. "GSI's License Agreements are governed by
5 the laws of Alberta including data licensed in areas
6 outside the Canada is incorrect." You started the
7 paragraph with, "We have been instructed."

8 A. Yes. So we're not expressing any kind of
9 Legal Opinion. I think if you look -- if you
10 highlight the first part of that instruction that we
11 received, is that those -- it was not appropriate to
12 include those as part of the Damages because that was
13 Canada's legal position.

14 We're not expressing a view as whether it is
15 correct or not. It is that Canada was disputing the
16 reasonableness of including Invoices for data outside
17 of Canada. For us, we are not reaching a legal
18 conclusion on that.

19 Q. But you do understand that the Falkland
20 Island Seismic Data makes up a very small percentage
21 of GSI Seismic Data collection?

22 A. I would have to go back and check the

1 percentage. I know it is the revenues on the Unpaid
2 Invoice list are higher than Mr. Sharp noted
3 yesterday. Because the calculation he was referring
4 to was one in our First Report, where we understood
5 certain Invoices were for Falkland Islands. And once
6 we actually received the Invoices, we found out there
7 were more Invoices than those reflected in our First
8 Report.

9 Q. So sir, I had asked you about the percentage
10 of the Falkland Island Seismic Data, as part of GSI's
11 Seismic Data collection.

12 A. I don't know the answer to that. I could
13 look it up for you, if you'd like me to.

14 Q. And are you aware that the Alberta Courts
15 have actually, in fact, ruled on the License
16 Agreements related to the Falkland Islands Seismic
17 Data?

18 A. I don't know if there's been a ruling, but
19 we had been instructed that they were not affected by
20 the Alberta Decisions.

21 Q. So you did not read the Decision at -- it is
22 cited in your Report, BR-19. That is one of your

1 exhibits, sir. It is a Geophysical Service
2 Incorporated and Falkland Oil and Gas Limited
3 Decision.

4 Did you read that?

5 A. If you can point me to where it is
6 referenced, I would be happy to tell you. We
7 certainly weren't using it to reach a legal
8 conclusion. We may have been using it to identify
9 some questions related to the allegations.

10 Q. Sorry. I don't know what you're asking me,
11 sir. I'm asking you if you've read the Decision?

12 A. We must have looked at it. And I'm telling
13 you that, if you would like me to tell you how we
14 considered it and what we looked at and so you can
15 understand how we used this, I would be happy to do
16 that.

17 Q. That's okay. I'm asking you a question
18 about whether you read the Decision. And I think
19 you're saying you don't really recall.

20 A. We certainly didn't read it in its entirety.
21 We may have looked at -- I think we probably looked at
22 the factual part of it, but I would have to go back

1 and confirm that. We are certainly not reaching a
2 legal conclusion.

3 Q. And do you understand that the Court of
4 Queen's Bench of Alberta made a Decision, with respect
5 to Falklands Seismic Data, and referenced the Common
6 Issues Decision in doing so at Paragraph 8?

7 A. I don't know. It shows a reference to that.
8 I don't know how or why they used it. It looks like
9 this is just a discussion of related litigation. But
10 I don't know what the ruling drew from that, if
11 anything.

12 Q. But it's pretty clear that the Falkland
13 Islands Seismic Data is, in fact, being dealt with
14 through the Canadian Courts; isn't it?

15 A. Through the Canadian Courts? Yes, but as we
16 were instructed, that it's not affected by the Alberta
17 Decisions.

18 Q. You also noted in the Rejoinder Report that
19 Edison International is a Party that was related to
20 GSI's Falkland Islands Seismic Data?

21 Do you recall that?

22 A. I believe that's correct.

1 Q. And you're aware that Edison International
2 actually participated in the Common Issues Trial?

3 Do you know that?

4 A. No, I don't know that.

5 Q. Okay. So I'd like to go to the Common
6 Issues Decision. It is Exhibit C-340.

7 Do you understand what I'm saying when I say
8 "style of cause"?

9 A. No.

10 Q. Okay. It's a bit of a legal term, but it is
11 intended to be the names of the Parties and what
12 position they have in the litigation.

13 And so here you see Geophysical Service
14 Incorporated and EnCana. But you'll see that there's
15 a bunch of Parties to the Common Issues Decision. And
16 if we scroll down, you'll actually see here on Page 5
17 of the PDF that Edison International was, in fact, a
18 participant in the Common Issues Trial.

19 Do you see that?

20 A. I do.

21 Q. So in fact the Falkland Islands Data
22 Licensees were participating in the Common Issues

1 Trial and were actively doing so, including that they
2 were dealing with their own issues in their litigation
3 because otherwise there wouldn't be a common issue.

4 Do you understand that?

5 A. I see that they participated. I don't know
6 how or why they did. And I don't know if it extends
7 beyond just Edison or it includes all of the Falkland
8 Islands Parties.

9 We received these legal instructions, and if
10 the legal instructions are wrong, then our critique
11 based off of those should be changed.

12 Q. Thank you.

13 PRESIDENT WALLGREN-LINDHOLM: Ms. Lemmens, I
14 think it would be helpful going forward, that when you
15 refer to something that is said in the Report that you
16 would point to the paragraph in the Expert Report,
17 where the statement is made.

18 You don't need to go back now, but I think,
19 going forward, it would be easier for the Expert to
20 find the place and the reference that you are
21 commenting on or you are asking questions about.

22 MS. LEMMENS: I sometimes do that and I

1 sometimes don't because there is a particular style to
2 cross-examination where you don't just simply take
3 them to the paragraph.

4 PRESIDENT WALLGREN-LINDHOLM: I understand
5 that, but sometimes it's obvious that the Expert is a
6 bit confused of when and how he is alleged to have
7 made a statement. Okay. Thank you.

8 BY MS. LEMMENS:

9 Q. Sir, I think it's your belief that the Price
10 List that existed at the time that a party accessed
11 GSI's Seismic Data from a Canadian Board should have
12 been used to calculate the applicable License Fee for
13 that access?

14 Is that your understanding?

15 A. Sorry. I do believe that's an ingredient,
16 yes.

17 Q. Did you say that's an agreement?

18 A. Ingredient.

19 Q. An ingredient. Okay. Thank you.

20 And do you understand that the Price List is
21 used for when data is actually licensed under a
22 licensing agreement with strict licensing terms?

1 A. Sorry, that the Price Lists are used?

2 Q. Yes.

3 A. I would say sometimes. There was some
4 discussion about potential discounts beyond those in
5 the Price Lists. I don't believe we ever had any
6 information about the extent of those discounts.

7 But Mr. Einarsson, I believe, did have in
8 his Witness Statement that at some point in time,
9 after they started suing customers, I believe they
10 stopped giving discounts from the Price List.

11 Q. So my question was, do you understand that
12 the Price List is the price for when data is actually
13 licensed under a License Agreement?

14 A. Yes. That's my understanding.

15 Q. The Price List is not something for accessed
16 data with no License Agreement?

17 A. I don't know the answer to that. I don't
18 think it is intended for that, but I don't know how or
19 whether it was used.

20 Q. And so the listed price from an earlier time
21 is no closer to getting to a License Agreement when
22 someone accesses the Board data; isn't that right?

1 A. Sorry. Can you ask the question again. I
2 don't think I followed.

3 Q. Well, if you use the Price List from an
4 earlier time, that doesn't mean that there is now a
5 License Agreement from that earlier time and that that
6 Party was governed by strict licensing terms for that
7 whole time; does it?

8 A. I think I'm confused. Are you referring to
9 the hypothetical Licenses from C-111?

10 Q. Well, there aren't any Licenses for C-111.
11 You called them "hypothetical"; right?

12 A. Right.

13 Q. And so when we're talking about a Price List
14 from an earlier time, that earlier Price List assumes
15 that there's a License Agreement still; correct?

16 A. That seems fair.

17 Q. And so for the whole of the time that the
18 data has been accessed and thereafter, that data is
19 not being governed by a License Agreement, which is
20 assumed when you apply a Price List?

21 A. That seems fair, as well, but I'm not
22 certain.

1 Q. You referred to the Total Decision in your
2 Rejoinder at Paragraph 131 to suggest that the Price
3 List at the Relevant Date of access from the Boards is
4 the better price to use to calculate the fees.

5 A. Yes. I see the discussion that the Court
6 struck down GSI's attempt -- I think it was the Court
7 struck down GSI's attempt to quantify Damages using
8 the 2013 Price List.

9 Q. And did you review this Total Decision in
10 full?

11 A. I don't believe we would have.

12 Q. Were you provided this quote from Counsel
13 and instructed to use it in your Report?

14 A. Counsel may have pointed us to this
15 Decision. We weren't instructed to include it. We
16 thought it was a relevant illustration of the problem
17 that we saw with using the 2013 price.

18 In particular, if you're trying to estimate
19 the revenue capacity as Mr. Sharp suggests. The
20 revenue capacity depends on the revenue that one would
21 have historically generated, not necessarily the
22 revenue capacity at some future date.

1 Q. But do you understand that the Total Case
2 was not about accessed data? It was a breach of
3 contract case.

4 A. I would have to go back and look. I don't
5 remember that, but --

6 Q. And so the Damages to be assessed were for a
7 breach of contract?

8 A. I would have to go back and check. I'm
9 happy to take your -- to accept what you're saying.

10 Q. Well, in the Decision, if we go to
11 Exhibit C-286, which is the Total Decision, we can
12 read further in the paragraph that you had cited there
13 in your Report that -- it states that: "The general
14 Rule is that Damages for breach of contract are to be
15 assessed at the date of the breach."

16 Do you see that there, sir?

17 A. Yes.

18 Q. So it was a breach of contract case and not
19 about access data.

20 A. That's fair. But I think the principle
21 question of what's the right Price List is still a
22 relevant one to ask in the analysis being done here.

1 Q. And so, sir, the analysis here was on a
2 breach of contract issue. And that also requires that
3 interest be applied to the amount up until the date of
4 the Judgment.

5 Do you understand that?

6 A. That makes sense, yes.

7 Q. And so the breach of contract also is
8 dictated in terms of how much the Damages are by the
9 terms of the contract; isn't that right?

10 A. I would expect so.

11 Q. And so this wasn't just simply the Court
12 deciding to use some Price List over another one. It
13 was, in fact, trying to do a breach of contract
14 analysis, not anything to do with accessed data?

15 A. Correct. But, again, I think the principle
16 still applies that, if you're trying to measure the
17 capacity to generate revenue, that you should be using
18 prices that were relevant at the time of an assumed
19 hypothetical License.

20 And this problem becomes particularly
21 pronounced when you're looking at the Cost ratio,
22 where you're using Costs that are, say, for a 2000

1 Access Cost estimated in \$2,000. And then trying
2 to -- then dividing that by normalized revenues in
3 dollars that are relevant for 2017. You're going to
4 get a distorted ratio.

5 Q. And, in fact, in the Total Case, there was a
6 calculation with respect to interest from the date of
7 breach of contract onwards.

8 Do you recall that from the Decision?

9 A. I don't recall that.

10 Q. So we can just pull it back up here at
11 Exhibit C-286, we see that there's a whole analysis
12 about interest to be applied.

13 A. Okay.

14 Q. Okay. So the issue about the appropriate
15 fees or damages with respect to accessed Seismic Data
16 from the Boards has not been determined by the Alberta
17 Courts because of the Alberta Decisions that dismissed
18 those claims.

19 Do you understand that?

20 A. Sorry. Can you ask it one more time.

21 Q. Yep. The issue of the quantum of Damages
22 for accessing Seismic Data from the Boards and copying

1 it has not been determined by the Canadian Courts
2 because of the Common Issues Decision or the Alberta
3 Decisions, however you want to refer to them here?

4 A. I don't know the answer to that. I would
5 have to go back and look at CalWest. I don't remember
6 what that Decision was about.

7 Q. We can look at CalWest. I'll get to it in a
8 moment, sir.

9 A. Okay.

10 Q. Do you understand that the CalWest Case was
11 about a copy company?

12 A. I know CalWest was a copy company.

13 Q. And do you understand that that copy company
14 was hired by the Quebec Government to create a copy of
15 the Seismic Data for the Quebec Government's purposes?

16 A. I don't recall that fact.

17 Q. And so when there was a discussion, with
18 respect to damages in the CalWest Case, in fact the
19 Claim was dismissed alongside the other Claims for
20 copyright infringement about accessed data as in what
21 had occurred in the Common Issues Decision?

22 Do you know that?

1 A. I don't remember that fact.

2 Q. So why don't we pull up the CalWest Decision
3 then, sir.

4 Okay. We're looking at R-150, which is the
5 CalWest Decision, sir.

6 A. Could I trouble you for the paragraph number
7 where we talk about CalWest in our Report.

8 Q. I don't know that. No, I don't have any
9 notes on it. I'm sorry.

10 A. Would you mind if I took a moment to look.

11 Q. You can look.

12 A. Do you remember if it was the First Report
13 or the Second Report?

14 Q. I don't remember, I'm sorry. There has been
15 a lot of paper.

16 My colleague has advised me that it's in the
17 Rejoinder Report.

18 A. Okay.

19 MS. BASTILLE-PARENT: Paragraph 22.

20 THE WITNESS: Okay. Thank you.

21 So I see this. If you want to ask me
22 general questions about CalWest, I'm happy to respond.

1 I believe this was one of the sections that was
2 assigned to Mr. Maniatis.

3 BY MS. LEMMENS:

4 Q. Okay. Well, I don't know that because I
5 understood that you were both commenting on the Report
6 and preparing the Report together?

7 A. As I said, I'm happy to do it, but I think
8 that there was -- that it was established that we
9 should be breaking out the sections we were
10 responsible for. But if it's -- if the Tribunal would
11 like me to try and answer, I'm happy to.

12 Q. I don't know, sir. You decided to raise
13 CalWest in your response.

14 A. Sure.

15 Q. So are you saying that you're not knowledge
16 about it?

17 A. No. I'm saying, if you're asking me about a
18 concept in this section, I believe this was a section
19 that was allocated to Mr. Maniatis. If you're asking
20 me a general question that's not related to the
21 Section, I can certainly answer that.

22 Q. So let's look at Paragraph 5 of the CalWest

1 Case here, sir. And you can see that it's about some
2 data that was copied by CalWest from the National
3 Energy Board's offices in Calgary, and it was
4 reproduced to its customer, the Ministry of Natural
5 Resources and Wildlife of the Government of Quebec.

6 Do you see that?

7 A. I do.

8 Q. And so, do you know anything about the Law
9 on Fair Dealing?

10 A. No, other than that it can be -- I
11 understand it can be a reason where it's okay to copy
12 data. But that's the extent of my knowledge, and not
13 even sure that's correct.

14 Q. And so, do you know whether that influenced
15 the outcome or the comments by the Judge in the
16 CalWest Case with respect to damages?

17 A. I don't.

18 Q. Okay. It's just that you had raised the
19 comment about CalWest and knowing whether there was
20 some sort of outcome on damages, and so I just wanted
21 to sort of understand what your -- the extent of your
22 knowledge about the answer to the question of whether

1 data accessed by the Boards has really had a
2 determination with respect to what the damages would
3 be as a result of the copying from the Boards?

4 A. Oh, I think, as we illustrate in the
5 Decision tree, we're not reaching any conclusion on
6 that. We're acknowledging that we understand it's a
7 Decision that would have to be considered, but we
8 don't have any particular Opinion on that.

9 Q. In the Report, sir, at Paragraph 143 of your
10 Rejoinder --

11 A. Okay.

12 Q. -- you suggested that Chevron accessed GSI's
13 Amauligak 3D data twice from the Boards?

14 A. Yes. I see that.

15 Q. And you suggested that it was accessed first
16 in June 2004 and again in November 2011?

17 A. That's what it says.

18 Q. Do you see that?

19 A. Yes.

20 Q. Yeah. And do you know why Chevron accessed
21 the data in 2011 from the Board if it already had the
22 data from 2004?

1 A. There could be many reasons. It could be
2 that, you know, it was on a computer and the hard
3 drive crashed. It could be that -- I'd have to look
4 back and check to see if it's possible that one was a
5 Secondary Submission. I'm not sure, but that's
6 something I could answer.

7 Q. Okay. I just wanted to be clear that you
8 weren't necessarily sure that they weren't the same
9 version. It's possible that they were different
10 versions that were accessed?

11 A. Yes. Although, as I noted before, Anadarko
12 suggests that, perhaps, there is reason that maybe
13 they are not -- that there is reason to believe that
14 maybe there wouldn't be more than one license issued,
15 and I know you had raised the question about whether
16 those were requesting the same data. I can't say what
17 they accessed, but I know it was Secondary Submissions
18 by different Parties.

19 Q. Well, you go on at Paragraph 144 of the
20 Rejoinder, sir, to mention that Chevron accessed
21 Jeanne D'Arc 1985 3D data three times from the
22 C-NLOPB?

1 A. Yes, that's correct.

2 Q. And it seems you understand that there were,
3 in fact, Secondary Submissions. In this particular
4 case you also seem to point out that: "Chevron's
5 request sought three Secondary Submissions made to the
6 C-NLOPB by Petro Canada, Husky, and Parex Partners."

7 Do you see that?

8 A. I do.

9 Q. And so, in fact, those may be different
10 versions with different reprocessing that were done by
11 all three of those different parties?

12 A. Yeah, that would make sense to me. But this
13 is where we cite the Anadarko invoice that shows that
14 when Anadarko requested two different Secondary
15 Submissions, the Unpaid Invoice that they received for
16 that access charged only for one.

17 Q. I'm just asking if you understand what
18 versions were being accessed and whether they were the
19 same or not.

20 Did you look at them?

21 A. No.

22 Q. Sir, you did not conduct any analysis on the

1 multipliers that were used in PwC's analysis of the
2 accessed data; is that right?

3 A. That's correct, because there was no data
4 for us to be able to do it.

5 Q. And you did not make any market inquiries to
6 test the multipliers used?

7 A. I think that's fair to say as well. We
8 didn't have access to that level of data because that
9 would be confidential data that we couldn't see.

10 Q. In fact, you conceded in your Rejoinder
11 Report at Paragraph 150, if you need to look at it,
12 that -- you said: "We cannot determine whether Paul
13 Einarsson's multiplier assumptions are unreasonable"?

14 A. That's correct.

15 Q. You are aware that Canada was provided with
16 all of GSI's License Agreements in this proceeding?

17 A. Yes.

18 Q. And did you look at any of them?

19 A. I think we saw a couple of them, but those
20 wouldn't answer this question.

21 Q. Well, they might answer questions about
22 Transfer Fees and Exploration Group Fees.

1 Did you look at that?

2 A. We did not.

3 Q. And, sir, did you ask Canada about whether
4 it was recording any information about what Parties
5 were copying the data for? For instance, to share
6 with others.

7 A. No.

8 Q. Did you speak with Mr. Uffen or Mr. Hobbs in
9 preparing your Report?

10 A. Yes. We talked to them.

11 Q. And did you understand from them that there
12 are Exploration Group Fees and Transfer Fees that are
13 common practice?

14 A. What we understood is that those fees
15 existed, that -- and that they were understood to
16 exist, but that it depends on the specifics of the
17 License Agreement.

18 Q. And do you understand that Exploration Group
19 Fees are common because partners will group together
20 and farm in on a particular area or a particular well?

21 A. I understand that they can be, but I believe
22 I also heard testimony that there are instances where

1 you can have these kinds of joint exploration ventures
2 that might not trigger an Equalization Fee.

3 Q. Well, somebody else's testimony, that is not
4 yours.

5 A. That's correct. I'm telling you our
6 understanding, but we also do see -- I believe it's in
7 the -- I can't remember. I think it might have been
8 in Plains Midstream where -- I would have to go back
9 and check, but I believe they invalidated the -- not
10 just the Transfer Fee but the Equalization Fee.

11 Q. But you understand that those are common
12 fees that are used in the industry and are, in fact,
13 treated as valid in the industry?

14 A. They are a valid type of fee, and we're not
15 questioning the validity of the existence of those
16 fees. What we are doing is we are saying, there seems
17 to be dispute about whether the application of those
18 fees in any particular instance is appropriate, given
19 the facts of the case. And Plains Midstream, it had
20 both Transfer Fees and Equalization Fees that were
21 being claimed.

22 And I don't think the Court disputed that

1 there were instances where those could become due. I
2 think they just looked at the facts of the case and
3 concluded that, given that particular set of facts,
4 they were not due.

5 Q. And, sir, you don't have any expertise on
6 how often Seismic Data is further licensed or
7 distributed to other parties from an original
8 licensee; is that right?

9 A. We don't.

10 Q. And do you understand that GSI does not know
11 in all instances how other parties distribute its data
12 to further Parties because it is not privy to the
13 access information from the Boards?

14 A. I don't know what GSI knows or not.

15 Q. Sir, you had some figures in, I believe,
16 your initial Report at Figures 4 and 5. And from
17 these figures that -- you created these or somebody
18 created these at Brattle?

19 A. Yes. They would have been created by
20 somebody under my direction.

21 Q. From these figures, it appears you argue
22 that PwC calculated significantly more Lost Revenues

1 from Seismic Data created prior to 1993 than from data
2 thereafter?

3 A. Yes, that's what that shows.

4 Q. You understand that PwC's analysis included
5 calculations from Lost Revenues arising from copying
6 data from the Boards? That's part of the analysis,
7 the accessed data.

8 A. Yes.

9 Q. And isn't it true that the Boards don't
10 release the Seismic Data for 10 or 15 years until
11 after it is submitted to the Boards?

12 A. I know there's an exclusivity period and
13 that it changed over time, but I don't remember what
14 applied when.

15 Q. So it's not surprising that much of the
16 accessed data revenues from Board copying relates to
17 earlier datasets that have been open for copying for
18 much longer rather than later datasets that we have
19 little to no information about?

20 A. I agree.

21 Q. Sir, I wanted to talk a little bit about
22 Pulse and TGS. So I think we have already established

1 that GSI was making revenues on some of its older
2 datasets because you saw that there were revenues in
3 the '90s and GSI -- current GSI was not yet creating
4 some of that Seismic Data?

5 A. Yes.

6 Q. And so, when you have a dataset in your
7 collection that's available for license, you're not
8 having to incur acquisition costs every year? You're
9 only incurring it when you create the dataset at first
10 instance, and then it's available to be licensed for
11 many years thereafter?

12 A. Right. I would agree.

13 Q. You understand that Pulse is a seismic
14 licensing business only, not an acquisition business?

15 A. I would have to go back and check. I
16 remember them acquiring data from somebody else.

17 Q. Do you -- I don't know what you're going to
18 go check to do that.

19 Do you understand that Pulse deals in
20 Western Canadian onshore data rather than offshore
21 data?

22 A. I do. And, in fact, we raised the concern

1 because Pulse was identified as a -- I don't think he
2 quite called them comparable, but he deemed them to be
3 a similar company for purposes of his analysis.

4 Q. Okay. So you are concerned that Pulse is
5 not a similar enough company because it deals in
6 onshore data?

7 A. We just raised the concern. I think
8 Mr. Sharp didn't do his own analysis of the
9 comparables, he was just instructed to use them. I
10 believe he was instructed to use Pulse in his First
11 Report, and then he decided or was instructed to use
12 TGS also in his Second Report.

13 Q. I'm not sure that he said that those were
14 instructions there, sir, but that's okay, we don't
15 need to get into that.

16 A. I'm happy to find it, if you'd like me to.

17 Q. Offshore data generally costs more to
18 license; isn't that right?

19 A. That's my understanding, but I don't have
20 expertise on it.

21 Q. So licensing offshore data generally has a
22 higher data license with it?

1 A. That seems fair, but it also has a higher
2 cost. Not clear that the profitability should be
3 materially different, but it could be.

4 Q. Maybe, but once the Costs are recouped from
5 actually creating the Seismic Data, then any License
6 Fees thereafter made on that data are generally higher
7 with a higher margin on the Costs?

8 A. Yes. I think that's fair to say for GSI as
9 well as the other companies.

10 Q. Right. So when GSI licensed its data from
11 pre-1993, being data that it acquired from
12 Halliburton, it was making a higher margin on it since
13 it wasn't having to acquire that data directly as part
14 of its expenses?

15 A. Yes. Again, that should be the same with
16 respect to any entity that has existing datasets.

17 Q. And, given that GSI is dealing in offshore
18 data which commands a higher license price than
19 onshore data, that's why we might see that there are
20 increased margins for GSI as opposed to Pulse for
21 onshore Seismic Data business?

22 A. It could affect the margins. Again,

1 Mr. Sharp used Pulse as a comparable, but the graph
2 that I presented earlier showed not just Pulse but
3 TGS. And in the case of TGS, the GSI margin was in
4 every year from I think the early 2000s all the way to
5 2020 or 2021, far above the highest margin that TGS
6 earned in any one of its years.

7 Q. Well, let's talk about TGS.

8 So TGS was an asset-light company until last
9 year when it purchased PGS and thereby acquired seven
10 seismic vessels. Are you familiar with that?

11 A. I understand that.

12 Q. So TGS's financial information that you
13 would have reviewed for your Reports was of a company
14 that had been an asset-light company?

15 A. Yes. That's correct.

16 Q. And so, TGS was also in a growth mode for
17 the past decade; isn't that right?

18 A. I would have to look. I don't know.

19 Q. TGS was busy acquiring other entities and
20 acquiring significant amounts of data in the market.

21 Are you aware of TGS's business?

22 A. I know they were doing data acquisition, and

1 I think they went through a couple of transactions.
2 That's true. But those don't necessarily fall into
3 the margins, as different profitability.

4 Q. Well, TGS would have had to be chartering
5 vessels prior to last year when it acquired PGS?

6 A. Yes, that's correct.

7 Q. So it's going to have rent costs for its
8 equipment to conduct seismic surveys?

9 A. That's correct.

10 Q. And that would factor into its margins?

11 A. Yes. And I think we actually discuss that
12 in our Report.

13 Q. TGS is also a public company based out of
14 many different regions across the world; right?

15 A. I don't know if they are based out there.
16 They operate in many different regions.

17 Q. Okay. And so they might have employee costs
18 and requirements for having to be a Norwegian public
19 company that are different than GSI's private-company
20 costs in Canada?

21 A. That's correct. But the margin differences
22 we -- that we showed earlier are really substantial.

1 Q. But that could be the case as between a
2 public company and a private company; isn't that
3 right?

4 A. There is certainly some costs that public
5 companies incur that private companies do not, but
6 there are also benefits from being a large diversified
7 company, such as economies of scale that TGS can
8 benefit from that GSI would not.

9 Q. But GSI also had seismic vessels that it
10 could benefit from?

11 A. Correct. And we noted that in our Report.
12 Again, these were not our choice of
13 comparables. These were Mr. Sharp's in both cases.

14 PRESIDENT WALLGREN-LINDHOLM: Ms. Lemmens,
15 may I just remind you that when you come to a suitable
16 place that you would break because I think that we are
17 reaching the time when we need to break for lunch.

18 MS. LEMMENS: Sorry. I wasn't watching the
19 time. I didn't realize when we had come back from the
20 break.

21 PRESIDENT WALLGREN-LINDHOLM: I am informed
22 that at 12:47 we should break, so we are getting

1 there.

2 MS. LEMMENS: You know what's going on? I
3 have a clock here that is not set on the current time.

4 PRESIDENT WALLGREN-LINDHOLM: I have the
5 same. Thank you.

6 MS. LEMMENS: Just a couple more questions
7 and then I think I can break. Thank you.

8 PRESIDENT WALLGREN-LINDHOLM: Yes. Okay.

9 BY MS. LEMMENS:

10 Q. And you would agree with me that a seismic
11 company that is in growth mode might have more
12 acquisition costs than one that is not in growth mode
13 but simply sustaining itself?

14 A. They would have both costs, more cost and
15 more revenues because the revenues generated from
16 seismic surveys happen in the very near term after
17 their Costs. And so you might see blips from year to
18 year, but I think that doesn't mean you
19 wouldn't -- you would see consistently different
20 margins over time.

21 Q. And you would agree with me that over the
22 long-term renting equipment often costs more than

1 owning the same equipment because renting the
2 equipment needs to account for the owner actually
3 owning it and then renting it and only having it
4 rented for some of the time?

5 A. Yes, it can.

6 Q. So an asset-light seismic business is not
7 necessarily more profitable than a seismic business
8 that owns its equipment?

9 A. Sorry. An asset-light is not necessarily
10 more --

11 Q. More profitable than a seismic business that
12 owns its own equipment?

13 A. Yeah. I think that's a fair statement.

14 MS. LEMMENS: Okay. I think I can take a
15 break here. Thank you.

16 PRESIDENT WALLGREN-LINDHOLM: Thank you very
17 much.

18 We will be back at 2:00 p.m., and I remind
19 the two Experts that they are under testimony?

20 THE WITNESS: Understood.

21 PRESIDENT WALLGREN-LINDHOLM: Thank you.

22 THE WITNESS: Thank you.

1 PRESIDENT WALLGREN-LINDHOLM: But you can
2 obviously move around and go and have lunch wherever
3 it is appropriate.

4 THE WITNESS: I'm after the candy.

5 PRESIDENT WALLGREN-LINDHOLM: I see. Good
6 luck. Thank you.

7 (Whereupon, at 12:51 p.m., the Hearing was
8 adjourned until 2:00 p.m., the same day.)

9 AFTERNOON SESSION

10 PRESIDENT WALLGREN-LINDHOLM: Welcome back.

11 (Comments off microphone.)

12 PRESIDENT WALLGREN-LINDHOLM: Thank you.

13 So we continue the cross-examination of
14 Mr. Chodorow?

15 MS. LEMMENS: Thank you.

16 PRESIDENT WALLGREN-LINDHOLM: Ms. Lemmens?

17 MS. LEMMENS: Yes. Thank you, and good
18 afternoon.

19 PRESIDENT WALLGREN-LINDHOLM: Good
20 afternoon.

21 BY MS. LEMMENS:

22 Q. Sir, before the lunch break we had talked

1 briefly about settlements, and I just wanted to
2 confirm your understanding that a settlement can
3 sometimes include a nonmonetary aspect to it?

4 A. Yes, in some cases.

5 Q. And so, it can include things like a return
6 of Seismic Data or confirmation of deletion of Seismic
7 Data?

8 A. That seems possible, yes.

9 Q. Have you ever met Paul or Russell Einarsson?

10 A. I've said hello in the hallway, but that's
11 it.

12 Q. Not before this Hearing?

13 A. Correct.

14 Q. And so, you don't actually have any
15 knowledge of when they would retire?

16 A. I don't.

17 Q. And do you know when Davey Einarsson
18 actually retired?

19 A. I don't know his exact date. I recall
20 seeing emails talking about him planning to retire in
21 2008, which, perhaps, was affected by the lawsuits,
22 but I don't know his exact retirement date.

1 Q. Okay. But you're not aware that he retired
2 in 2019?

3 A. I'm not. I'm not certain of that, no.

4 Q. And I think we've covered most of these
5 things, but I just want to make sure.

6 So you do not have any training in Seismic
7 Data, including interpreting it or reviewing the
8 quality of the Seismic Data?

9 A. Correct.

10 Q. You did not ask to review GSI's Seismic Data
11 for the purposes of your Reports?

12 A. Correct.

13 Q. If you had reviewed it, you wouldn't know
14 whether it was high quality or low quality or
15 somewhere in the middle?

16 A. Correct.

17 Q. You can only rely on the other Experts that
18 Canada has called, Mr. Uffen and Mr. Hobbs, for the
19 purposes of any commentary on Seismic Data industry or
20 valuation; is that right?

21 A. On the Seismic Data industry? I would agree
22 with that statement. We may have taken a couple of

1 instructions related to Seismic Data quality. I would
2 have to check to be sure. But when you get to the
3 question of valuation, we don't have specific
4 expertise to value Seismic Data, but our valuation
5 qualifications, I think, are very strong and allow us
6 to provide insights into the valuation and the right
7 way to approach damages, even if we can't tell you all
8 of the details of Seismic Data.

9 Q. Have you ever valued other intellectual
10 property?

11 A. Yes.

12 Q. What type of intellectual property was that?

13 A. A variety. I've done intellectual property
14 cases that involved alleged infringement of a variety
15 of products.

16 Q. And so you then, sir, would have an
17 understanding of the fact that, for infringement of
18 intellectual property, there are a variety of ways to
19 consider the damages?

20 A. There can be. There is usually a legal
21 structure that gives rise to the relevant ways to
22 value it.

1 Q. But it can include things like considering a
2 royalty or a licensing fee or a disgorgement of
3 profits from somebody using and disseminating the
4 intellectual property?

5 A. Yes. Those are accepted ways.

6 Q. You had discussions with Mr. Hobbs and
7 Mr. Uffen?

8 A. Correct.

9 Q. How many times did you have discussions with
10 them?

11 A. Probably three, maybe four.

12 Q. Did you ask them to conduct any analysis for
13 the purposes of your Report?

14 A. No. We were not instructing them on what to
15 do.

16 Q. What did you discuss?

17 A. We might have asked questions about the
18 Seismic Data industry and, you know, we might have
19 asked their Opinion on various things or what some of
20 the things that we've cited in our Reports.

21 Q. Did you ask them for any Seismic Data market
22 information?

1 A. We didn't specifically.

2 Q. Okay. So you didn't ask for anything about
3 Acquisition Costs or prices that would be applied to
4 licensed data or anything of the sort?

5 A. That's correct.

6 Q. Did you at any point in time consider the
7 Secondary Submissions as part of your -- I don't
8 know -- assessment of PwC's analysis in this
9 proceeding?

10 A. I think to the extent that they were
11 incorporated into their analysis, then we considered
12 them.

13 Q. But you don't actually know anything further
14 about Secondary Submissions other than what was in
15 PwC's analysis?

16 A. I don't think they -- I don't recall them
17 doing any modeling that was specific to Secondary
18 Submissions. C-111 contained information about
19 requests for Secondary Submissions, and I believe that
20 some of the Unpaid Invoices may have included fees
21 that were being -- that GSI alleged were due for
22 submitting secondary information to the Boards.

1 But there is no specific analysis or
2 separation of Secondary Submission in Mr. Sharp's
3 Report from other items. It is all just lumped
4 together. It is either Lost Revenue to port -- due to
5 port access or fees claimed on the Unpaid Invoices,
6 although I believe Mr. Sharp did not actually include
7 the Secondary Submission portion of the Secondary
8 Submission fees from those Invoices in his analysis.

9 Q. Did you ask your client Canada about whether
10 the accessed data list was fulsome?

11 A. We did not.

12 Q. And so, you didn't ask what was missing, if
13 anything, from that list?

14 A. That's correct.

15 Q. And you're aware that Canada may have that
16 information because that's who is releasing the data?

17 A. I've heard it alleged, but I don't know if
18 there is any or not.

19 Q. And so instead you only focused on
20 criticizing amounts in PwC's normalization of revenues
21 that you do not believe should be included?

22 A. That's correct. We focused generally on the

1 concerns that using a list of requests is not a proper
2 way to estimate Licensing Fees unless you can
3 determine how those requests for the free version of
4 the data would have translated into actual licensing
5 requests. And that's a very difficult question, one
6 that I don't think we had a good answer to, and
7 Mr. Sharp just assumed every one turned into a
8 hypothetical License.

9 Q. But you also didn't investigate what the
10 actual listing should be, then?

11 A. You mean the actual version of C-111?

12 Q. Well, if there's something missing from it
13 you didn't bother to ask?

14 A. Correct. Because we were not trying to put
15 forth something as a reliable calculation because we
16 didn't believe there was a reasonable way to make it
17 reliable.

18 Q. So GSI in the 2000s was a Company with
19 significant intangible assets and few fixed assets; is
20 that right?

21 A. I'm not -- certainly they had intangible
22 assets, such as such the ownership over the Seismic

1 Data library as well as their customer relationships,
2 as well as an assembled staff. It is hard for me to
3 gauge the exact proportions of those intangible assets
4 versus the tangible ones.

5 Q. But you would agree with me that Valuation
6 Experts often prefer to employ the CCF method for
7 companies with significant intangible assets and few
8 fixed assets?

9 A. They can, but I would not necessarily go to
10 the CCF under normal conditions if I was trying to
11 value the cash flows from the Company. I would go to
12 the CCF method only in an instance where one can
13 predict reliable growth in cash flows over time, and
14 the Seismic industry is far from that, as we presented
15 in our slide earlier.

16 It is moving all over the place. It was in
17 free fall at the Valuation Date in 2017, and so
18 Mr. Sharp's analysis assumes that, you know, there's a
19 very steep decline and then it just starts increasing
20 over time with inflation from that point without
21 assessing what was going on and dealing with
22 the -- dealing with the questions of what was

1 happening with the larger Seismic Data industry.

2 Q. And, sir, I'm really looking at the textbook
3 that you had referenced in your own Report at
4 Paragraph 195 of your Rejoinder report.

5 You rely on a textbook from Mark Kantor?

6 A. Yes.

7 Q. Which is at Exhibit BR-65?

8 A. Yes. I'm there.

9 Q. And valuation -- you'll see it on the screen
10 here, the exhibits.

11 Do you see that, sir?

12 A. Yes.

13 Q. Okay: "Valuation Experts often prefer to
14 employ the CCF method for companies with significant
15 intangible assets and few fixed assets."

16 A. I see that.

17 Q. Do you disagree?

18 A. No. But it does depend upon the
19 circumstances, and, in this situation I think there is
20 a real concern associated with doing that.

21 Q. And you would agree with me that the Seismic
22 Data industry is involved in the oil-and-gas industry,

1 for the most part?

2 A. Yes.

3 Q. And the oil-and-gas industry is highly
4 cyclical?

5 A. There is some cyclicalality, yes.

6 Q. And certainly the oil-and-gas can use a CCF
7 valuation?

8 A. It depends on the circumstances, but it may
9 be used. I don't know that that's always the best
10 approach. If I was going to value something, I would
11 almost certainly not use the CCF in the oil-and-gas
12 industry. The reason being that we have actual
13 information on futures prices that the market has
14 determined and set as expectations going forward. So
15 I would incorporate that. I wouldn't jump to the CCF.

16 And I will note that Mr. --

17 Q. And sir, oh sorry.

18 A. Sorry. Please go ahead.

19 Q. Sorry. So if you were to conduct a
20 valuation of GSI, you would have done a Discounted
21 Cash Flow analysis?

22 A. I would have attempted to. What I think is

1 important to understand is that the CCF is a very
2 particular version of the Discounted Cash Flow model,
3 and it's one that assumes that the future cash flows
4 will simply grow at some constant rate in perpetuity.

5 That may be reasonable in some cases, but if
6 we were going to do an analysis, we would first ask
7 the question of: Is that assumption of constant
8 perpetual growth reasonable?

9 And over the long-term, when you're talking
10 about cash flows many years out that, can be a
11 reasonable assumption, but over the short-term, it is
12 often more important to look at the details and the
13 expectations and understand what's going to be
14 happening going forward to determine whether the
15 short-term is -- growth rates are consistent with the
16 long-term. And that's often not the case.

17 Q. And so, a DCF is going to analyze the future
18 projections of a company?

19 A. That's correct.

20 Q. And those future projections should be
21 checked for reasonable against the historical revenues
22 of the Company?

1 A. That would be -- that would be one thing
2 that you would want to consider but not the only
3 thing.

4 Q. So we can't simply detach the future
5 projections from the historical earnings of the
6 Company. That would be unreasonable?

7 A. You can, but you'd have to understand why
8 that is reasonable; right? Sometimes there is just
9 some kind of fundamental economic or regulatory or
10 whatever shift. That means the future is different
11 from the past. And so, you can't just blindly look at
12 the past. You have to ask the question of what is
13 reasonable going forward, and if the historical
14 informs that future expectation, that is very helpful,
15 but it doesn't always.

16 Q. And that's because DCF models assume we can
17 accurately forecast revenue and earnings, let's say,
18 three to five years into the future or maybe even
19 longer than that?

20 A. I think that the hope is that you can add in
21 more precision than is possible with the CCF, because
22 the CCF, as I mentioned, is just -- there is just one

1 long-term growth rate. But that is often not
2 reflective of expectations as of a Valuation Date.

3 Q. But that long-term growth rate is intended
4 to be an average of what could potentially happen
5 based on historical growth, isn't it?

6 A. That is what gets incorporated into the CCF,
7 but a fundamental consideration -- and let me step
8 back for a moment. Both of them are discounting some
9 expected future cash flows. The CCF just simply
10 assumes they grow with some constant rate, and the DCF
11 tries to model in specific expectations.

12 And oftentimes when you're valuing an
13 industry, you're not at a situation where things are
14 just going to jump to a long-term constant growth
15 rate; right? You might be somewhere in a cycle, and
16 you might need to think about, well, how does that
17 cycle resolve itself and then turn into the long-term?

18 And the modeling of it as constant can
19 sometimes be reasonable, but if I'm in a downturn,
20 even if I know there's going to be a future upturn, in
21 that situation the CCF and the DCF, even if the
22 average growth rate is the same, can deliver very

1 different answers because the near term cash flows are
2 discounted less.

3 And so they have a higher impact on the
4 valuation, and so you care not just about some average
5 long-term growth rate from here until eternity, but
6 you care what the pattern of those looks like, and
7 that's the distinction that you can get with the DCF
8 that you can't with the CCF.

9 Q. But I think you would agree with me that the
10 highly cyclical oil-and-gas industry is not exactly
11 predictable or consistent from time to time?

12 A. Certainly it varies a lot, but there are
13 ways that you can hedge that.

14 Q. And, in fact, we even have things like the
15 war in Ukraine that intervene and change the prices of
16 things, and we have OPEC who flexes its muscles and it
17 changes the prices over in North America, and we have
18 tariffs -- as of a little bit ago -- that will
19 undoubtedly affect the oil-and-gas prices in this
20 country.

21 A. Yes. And I think that's exactly my -- that
22 goes almost exactly to my point; right? If we were

1 valuing things in the oil-and-gas industry in Calgary
2 six months ago, it would be a very different outlook
3 than it is today; right? Today, there are specific
4 impacts that are likely to happen as a result of the
5 tariff war, and that means that you know that things
6 are, perhaps, not at some kind of long-term
7 equilibrium that you can just -- that you can just
8 ignore by using a constant growth rate in a CCF model.
9 You try and predict those and try and estimate when
10 things return to normalcy, and then, at that far out
11 date, once things have returned to normal, then you go
12 to -- you put in, oftentimes, a terminal value, which
13 is effectively -- it's a CCF for everything starting,
14 you know, 10 years from now and beyond; right? Beyond
15 a reasonable forecast window.

16 Q. But it would be hard to prepare a reliable
17 projection or analysis of the Seismic Data industry in
18 Canada for years forward in order to use it in a
19 Discounted Cash Flow analysis, isn't it?

20 A. It could be. We didn't have access to
21 information that would allow us to do that, in part,
22 probably, because we didn't look for it because we

1 believed that the model of conducting a DCF was
2 effectively not the right model to value these
3 breaches.

4 Q. And you didn't ask Canada for any of that
5 information to prepare a DCF analysis?

6 A. Correct, although I don't know that we would
7 have approached Canada. I think we would have
8 probably looked for many of these things on our own.

9 Q. Just give me one moment.

10 A. Sure.

11 Q. Sir, the growth rate in PwC's analysis was
12 simply an inflation factor, wasn't it?

13 A. That's correct.

14 MS. LEMMENS: Thank you. Those are all my
15 questions.

16 PRESIDENT WALLGREN-LINDHOLM: Thank you very
17 much, Ms. Lemmens.

18 These were all your questions to
19 Mr. -- excuse me. This was all your questions or only
20 to Mr. Chodorow?

21 MS. LEMMENS: Sorry. Yes, those were only
22 my questions for Mr. Chodorow, but I do have questions

1 for Mr. Maniatis.

2 PRESIDENT WALLGREN-LINDHOLM: Okay. That's
3 what I wanted to clarify. So shall we now just change
4 seats and...

5 MS. LEMMENS: So I don't know. I think
6 that -- I'm not sure if you have a redirect.

7 PRESIDENT WALLGREN-LINDHOLM: Well, the
8 question is, is there any point in doing the redirect
9 now, or do you want to do them together on both?

10 MS. TABET: So we do not have a redirect,
11 however, we did want to raise a small issue related to
12 questions that were put to Mr. Chodorow.

13 PRESIDENT WALLGREN-LINDHOLM: Yes. Sure.

14 MS. TABET: Okay. So Ms. Lemmens suggested
15 quite a few times in her questions to Mr. Chodorow
16 certain things which are contested, and I'm not going
17 to address those, but, just for the record, she said
18 at 12:23 that -- referring to C-286, the Total Case,
19 that it was a breach of contract case and not about
20 the re-access to data. But, if you look at that case
21 at Paragraph 6 and Paragraph 9, in fact, it was about
22 both. She is, indeed, right that it was breach of

1 contract, but the contract provision at issue was the
2 ability for the oil company to access data from the
3 Boards. So we just wanted to clarify that for the
4 record. Thank you.

5 PRESIDENT WALLGREN-LINDHOLM: Thank you.
6 The clarification is now on the record.

7 And should we then change seats?

8 MS. LEMMENS: Yes. I think we're -- unless
9 the Panel has questions for Mr. Chodorow.

10 PRESIDENT WALLGREN-LINDHOLM: Well, the
11 question is actually -- we look at the Report as a
12 whole, so I don't know if my colleagues -- you have no
13 questions? And no. So that resolves the question,
14 that, if we have any questions, they are bound to be
15 after the second cross.

16 MS. LEMMENS: Thank you.

17 PRESIDENT WALLGREN-LINDHOLM: Thank you.

18 THE WITNESS: Thank you.

19 PRESIDENT WALLGREN-LINDHOLM: And thank you.
20 You will remain here, won't you?

21 THE WITNESS: Yes.

22 PRESIDENT WALLGREN-LINDHOLM: Yes. Very

1 good. Thank you.

2 (Witness steps down.)

3 CROSS-EXAMINATION of MR. MANIATIS

4 PRESIDENT WALLGREN-LINDHOLM: So welcome
5 back, Mr. Maniatis, and we will now proceed to your
6 cross-examination.

7 MS. LEMMENS: Thank you.

8 BY MS. LEMMENS:

9 Q. Good afternoon, sir.

10 A. Good afternoon, Ms. Lemmens.

11 Q. So let's start with some basics. You are
12 trained as an economist, sir?

13 A. I am.

14 Q. Yes. Okay. And you are not a Chartered
15 Business Valuator?

16 A. I do not have that Canadian credential, no.

17 Q. You don't have it in the U.S. either, do
18 you?

19 A. I don't.

20 Q. Okay. You are a joint author of the two
21 Reports tendered by the Brattle Group in this
22 Arbitration?

1 A. I am.

2 Q. And what specialized expertise required you
3 to author certain portions of the Report, or would you
4 say that you have the breadth of expertise over the
5 entirety of the Report?

6 A. Well, as it was conducted, I would say
7 either of us have the expertise over the breadth of
8 the Report, but we had different focuses and invested
9 our time differently.

10 Q. And did you rely on any of Mr. Chodorow's
11 Opinions in the course of drafting your portions of
12 the Reports?

13 A. We discussed the case throughout, so I don't
14 know that he has -- I think we formed our Opinions as
15 we worked through it, so I don't -- I think either of
16 us can adopt the Opinions of the other. So...

17 Q. Okay. But Mr. Chodorow, he was conducting
18 more of the review of specific items and calculations;
19 is that right?

20 A. I think that's fair.

21 Q. And you were dealing more with conceptual
22 matters, I think, is what I heard from Mr. Chodorow,

1 at least?

2 A. I would agree with that.

3 Q. Okay. And did you check Mr. Chodorow's
4 calculations that he had done for the Report?

5 A. I did not check his calculations. We have
6 teams that check the calculations, but that's not a
7 function a principal typically would do.

8 Q. Did you merge the different sections of the
9 Report that you authored into Mr. Chodorow's Report,
10 or how did that work?

11 A. Well, I suspect you're familiar -- no. We
12 have a form of a SharePoint site, so we're
13 simultaneously working in the same document.

14 Q. Got it. I want to start with some basic
15 facts in this matter.

16 Do you understand that Canada provided
17 access to GSI's Seismic Data through its Government
18 Boards?

19 A. I understand that, and that that's not
20 considered a breach. Not claimed as breach, yeah?

21 Q. I'm just asking if you understood that fact,
22 sir.

1 A. Yes. Yes.

2 Q. And you understand that that was done on a
3 free basis?

4 A. Yes.

5 Q. And that resulted in copying of the Seismic
6 Data by third parties, including oil-and-gas
7 companies?

8 A. I understand that's alleged. I don't know
9 it directly.

10 Q. Did you understand that from your client?

11 A. That copying is alleged, you mean?

12 Q. Yeah. Did you formulate that through your
13 own review of the materials or did you get
14 instructions from Counsel on these points?

15 A. Well, I certainly have read the Claims, so
16 that's a source, and I'm sure we spoke about it in the
17 course of the work as well.

18 Q. And do you understand why the Seismic Data
19 is provided for free by Canada's Government Boards?

20 A. I've heard testimony about that.

21 Q. And what do you understand about that?

22 A. That, to encourage exploration and

1 development, governments make data public after a
2 period of confidentiality.

3 Q. And do you understand why that was the case
4 that that would promote offshore oil-and-gas
5 development?

6 A. I have some understanding of it. I mean, I
7 think it's to create information that might stimulate
8 a desire to explore or bid on oil-and-gas leases.

9 Q. Was it to create the information or to make
10 the information available?

11 A. No. The information is made available to
12 spur commercial interest, and for other reasons as
13 well. We heard about academic institutions and
14 Government seizing information.

15 Q. And so, is it your understanding that the
16 free access to that Seismic Data through the
17 Government Boards would lead to a promotion or
18 encouragement of offshore oil-and-gas because it was
19 free?

20 A. Because it was public. I mean, it can
21 stimulate that kind of interest, yes. I think that's
22 the public-policy purpose, yeah.

1 Q. Right. But because you don't have to pay
2 for it?

3 A. It certainly encourages more interest if you
4 don't have to pay for it.

5 Q. And do you understand that, prior to Canada
6 providing that free access to Seismic Data, that oil
7 companies paid significant amounts of money for that
8 type of Seismic Data?

9 A. I don't know that history.

10 Q. Do you understand that GSI's right to
11 enforce its copyright in its Seismic Data was not an
12 issue that was permitted to proceed after the Alberta
13 Decisions?

14 A. I do.

15 Q. Did you prepare any analysis of the
16 difference between free access and what GSI would have
17 earned on its Seismic Data if it was charging those
18 oil-and-gas companies for copies of its Seismic Data?

19 A. I did not.

20 Q. And why not?

21 A. So the Claim, as I understand it, is that
22 the Alberta Decisions terminated GSI's ability to

1 continue to pursue litigation. I think you asked me
2 about a different analysis. Maybe I misunderstood.

3 Q. Well, do you understand that GSI was
4 pursuing copyright infringement for Parties that were
5 accessing and copying its Seismic Data from the
6 Boards?

7 A. I do.

8 Q. And did you provide any analysis or conduct
9 any valuation of what that would be worth?

10 A. What the Claims would be worth? I think we
11 described in our Report how you would go about that
12 with the litigation risk analysis.

13 Q. But you did not, in fact, provide a
14 valuation of it?

15 A. No.

16 Q. Why not?

17 A. Well, we weren't asked to, and the Claimants
18 themselves have said it would be highly speculative,
19 and -- so for those reasons.

20 Q. So highly speculative in the sense that you
21 don't know what the outcome would be? Is that what
22 you're saying?

1 A. I'm quoting the Claimants, but I take
2 "highly speculative" to mean they didn't have
3 information that would allow any reliable
4 quantification of the series -- of the Claims.

5 Q. And is that because no one knows the outcome
6 of it because it stopped at the Alberta Decisions?

7 A. No.

8 Q. So why not then?

9 A. I'm sorry? I'm misunderstanding. The
10 highly speculative characterization was the
11 Claimants'. I can't tell you why they felt -- I
12 can -- would you like --

13 Q. Do you agree with it?

14 A. I don't know because I haven't done that
15 analysis.

16 Q. Okay. Do you agree with PwC that the
17 correct Counterfactual Scenario is the one in which
18 GSI is successful in enforcing its copyright from the
19 Alberta Decisions?

20 A. I'm sorry, could you reread it.

21 Q. Do you agree with PwC that the correct
22 Counterfactual Scenario is the one in which GSI is

1 successful in enforcing its copyright?

2 A. I don't think that's PwC's scenario. So I
3 agree that the proper scenario would consider the
4 Claims, had the Alberta Decisions permitted GSI to
5 continue to pursue its copyright claims. I reject the
6 notion that that's what PwC has modeled.

7 Q. Thank you.

8 Are you aware that those Claims were
9 claiming in the hundreds of millions of dollars?

10 A. I am.

11 Q. And you would agree with me, I think, that
12 GSI could have carried on with its seismic acquisition
13 and licensing business if it had received that kind of
14 money, and had the Court confirmed that it had
15 enforceable copyrights?

16 A. If it had received hundreds of millions of
17 dollars, could it have chosen to apply them to create
18 a Seismic Data business? Sure.

19 Q. You have no reason to doubt that it could
20 have continued its business in that Counterfactual
21 Scenario?

22 A. Well, I'm -- "continued" is problematic. It

1 was, I discussed this morning, not a going concern,
2 did not have fixed assets, did not have customers, so
3 it could do whatever it wished with any quantum of
4 money it had. Maybe you could say "creating" or
5 "rebuilding" a Seismic Data business? That could be a
6 choice.

7 Q. At Paragraph 6 of the Rejoinder Report -- I
8 don't know if these are your words or
9 Mr. Chodorow's -- we'll just pull it up here. You
10 indicate that: "GSI ceased to be a going concern
11 years before the alleged expropriation," and then you
12 rely on a quote out of a case; is that right?

13 A. That is what that says, yes.

14 Q. You go further to say: "The Court found
15 that GSI had ceased investing in its Canadian business
16 altogether by 2009."

17 Do you see that?

18 A. Yes.

19 Q. But when we actually look at what you quoted
20 there, sir, it says: "The Plaintiff, GSI" -- I think
21 you've added those words -- "ceased its Seismic
22 exploration in Canada and sold its ships in 2009."

1 A. That's right.

2 Q. It doesn't say that it ceased investing in
3 its Canadian business altogether by 2009; does it,
4 sir?

5 A. It does not use those words.

6 Q. It does not say that GSI ceased licensing
7 its Seismic Data?

8 A. So licensing is not investing in the
9 business. It is harvesting the business, yes?

10 Q. Does it say anything about whether GSI was
11 reprocessing its Seismic Data?

12 A. I will agree with you that that is the
13 ambiguity.

14 Q. And does it say anything about the fact that
15 GSI was also investing in its business by protecting
16 its intellectual property?

17 A. It was investing in protecting its
18 intellectual property. That is, of course, correct.

19 Q. In your First Report, sir, you had suggested
20 that GSI's only meaningful asset after the Alberta
21 Decisions was its remaining litigation against third
22 parties?

1 A. Yes.

2 Q. You also talk about GSI's --

3 A. Sorry. Could I just hear that again or see
4 it again or something?

5 Q. So I had said in your First Report, you
6 suggest that GSI's only meaningful asset after the
7 Alberta Decisions was its remaining litigation against
8 third parties?

9 PRESIDENT WALLGREN-LINDHOLM: Can you just
10 take the Expert to that point in the Report?

11 BY MS. LEMMENS:

12 Q. Paragraph 7 of the Rejoinder.

13 A. I'm sorry. Is that --

14 Q. This is also saying that its only meaningful
15 asset --

16 A. I don't see it. I'm sorry.

17 Q. Well, I don't have the first reference in my
18 notes.

19 A. Why don't I just tell you what I believe?

20 Q. But I can tell you that you also say that
21 the only meaningful asset that GSI held was its data
22 library?

1 A. Yes. I think you heard me this morning.

2 Those are both meaningful -- well, both assets it
3 retained immediately prior to the alleged breach.

4 Q. Okay. So it had two meaningful assets, not
5 only one?

6 A. That's fair.

7 Q. Okay. I just wanted to clarify because you
8 say the only meaningful one here is the data library,
9 but it sounds like I also agree that there was --

10 A. I do.

11 Q. Okay.

12 A. Forgive me. I didn't let you finish your
13 question. So...

14 Q. That's okay. It is a process always.

15 You understand that GSI had a business that
16 included licensing its Seismic Data?

17 A. Yes. That was part of its business.

18 Q. And it also had a processing department at a
19 time that processed Seismic Data?

20 A. Yes.

21 Q. And you also understand that GSI had Seismic
22 vessels that created new Seismic surveys, either for

1 hire exclusively or for Multi-Client Seismic
2 Licensing?

3 A. At one time, yes.

4 Q. Okay. And you agree that GSI was not
5 earning any revenues from any of its business after
6 the Alberta Decisions?

7 A. I don't know, specifically, after the
8 Alberta Decisions but also wasn't earning much prior
9 to the Alberta Decisions -- immediately prior to the
10 Alberta Decisions.

11 Q. But I think we all agree that there was not
12 much business left after the Alberta Decisions time?

13 A. Much business -- there were Seismic
14 companies continuing -- right? -- to operate. They
15 acquired new data. They licensed new data. So there
16 is that kind of business that remains. GSI was not
17 equipped to compete in it at the time of the Alberta
18 Decisions.

19 Q. Those other businesses that you're referring
20 to were either doing onshore that doesn't get released
21 by any government Boards or they were involved in
22 other areas of the world?

1 A. No.

2 Q. So you're talking about an exclusively
3 Canadian Seismic Data Licensing business for offshore?

4 A. No. I'm talking about businesses that
5 explored -- that mapped Offshore Canada under the
6 Regulatory Regime after the Alberta Decisions.

7 Q. And so are you talking about TGS?

8 A. That's one of them.

9 Q. And TGS was also involved in other areas of
10 the world?

11 A. Oh, yes. They are global companies, but
12 they are operating in Canada under the Regulatory
13 Regime. That was my point.

14 Q. But you don't know under what terms?

15 A. Under the Regulatory Regime.

16 Q. I see. But you don't know if there were
17 other terms that TGS was also operating under in the
18 Canadian Offshore Area, including partnering with some
19 of the Governments?

20 A. I've heard that testimony in this room.
21 Just to be clear, also, Mr. Hobbs testified that
22 his -- I'll say his firm, the firm of which he is

1 Chairman, also conducted some activity in Canada.

2 Q. Are you talking about Shearwater?

3 A. I am.

4 Q. Shearwater is also involved in other areas
5 of the world?

6 A. Global companies, or international
7 companies, but the point is, they find it worthwhile
8 to create Seismic Data offshore Canada.

9 Q. Sir, in this same Paragraph 7 here of your
10 Rejoinder Report, you suggest that there's more value
11 to GSI's data collection than the actual Damages
12 because some of data remains subject to the
13 confidentiality period as of the 2017 Valuation Date?

14 A. I did. I think, yes, I did say that.

15 Q. You recall that? It is also on the screen.

16 Did you analyze what data remains --

17 A. Sorry to interrupt you. I don't need it,
18 but it's not on the screen. So if there is other
19 things coming.

20 Q. Is your screen blank?

21 A. I have the old -- No, I have the previous --

22 Q. We're still looking at the same paragraph?

1 A. I thought you were putting the Transcript
2 up. Forgive me.

3 Q. That's okay. We are on the same one still.
4 We haven't moved.

5 A. Very good.

6 Q. So did you analyze what data remains subject
7 to confidentiality as of the 2017 Valuation Date?

8 A. I did not. I think I testified this morning
9 that I understand that that's an understanding from
10 Canada.

11 Q. Oh, you got an instruction that that
12 existed?

13 A. I'm aware of it -- Sure, an instruction.
14 You can call it that.

15 Q. Okay. But you don't actually have any
16 information about what data remains subject to
17 confidentiality in 2017?

18 A. I have heard it referenced, but I wouldn't
19 say I wouldn't recall it. I'm sure I never absorbed
20 it.

21 Q. Did you ask your client Canada about what
22 amount of GSI's data remained subject to

1 confidentiality in 2017?

2 A. I did not. I was stating the principle that
3 there is value -- that whatever that value is would
4 have to be considered.

5 Q. But when you're asked to conduct a valuation
6 exercise, why wouldn't you ask that question?

7 A. I was not valuing GSI's Seismic Data
8 library.

9 Q. But you were asked -- I had understood from
10 your colleague Mr. Chodorow that there was some intent
11 to conduct a valuation exercise at some point in your
12 engagement here.

13 A. It was considered, yes. And there was not
14 sufficient information to perform it.

15 Q. But you weren't necessarily asking questions
16 to get to the bottom of the question; right?

17 A. If we don't have the information to do it, I
18 would not ask about the details of the residual value
19 of the library. It would not be useful.

20 Q. But you knew enough to know that there was
21 Seismic Data that did remain subject to the
22 confidentiality period as of the 2017 date?

1 A. I knew enough to consider, conceptually,
2 what kinds of categories of value might remain. And
3 as I testified this morning, and that's one of them.

4 Q. Right. So you knew about categories, but
5 then you didn't go the next step and ask more about
6 the categories beyond that?

7 A. Other than, was there was any? Right? Is
8 that a category that's relevant? And it is.

9 Q. You did review GSI's Financial Statements;
10 sir?

11 A. I have reviewed GSI's Financial Statements.

12 Q. And you would agree there are no revenues
13 past 2017?

14 A. That would not surprise me, but I can't tell
15 you I remember it, specifically.

16 Q. And so based on GSI's lack of revenues
17 post-2017, was there any value to that data that
18 remained confidential?

19 A. Sure.

20 Q. What is it?

21 A. There may be interest in it in the future.

22 Q. But you didn't do any market testing about

1 that, and you didn't ask any questions about what that
2 data was?

3 A. That's right. I'm introducing the concept
4 for the -- that, if the Seismic Data library is to be
5 valued, you would want to exclude the parts of it that
6 are not affected by the Alberta Decisions.

7 Q. I believe you also comment here that,
8 apparently, you understand that GSI had failed to
9 submit some of the data required under the Regulatory
10 Regime?

11 You were informed of that by Canada?

12 A. That's correct.

13 Q. And did you ask about what that was?

14 A. What the specific information was? I did
15 not.

16 Q. Did you conduct any analysis of the value of
17 that apparent data there?

18 A. It would be impossible to do. They haven't
19 submitted it.

20 Q. Well, did you ask what was missing, what
21 wasn't submitted?

22 A. Specifically, no.

1 Q. And based on the GSI's lack of revenues
2 post-2017, was there any value to that data?

3 A. The same as my previous answer: There could
4 be value to that data.

5 Q. Now, I'm just taking a wild guess, but I
6 assume you're not trained in geophysics or geoscience
7 in any way?

8 A. With slight objection to the framing of the
9 question, I am not.

10 Q. And so you did not conduct any review of
11 GSI's Seismic Data at all?

12 A. I did not.

13 Q. You cannot comment on the physical condition
14 or characteristics of GSI's Seismic Data collection;
15 is that right?

16 A. That's right.

17 Q. And you also did not ask Canada if you could
18 review any of that data?

19 A. I did not.

20 Q. You suggest in your Report, sir, that GSI
21 destroyed its business relationships with its
22 customers by bringing litigation against them?

1 A. I don't suggest it. I think I'm quoting the
2 Claimants.

3 Q. Okay. Is it something that you believe?

4 A. Is it something that I believe? I'm not
5 going to challenge the testimony of the Claimants.

6 Q. Are you aware that the accessed data Claims
7 or copyright infringement Claims relating to access at
8 the Boards started first, followed by Licensing and
9 Invoice issues with GSI's customers?

10 A. I don't have any recollection different than
11 that.

12 Q. Okay, but you didn't analyze the Pleadings
13 all of GSI's domestic Claims closely enough to
14 determine that?

15 A. Still working on it.

16 Q. Okay. Did you contact any of the Defendants
17 in GSI's domestic Claims?

18 A. I did not.

19 Q. Okay. So you didn't conduct a survey of
20 those customers to ask them if that they thought that
21 the business relationship was destroyed or not?

22 A. Again, I'm relying on the Claimant's own

1 characterization.

2 Q. You seem to analyze the litigation process
3 in your Report. You're familiar with a general
4 litigation process, a claim, a defense?

5 A. I am.

6 Q. Okay. And so do you have any understanding
7 that a Party that is successful in litigation is
8 generally seen more favorably than the Party that lost
9 in the litigation?

10 A. I think it depends on -- that's a
11 case-specific question.

12 Q. Have you noticed that in your experience,
13 that, if a Party wins in litigation, it is vindicated.
14 And the Party that loses is seen as being wrong all
15 along?

16 You don't have any familiarity with that?

17 A. By its customers? I don't have any specific
18 information about that, no.

19 Q. Did you ask any of the customers of GSI that
20 it had litigation with domestically whether they would
21 have done further business with GSI if GSI had
22 successfully enforced its copyrights against those

1 customers?

2 A. I did not.

3 Q. And so, in fact, it is entirely possible
4 that GSI would have had significant business with
5 those same customers that it sued after the Alberta
6 Decisions, if the Alberta Decisions had turned out a
7 different way; isn't it?

8 A. I don't know. The information I have is
9 that once GSI sued a customer, they never again did
10 business.

11 Q. Did you ask Canada as to whether it would
12 hire a legal expert to advise you about the meaning of
13 the various Canadian Court Decisions involving GSI?

14 A. I did not.

15 Q. Did you speak with Barry Sookman in the
16 course of your reporting in this matter?

17 A. I did not.

18 Q. Do you know anything about the fair dealing
19 defense to copyright infringement claims?

20 A. Only in a lay sense.

21 Q. Okay. And so then let me walk you through
22 it and see how much you know from that lay sense.

1 Okay, sir.

2 Do you know that there are six elements that
3 the Supreme Court of Canada has endorsed for a fair
4 dealing defense?

5 A. I do not.

6 Q. Okay. And so do you know whether a fair
7 dealing defense would require one to assess whether
8 the end-user is using the copyright work for a
9 commercial use and the number of times that copying
10 occurs?

11 A. I don't know that as a formal Canadian
12 criterion, but it sounds like a relevant fair dealing
13 question.

14 MS. LEMMENS: I'm testing his knowledge. He
15 said he had a layperson knowledge and he mentions the
16 fair dealing defense in his Report.

17 MS. TABET: Okay. I am a little bit
18 concerned that there is -- these are not questions.
19 There is testimony that is being given by Ms. Lemmens,
20 and he's already answered the question that he didn't
21 have knowledge on these legal issues.

22 MS. LEMMENS: I'm not testifying.

1 BY MS. LEMMENS:

2 Q. You noted in your Report at Paragraph 22 of
3 the Rejoinder, sir, that the CalWest Case had an
4 element of fair dealing in it, I believe. For
5 example: "In the CalWest Decision, although the
6 Alberta court did not need to decide on fair dealing
7 as a defense, the Court noted that 'on the evidence,
8 it is likely in my view that this defense could have
9 succeeded.'"

10 Do you see that?

11 A. I do see that.

12 Q. So you go on to say we do not offer Legal
13 Opinions?

14 A. That's right.

15 Q. And so are you offering a Legal Opinion here
16 about fair dealing?

17 A. As I -- again, as I testified this morning,
18 the point of this case was to say there's some risk.
19 Remember, we put up the litigation risk analysis that,
20 I think as Mr. Gowdy mentioned the other day, there
21 would be defenses. This is one of the defenses.

22 And so, we do cite the CalWest Case for the

1 proposition that there is some risk in these other
2 cases that defenses to include fair dealing would be
3 raised and have some likelihood of success.

4 Q. And did you make any inquiries with your
5 instructing Counsel about defenses to copyright and
6 whether they were tenable on the evidence?

7 A. For which case now? When you refer to on
8 the evidence, these would be the individual
9 litigations that would have continued but for the
10 Alberta Decisions?

11 Q. That's right.

12 A. Did I do a litigation risk analysis of what
13 those defenses might be?

14 Q. Yes.

15 A. No.

16 Q. Okay. And so ultimately you have not
17 prepared a valuation of the copyright infringement
18 claims by GSI?

19 A. That's correct.

20 Q. And you understand that litigation Claims
21 may be settled rather than fully litigated to trial?

22 A. Absolutely.

1 Q. So you sometimes don't get answers to the
2 questions about whether defenses are proved or not
3 proved?

4 A. You know, that is interesting. With
5 settlements you get information -- you do get some
6 information, though, right. If -- I mean, just an
7 example. If you believed with 100 percent certainty
8 you would win the amount you claim, it is unlikely you
9 would settle for much less anyway. Right. You might
10 save some litigation costs.

11 So the fact and quantum of settlements could
12 be a place one would look if you were doing a
13 full-bore litigation risk analysis for information,
14 not that you could translate it directly, but you
15 might learn something. I think, as Mr. Sharp
16 testified as well.

17 Q. But you also might settle some litigation
18 for less because you actually need cash in hand
19 instead of waiting for an outcome, even though you
20 think that you're right?

21 A. Yes.

22 Q. I asked Mr. Chodorow about some of these

1 questions, and I think you were in the room, so I just
2 want to see if you have any further information.

3 Did you ever inquire as to whether the
4 accessed data list was a fulsome list from Canada's
5 perspective, or if anything was missing from it?

6 A. I have.

7 Q. And?

8 A. I was told that they have provided the
9 information they have.

10 Q. They have provided the information to you
11 or --

12 A. No, I'm sorry, to GSI. That the Boards have
13 responded with what information they have.

14 Q. Right. But are you aware that they don't
15 actually track all of the information about who has
16 access or copied the data?

17 A. I don't know more than I have just told you.

18 Q. Okay.

19 THE WITNESS: Sorry, while there's a pause,
20 if we are not going to break soon, if I could ask
21 somebody to just get me a glass of water.

22 MS. LEMMENS: I apologize. Of course.

1 THE WITNESS: I should have brought one.

2 (Comments off microphone.)

3 THE WITNESS: Please continue. I don't mean
4 to interrupt.

5

6 BY MS. LEMMENS:

7 Q. Okay. Do you believe that your
8 counterfactual that you believe is the correct
9 counterfactual relies on the number of instances of
10 copyright infringement and the volume of the data
11 infringed?

12 A. It relies on the copyright claims, which
13 those factors would be relevant presumably to the
14 Claims.

15 Q. And so, in other words, it would have to be
16 an accurate account of who had copied GSI's data from
17 the Boards before 2017 in order to have a proper
18 accounting in that Counterfactual Scenario?

19 A. The Counterfactual Scenario assumes the
20 Claims can continue. I think you're raising a
21 different issue of whether they were Claims that could
22 be brought. That is a distinct issue.

1 Q. Well, I think you're saying that there
2 was -- okay. We have a situation where GSI cannot
3 enforce its copyright after the Alberta Decisions.

4 Do you agree?

5 A. It cannot pursue enforcement of its alleged
6 copyright - claimed copyright.

7 Q. And so, the copyright infringements that GSI
8 knew about are the only ones that GSI knows about to
9 pursue?

10 A. That's fair.

11 Q. And it --

12 A. That's correct. I don't like the word
13 "fair."

14 Q. It doesn't know what it doesn't know?

15 A. It doesn't know what it doesn't know, of
16 course.

17 Q. Okay. But if GSI had been able to enforce
18 its copyright, it would be able to enforce it until
19 the end of the copyright term for its Seismic Data
20 which, in 2016, when we get the Alberta -- the first
21 Alberta Decisions was life of the author plus
22 50 years. It is now life of the author plus 70 years.

1 Do you understand that --

2 A. I do.

3 Q. -- that it would have been able to do that?
4 Okay.

5 And so you did no analysis in terms of how
6 many instances of copying from the Boards might occur
7 for life of the author plus 50 years?

8 A. I did not, but we do know that on average
9 Seismic Data depreciates fairly quickly.

10 Q. And, sir, you would agree with me that
11 because of the Alberta Decisions, the Court here in
12 Alberta never ruled on these other defenses with
13 respect to accessing and copying data from the Boards?

14 A. That is my understanding.

15 Q. And it's just -- just as you prepare a form
16 of -- did you call it a decision tree? Or what did
17 you call it?

18 A. Oh, yeah. Decision tree is fine. Yeah.
19 Litigation risk analysis. Something like that.

20 Q. Okay. Just as you prepare that and don't
21 apply any percentages to each step, it's possible that
22 GSI would have won and those defenses would not have

1 been proven. It is possible that the defenses may
2 have been proven and GSI would not have won?

3 A. Yes.

4 Q. And I know you don't have a legal training,
5 so at this point both are equally likely?

6 A. I don't think that's how statistics works.

7 Q. You don't have any information to the
8 contrary, do you?

9 A. I do not.

10 Q. And so we've pulled up your Figure 1 from
11 the Rejoinder Report, sir, just so that you have it
12 before you.

13 A. Yeah.

14 Q. And this was something that Brattle
15 prepared?

16 A. It is.

17 Q. And it's not something that Counsel provided
18 to you?

19 A. It is not.

20 Q. But just to be clear, you're not legally
21 trained in copyright?

22 A. I'm not legally trained in copyright.

1 It's -- and it's not meant to suggest legal
2 information. It's meant to suggest a framework for
3 how one would go about pursuing a claims analysis.

4 And, of course, in any particular case,
5 there could be different gates, more gates, fewer
6 gates. It depends on the specific process and claims
7 through which a claim would go.

8 Q. Right. And I noted that you didn't have any
9 percentages listed here, and that's because ultimately
10 beyond the first one, which we know there was a Common
11 Issues Decision that turned out the way it did, we
12 don't actually know any of these, these are all
13 hypothetical?

14 A. They are hypothetical. One could try to
15 estimate them, one with legal training.

16 Q. Okay. You did not try to estimate them?

17 A. I did not.

18 Q. Sir, in your Rejoinder Report you had
19 indicated that if the Alberta Decisions were
20 unexpected, the Decisions could not have materially
21 depressed the value of GSI prior to their issuance.
22 And we see that at Paragraph 24, sir.

1 A. I recall it.

2 Q. Would you agree with me that most defendants
3 in litigation are not paying the damages ahead of
4 time. They're seeing whether their defenses will be
5 proven?

6 A. Yes. I would agree with that.

7 Q. So when a defendant is sued for not paying
8 an invoice, they don't pay it and then try to
9 litigate. They don't pay it while they continue the
10 litigation and wait to see the outcome?

11 A. That's true, if they believe they have valid
12 defenses that might succeed, right. If they think
13 it's certain that they would lose, they probably don't
14 continue to litigate the case. They would settle the
15 case instead of incurring the cost of litigation, if
16 they expect to lose.

17 Q. So while the litigation carries on, because
18 the defendant has whatever reasons, maybe it can't
19 afford to pay, maybe it believes it has good defenses,
20 we don't know. While it carries on, the plaintiff is
21 without the revenues on that invoice that it's suing
22 on?

1 A. Yes.

2 Q. And so, if many parties are not paying on
3 their invoices, then the Company's revenues will
4 reflect that they are not being paid by all of those
5 defendants. Obviously, the revenues will go down?

6 A. Of course.

7 Q. So that lack of revenue or depressed
8 revenues obviously affect the financial situation of
9 the Company?

10 A. Yes.

11 Q. And that would affect the valuation of that
12 company because we often do a valuation based on a
13 company's financials?

14 A. I'm not sure that's right. You would
15 value -- if that's the asset of the Company, you would
16 value it. If you said what's the value of a company,
17 you would look at both its current assets and its
18 claims for future assets.

19 Q. And so, the value of a company is then -- I
20 think what you're saying is, its assets and its
21 claims, and that's what GSI had the day before the
22 Decisions?

1 A. I think that's exactly what I explained this
2 morning.

3 Q. And so, you would agree with me that GSI's
4 value could have been impacted by the litigation that
5 it had because the defendants weren't paying ahead of
6 time while they were in the litigation defending it?

7 A. I'm sorry. I'm going to have to ask you to
8 repeat the question or put it up. I'm sorry.

9 Q. I don't have it anywhere to put up.

10 You would agree with me that GSI's -- and I
11 might not get it exactly worded the same way. I
12 apologize.

13 A. That might be good.

14 Q. You would agree with me that GSI's value was
15 whatever it had the day before the Decisions. It
16 included its claims and whatever assets it had?

17 A. Yes. I agree with that.

18 Q. You mentioned some other defenses in your
19 Report, sir. So you had mentioned fair dealing.
20 We've talked about that. I won't go back to it.
21 Okay. Because I think we understand the extent of
22 your knowledge on that.

1 You mentioned also the Crown copyright.

2 Do you know what that is?

3 A. I don't. This is a legal instruction, so I
4 shouldn't stray into it.

5 Q. Okay. Got it.

6 Okay. So you don't know what Crown
7 copyright is or the library exception or laches or
8 acquiescence?

9 A. I don't depend on any knowledge of those
10 things. This is an instruction.

11 Q. Okay. I won't test you on those things
12 then.

13 Did you consider, sir, whether the Seismic
14 Data is valuable to other industries that are
15 interested in rare earth minerals or anything like
16 that?

17 A. I didn't consider any specific industry.
18 The value of the data, Seismic Data library is
19 whatever its value is to anybody who is willing to pay
20 for it.

21 Q. Okay.

22 MS. LEMMENS: May I have a short break for

1 five minutes just to speak with my team?

2 PRESIDENT WALLGREN-LINDHOLM: That's fine.
3 Thank you. Five minutes.

4 MS. LEMMENS: Thank you.

5 PRESIDENT WALLGREN-LINDHOLM: May I ask the
6 Expert, just to remain. We'll have the Claimants go
7 out.

8 If Counsel for Respondent would like to
9 stretch their legs, that is obviously fine too.

10 (Brief recess.)

11 PRESIDENT WALLGREN-LINDHOLM: So
12 Ms. Lemmens.

13 MS. LEMMENS: Those are all my questions for
14 you, Mr. Maniatis. Thank you.

15 THE WITNESS: You're welcome.

16 PRESIDENT WALLGREN-LINDHOLM: Thank you very
17 much. Okay. So I will ask you to remain.

18 Still would there be any cross-examination
19 from -- sorry. Redirect? Sorry.

20 MS. TABET: There is not. Thank you.

21 PRESIDENT WALLGREN-LINDHOLM: There is none.

22 Now, let me look to the sides. No? No.

1 Okay. In that case, I say to Mr. Maniatis,
2 thank you for coming here, and you may take a seat on
3 one of the wings here, or presumably that wing. If
4 you've -- can find a chair, which is questionable. So
5 thank you very much.

6 (Witness steps down.)

7 PRESIDENT WALLGREN-LINDHOLM: And now
8 I -- yes. Now, I believe that we will have Mr. Sharp
9 take the stand; right?

10 MS. LEMMENS: Yes, Madam Chair. We will do
11 that. Let me just check, Mr. Sharp, that you're ready
12 to go. Yes. Okay.

13 PRESIDENT WALLGREN-LINDHOLM: Ready? Thank
14 you.

15 PAUL SHARP, CLAIMANTS' WITNESS, RECALLED

16 MS. LEMMENS: And we may need to pull up the
17 slide that was introduced.

18 PRESIDENT WALLGREN-LINDHOLM: Yeah.

19 MS. LEMMENS: I think that would be helpful.
20 So are we able to do that?

21 (Comments off microphone.)

22 PRESIDENT WALLGREN-LINDHOLM: Thank you,

1 Mr. Sharp. I don't think there is any risk of
2 confusion, but you may remove the name tags of the
3 previous because -- just for good order. Thank you.

4 We will be -- Respondent, please, we will be
5 uploading the new chart onto the box; right?

6 MR. LUZ: Yes.

7 PRESIDENT WALLGREN-LINDHOLM: Okay. Thank
8 you.

9 MS. LEMMENS: We are pulling it up. It's
10 just taking us a moment to connect because it looks
11 like we got disconnected from the internet. Just bear
12 with us. Sorry.

13 PRESIDENT WALLGREN-LINDHOLM: Thank you very
14 much. No, we are not very pressed for time. I
15 believe so. Thank you.

16 MS. LEMMENS: There you have it.

17 THE WITNESS: Perfect. Shall I begin?

18 PRESIDENT WALLGREN-LINDHOLM: Thank you.

19 FURTHER DIRECT PRESENTATION BY PAUL SHARP

20 THE WITNESS: Thank you.

21 If we could go back one slide, please, as it
22 presents this slide.

1 MS. LEMMENS: We just have the PowerPoint
2 separated.

3 (Overlapping speakers.)

4 THE WITNESS: Oh, so if you go to 26, then,
5 yes. This is the preceding Slide. Yeah, we got it in
6 two instances.

7 So I think I'll be brief here, but I
8 just -- I think I have the opportunity just to speak
9 to that additional slide where an additional
10 calculation was done by the Brattle Group.

11 Slide 26 introduces that slide, and I'll
12 just start with the bottom left where: "We claim to
13 use regression analysis, but we neglect to use the
14 resulting formula," and then they introduce the next
15 slide. So if we could go to PwC-1 or in our
16 September 26, 2022 Report. And to Page 23, which is
17 Paragraph 105. Perfect. Thank you.

18 So with respect to the claim that we use
19 regression analysis, I would point out we don't say we
20 use regression analysis. At Paragraph 105 and 106,
21 which are the two paragraphs that were inadvertently
22 deleted from our subsequent Report. We say that "in

1 order to evaluate the potential relationship between
2 normalized revenues and the shifted metrics, we
3 calculated the R-squared value."

4 So we don't say we used regression analysis.
5 We say we calculated R-squared. Furthermore we -- in
6 106, then we lay out those R-squareds for the
7 observable eight shifted indicators, and we do cite
8 them in both normalized revenues and Canadian dollars,
9 and normalized revenues in U.S. dollars.

10 If we could go to Paragraph 107, just
11 further up on the page to the right. So we do note or
12 we did note the statistically strongest predictor of
13 normalized revenues in a given year was the
14 following years' annual global offshore rig count when
15 compared to normalized U.S. dollar revenues.

16 We note the R-squared was .5 for that. And
17 then importantly, we say we performed our illustrative
18 extension of normalized revenues by applying the
19 annual change in offshore rig count to U.S. dollar
20 normalized revenues. Meaning if rig count changed by
21 5 percent, then revenues would change by 5 percent.
22 We don't claim to do a regression analysis. What we

1 claim to do is change it by the annual change in
2 offshore rig count.

3 If we can then go back to the Brattle
4 Slide 27, please.

5 And so here what Brattle has attempted to do
6 is to, as I understand it, recalculate our 2017 But-
7 For revenues, albeit in Canadian dollars. If we go to
8 the previous slide on the Brattle deck -- perfect.

9 As we know -- I believe the Tribunal
10 knows -- they are now saying, well, spot price, for
11 example, has the highest correlation or R-squared
12 factor of .53. So let's use that.

13 So if we go back to Slide 27.

14 What they do is, is they take our normalized
15 But-For revenue in Canadian dollars in 2012. They
16 look at the spot price in 2011, compare that to the
17 spot price in 2016, and they note that it's gone down
18 54 percent.

19 Accordingly, then they would say that, if
20 PwC had used this metric, they would have said that,
21 But-For revenue in 2017 would have been 56 million,
22 not 112. And I think the implication being that,

1 well, that should be our starting point for 2017
2 revenues which would significantly influence our
3 valuation.

4 So I think what's important to understand is
5 what R-squared is. It's the square of the coefficient
6 of correlation. So it just means multiply the
7 coefficient of correlation by itself to arrive at
8 R-squared.

9 The coefficient of correlation measures the
10 correlation between two numbers, and a number of 1.0
11 means perfect correlation. A number of .7-.9 means
12 per -- means highly correlated. Correlation can be
13 negative as well, though. Positive correlation means
14 things move in the same direction. One goes up, the
15 other goes up, of the two variables you're looking at.

16 Negative correlation means the exact
17 opposite. When you square a negative correlation, you
18 obviously arrive at a positive R-squared number, and
19 that .53 number that's quoted on the previous slide
20 is, in fact, the square of two negative -- is the
21 square of a negative correlation, meaning that, from
22 2000-2012, the Company's revenues actually moved in

1 the opposite direction of what the spot price did.

2 So Brattle, by suggesting here that, well,
3 it's a .53 correlation, therefore, if spot price comes
4 down 54 percent, we should drop down revenues by
5 54 percent, is completely incorrect. They would have
6 had the data to do this. I mean, they know the WTI
7 price because they were able to do it from 2011-2016.
8 They would have it for the previous years as well.
9 But, in fact, a negative correlation, which suggests
10 it goes in the exact opposite direction -- so, if one
11 was to do this, I think one could argue that, well,
12 they should be doing the opposite in saying that,
13 well, in the past, when spot prices went down, the
14 Company's revenues went up. So, therefore, now that
15 the Company -- now that the spot price is going down,
16 should we, therefore, double the Company's revenues
17 and then saying 112 should be 224 million? I don't
18 think that's what they're intending to say, but I
19 think this relationship onscreen is completely false
20 and does not consider the fact that it's a negative
21 correlation. So I understand what they're trying to
22 do, but, just because you have an R-squared number

1 doesn't mean it's positive correlation. So that would
2 be my comment on this slide.

3 PRESIDENT WALLGREN-LINDHOLM: Thank you,
4 Mr. Sharp.

5 Would there be a desire for a cross?

6 MS. TABET: Thank you. We have nothing
7 further. Thank you.

8 PRESIDENT WALLGREN-LINDHOLM: I beg your
9 pardon?

10 MS. TABET: Nothing from us. Thank you,
11 Madam President.

12 PRESIDENT WALLGREN-LINDHOLM: Nothing
13 further from Canada.

14 My co-arbitrators? No?

15 In that case, Mr. Sharp, I'm glad that you
16 didn't come here in vain today. So we thank you for
17 your additional direct and ask you to resume your
18 seat.

19 THE WITNESS: Thank you.

20 (Witness steps down.)

21 PRESIDENT WALLGREN-LINDHOLM: What we
22 propose to do now is to discuss a bit further steps

1 and what is in store for Thursday, and then some
2 pre-notification of what we will do at the end of
3 Thursday, after your Closing Presentations.

4 So when it comes to Tribunal questions in
5 advance of your Closing Presentations, we believe that
6 you now should do your Closing Presentations as you
7 deem fit, and we have no particular areas that we will
8 ask you to focus on for Thursday.

9 Now, at the end of Thursday, we will discuss
10 the PO 11, Paragraph 40, in which we discuss the
11 format, the timing of the Post-Hearing Briefs,
12 correction of transcripts, closing of the record. I
13 don't think we will close the record. And we will
14 also propose to you at this point that you can discuss
15 among yourselves beforehand, if you have the time, the
16 deadlines that you would find palatable for Cost
17 Submissions, for transcript corrections, and for your
18 Post-Hearing Briefs. We would propose that we have
19 the Post-Hearing Briefs -- the ones in tabular form,
20 that we would have them in parallel, but you're free
21 to disagree -- and also that there would be a
22 possibility for rebuttal. So Post-Hearing Brief

1 rebuttals.

2 Then, when it comes to Tribunal questions,
3 after Thursday, after your Oral Closing Presentations,
4 we may formulate some questions if we thereafter think
5 that there would be particular areas that we would
6 like for you to focus on, but, as I said, we may or we
7 may not. Those will be sent to you in writing in good
8 enough time, obviously, before your Post-Hearing
9 Briefs so that you will have time to take account of
10 them before you prepare your Briefs.

11 We will also, on Thursday afternoon, discuss
12 the columns and the headings on the columns in the
13 tabular forms that we will have for the Post-Hearing
14 Briefs, and agree -- hopefully agree, among ourselves,
15 what are the appropriate columns. And obviously, it
16 also needs to be practical and not be like some
17 Redfern Schedules, you know, that there is a thin
18 margin and then there is one meter of text. So we
19 will discuss that.

20 Finally, regarding the Oral Closings: While
21 we do not have specific questions now that we ask you
22 to discuss therein, we wish to remind you that the

1 Tribunal is free to ask questions or clarifications in
2 the course of your presentations.

3 Obviously, we are mindful not to try to cut
4 off the rhythm or disturb your presentations, but we
5 will ask them. And those questions, the time
6 consumption related to those questions, will be
7 counted against the Tribunal and not the Parties.

8 I believe I have now said what we meant to
9 say, but -- Yep. Okay.

10 So are there any questions? Claimants?

11 MS. LEMMENS: My only question is -- and,
12 obviously, there is no specific deadline for when the
13 Tribunal will have its list of questions, but if we
14 know now that you think that it might take a week or
15 it might take two weeks, that might inform the
16 discussion between the Parties about when we would
17 propose Brief deadlines.

18 PRESIDENT WALLGREN-LINDHOLM: I can say
19 this, which I think I'm free to say, that we will
20 deliberate on Friday after your Closing Presentations.
21 And, obviously, our aim and our aspirational target is
22 to progress any questions very far at that point.

1 I don't think that there is any purpose for
2 anybody to delay. But it might be, of course, that we
3 might want to revisit after we return home some of the
4 submissions. But I think that we will make sure that
5 the date for the PHBs allows for the time that we
6 will, on Friday, discuss what we think is reasonable.

7 MS. LEMMENS: Okay. Very good. Thank you.

8 PRESIDENT WALLGREN-LINDHOLM: Okay.

9 MS. TABET: Thank you very much. I think
10 that seems reasonable to us, and we are happy to
11 discuss with Ms. Lemmens. It might be useful to have
12 a better sense of the format that you're envisaging
13 for the Post-Hearing Brief and what issues could
14 be -- how we can address issues in that. That might
15 also inform both our closing and the time we may need.

16 PRESIDENT WALLGREN-LINDHOLM: You mean you
17 would have a better understanding of the tabular form?
18 Yes. We were thinking that we would have our
19 proposal, but only at the close of Thursday. Is
20 that -- or...

21 MS. TABET: Yes. We are, obviously, in the
22 hands of the Tribunal.

1 PRESIDENT WALLGREN-LINDHOLM: No, I
2 understand, but I'm raising this so that we could have
3 a proper discussion. And I don't think that we are
4 very set, but it, obviously, needs to be meaningful.
5 And if you want we can, obviously, make a proposal of
6 what we'd like to have. But we thought that maybe we
7 would invite your views after your Oral Closings as to
8 what would be your preference.

9 MS. LEMMENS: I'll just say, I mean, like I
10 think what Ms. Tabet is getting at is just that we
11 want to know that we cover everything. And so if we
12 do an Oral Closing and we're told, oh, after that we
13 only want you to address certain issues in the tabular
14 form, we don't want to have missed out on that in the
15 Oral Closing.

16 Is that sort of what you're getting at?

17 And for us, too, obviously, we don't want to
18 miss something in our Oral Closing that we somehow are
19 foreclosed on in our written submissions thereafter.

20 MS. TABET: And if I may, just on that, I
21 think we had agreed that it would be a fairly short
22 Post-Hearing Brief. There is, obviously, a lot of

1 material that has come up in the course of these
2 two-week hearing. Just for us to focus our closing
3 on, you know, on the main issue, but we may not be
4 getting into some of the more detailed and evidentiary
5 record in the 1.5 hour allotted to us.

6 PRESIDENT WALLGREN-LINDHOLM: It is true
7 that what is said in PO11 is that the tabular PHB is
8 going to be a full closing. So that is intended to be
9 the complete one.

10 I will listen now to my co-arbitrators. And
11 the first question to them is, would you like for us
12 to go for a walk in our turn? Would you like us to go
13 for a walk before we express our views? Okay. Just a
14 second.

15 (Tribunal conferring.)

16 PRESIDENT WALLGREN-LINDHOLM: Okay. Let's
17 see now if we can provide further clarity and
18 direction to the Parties.

19 When it comes to Thursday, your oral
20 summation, oral presentation, we think that you should
21 address the matters that you think are important to
22 your case. And, also, it is true that we agreed that

1 that would be a shorter version; and, as said, we
2 don't have any questions in advance of that.

3 When it comes to the full Post-Hearing
4 Briefs, albeit in tabular form, I think our view of
5 what it should look like is that it is a full
6 distillation without repetition of what your
7 respective cases are with references also in one
8 column.

9 So it would be -- and you can supplement. I
10 know you always want to supplement, that's fine, but
11 I'll finish. So that it would be a full Post-Hearing
12 Brief, for the full case with references. And we were
13 thinking that in the course of tomorrow, we could
14 formulate to you and send to you what would be the
15 headings in the tabular template.

16 We have looked at your list of issues. And
17 thank you for that. I think that for the PHBs, I
18 think that is a good format to follow because we have
19 looked at it and believe that it's a very good point
20 of departure for that.

21 And now I will ask for supplementation.

22 ARBITRATOR LANDAU: I just wanted to give

1 comfort that the idea, originally, for the tabular
2 Post-Hearing Briefs is not to repeat written
3 submissions. And, obviously, as you've said and I
4 think we are all agreed, we have received a huge
5 amount that, obviously, we're materially assisted by
6 all that, but not if it's repeated.

7 So the idea of the tabular form is really to
8 distill what we have learned in the course of the
9 Hearing, rather than squeezing submissions into a
10 table. That was a thought of it. So the exercise is
11 one of, basically, which we will give clarity on of
12 actually distilling the Transcript by reference to the
13 list of issues with references.

14 PRESIDENT WALLGREN-LINDHOLM: It should be
15 intelligent, you say?

16 ARBITRATOR LANDAU: Intelligible.

17 PRESIDENT WALLGREN-LINDHOLM: Okay.

18 ARBITRATOR LANDAU: Intelligence is not
19 being doubted.

20 PRESIDENT WALLGREN-LINDHOLM: Intelligible.
21 Okay. Sorry. I had a mint in my mou --

22 Okay?

1 MS. TABET: Yes. Perfectly fine. Thank you
2 very much.

3 PRESIDENT WALLGREN-LINDHOLM: So now you
4 feel more comfort that you know the direction? Good.

5 So with that, we hope you will not be
6 staying up all night because it's going to be a
7 summation on Thursday. So we shall see you then at
8 9:30. Thank you.

9 MS. LEMMENS: Thank you.

10 (Whereupon, at 3:46 p.m., the Hearing was
11 adjourned until 9:30 a.m. on Thursday, March 13,
12 2025.)

POST-HEARING REVISIONS

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter,
do hereby attest that the foregoing English-
speaking proceedings, after agreed-upon
revisions submitted by the Parties, were
revised and re-submitted to the Parties per
their instructions.

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.

[Signed]

Dawn K. Larson

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

AND

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW, AS ADOPTED IN 1976

- - - - -	x	
In the Matter of Arbitration	:	
Between:	:	
	:	
THEODORE DAVID EINARSSON,	:	
HAROLD PAUL EINARSSON,	:	
RUSSELL JOHN EINARSSON, AND	:	
GEOPHYSICAL SERVICE INCORPORATED,	:	
	:	ICSID Case No.
Claimants,	:	UNCT/20/6
	:	
and	:	
	:	
THE GOVERNMENT OF CANADA,	:	
	:	
Respondent.	:	
- - - - -	x	Volume 8

HEARING ON JURISDICTION, MERITS, AND LIABILITY

Thursday, March 13, 2025

Calgary Marriott Downtown Hotel
110 9th Avenue SE
Calgary, AB, T2G 5A6
Canada

The Hearing in the above-entitled matter
came on at 9:30 a.m. before:

MS. CARITA WALLGREN-LINDHOLM, President

MR. TREY GOWDY, Co-Arbitrator

MR. TOBY LANDAU KC, Co-Arbitrator

ALSO PRESENT:

On Behalf of ICSID:

MS. GERALDINE R. FISCHER
Secretariat to the Tribunal

Realtime Stenographer:

MS. DAWN K. LARSON
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
Certified Realtime Captioner (CRC)
Larson Reporting, Inc.
2564 West 280 North Street
Hurricane, Utah 84737
United States of America
+1 720 298 2480
DawnStenosTheWorld@gmail.com
DawnStenosTheWorld.com

APPEARANCES:

Attending on behalf of the Claimants:

**MS. MATTI LEMMENS
MR. VINCENT LANCTÔT-FORTIER
MS. MARIANNE BASTILLE-PARENT
Borden Ladner Gervais LLP
520 - 3rd Avenue SW
Suite 1900
Calgary, AB, T2P 0R3
Canada**

Party representatives:

MR. HAROLD PAUL EINARSSON

APPEARANCES: (Continued)**Attending on behalf of the Respondent:**

MR. MARK LUZ
MS. SYLVIE TABET
MS. JULIA DEUTSCH
MS. ELENA LAPINA
MS. CAMILLE BÉRUBÉ-LEPAGE (virtual)
Trade Law Bureau
Global Affairs Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada

MS. MOLLY RUMPKE
Core Legal Concepts

MS. DAPHNÉE CAMPEAU
Global Affairs Canada

MR. ALEXANDER BLACK (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada & ISC Legal Services,
Indigenous Rights and Relations Portfolio

MR. PETER WIGEN (virtual)
Canadian Heritage Legal Services

MR. MARK KLAVER (virtual)
Office Legal Services Sector

MR. FRANCO BELLO (virtual)
MS. KIM PHILLIPS (virtual)
MS. JESSICA MACINTOSH (virtual)
MS. JEAN-FRANÇOIS ROMAN (virtual)
Natural Resources Canada

APPEARANCES: (Continued)

MR. SÉBASTIEN FOURNIER (virtual)
Crown-Indigenous Relations and Northern
Affairs Canada

MR. SCOTT LITTLE (virtual)
MS. SUSANNA KAM (virtual)
MR. VINCENT BOULANGER (virtual)
Global Affairs Canada

MS. TARA SNELL (virtual)
MS. NATALIE GIASSA (virtual)
MS. PIERRE-LUC RACINE (virtual)
Innovation Science and Economic Development

MS. TIFFANY SANDERS (virtual)
MS. LYNETTE GIBBONS (virtual)
Canada Newfoundland & Labrador Offshore
Petroleum Board

Respondent's Party Representatives:

MR. MARKO VESELY
Canada Energy Regulator

MR. ALEX MILLER
Core Legal Concepts

MR. CHRIS REYNOLDS
Core Legal Concepts

Non-Disputing Parties:

MS. KRISTINA E. BEARD (virtual)
Office of International Claims and
Investment Disputes
U.S. Department of State

MR. ALAN BONFIGLIO RÍOS (virtual)
MS. PAMELA HERNÁNDEZ MENDOZA (virtual)
MR. ALDO GONZÁLEZ ARANDA (virtual)
Secretaría de Economía

C O N T E N T S

	PAGE
PRELIMINARY MATTERS.....	1651
CLOSING ARGUMENTS:	
ON BEHALF OF THE CLAIMANTS	
By Ms. Lemmens.....	1652
ON BEHALF OF THE RESPONDENT	
By Ms. Tabet.....	1766
By Mr. Luz.....	1823
CONFIDENTIAL SESSION.....	1844
REBUTTAL ARGUMENTS:	
ON BEHALF OF THE CLAIMANTS	
By Ms. Lemmens.....	1854
SURREBUTTAL ARGUMENTS:	
ON BEHALF OF THE RESPONDENT	
By Ms. Tabet.....	1875
By Mr. Luz.....	1878
POST-HEARING MATTERS.....	1881

P R O C E E D I N G S

PRESIDENT WALLGREN-LINDHOLM: So good morning.

Would you indicate when you are ready?

And in the meantime, is there anything we should discuss before we proceed to Claimants' Closing presentation?

MS. LEMMENS: Good morning, Madam Chair, and Members of the Tribunal. Yes, we are just getting set up at this moment to display the presentation, so we should be ready to go right away. But we do have an additional person with us today. That is an acquaintance of the Einarsson family. His name is Milan Hrabovsky (phonetic), I think is how it is pronounced. And he has known the Einarssons for a long time. He was involved in the oil-and-gas industry, and is somebody that they used to have as a friend.

PRESIDENT WALLGREN-LINDHOLM: Thank you. Good morning, Mr. Hrabovsky.

MS. LEMMENS: And I'll just note that there is no concerns about Confidential Information,

1 vis-à-vis Mr. Hrabovsky.

2 PRESIDENT WALLGREN-LINDHOLM: I understand.
3 Thank you.

4 Anything from Respondent this morning?

5 MS. TABET: Good morning, Madam President,
6 Members of the Tribunal. No one -- no new addition to
7 our team, and no procedural issues to raise. Thank
8 you.

9 PRESIDENT WALLGREN-LINDHOLM: Thank you.

10 MS. LEMMENS: Then I will get started if
11 everyone is ready to go.

12 Okay. Thank you.

13 CLOSING STATEMENT BY COUNSEL FOR CLAIMANTS

14 MS. LEMMENS: So we are now at Closing Oral
15 Submissions of the Parties. We have a little overview
16 of what we're going to talk about today. I'm sure
17 none of that is surprising. We are going to talk a
18 little bit about the facts that we learned over the
19 course of the last week and a half.

20 We will talk again about jurisdiction,
21 merits, and damages, and revisit our list of issues,
22 the answers that we had in our Opening Statement,

1 which have not changed. You'll see a lot of the
2 information in this presentation confirms what we said
3 in our Opening Statement.

4 I might just move this screen so that I make
5 sure that I'm visible.

6 So I wanted to remind the Tribunal that
7 there are two distinct Claims made by the Claimants in
8 this matter. One is expropriation under Article 1110
9 of NAFTA, and the second, which I know there hasn't
10 been any questions raised by the Tribunal with respect
11 to the second one, but I want to remind everybody that
12 there is, in fact, a second one which is about a
13 specific performance requirement under Article 1106 of
14 NAFTA. I also want to talk about the testimony,
15 obviously, that we've heard.

16 Certainly we've heard a lot about different
17 views in the market on Seismic Data, and we've also
18 heard a lot from the lay witnesses that there was a
19 lack of clarity. That was confirmed further through
20 our Legal Experts that were testifying during this
21 proceeding.

22 And really, we also focused in on some of

1 the unfairness that we see out of the Common Issues
2 Decision. I'm sure that all of the Members of the
3 Tribunal will review the Common Issues Decision for
4 the tenth time while preparing their Decision on this
5 matter, but the words are what they are, and they do
6 indicate that it is unfair that GSI did not consent
7 and that GSI was forced to grant a compulsory License
8 and that elements of that are confiscatory.

9 We have a summary of our takeaways of the
10 witnesses. So these are just the witnesses that
11 testified. Do recall that some of the witnesses of
12 the Claimants were not called to testify, so we don't
13 want to lose sight of those Witness Statements. Those
14 remain unchallenged at this time.

15 So I just -- I note, for instance, that we
16 did not hear from the Claimants' Seismic Data Industry
17 Expert, Mr. Chip Gill, who was the former President of
18 the IAGC for approximately 13 to 14 years in the
19 relevant times, about 2000 or 2001 to 2014.

20 He spoke about many of the things that we
21 also heard from Mr. Uffen and Mr. Hobbs in their
22 testimony, and in our view, Mr. Uffen and Mr. Hobbs,

1 the differences that there might have been between
2 them and Mr. Gill seem to have very much narrowed, and
3 now I see it, quite a bit of overlap.

4 For instance, they confirmed that Seismic
5 Data can remain valuable for an extended period of
6 time, in their testimony. They also confirmed
7 Transfer Fees and Exploration Group Fees. They also
8 confirmed the ethical use of Geophysical's data and
9 the guidelines that we went over with Mr. Uffen, for
10 instance, with respect to that. So I just -- I note
11 that because we didn't hear from the Claimants'
12 witness on that, in that regard, but I think that now
13 we see quite a bit overlap.

14 Speaking about the witnesses that did
15 testify, we heard from Mr. Einarsson. His
16 testimony -- he wasn't challenged about his
17 nationality at all. We would say that he is American.
18 I don't think that is any different from our Opening
19 Statement. He gave lengthy evidence in his Witness
20 Statement with respect to his American nationality and
21 why he was in Canada for a period of time to promote
22 GSI's business, but that he has since returned to the

1 United States.

2 He lives in Nevada. He has been living in
3 Nevada since 2016 when they sold their home. They
4 filed a departing tax return, him and his wife, at
5 January 1, 2017, and his children were born in the
6 United States, his children do not live in Canada. He
7 lives there with his wife now, so there is certainly
8 no contest about where he lives at the time that the
9 Notice of Arbitration was served.

10 And we say, also, that his dominant and
11 effective nationality at the time of the breach, being
12 the Common Issues Decision, was also American.

13 He also testified with respect to
14 Mr. Gowdy's question of when did GSI have notice of
15 any of these matters. And we prepared -- we went back
16 and we reviewed many of the exhibits.

17 As you know, there is many, many Exhibits,
18 so we tried to prepare a relatively-focused chronology
19 with respect to notice that incorporated some of what
20 Canada was putting to the witnesses as well as what we
21 were putting to the witnesses to give an overview of
22 sort of the state of affairs, and when you look at it,

1 you will notice in CD-006 -- that is that
2 demonstrative that I handed out -- that you'll see
3 that it's not very clear what the positions of the
4 Parties are.

5 They seem to be speaking sort of about
6 different things at different times. We are talking
7 about release and disclosure, but we are not talking
8 about copyright when it comes to the Boards. We heard
9 from the witnesses that the Boards were not taking a
10 position on copyright. We heard from Mr. Uffen that
11 the Seismic Data industry, the oil-and-gas industry in
12 Canada was being told through the guidelines for
13 ethical use of Seismic Data that you should be
14 treating the Board data as copyright.

15 So there was a lot of information in all of
16 these exhibits, but I think, to sum it up, it is
17 pretty clear that no one knew what was going on before
18 we got to the Alberta Decisions. That clarified that,
19 in fact, copyright does subsist in Seismic Data, and
20 it clarified -- or, I mean, frankly it was surprising
21 to the legal community that the CPRA overrode the
22 Copyright Act.

1 And so, you'll see in this chronology a
2 variety of different things in that regard, but I
3 just -- I wanted to have something that could assist
4 the Tribunal to answer the question.

5 And Mr. Gowdy, as I noted in my Opening when
6 you had asked the question about when did GSI have
7 notice, I told you that you'd hear from Mr. Einarsson
8 because that would be the perfect person to answer
9 that question for you. And he advised that he did not
10 know that there was a conflict between the laws until
11 he got the Alberta Decisions.

12 And you would have heard from our Experts as
13 well on the legal matters, that they also were not of
14 the view that there necessarily was an obvious
15 conflict here, or how it was resolved was also not
16 obvious given that there were many different tools in
17 the armory or arsenal I think we heard from our
18 Experts with respect to how to resolve a conflict.

19 We heard from the three individuals that
20 were tasked with some of the supervisory roles with
21 respect to Seismic Data at the Board. So that is
22 Mr. Dixit, Mr. Makrides, and Mr. Bennett. What came

1 clear out of that is that, none of them really work in
2 the Seismic Data field. So Mr. Dixit and Mr. Makrides
3 were not particularly knowledgeable about Seismic Data
4 and how it's created, how it's interpreted.

5 Mr. Bennett, perhaps, had slightly more
6 knowledge but was not somebody that was particularly
7 involved in any of those types of tasks. So when
8 you're running the Board operations with respect to
9 Seismic Data, it's frankly quite surprising that you
10 have individuals that are not that knowledgeable about
11 the very valuable asset that they hold in their hands
12 and are disclosing to third parties.

13 And they all seemed to testify to the fact
14 that the Boards did not take a position with respect
15 to copyright. They didn't really know whether Seismic
16 Data was copyright, and I think that's the reality, is
17 that people didn't know whether it was copyright. And
18 that's probably why it wasn't properly addressed in
19 the legislation, and that's why we end up with the
20 Common Issues Decision as it comes.

21 It just wasn't something that people put
22 their mind to, probably, and then when concerns were

1 raised by the Seismic Data industry with respect to
2 copyright, the Board said: "Look, I'm just the
3 library. I'm expecting that you would pursue the
4 infringers of the copyright in the materials in the
5 library if you so choose to do so."

6 And we saw that confirmed from a position
7 that the NEB had taken in minutes of a meeting in, I
8 think, 1998 or '99, that we had reviewed in our
9 Opening Statement where the NEB said, "well, if you
10 think that you need to address misappropriation of
11 your property, then you should be doing that."

12 That's a copyright infringement claim in
13 this instance, but you obviously need the information
14 about who is copying in order to be able to pursue a
15 copyright infringement Claim.

16 You can't just simply sue John Doe, you have
17 to know who it is, and so that took a lengthy amount
18 of time to get that information from the Boards, and
19 that is exactly what GSI ultimately did was pursue
20 copyright infringement Claims with respect to the
21 parties that were accessing and copying its data.
22 That's what resulted in the Alberta Decisions.

1 We heard from all of the Board members that
2 there were different practices at different times with
3 respect to Seismic Data. We heard that GSI -- Old GSI
4 had submitted data to a Board called COGLA, and then
5 COGLA had transferred this Seismic Data to another
6 administration when the Newfoundland and Nova Scotia
7 Boards were set up, and then it's governed by
8 different legislation.

9 So I think Justice Eidsvik was correct when
10 it reviewed all of these various matters in great
11 detail in the Common Issues Trial and determined that
12 GSI had not consented. There were changing rules of
13 the game. I don't know what the game is, when
14 property is getting taken away from somebody.

15 I don't find that to be a game, personally,
16 but that was what the defendants, including Canada,
17 had argued before Justice Eidsvik was that it was the
18 rules of the game. We hear it again -- sorry.

19 Do you have a question?

20 ARBITRATOR GOWDY: Yeah. I hate to
21 interrupt somebody's Closing Argument, but I guess my
22 question is, did you view the Regulatory Regime itself

1 as confiscatory or a taking? And if not, why not
2 pursue a NAFTA Claim then?

3 MS. LEMMENS: So I think that that was not
4 what it was viewed as. It was viewed as, no, you
5 cannot do these things. You cannot have copying, so
6 that's why I'm bringing copyright infringement Claims.
7 That was the end result of what we had understood from
8 the NEB saying, you should be pursuing parties for
9 misappropriation of property, that's the copyright
10 infringement.

11 That is also the end result of the Boards'
12 various liability or Disclosure Agreements and the
13 signage at the Boards that says the materials in this
14 library may be subject to the intellectual property
15 laws of Canada or copyright. They're sort of
16 variously termed. And so that is what the -- that is
17 what was pursued, was to deal with, okay, well then I
18 have these rights.

19 Nobody is saying I don't have these rights.
20 Nobody said GSI, you don't have copyright. So GSI
21 pursued its copyright. And then in the Alberta
22 Decisions it's determined you have copyright, but it

1 is confiscated. That is when you get the NAFTA
2 breach. That is a Decision that is not in accordance
3 with international law.

4 We have a Decision that essentially reads
5 the copyright protections that are required under
6 NAFTA and found in Canada's Copyright Act, and it
7 reads them down and takes them away. That's the
8 illegal act that occurs. It's not necessarily from
9 the legislation itself. We don't have the words
10 "copy, copyright, reproduce, publish," anything of the
11 sort in the CPRA. So, it wasn't an obvious conflict,
12 as you would have heard from our Legal Experts.

13 That is why we only have a NAFTA breach at
14 the time of the Alberta Decisions.

15 ARBITRATOR GOWDY: If it wasn't obvious, was
16 it at least possible -- because it seemed like GSI was
17 expressing concern early on -- and was it an option to
18 pursue some kind of declaratory relief to resolve that
19 ambiguity before the Common Decisions Opinion?

20 MS. LEMMENS: So why don't I go down this
21 hypothetical road. Let's say it's the legislation
22 itself, as the question is sort of asking. So we take

1 the CPRA and the Copyright Act to a NAFTA Tribunal,
2 and we say, "we're worried about an international
3 breach here. We think that the CPRA is not in
4 accordance with NAFTA," I think, is how that would
5 have to get formulated. I think the NAFTA Tribunal
6 would look at us funny and say, "well, it's not
7 obvious to me that there's a conflict here, so what's
8 the breach?" I don't think we'd get there.

9 That's why we need an Alberta Decision that
10 says that. And if the Alberta Decisions had come out
11 and said, in fact, the Copyright Act prevails, instead
12 of the CPRA, we also wouldn't be here today.

13 We didn't necessarily have the conflict, and
14 we didn't necessarily have the Resolution that Justice
15 Eidsvik put together in the Decision. Those are the
16 elements -- the ingredients that we needed in order to
17 have any sort of NAFTA breach.

18 ARBITRATOR LANDAU: If I can just follow up
19 on Mr. Gowdy's question. In circumstances where the
20 issue of copyright is being raised by GSI, as matters
21 develop over the years, damage is being done -- is
22 being said to be done to GSI because of the misuse of

1 data, putting it broadly, that's going over a number
2 of years. That damage is significant in the
3 Claimants' case, so significant that GSI is no longer,
4 on some of the testimony, "a going concern." It's
5 lost staff. It's sold vessels. It's no longer
6 investing. So that's quite significant damage along
7 the way.

8 (Overlapping speakers.)

9 MS. LEMMENS: I wanted to pull some slides
10 up because I believe I have something that addresses
11 your question because I think it's the same as the one
12 that you had on Day 1.

13 ARBITRATOR LANDAU: It may or may not be.
14 But let me develop it and see.

15 MS. LEMMENS: Okay.

16 ARBITRATOR LANDAU: So in that scenario, you
17 have got a specific complaint -- this is before a
18 court decision -- that you're not getting a proper
19 answer from the Authorities on the question of
20 copyright in order to address the damage that's been
21 done. Why, at that point, have you -- could you not
22 go to a NAFTA Tribunal, not necessarily on

1 expropriation, but on Minimum Standard of Treatment,
2 FET? Why couldn't you say that the problem here is
3 that there is lack of transparency, arbitrary conduct,
4 errors in the administration such as not to get to the
5 NAFTA standards of everything encapsulated by FET,
6 essentially?

7 MS. LEMMENS: Right. So you can have an FET
8 Claim about those types of things that you're having
9 regulatory uncertainty. I mean, that's what we saw in
10 the Windstream case under NAFTA as well -- is that
11 there was regulatory uncertainty that needed to be
12 resolved by scientific research. Given that this is a
13 particular issue of law, I think a NAFTA Tribunal
14 would look at this and still want to know what the
15 Canadian law is on this point, and I think that that
16 only comes when we get the Alberta Decisions. So it's
17 not a matter of scientific research or those types of
18 things like we see in the Windstream case. It's a
19 matter of regulatory uncertainty borne out by some
20 legislation that's not obviously in conflict. I don't
21 know that you'd have a very successful NAFTA Minimum
22 Standard of Treatment or fair and equitable treatment

1 claim on the facts. GSI was going to court. It was
2 getting a day in court, but it wasn't necessarily
3 getting an answer. I mean, we see, for instance, in
4 2011, the Federal Court of Appeal, GSI, says, "okay,
5 well, I'd like to get an injunction to stop you from
6 releasing some certain seismic surveys. They were
7 still under the Privilege Period until 2023 at the
8 time." And the court says, "well, I don't know if
9 these are actually going to get disclosed in 2023.
10 The policy could change. I have no idea. This is
11 premature."

12 And the court goes a little bit further to
13 actually say, "we also don't give advisory opinions
14 about things" -- I just wanted to quote it. I have it
15 in our chronology as well. I want to get the words
16 right: "That a ruling on the substantive issues
17 raised in the appeal and the applications for judicial
18 review may be useful to GSI in the action that it has
19 commenced in the Alberta Court of Queen's Bench with
20 respect to other , does not warrant a positive
21 exercise of this Court's discretion to determine the
22 issues before us, nor is it sufficient that the

1 industry might like to know now whether the present
2 law and policy on disclosure supersede any other legal
3 rights relating to confidential or copyrighted
4 material."

5 Courts do not normally render advisory
6 opinions. And I think that's right. Our Canadian
7 courts don't render advisory opinions. So if I took
8 that to a NAFTA Tribunal, I'm not sure that the NAFTA
9 Tribunal would not say that you're getting fair and
10 equitable treatment, you're not being barred from
11 seeking relief in the Courts. You've got copyright
12 infringement claims. Let's see them through. I don't
13 know what the outcome of these copyright infringement
14 claims will be.

15 I hope that answered your question.

16 ARBITRATOR LANDAU: Okay.

17 ARBITRATOR GOWDY: Can I ask one follow-up
18 question to Mr. Landau.

19 MS. LEMMENS: Yes, of course.

20 ARBITRATOR GOWDY: Was there any
21 consideration given to withholding the information
22 that was required by the Regulatory Regime because, in

1 that instance, it might join the issues?

2 MS. LEMMENS: So, I mean, much of the
3 pre-1993 data was already submitted to the Regulators.
4 You're talking about submission to the Regulators?

5 ARBITRATOR GOWDY: Yes.

6 MS. LEMMENS: Yes. So I think that -- I
7 mean, GSI wanted to see -- be seen as complying with
8 the law. It had a business in the Seismic Data
9 industry, and it didn't want to be seen as being in
10 breach of any laws that it was required to follow in
11 order to conduct its business. I don't think that
12 that would be a wise choice by anyone to simply breach
13 the law and hope for the best. I think that
14 it's -- you know, frankly, a show of integrity that
15 GSI continued to comply with the law. That didn't
16 mean that it was consenting to any of this. It was
17 following what it had to in order to conduct its
18 business. We all pay taxes but we don't consent to
19 them. Same idea.

20 And if you don't follow the requirements of
21 the law, you can end up with penalties. You might not
22 get additional permits to conduct seismic surveys.

1 You, in fact, I believe, under the Acts, have to pay a
2 fine. I think, at one point in time, GSI thought
3 about not submitting some of its Seismic Data and it
4 was threatened by, I think it was, the C-NSOPB with
5 some penal type of ramifications, and I think it was
6 mentioned that it was maybe fines and perhaps jail.

7 So I wouldn't -- as a lawyer, I certainly
8 wouldn't suggest that you simply don't follow the law.
9 Okay.

10 You're right, Mr. Landau, it was a slightly
11 different question. So I will get to answering your
12 other question as I go along in my presentation.
13 Thank you.

14 Just moving back to the testimony of the
15 various Parties, I don't wish to belabor this for too
16 long, but we certainly heard from Mr. Makrides that
17 there have been changing practices. There is now a
18 digital management center since, I think he mentioned,
19 maybe 2006 or '07, and that allows for data to be
20 available online. He had talked about the shared data
21 repository that the Boards were discussing in the late
22 '90s into the early 2000s. That ultimately did not

1 come to fruition. He also spoke to the fact that the
2 C-NSOPB Chief Conservation Officer is of the view that
3 it can demand SEG-Y Data. It can demand Seismic Data
4 in any format it so chooses and, in fact, it did
5 demand SEG-Y Data from GSI in 2008 through Mr. Steve
6 Bigelow. We talked about that with Mr. Makrides, and
7 this is, I believe, when GSI thought about not
8 submitting and was concerned about what it needed to
9 do and what requirements it had to do in order to
10 follow the law. So it did think about that at that
11 moment.

12 He also spoke to the fact that the C-NSOPB
13 is awaiting the outcome of the cases or the litigation
14 before making further views as to what will happen
15 with Seismic Data at the Boards. So there's sort of a
16 pending threat about further disclosure or submission
17 requirements that can be retroactive, according to the
18 C-NSOPB's interpretation of their authority.

19 We heard from Mr. Bennett. He confirmed
20 many of the same things, that there have been changes
21 to policies over the years. There's even been a
22 change to the C-NLOPB's policies in 2021, during the

1 existence of this NAFTA proceeding which was
2 instituted in 2019. So we continue to have changes.
3 Certainly you can't consent to something when it's
4 changing repeatedly.

5 I also wish to note that we didn't
6 necessarily hear from all the right witnesses. So we
7 heard a lay witness from each of the Boards, but what
8 we didn't get are some of the officials from the
9 Government testifying. So we didn't have any Witness
10 Statements from them, including representatives of the
11 Ministry of Natural Resources, so NRCan. I know, in
12 some ways, we got a lot of "I don't knows" out of the
13 Board individuals, and, as a result, we don't have
14 exact answers on some of the questions that we were
15 posing about what was known by the Boards and what
16 positions they were taking.

17 I'm just going to sort of go through all the
18 witnesses that we heard and just explain them from our
19 perspective.

20 We heard from Mr. Nigel Bankes. He is a
21 now-retired professor, but he was a long-time
22 professor, and I believe he was the Professor Emeritus

1 at the University of Calgary here in town. Being a
2 law university that actually focuses on natural
3 resources law, he has worked at the Department of
4 Foreign Affairs and International Trade before for the
5 Government of Canada in 1999 and 2000. He testified
6 that, in his Opinion, the outcome of the Alberta
7 Decisions was both confiscatory and unforeseeable. He
8 also presented the Opinion that GSI's case, being the
9 issue of the interplay between the Copyright Act and
10 the Regulatory Regime, was a new point of law for the
11 Court of Appeal, that's why it also issued a written
12 Decision.

13 He further testified that the outcome of the
14 Alberta Decisions was unfair, in response to some of
15 Mr. Gowdy's questions about that and the wording that
16 there was in the Decision, and it was based on a
17 questionable approach to legislative interpretation.

18 We heard similar things from Dr. Hutchison
19 who is a professor of law at the University of Alberta
20 up in Edmonton. He specializes in statutory
21 interpretation and copyright. Mr. Hutchison testified
22 that Justice Eidsvik's approach to legislative

1 interpretation was not necessarily thorough. She
2 didn't do a full interpretive and purposeful exercise
3 of reading the Copyright Act. She seemed to focus on
4 the CPRA in a lot of her Decision, but she actually
5 didn't think about the balancing of a copyright
6 owner's interests under the Copyright Act, which is
7 already balanced. It's the life of the author plus
8 50 years. We don't need a different balancing under
9 the CPRA where, apparently, it's just five years.
10 That seems to be sort of what her focus was on, was
11 what is the purpose of the CPRA in promoting the
12 offshore oil-and-gas development in Canada, but
13 without necessarily thinking about the purpose of the
14 Copyright Act. We don't see a lot of that discussion
15 in her Decision.

16 He also described -- and I think Mr. Sookman
17 also described in his testimony that Justice Eidsvik
18 used terms such as "Implied License," "Mandatory
19 License," and "Compulsory License" in fairly novel and
20 unknown ways in the copyright world of Canada. So
21 none of those terms appear in the Copyright Act in
22 Canada, and a Compulsory License is just something

1 that was born out of case law in the broadcasting
2 reference that I spoke to Mr. Sookman about, and the
3 Implied License is not something that we see by way of
4 legislation, and Mandatory License is not something
5 that we've ever really heard of before.

6 Mr. Gowdy.

7 ARBITRATOR GOWDY: I hate to interrupt. I
8 really do. I mean that when I say that. Given that
9 we're not a Court of Appeals, accepting that, can the
10 Regulatory Regime and Copyright Law be read
11 consistently to reach a different outcome from the
12 Common Decisions Opinion? Can the two coexist? And,
13 if so, where is that testimony and how can they
14 coexist?

15 MS. LEMMENS: I think that, in fact, it
16 could have coexisted. So we heard from Dr. Hutchison
17 on this point. It appears in one of our later slides,
18 so I don't have it up and I don't know which slide it
19 is to necessarily show you, but it is in our package
20 here. He essentially said you could have a pay wall,
21 I think is what he referred to, whereby you can't
22 download an item online. You can simply look at it.

1 It's almost like streaming a movie, you might be more
2 familiar with that concept, whereby you actually can't
3 keep a copy of it. You can view it, but you don't
4 necessarily get to walk out the door with your own
5 copy and then use it at a workstation in order to
6 actually manipulate it and be able to go and drill and
7 explore in the area. That's where a big issue arises
8 for this Seismic Data, is that the Boards say that
9 they don't know what the individuals that accessed the
10 data are doing with it. We heard that from the
11 individuals, that they aren't inquiring about what the
12 users are getting up to or why they are looking at
13 things or what they're looking at.

14 But, if you go and scan this information
15 that's available at the Boards and you take it away,
16 you can actually then revectorize it. We heard about
17 that, and I know that there were some questions from
18 Mr. Landau about what revectorizing means. Vectorized
19 information is information that is extremely detailed.
20 So when we think of what we see on a piece of paper,
21 it's not as detailed, but the vectorized information
22 actually has way more little pixels, if I can describe

1 it in that way, than what we would see. And that's
2 what you need in order to be able to actually use and
3 interpret the Seismic Data.

4 So you could say, "oh, I saw a piece of
5 Seismic Data at the Board and it looks like it's
6 interesting." But you're not going to be able to go
7 drill as a result. You actually need the data to be
8 able to manipulate it and figure out, okay, well, how
9 would I be able to access this area? What does the
10 sedimentary areas look like and the geology in that
11 area? You can't simply just go out into the ocean and
12 start drilling without that kind of information.

13 And so, when you're able to revectorize the
14 information, that becomes a problem. Now you've got a
15 SEG-Y format that you're using at your workstation and
16 you don't need to go and license it from GSI.

17 ARBITRATOR GOWDY: If I remember correctly,
18 there was some discussion on viewing versus coping. I
19 think there was a question about whether or not it
20 boils down to a memory test, but, at some point, GSI
21 was aware that it actually was being copied. When was
22 that, and what legal steps did GSI take if, assuming

1 arguendo, the Common Decisions Opinion could have been
2 written differently? When was GSI, when should GSI
3 have pursued their view-but-not-copy theory?

4 MS. LEMMENS: I think that GSI did pursue
5 its view in noncopy theory at the Common Issues Trial,
6 just so that's clear. GSI made numerous Access to
7 Information Requests, and we see that in the materials
8 before the Tribunal, starting in late 1999, I believe,
9 and into early 2000.

10 The Boards actually refused to give the
11 information about who was accessing the data at that
12 time, so GSI went to federal court, and the Federal
13 Court of Canada compelled the Boards, all three of
14 them, to provide the information of who was accessing
15 GSI's Seismic Data.

16 When the Boards did that, they did something
17 a little bit strange. So what they didn't do was give
18 copies of the Liability Agreements that the Parties
19 were signing, which is what you might have expected as
20 a response to that. What they did was they created
21 new information. They created lists of who was
22 accessing the Seismic Data, and so GSI just had lists

1 of Parties that accessed the Seismic Data, rather than
2 copies of Disclosure Agreements that said, "I agree
3 that I'm borrowing this material and it might be
4 covered by copyright, and I'm going borrow it and take
5 it out of the Board's data collection and maybe copy
6 it."

7 Typically, when you do an Access to
8 Information Act Request, you get the documents that
9 already exist at the Government. You don't get new
10 documents that are generated as a result of the Access
11 to Information Act Requests. So I'm pointing that out
12 because it actually ended up meaning that GSI didn't
13 have information about what was going on with the
14 data. And as we heard from the Boards' lay witnesses,
15 we actually don't necessarily always have that
16 information. They don't necessarily record who is
17 accessing, what they're looking at, what they're doing
18 with the data. We heard that from Mr. Dixit and
19 Mr. Makrides.

20 Mr. Bennett said they at least record who
21 comes to the C-NLOPB and what Seismic Data they're
22 looking at, but they don't necessarily record who's

1 copying it.

2 So when you don't have the information at
3 the Board level, it's pretty hard to think about how
4 does GSI get the information if it's not being
5 recorded. And so, GSI is doing what it can. I think
6 we heard from Mr. Einarsson in his testimony, or at
7 least in his Witness Statements, that he said that he
8 was doing hundreds of Access to Information Act
9 Requests trying to get this kind of information so he
10 could then pursue the issue.

11 He then starts to get a trickle of
12 information after that Decision occurred, and he
13 starts saying, "okay, well, I've got a list of people.
14 So tell me, what was this oil company accessing?
15 Don't just give me the name of a party that accessed
16 my data and I don't even know what data it is." He
17 started sending out letters to oil companies saying,
18 "you accessed my data, just so you know, it's
19 copyright. What are you doing with it? I'd like you
20 to return any copies that you have of it."

21 And at the beginning, I think he was having
22 some success in resolving some of the issues, but some

1 of them were not resolving, and that's why you end up
2 with copyright infringement claims that start from
3 2007 up until we get the Alberta Decisions. So he was
4 pursuing what he understood to be his rights. And,
5 frankly, the Boards were taking no position about his
6 copyright, so why wouldn't he have done that?

7 ARBITRATOR GOWDY: When did the placards
8 first appear, the copyright notice placards? Did you
9 ever get an explanation from Canada as to why they
10 began to appear, and did GSI rely on those placards?

11 MS. LEMMENS: So I think that Mr. Einarsson
12 didn't testify to this, but in his Witness Statement
13 he speaks to having seen the Notices, the placards,
14 and believing that that meant that, in fact, the
15 intellectual property laws of Canada were being abided
16 by and complied with.

17 The Boards -- I think Mr. Dixit in his
18 Witness Statement and maybe it came out in his
19 testimony, as well, but he had said that the Notice
20 and the Liability Form started to be used in the early
21 2000s. I mean, when we talked to Mr. Dixit, and I
22 think both you, Mr. Gowdy, and myself asked questions

1 about why they were using these Liability Agreements
2 and these signs. And he seemed to indicate, well, it
3 was out of an abundance of caution, and we weren't
4 taking a position about copyright. That's what we
5 were doing.

6 But I believe that, you know, the Boards
7 wanted to paint themselves as if they were a simple
8 library. But a simple library doesn't require you to
9 submit the books that you then borrow. The library
10 just has some other books that you're able to go and
11 read and borrow. And you are certainly not allowed to
12 take a book out of library and copy the whole thing.
13 I think we all know that from our University days.

14 If we could go to the next slide. Sorry.

15 I think I have already spoken about
16 Mr. Uffen and Mr. Hobbs -- that they had
17 testified -- and their evidence seemed to get closer
18 to what we saw in Mr. Gill's Witness Statements, in
19 terms of the longevity of the value of Seismic Data.

20 We noticed that Mr. Uffen in his First
21 Report was simply providing factors to look at in
22 valuing Seismic Data, but he then changed by the time

1 of his Second Report, likely in response to the fact
2 that the Claimants also tried to conduct an
3 independent Seismic Data valuation.

4 As you can tell, it's not the easiest
5 exercise to do that because no one seemed to be able
6 to give you a very good answer on that.

7 Mr. Uffen, he then, in response, I think,
8 probably to Troika's independent valuation where they
9 had reviewed GSI's Seismic Data and noted that it was
10 in good order. It was on modern DLT tapes, which is a
11 format that you can load into one of these
12 workstations. All of the information was readable.
13 It was ready to be interpreted or reprocessed, if
14 that's what you wanted to do with it. So Troika was
15 the only one that actually reviewed the Seismic Data
16 that GSI has.

17 No one asked from Canada's side to review
18 the Seismic Data. And on top of that, Canada has the
19 Seismic Data in its Boards' collections. So I'm
20 surprised when I heard testimony from Canada's Experts
21 saying, well, I didn't have access to the data or I
22 didn't review it or I couldn't do it or it wasn't

1 available to me.

2 All they had to do was ask us, and we would
3 have, of course, made it available. It is just
4 located outside of this city. But on top of that,
5 Canada has the data. So I don't know why it wouldn't
6 have reviewed what was in its own possession.

7 So Troika is the only one that actually
8 looked at it and confirmed that the data is intact and
9 readily available to be interpreted and worked at with
10 a workstation.

11 Mr. Uffen attempted to do some sort of
12 extension of an older methodology that we saw in Boyd
13 valuations. You may recall that. So there were three
14 Boyd valuations that GSI had commissioned in order to
15 support some financings related to its seismic
16 vessels. So those Boyd valuations were done in 2003,
17 2005, and 2009. And Mr. Uffen, he essentially, took
18 the 2009 Boyd valuation and tried to extend it out.

19 I'll get to that when I speak about Damages,
20 but it was a bit of a contorted methodology there.
21 There's some deficiencies in the way it was done, but
22 we can get to that. But he certainly confirmed that

1 he didn't know -- being on the Committee for the
2 ethical use of geophysical data, he didn't know what
3 to advise people before the Alberta Decisions about
4 whether there was copyright in the data at the Board.

5 So they provided an advisory note in their
6 guidelines to say, well, you better check whether
7 there's ownership here. You may have challenges with
8 ownership if you go and get data from the Boards or if
9 you get data from a copy company that came from the
10 Boards, you better check that they actually have the
11 ownership of that data in order to be able to sell it
12 to you.

13 Just like you probably shouldn't buy a DVD
14 on the streets in some foreign country because it
15 might be a copy. That is, kind of, what they were
16 saying. We advise that that might not be the best
17 practice for you.

18 We heard from Paul Sharp of PwC. And he was
19 the only one that provided a valuation of GSI's
20 business in this matter. He amended his Report in
21 response to various items that had been identified by
22 the Brattle Group. He said, look, I'm a professional.

1 I'm an independent expert. I've got to give you, you
2 know, proper information, so that you, as a tribunal,
3 are able to actually assess the Damages in this case.

4 And that's what he was doing when he
5 provided his Amended Report. He said, look, I relied
6 on the information, turns out Brattle has identified
7 some concerns with it. I've gone back and I've
8 reviewed that, and I have addressed those concerns.
9 And so that is what is available in PwC's Amended
10 Report.

11 We heard from the Brattle Group. And the
12 Brattle Group provided us with somewhat of just -- a
13 lot of critiques, which, when asked about them, I
14 would say they weren't necessarily holding strong on
15 all of those critiques. So obviously, they had
16 identified the issues that PwC addressed in its
17 Amended Report. Those were valid critiques, and we've
18 addressed them.

19 But other critiques about whether to use a
20 DCF -- well, a DCF relies on a consistent and
21 predictable projection in this industry. And, as we
22 heard, there is a lot of factors that actually are at

1 play. And it's not necessarily always that
2 predictable in the oil-and-gas industry. It is highly
3 cyclical.

4 We have things even during the time of this
5 Arbitration proceeding, since 2019: We've had the
6 Ukraine war. We've had tariffs in the last month,
7 which are also applying to the energy industry of
8 Canada. You know, we had COVID. That had a huge
9 impact on oil prices for us.

10 So it's not exactly the easiest thing to say
11 that a DCF would have been able to give us reliable
12 projections that we could have then worked backwards
13 from and got a Net Present Value on.

14 And I asked them about that, and they agreed
15 that there was some unpredictability in this industry.
16 They commented that there were two meaningful assets
17 of GSI on the day before the Decisions: They said the
18 Seismic Data collection of GSI and GSI's Litigation
19 Claims.

20 That would be from a Liquidation Approach.
21 I don't think that that's necessarily the most
22 appropriate methodology in this case. Because GSI,

1 But-For the outcome of these Alberta Decisions, would
2 have used its success in the Alberta Decisions to be
3 able to enforce its copyright, maintain its Seismic
4 Data. It would have had Damages from all the
5 copyright infringements. It would have continued an
6 ongoing business and continued to acquire Seismic Data
7 and license it.

8 So we'll get to Damages later on in my
9 presentation, but I just wanted to give you a
10 highlight of what our views of some of the evidence
11 that we heard over the last week are.

12 So during this -- just speaking a little bit
13 more about the facts. During this Arbitration, the
14 tendered evidence, it demonstrates that GSI held
15 copyright in its Seismic Works.

16 It is a little unclear to me from some of
17 the comments and questions that were posed from Canada
18 about whether they are of the view that there is not
19 copyright in the Seismic Works. I would agree that
20 the question posed to Justice Eidsvik in the Common
21 Issues Trial was a slightly more generic question:
22 Can copyright subsist in Seismic Data? It doesn't ask

1 the question about GSI Seismic Data.

2 But the second question was about GSI's
3 Claims, and GSI's Claims include that it would have
4 copyright in its Seismic Data. So when you get to the
5 second question about the effects of the Regulatory
6 Regime on GSI's Claims, that was speaking about GSI
7 having copyright in its Seismic Works.

8 During the Common Issues Trial -- and this
9 is borne out in the Common Issues Decision and the
10 CalWest Decision, which was heard at the same
11 time -- so those two trials happened. They were
12 intertwined.

13 So we had one sort of case with CalWest that
14 was a full trial. And then we had the sort of two
15 common issues appended onto it like a very ugly
16 appendage, I have to say. It was a difficult trial to
17 work through in terms of the process, but those
18 questions got answered out of part of the CalWest
19 Trial.

20 So when you look at those Decisions, you'll
21 see that she heard evidence from Davey Einarsson. She
22 heard evidence from John Anderson. She heard evidence

1 from -- I think it was Gerald Harmon, if I recall
2 correctly. All individuals that worked at GSI
3 Delaware over the years. And explained how they
4 created the Seismic Data, and how it was created in
5 Canada, how you would plan a survey, how you would
6 use -- and these are the key ingredients to find
7 copyright -- skill and judgment to create an original
8 work.

9 She found in the CalWest Decision, as I
10 pointed out to Mr. Sookman at Paragraph 18, that there
11 was, in fact, copyright in GSI Seismic Data that was
12 at issue in the CalWest case. But the testimony was
13 about GSI's data in total. It wasn't just about that
14 one survey that was at issue in CalWest. They were
15 speaking to the practices.

16 We didn't hear from the Witnesses of the
17 Claimants in this proceeding, Mr. George Lau and
18 Mr. Allan Feir, because they weren't called by Canada.
19 But they spoke to the skill and judgment that they use
20 in creating Seismic Data, processing it, determining
21 what elements to use in order to come up with the
22 images that we see in the Seismic Data.

1 Just like you take a photo on the street.
2 You determine whether you're going to have the
3 aperture open for a long time or a short time. Maybe
4 not on your phone, but back in the day when you might
5 have used an SLR camera, you determine how you're
6 going to use the camera to create the image that you
7 want.

8 You decide I'm going to make an image of the
9 Calgary Tower. That's a thing in and of itself that
10 you decided to use skill and judgment. You didn't
11 decide to take a picture of just the street. You
12 decided, I want to have an image of the Calgary Tower.
13 I want to have it centered. All of those different
14 elements.

15 That is what we see in the Seismic Data. So
16 they testified to that and that was unchallenged.

17 ARBITRATOR LANDAU: Sorry. Forgive me. I
18 didn't mean to interrupt you. I wanted to ask a
19 question.

20 MS. LEMMENS: Yes.

21 ARBITRATOR LANDAU: In your submission, do
22 we have enough evidence or materials before us as a

1 tribunal to come to a definitive view or to make any
2 findings on whether or not there is both copyright in
3 all the data that is in question and that that
4 copyright is enforceable and would not be defeated by
5 any defenses?

6 MS. LEMMENS: So I think there's a few
7 elements to your question there, sir. So I do believe
8 that you have sufficient evidence to determine that
9 there's copyright in the Seismic Works. I do think
10 that you have sufficient evidence to determine that
11 GSI owned it.

12 We talked about the chain of title. And, by
13 the way, in the CalWest Decision, Justice Eidsvik
14 confirmed the chain of title in, In I think,
15 Paragraphs 30 and 31, or maybe 32.

16 So that has been confirmed that the GSI
17 Delaware material was transferred to current GSI. And
18 then GSI also created its own Seismic Works while GSI
19 has been up and running since 1993. So there's some
20 of the question.

21 Now, you're asking about whether there would
22 be defenses to Copyright Infringement Claims. We

1 heard about this from the Brattle Group. And I have
2 to say, they're not Legal Experts. So it was a bit
3 interesting to hear it coming from their mouths, that
4 they thought there were defenses that could validly
5 determine that the Copyright Infringement Claims might
6 not work out.

7 The defenses were Crown Copyright. Crown
8 Copyright is a copyright that the Government of Canada
9 can hold in works that it directs or controls. And
10 here we have a situation where it was determined in
11 the Common Issues Decision that GSI created its
12 Seismic Works as it saw fit.

13 It was determining how they would be
14 created. It was not being directed by the Government
15 of Canada to create it. So when we see the Court of
16 Appeals say GSI's exclusivity in its copyright ends at
17 the expiry of the Privilege Period, I think that
18 they're saying there is no Crown Copyright here.
19 That's not explicit, but it is implied.

20 We then have a defense of the library
21 exemption. You might have heard that in some of the
22 testimony. And the library exemption is something

1 whereby, as I was describing earlier with you,
2 Mr. Gowdy, the library is not necessarily the one
3 that's at fault for the copying that happens at its
4 photocopy machine, as long as it's got the appropriate
5 signage.

6 Here, there was no finding about the library
7 exemption because, obviously, we see that GSI is not
8 able to enforce its copyright. But the library
9 exemption would only apply to the library itself, not
10 to the oil companies that are going and using the
11 library to copy the data.

12 So then we get to the defense of fair
13 dealing. Fair dealing is something that we took into
14 account, I believe, when we applied the multiples to
15 the accessed data.

16 So you may recall that PwC had applied
17 various multiples, depending on what type of company
18 or party was accessing the data from the Government.
19 A multiple of 0 was used on parties that were
20 government or academic institutions. And the reason
21 that we did that is because we said, you know what,
22 that is probably going to end up with a fairly good

1 fair dealing defense because they are just using it
2 for research purposes.

3 But an oil-and-gas company is not just
4 simply using it for academic research. They're using
5 it for commercial purposes. And so you may recall
6 that I asked Mr. Sookman questions about fair dealing
7 defenses and the six elements that need to be
8 reviewed.

9 And he agreed with me that you'd need to
10 look at the end users' use of the work, which if it's
11 a commercial use, would not necessarily weigh in favor
12 of a fair dealing defense. Also, the number of times
13 that a work is copied needs to be considered in the
14 fair dealing analysis. We have no idea how many times
15 the Seismic Data has been copied because we know that
16 the Boards aren't keeping track.

17 So in that scenario, I think that we would
18 be speaking to the Court about the very fact that it's
19 a commercial use and that we don't know how many times
20 it's been copied, as reasons why you wouldn't find a
21 fair dealing defense in this scenario.

22 This type of activity, where the very

1 customers that GSI was trying to have and service with
2 its Seismic Data licensing are the ones that are
3 getting the information for free, that is exactly what
4 the Berne Convention says is in conflict with the
5 normal exploitation of the work by the owner of the
6 copyright. And that's why we have a Compulsory
7 License now that actually is not in accordance with
8 international law.

9 I don't think you're going to get over that
10 hump with a fair dealing defense. So that is why we
11 applied a different multiplier for the oil-and-gas
12 companies and the copy companies who are in the
13 business of copying the data.

14 So we talked about the oil-and-gas companies
15 having a multiplier of, I believe, it was a 2 when
16 they accessed the data. And that was to recognize
17 that when an oil-and-gas gets it, there is often many
18 partners that "farm in" in the offshore area because
19 it is so expensive to drill in that area. We heard
20 the hundreds of millions for a single well alone. I
21 think that was either from Mr. Uffen or Mr. Hobbs. I
22 apologize that I don't remember which one.

1 So they have Exploration Group Partners. So
2 they share it with their Exploration Group Partners
3 often. And so that's why we have things in the
4 Seismic Data industry like Exploration Group Fees, and
5 we also have Transfer Fees.

6 When a company has a change of control and
7 is acquired by another company. So, you know,
8 Talisman was bought up by Repsol recently. We have
9 lots of Mergers & Acquisitions in the oil-and-gas
10 industry on a regular basis.

11 And, as a result, you have a Transfer Fee
12 that is triggered and would cause another License Fee
13 to have to be payable. Because, essentially, you
14 could have a situation, otherwise, where an oil
15 company has the Seismic Data; it is bought out by
16 another company; and it was solely for the purposes of
17 accessing that Seismic Data; and that new company is
18 now getting to use it, for whatever other reasons, and
19 sharing it with its partners. So that's why we have
20 things like Exploration Group Fees and Transfer Fees.

21 So the multiplier of 2 was to signify that,
22 if an oil company is accessing it, chances are,

1 they're probably going to have a merger or acquisition
2 or an Exploration Group Partner or maybe four
3 Exploration Group Partners and a Transfer.

4 It was just intended to represent some
5 multiple. And, frankly, I would say it was a
6 conservative multiple on the accessed data.

7 The multiplier of 3 was applied to a copy
8 company because the reality is, is that the copy
9 company goes and accesses the data, copies it, and
10 then they go and give -- they are in the business of
11 selling copies. So chances are, they are going give
12 it to an oil company who may then have Exploration
13 Group Partners or Transfer Fees.

14 So that's why we gave one additional number
15 to that multiplier. Was that -- was the fact that the
16 copy company is getting it, and then they are selling
17 it to an oil-and-gas company. Maybe they are selling
18 it to two oil-and-gas that have further Exploration
19 Group Partners.

20 We don't have that information because, as
21 we all know, the Copyright Infringements Claims were
22 not allowed to proceed. So we don't get to conduct

1 discovery to determine all of these facts and see how
2 many times it got copied in the process.

3 We will never know the outcome of the
4 Copyright Infringement Claims and the defenses to
5 them, Mr. Landau. That's the reality, but when you
6 look at what the defenses were, they weren't
7 necessarily strong defenses.

8 I will address one other defense that gets
9 raised, which is, obviously, the common
10 one: Limitation Periods.

11 GSI was bringing Copyright Infringement
12 Claims within the two-year Limitation Period -- well,
13 it is two years in Alberta, but it is actually
14 three years under the Copyright Act. So there is a
15 benefit difference there.

16 But GSI was bringing its claims within the
17 two-year Limitation Period for safe measure from it
18 finding out that there had been a copy made by a
19 company through its Access to Information Act Request.

20 So that's why you see that there is a bunch
21 of Copyright Infringements Claims from 2007 up to the
22 Alberta Decisions is because GSI was getting more

1 information, so it was bringing claims. GSI was
2 anxious to ensure that it was not wasting time and
3 proceeding according to the Limitations Period and
4 when it had discovered that it had a Copyright
5 Infringement Claim.

6 So in our view, the defenses to those Claims
7 were not necessarily meritorious defenses. We
8 understand the questions that were posed. Obviously,
9 I understand the question of a 100 percent success
10 rate is a great success rate. That's not lost on us.

11 But when we were looking at the general
12 facts in terms of what PwC was trying to do, the
13 defenses weren't necessarily good defenses either.
14 So, and I'll get to this when I speak to Damages, but
15 I think that it's fair to have assumed general success
16 on the Copyright Infringement Claims in PwC's
17 analysis. And you may say, no, it's not.

18 Well, you could, obviously, direct PwC to
19 apply some sort of discount, based on what you now
20 understand about those defenses. Maybe that's an
21 80 percent discount -- sorry -- a discount to
22 80 percent or something of that nature.

1 I don't know what the outcome is because I
2 don't run the model, and I think that that might
3 require a new regression correlation an R-squared
4 factor. But it would be in your discretion to direct
5 that, if you so choose to do so, if you want that
6 calculation run.

7 I think I've answered your question. Sorry.

8 Okay. So here's where I got to your
9 question on Day 1, Mr. Landau. And I would like to
10 just go through the next slides about what is -- what
11 do we do with the effect of the Regulatory Regime in
12 this Scenario, if we assume that the Alberta Decisions
13 are, in fact, the breach?

14 So we thought about this question over the
15 past week and a half, and it's actually right before
16 our eyes in the Common Issues Decision. Because the
17 second question that was posed in the Common Issues
18 Decision is -- I think we have it on the next slide
19 maybe. No. Next slide.

20 What is the effect of the Regulatory Regime
21 on GSI's Claims? So, in fact, the question was asked
22 at that time, and it's subsumed in the Alberta

1 Decisions. We are of the view that the issue of the
2 effects of the Regulatory Regime are actually part of
3 the very confiscation that ultimately occurs by the
4 Alberta Decisions.

5 On Day 1, I was talking to you about how the
6 Copyright Infringement Claims were ongoing for many
7 years leading up to the Alberta Decisions. And so the
8 damages that were being sought in those common
9 issues -- or sorry, in the Copyright Infringement
10 Claims are part of the outcome that ends up happening
11 in the Alberta Decisions. And I think that's why
12 we're talking about PwC's analysis with respect to
13 access data.

14 And in fact, The Brattle Group even notes
15 that GSI's claims would have had some sort of value
16 the day before the Alberta Decisions are rendered.

17 It just takes a long time for the litigation
18 to work its way through the Courts. That's just the
19 reality of how slow our courts are, to some degree,
20 but GSI was doing what it could to address the
21 infringements. And then had it been successful in
22 addressing the infringements, then those effects would

1 have been remedied, and they're supposed to put the
2 complainant back into the position that they would
3 have been in But-For the damages that had been
4 incurred.

5 But what we get in the Alberta Decisions is
6 we get told, well, no, there are no damages for you to
7 have to remedy those effects. And that's part of why
8 we're here before this NAFTA Tribunal is to say, well,
9 we require the compensation that we deserve. That's
10 not appropriate. That is a breach of international
11 law.

12 ARBITRATOR LANDAU: Sorry. I think this is
13 on Tribunal's time, when we intervene, so apologies.

14 MS. LEMMENS: That's okay.

15 ARBITRATOR LANDAU: So the question I have
16 on that, and I have to apologize if it's likely that
17 my question was not as clear as it could have been.

18 MS. LEMMENS: Okay.

19 ARBITRATOR LANDAU: But I see exactly the
20 way that you've approached it. The question that is
21 still in my mind is, the question that was puzzling to
22 me on Day 1 is, in circumstances where there had been

1 a period of time where Claimants had been complaining
2 about the Regulatory Regime for an extended period, we
3 then get into a new phase where there is no longer a
4 complaint specifically about the Regulatory Regime,
5 which is the way that the Claim is framed now before
6 us, the complaint is the Alberta Court.

7 And so -- and I think Claimants, to be fair,
8 have been very clear about that, that this is not a
9 claim about the Regulatory Regime. It's a claim about
10 a court decision and the appeal, et cetera.

11 So the question I had in my mind was: What
12 assumptions do we, as a tribunal, take from that in
13 the course of our determination? Is it something
14 that, because of time period limitation, et cetera, do
15 we assume now that that you can no longer complain
16 about the Regulatory Regime because that time has
17 passed? So we are looking at a court decision, which
18 we evaluate against a background where there is no
19 complaint about the Regulatory Regime. And
20 that's -- and that is -- because if there had been a
21 complaint about the Regulatory Regime, you had time to
22 bring it? Do you see what I mean?

1 To say, well, the Court addressed that, I'm
2 not sure the Court did. The Court said the Regulatory
3 Regime takes precedence, in essence, from the
4 Copyright Regime, and that is something that now is a
5 complaint, but how do we deal with that in
6 circumstances where in a sense, you may have disavowed
7 any complaint about the Regulatory Regime?

8 MS. LEMMENS: Well, then I think perhaps
9 there is a disconnect on what we are complaining about
10 just based on what I've just heard because we complain
11 about the Alberta Decisions and the fact that the
12 Regulatory Regime was given priority over the
13 Copyright Act. So I don't want to make it sound as
14 though the Regulatory Regime is not part and parcel of
15 the Alberta Decisions. It obviously is, and it's
16 subsumed in it, and it was addressed by it.

17 So our complaint is that the Alberta
18 Decisions found that there was a priority of the
19 Regulatory Regime over the Copyright Act. I'm not
20 sure if that answered your question.

21 ARBITRATOR LANDAU: I understand. I
22 understand what you're putting.

1 ARBITRATOR GOWDY: Can I just follow up on
2 that?

3 MS. LEMMENS: Yes.

4 ARBITRATOR GOWDY: I think when I asked
5 about this concept of creeping expropriation, I think
6 the answer was that's not what we are alleging. And I
7 sort of hear Mr. Landau KC's question as maybe, why
8 not? Why not? Why is this not a creeping
9 expropriation, although Claimants have made it clear
10 that's not what they are arguing.

11 MS. LEMMENS: Thank you, Mr. Gowdy.

12 I think that we're not -- we're not claiming
13 creeping expropriation, but the reason is, is that it
14 was the Alberta Decisions that decided that the
15 Regulatory Regime trumped the Copyright Act. That was
16 not known before that. So although there is
17 complaints about the Regulatory Regime, obviously we
18 are not hiding that. You see lots of pieces of
19 correspondence where GSI was complaining about it.

20 It always believed, according to
21 Mr. Einarsson's testimony, that it had copyright, that
22 Canada would abide by those types of intellectual

1 property laws in Canada. That is guaranteed by
2 international law. That's guaranteed by the Berne
3 Convention. The Berne Convention is incorporated into
4 Chapter 17 of NAFTA.

5 And as you would have seen in our Opening
6 Statement at Article 1110(7) of NAFTA, which is part
7 of the expropriation issue here, you can have a
8 compulsory license, but you can't have a compulsory
9 license that is not in accordance with Chapter 17.

10 And so when Chapter 17 incorporates Berne
11 and says that you've got life of the author plus
12 50 years and you can't have a compulsory license that
13 competes with the normal exploitation of the work by
14 the copyright owner, well, that's what we have here.

15 So when Justice Eidsvik decides to apply the
16 legislation in a way that undermines the international
17 law, that's when we have this breach.

18 ARBITRATOR GOWDY: Let me quickly follow up.

19 Is there any argument of expropriation by
20 estoppel? In other words, that GSI somehow relied
21 upon this ambiguity, on the placards, on the
22 correspondence back and forth, and it created this

1 uncertainty that then prohibited you from seeking an
2 answer, a definitive answer, until the Alberta
3 Decisions?

4 MS. LEMMENS: Well, I think where it's
5 factoring in is that you can see that GSI doesn't
6 discover that it has this expropriation claim until
7 the time of the Alberta Decisions. So there's lots of
8 representations, which are that the intellectual
9 property laws of Canada may apply to Seismic Data.
10 And be careful with it, coming from the Boards, and
11 the Boards not taking a position and not really
12 responding to GSI's concerns about copyright.

13 And so the end result is that GSI believed
14 that it had copyright and, therefore, it pursued its
15 Copyright Infringement Claims. And that's why we end
16 up with the Alberta Decisions that we end up with as a
17 result of 25 different Copyright Infringement Claims.

18 So, yes, there were complaints, but I think
19 that they ultimately, just like what I was speaking
20 about with Mr. Landau, get subsumed in the Alberta
21 Decisions, all of those complaints.

22 Okay. Let me just get my bearings about

1 where I am at.

2 I just -- if we could go back a moment in
3 the presentation. I just want to make sure that I'm
4 covering stuff that I meant to do.

5 So you may have noticed that I brought
6 Mr. Barry Sookman to a Federal Court of Canada
7 Decision that was actually talking about the Common
8 Issues Decision. So he confirmed that the Federal
9 Court of Canada is the one that normally deals with
10 copyright matters. You don't normally go to the
11 federal -- sorry, to the Queen's Bench -- now King's
12 Bench -- to determine those matters, but there were
13 other causes of action that were also being pursued.
14 So unjust enrichment or conversion, i.e., stealing.
15 So those weren't necessarily apt for the federal
16 court. So that's why they were brought before the
17 Queen's Bench here in Alberta instead.

18 But when the Alberta Decisions gets issued,
19 I don't think that it is any surprise that GSI
20 attempted to seek relief related to the Alberta
21 Decisions for expropriation. Expropriation, as you
22 heard from Mr. Bankes, is not something that we

1 actually have in our constitution here in Canada. So
2 the law is a gray area in Canada whether you can
3 actually seek de facto expropriation. But we tried,
4 and we did that after the Alberta Decisions.

5 And the federal court made an interpretation
6 of the Alberta Decisions that I guess Mr. Sookman had
7 not reviewed in preparing his opinion about what the
8 Common Issues Decision should mean.

9 And that Decision we included in our
10 PowerPoint slide because they say that the Alberta
11 Decisions, when they refer to "those
12 Decisions" -- you'll see it in the quote below:
13 "Those Decisions held that there was no violation of
14 the copyright act, not that there was no
15 expropriation."

16 And the reason I'm drawing that to your
17 attention is because we keep hearing from Canada the
18 "rules of the game." I would have said that that was
19 done in the Alberta Decisions. It was pretty clear
20 that Justice Eidsvik said GSI did not consent. The
21 rules were changing. It was unfair. This is being
22 confiscated. Those are the words that she was using.

1 But the federal court confirms that, in
2 fact, there was no suggestion in those Decisions that
3 there was not expropriation. So this idea that the
4 "rules of the game" and consent somehow apply in this
5 scenario, the federal court was saying, well, the way
6 I read it, that's not what was found. It's not a case
7 of "rules of the game" and consent. It is actually
8 that we didn't find that there was no expropriation
9 here. So that's why I wanted to draw that to your
10 attention.

11 I think I've covered -- here is where I had
12 talked about -- I kept the CalWest quote about finding
13 copyright in the Seismic Works. So I just wanted to
14 point that out. I think I've already covered that.

15 And then we've covered the answers to what I
16 thought was Mr. Landau's question, but, perhaps, I had
17 misunderstood it at first. I apologize.

18 So now we want to talk about jurisdiction.
19 So I just spoke briefly about Mr. Einarsson's
20 nationality. You know, it wasn't challenged in
21 cross-examine. I don't think I heard any questions
22 about the nationality, to my recall, and so the

1 evidence in Mr. Einarsson's Witness Statements remains
2 valid and unchallenged at this time about the
3 nationality.

4 I know that Canada had included some minor
5 exhibits showing that the -- Mr. Einarsson and his
6 wife had voted in elections here, that, you know,
7 obviously they had paid taxes in Canada while they
8 were living here. That's the reality of having to pay
9 taxes where you are a resident. That doesn't mean
10 that that's your dominant and effective nationality.

11 And there were times when Mr. Einarsson
12 would say: "This is a family-owned business that's a
13 Canadian business," and he's addressed that in his
14 Witness Statements. He said that because he thought
15 that he would get more sympathy. It's -- I apologize
16 to Mr. Gowdy when I say this, but it's not always a
17 welcome thing when Americans are doing business in
18 Canada and saying I'm American and I have a bunch of
19 rights here in Canada. So that explains why that was
20 happening.

21 I want to talk about waiver. Again, nothing
22 was asked in cross-examination of Mr. Einarsson about

1 waiver, to my recall at least. We are aware that
2 there were two Newfoundland proceedings against the
3 C-NLOPB that remained on the courthouse books at the
4 time that this NAFTA Arbitration commenced.

5 In fact, what happened was they were frankly
6 forgotten about and abandoned after the Alberta
7 Decisions because the Alberta Decisions seemed to
8 answer the question that was being pursued as against
9 the C-NLOPB in those matters, and so from GSI's
10 perspective, they were abandoned. They -- GSI tried
11 to file discontinuances.

12 This is borne out by the procedure cards. I
13 don't know if you call them procedure cards, but sort
14 of the procedural history printout from the
15 courthouse. You'll see that GSI was trying to file
16 discontinuances once it was raised that these were
17 extant, just after the Notice of Arbitration had been
18 served in this proceeding.

19 And in Newfoundland the procedure is, is
20 that you can't file a discontinuance without the
21 consent of the other Party, and so GSI wasn't really
22 able to do that. And ultimately the C-NLOPB proceeded

1 to ask for Dismissal Orders, but the Dismissal Orders
2 specifically say: "The matters raised in the within
3 action as between the plaintiff GSI and the first
4 defendant being the C-NLOPB, have been heard and
5 finally determined by the Alberta Courts; and, as a
6 result, the within action is res judicata."

7 So that happened shortly after this
8 Arbitration had commenced in 2019. They are not alive
9 at this point. They haven't been alive for years, and
10 certainly GSI was not pursuing them or taking any
11 steps to advance those actions.

12 Then if the complaint about waiver is about
13 the domestic private litigations on license agreements
14 with third-party oil companies, Mr. Paul Sharp in his
15 testimony confirmed that there is no issue of double
16 recovery between what is being claimed in that
17 valuation of GSI's business and those claims. He says
18 I'm not -- he's not including in his valuation a
19 quantification of past losses.

20 So that is where you would find a double
21 recovery with the domestic claims against the private
22 parties is if in this scenario we were doing an asset

1 liquidation valuation whereby we would be looking at,
2 oh, we have these extant claims against oil-and-gas
3 companies, and we believe that's an asset that we
4 have, and we are looking to be paid on those.

5 What PwC was attempting to do in its
6 Normalization Methodology was actually just show what
7 revenues GSI would have been earning over the years to
8 create a Capitalized Cash Flow valuation.

9 ARBITRATOR LANDAU: Just to clarify, though,
10 the question on -- well, there's a question on -- may
11 be a question on waiver, not with respect to double
12 recovery but simply the NAFTA requirement.

13 So do I understand it that you use the
14 testimony of PwC to show the difference in nature of
15 the claims which feeds back into the waiver? Is that
16 the point?

17 MS. LEMMENS: That is what I had understood
18 part of complaint to be, that there was a double
19 recovery, but, yes, I -- and I think this is actually
20 in our Memorials as well, that we speak to the fact
21 that there's no overlap of Parties. The measures are
22 not the same, and that's what the waiver is driving

1 at, is that you are not seeking the same -- you're not
2 seeking redress for the same measures as against the
3 party or the State. Well, that's not happening at
4 this time. All of the Copyright Infringement Claims
5 after the Alberta Decisions are done.

6 ARBITRATOR LANDAU: Thank you.

7 MS. LEMMENS: Thank you.

8 Then I wanted to talk about the limitation
9 period with respect to jurisdiction. So I think we
10 heard a lot of evidence from the lay witnesses, as
11 I've already spoken about, and from the Canadian Law
12 Experts about the uncertainty between the interplay of
13 the Regulatory Regime and the Copyright Act, and we
14 saw that there was a lot of correspondence from GSI
15 complaining, but it seemed like there were two ships
16 passing in the night sometimes.

17 We've got the Board saying: "We've got the
18 Regulatory Regime," and we've got GSI saying: "Well,
19 what about my copyright?" And the Boards weren't
20 saying: "Well, you don't have copyright." In fact,
21 they were confirming that GSI had copyright in some of
22 their correspondence that's detailed in our

1 chronology.

2 For instance, in the chronology you'll see,
3 on Page 4 of the chronology, May 21, 2010, a letter
4 from the NEB to GSI stating: "The Board acknowledges
5 that GSI's information may be subject to copyright."
6 And then they go on to describe themselves as falling
7 within the library exemption.

8 So no -- at no time was GSI really being
9 told in that correspondence "you don't have
10 copyright." They were in fact being affirmed in their
11 belief that they may, in fact, have copyright.

12 It seems that the Board was simply turning a
13 blind eye to the issue and leaving the regulatory
14 uncertainty for some other day. That other day ends
15 up being the Alberta Decisions.

16 And so GSI, in its attempts to obtain
17 clarity, didn't get it. And it was the outcome of the
18 Alberta Decisions that remained unknown prior to -- I
19 mean, the Common Issues Decision. It surprised the
20 Canadian legal community with the way that Justice
21 Eidsvik described some of the different licenses that
22 we've -- some of which we've never even heard of

1 before, according to Dr. Hutchison. And even
2 Mr. Sookman himself confirmed that he's not heard of a
3 Mandatory License or that Implied License and
4 Compulsory License were not used in a way that was
5 typical in copyright law.

6 ARBITRATOR LANDAU: Sorry. I apologize each
7 time and then interrupt.

8 MS. LEMMENS: No more apologies. You're
9 sounding Canadian, sir.

10 ARBITRATOR LANDAU: It's contagious.

11 Just for my own clarification, there's an
12 analysis of the Alberta Court Decision that sees the
13 mentioning of Compulsory Licenses as in the
14 alternative, and I'm not sure I'm entirely clear about
15 that because there is obviously all the analysis of
16 statutory interpretation, the analysis of *lex*
17 *specialis*, and in some respects you could see the
18 analysis of a Compulsory or inferred or Implicit
19 License, or whatever it's called, as an alternative,
20 or you could see it as a consequence of the statute
21 interpretation.

22 I would be grateful for your submissions as

1 to how we should read that.

2 MS. LEMMENS: We actually had this debate
3 yesterday on our side of the team because I've always
4 viewed it as strange that a court decision has said
5 that there's an alternative decision. We came
6 to -- it wasn't a conclusion, but we sort of came to
7 the view that it is probably, like you've just
8 described, a consequence of the priority of the CPRA
9 over the Copyright Act that she finds that it's a
10 Compulsory License.

11 Because to find that it's an alternative is
12 a little bit bizarre in a decision. It is almost as
13 if she was looking for the words "in other words, a
14 Compulsory License." But obviously that is just me
15 trying to understand it.

16 ARBITRATOR LANDAU: There is -- if one would
17 think about it this way, I mean obviously there are
18 different judicial styles when some courts may look at
19 alternatives, some may look at the principle of
20 judicial -- something that's called judicial economy
21 of not saying what you don't need to say.

22 But if you were to delete that part of

1 Judgment, the effect would be the same. You'd have a
2 conclusion that, under *lex specialis*, the Regulatory
3 Regime trumps Copyright Regime, and you don't need to
4 say anything more; is that right? You get the same
5 answer?

6 MS. LEMMENS: I think you get the same
7 answer, you're right, but I think she was grasping for
8 ways to figure out to how to describe the answer. So
9 I don't have Justice Eidsvik here, although I do know
10 Justice Eidsvik, but, you know, she obviously felt
11 that the words were important, and she didn't
12 judicially economize them out.

13 Ms. Lyseng's just pointed me to the time.

14 PRESIDENT WALLGREN-LINDHOLM: Let us hear
15 from the Secretary how much time there is left now
16 when the interruptions have been counted against the
17 Tribunal - Secretary?

18 (Comments off microphone.)

19 PRESIDENT WALLGREN-LINDHOLM: I beg your
20 pardon? Excuse me, Dawn. I understand that
21 regardless of the time consumption, now it's time to
22 have a Court Reporter break. Thank you very much. So

1 15 minutes. Thank you.

2 (Brief recess.)

3 PRESIDENT WALLGREN-LINDHOLM: So before
4 Ms. Lemmens continues, let me just give you the
5 interim account. Claimant has used 42 minutes and
6 43 seconds; and the Tribunal has used 42 minutes and
7 50 seconds. So the Tribunal is ahead.

8 ARBITRATOR LANDAU: We win.

9 (Comments off the record.)

10 PRESIDENT WALLGREN-LINDHOLM: Yes. You win.
11 Yes.

12 Thank you. So, Ms. Lemmens.

13 MS. LEMMENS: Thank you, Madam Chair,
14 Members of the Tribunal.

15 They said "sorry" every time they asked a
16 question, so it's just fine.

17 So I just wanted to -- just before the break
18 we were still talking about the time limitation, and
19 so I just wanted to make it clear what -- how we
20 viewed Alberta Decisions as being the breach here. On
21 this slide we are just saying that the outcome of the
22 Alberta Decisions was surprising to the legal

1 community as well as the Seismic Data industry, as we
2 heard from our Witnesses. Mr. Uffen said that he
3 didn't know whether copyright applied to the Board
4 data and that's why it's in the ethical guidelines.

5 And so, a conflict between the Regulatory
6 Regime and the Copyright Act was not obvious. We
7 heard that from the Canadian Law Experts.

8 Resolving that conflict could have been
9 achieved using many different tools in the armory or
10 the arsenal. I think we heard it described both ways.
11 It is not just simply *lex specialis* is the only way to
12 do this. You can have statute later in time, you can
13 really try to construe the purpose of the legislation
14 in a way to read down the different acts. We heard
15 from Dr. Hutchison how that's a typical exercise that
16 is actually employed in our Canadian case law when
17 doing statutory interpretation.

18 And so there was no clear choice but what
19 would trump the other one. For instance, we heard
20 from Mr. Sookman in his testimony, that the last major
21 or significant amendments to the Copyright Act were
22 actually in 2012. So the later-in-time statute could

1 have actually been viewed as the Copyright Act.

2 The more specific statute could have been
3 the one that actually addressed copyright as opposed
4 to the CPRA, which doesn't even mention copy, publish,
5 reproduce, copyright. So there wasn't an obvious
6 clear choice in the matter.

7 And Justice Eidsvik concluded that the
8 Regulatory Regime has priority over the Copyright Act,
9 and, as you've aptly pointed out, Mr. Landau,
10 alternatively, that the GSI was forced to grant
11 Compulsory License over its Seismic Data, which was a
12 bit of an unusual way to word it.

13 So -- and I just wanted to -- as I
14 mentioned, we have a bunch of quotes related to these
15 issues in our PowerPoint materials. Because of the
16 timing and the fact that our oral closing is happening
17 and I'm losing time, I'm not going to go over all of
18 the quotes, but I thought this one was particularly
19 poignant in this regard.

20 Mr. Gowdy had asked Mr. Sookman, had the
21 Canadian Parliament amended either the Copyright Act
22 or created a specific exemption, exception in this

1 CPRA, I guess we wouldn't be here? And Mr. Sookman
2 confirmed: "I suppose we wouldn't." Because it would
3 have been clear.

4 That's the point that I'm trying to get
5 across there, and the lack of clarity, this
6 uncertainty that the Boards wanted to leave the
7 situation in, is how we ended up at an Alberta
8 Decision years -- after years of complaining about
9 various aspects. We don't actually get a resolution
10 and know that one trumps the other until we have an
11 Alberta Decision.

12 I'm now going to, as I said, skip over many
13 of the quotes, but I just want you to be aware that
14 they are in the materials and I've spoken to some of
15 them as I've been speaking already this morning.

16 So let's get into the merits. I'm going to
17 skip all the way, if you're following in the paper
18 document, to Slide 61 because, as I said, there's a
19 bunch of quotes in there. And so, as I mentioned at
20 the outset, Article 1110 and Article 1106 of NAFTA are
21 the two distinct claims made by the Claimants here.

22 In our view, as I mentioned earlier, that

1 Common Issues Decision was an application of the
2 Regulatory Regime in a manner that conflicted with
3 international law, being the Berne Convention, as
4 incorporated into NAFTA.

5 So turning to the relevant Authorities here
6 on Article 1110 first and then I'll turn to 1106, we
7 say that the judicial Decision can, in fact, be a
8 breach of NAFTA. There are a variety of Authorities
9 in support of that. I know that there is a debate
10 about denial of justice because the Respondent has
11 raised the issue that they believe that we need to
12 plead a denial of justice in order for a judicial
13 Decision to constitute expropriation, and we say
14 that's not the case.

15 It is clear that there is Authority, and
16 multiple Authorities, that support that you can have a
17 judicial Decision where it applies legislation in a
18 manner that conflicts with international law that
19 could, in fact, support a breach.

20 And so here we see in the Azinian case,
21 another NAFTA case. We just quoted it here. The
22 first is a Decision. Sorry.

1 The responsibility of the State for acts of
2 Judicial Authorities may result from three different
3 types of judicial Decision. The first is a Decision
4 of a Municipal Court clearly incompatible with a rule
5 of international law. The second is what is known
6 traditionally as a 'denial of justice.' The third
7 occurs when, in certain exceptional and well-defined
8 circumstances, "a State is reasonable for the judicial
9 Decision contrary to municipal law."

10 And so we are of the view, as I mentioned,
11 that we believe that the Alberta Decisions are
12 incompatible. They award no compensation for a taking
13 of the copyright from GSI.

14 And this is a quote in Azinian, but, in
15 fact, it's a quote from the former President of the
16 International Court of Justice regarding whether a
17 judicial Decision can constitute an expropriation.
18 That is where the quote is originally from.

19 Then we see in the Eli Lilly case, which is
20 another NAFTA case, that the Tribunal in that
21 particular matter said: "It is possible to
22 contemplate circumstances in which a judicial act or

1 omission may engage questions of expropriation under
2 NAFTA Article 1110, such as perhaps in circumstances
3 in which a judicial decision crystallizes a taking
4 alleged to be contrary to NAFTA Article 1110."

5 We have further case law. So these are not
6 necessarily NAFTA cases, but there are other
7 Authorities that support that a judicial decision can,
8 in fact, constitute an expropriation.

9 So in the System case in our Authorities, it
10 said there: "It is well-established that the
11 abrogation of contractual rights by a State, in the
12 circumstances which obtained in this case is
13 tantamount to an expropriation of property by that
14 State. The Court Decision deprived the Claimant of
15 its property rights in the hotel just as surely as if
16 the State had expropriated it by Decree. "

17 So what they were trying -- obviously that
18 case is about a hotel, but what they are trying to say
19 there is that, in fact, you shouldn't differentiate
20 the judicial organ from the remaining part of the
21 State through its legislative and executive branches.
22 In fact, if a Decision is made by the judicial organ

1 of a State, it can still constitute an expropriation.

2 In the Saipem case, which we also relied
3 upon in our Memorials, at -- the Tribunal said that it
4 agrees in substance with Saipem's analysis: "Saipem's
5 case is one of expropriation. While the Tribunal
6 concurs with the Parties that expropriation by the
7 Courts presupposes that the Courts' intervention was
8 illegal, this does not mean that expropriation by a
9 Court necessarily presupposes a denial of justice."

10 So it's very much clear that, in fact, you
11 can have judicial Decisions constitute an
12 expropriation. And certainly there is nothing in
13 NAFTA, in the wording in NAFTA that would suggest
14 otherwise. So NAFTA Article 1110 does not include a
15 requirement to find a denial of justice in an instance
16 of a judicial Decision in order to constitute an
17 expropriation.

18 The ingredients for an expropriation do not
19 include that. They include other things such as, no
20 compensation and Compulsory License not in accordance
21 with Chapter 17 being the Berne Convention elements
22 that I've spoken about.

1 Here we were reviewing the materials or the
2 suggested Authorities for Mr. Landau that were
3 provided on Friday, and we noted that there was a
4 Declaration of Judge Bhandari of the ICJ, in which he
5 provided more fulsome commentary with respect to
6 judicial Decisions constituting expropriation.

7 He felt that the main Judgment was not
8 actually fulsome enough in terms of -- or sufficient
9 in its reasons, so he decided to say some more about
10 it.

11 And so he quoted in the Certain Iranian
12 Assets case with the United States, that the main
13 Judgment at Paragraph 184, which says: "The Court
14 considers that a judicial Decision ordering the
15 attachment and execution of property or interests in
16 property does not per se constitute a taking or
17 expropriation of that property. A specific element of
18 illegality related to that Decision is required to
19 turn it into a compensable expropriation. Such an
20 element of illegality is present, in certain
21 situations, when a deprivation of property results
22 from a denial of justice, or when a judicial organ

1 applies legislative or executive measures that
2 infringe international law and thereby causes a
3 deprivation of property."

4 That is what we say we have here, that
5 second one. If we go to the next slide.

6 And so he goes on to discuss the Authorities
7 that support that you can, in fact, have a Decision of
8 a court, a domestic court, apply legislation in a way
9 that will breach the international requirements other
10 than treaties. So he talks about the Saipem case that
11 I had just referred to. He talks about another case
12 related to the Standard, Chartered Bank in Hong Kong.

13 We did not have that one in our Authorities
14 so we didn't necessarily include it but we have the
15 substance of it here in which it says that: "Judicial
16 Decisions that permit the actions or inactions of
17 other branches of the State and which deprive the
18 investor of its property or property rights can still
19 amount to expropriation."

20 So it doesn't have to include denial of
21 justice. We say Canada is wrong on that point.

22 I see also that he had referred to the

1 Sistem case that I had also mentioned earlier.

2 Then with respect to some of the other
3 Authorities that Mr. Landau had suggested to us that
4 he wanted our views on -- or maybe they were
5 applicable or maybe they weren't. So we found that in
6 the Vöcklinghaus case with the Czech Republic that the
7 denial of justice was alleged by the Claimants.

8 We don't allege it here, so it seems that
9 it's, perhaps, not that applicable because the
10 question seems to be, "do you need to allege denial of
11 justice in order for a judicial Decision to constitute
12 expropriation?" And we say the Authorities do not
13 require that. So an Authority that is about denial of
14 justice isn't necessarily on point for our case.

15 In the MNSS B.V. case, in that case the
16 Tribunal's reasoning holds, in one sense, and does not
17 refer to any Authorities, and the Claimants allege
18 that there was no due process of law and some acts of
19 the State were discriminatory. So those are elements
20 that are more akin to denial of justice.

21 In the Frontier Petroleum Services case,
22 that case was not a case of judicial expropriation.

1 It was an FET claim or fair and equitable treatment
2 claim, as we were talking about earlier. And so, you
3 know, you can have denial of justice also within an
4 FET claim, but that's not what we are doing here. We
5 are not making that FET Claim.

6 We had initially included an FET claim, but
7 we ultimately did not pursue it.

8 Then on the next slide we have the
9 Commentary from Zachary Douglas, and the author's
10 propositions on the standard of judicial
11 expropriation, they contradict the findings that we
12 have in these other cases, in Azinian, Sistem, Saipem,
13 and the Certain Iranian Assets, but we note that this
14 article was written frankly before the Certain Iran
15 Assets Decision which came out in 2023, so it didn't
16 have the benefit of necessarily seeing that further
17 Declaration from Judge Bhandari on point. And the
18 author acknowledges that there are other views about
19 this issue.

20 And so we just quoted it from the Article.
21 It says: "This appears to have been overlooked by
22 Fitzmaurice" -- at Note 12, 110 -- "It is generally

1 admitted and there is ample authority for the view
2 that the judgments of municipal courts applying
3 international law will, if they misapply international
4 law, ipso facto involve the responsibility of the
5 State at any rate if acted upon even though rendered
6 in perfect good faith by an honest and competent
7 court."

8 And so here we have just highlighted the
9 wording of Article 1110(7), which is about the
10 Compulsory Licenses component, if that's the wording
11 that Justice Eidsvik wanted to use for the consequence
12 of her Decision. It's obviously an apt or, you know,
13 a relevant part of Article 1110 that we should look
14 to.

15 And it's been made clear by Meg Kinnear and
16 Andrea Bjorklund in their commentary about Chapter 11
17 of NAFTA that Chapter 17, in particular with reference
18 to Article 1110(7): "It obliges the NAFTA Parties to
19 provide effective protection of intellectual property
20 rights and to ensure that domestic enforcement
21 procedures are available for infringement of those
22 rights. The express wording of Article 1110(7) being

1 'to the extent that such issuance, revocation,
2 limitation, or creation is consistent with Chapter 17'
3 makes the application of the paragraph contingent on
4 the host Government acting consistently with Chapter
5 17 of the NAFTA."

6 And so, what part of Chapter 17, if you're
7 curious? Well, Article 1705(1) of NAFTA indicates
8 that: "Each Party shall protect the Works covered by
9 Article 2 of the Berne Convention including any Other
10 Works that embody original expression within the
11 meaning of that Convention."

12 And I want to point out, because we haven't
13 talked about this with our Canadian Law Experts, we
14 didn't ask them questions on this, but what was before
15 Justice Eidsvik was a Copyright Act that incorporates
16 the Berne Convention. So our Canadian Copyright Act
17 actually makes it very explicit in Section 91 -- and
18 you'll see that we included the Copyright Act as
19 Exhibit C-1133 -- that, at Section 91, it specifically
20 says: "Adherence to Berne and Rome Conventions."
21 Rome Conventions is about sound recording, so we don't
22 need to worry about that here. "The governor in

1 council shall take such measures as are necessary to
2 secure the adherence of Canada to the Convention for
3 the Protection of Literary and Artistic Works
4 concluded at Berne on September 9, 1886, as revised by
5 the Paris Act of 1971."

6 So it was clear, even in our domestic
7 legislation, that we had international obligations in
8 this country to adhere to these requirements. She
9 didn't even have to look at NAFTA. She just had to
10 look at the very Copyright Act that was before her
11 and, we say, she, perhaps, didn't fully review, but
12 that's neither here nor there at this point. So when
13 she applies the CPRA to override it, she's applying
14 that legislation in a way that is tantamount to a
15 breach of Canada's international law obligations, and
16 it's borne out right here in the Act.

17 When we look at Article 1705(5) of NAFTA, it
18 requires that: "Each Party shall confine limitations
19 or exception to the rights provided for in this
20 article to certain special cases that do not conflict
21 with a normal exploitation of the work and do not
22 unreasonably prejudice the legitimate interests of the

1 right holder."

2 I think it's abundantly clear that we would
3 say that, when oil companies are accessing for free
4 from the Boards what they would normally be charged a
5 License Fee for from GSI, that is conflicting with the
6 normal exploitation of the work that GSI had, and it
7 is unreasonably prejudicing the legitimate interests
8 of the right holder, being GSI.

9 So there was a WTO case. We mentioned this
10 in our Opening Statement, Members of the Tribunal,
11 that was talking about a very similar issue with
12 respect to this type of protection. And so we don't
13 have one on point under Chapter 17 of NAFTA, but we do
14 have this WTO commentary about a U.S. Copyright Act
15 Section 110(5). And so the World Trade Organization
16 Panel on this particular issue in 2000 said that there
17 are three distinct components of the test that we see
18 formulated in 1705(5) of NAFTA. They're very -- they
19 might be identical, but they're very similarly worded.

20 And so the three distinct components of test
21 are: A limitation must be confined to certain special
22 cases. So if you're taking the copyright away, you're

1 limiting it in some way, it's got to be confined to
2 certain special cases; the limitation must also not
3 conflict with a normal exploitation of the work; and
4 any limitation must not unreasonably prejudice the
5 legitimate interests of the rights holder. That
6 three-part test, we have not seen Canada rebut that
7 test at all.

8 ARBITRATOR LANDAU: Just before you move on,
9 forgive me. If you're going on to performance
10 requirements.

11 MS. LEMMENS: I am.

12 ARBITRATOR LANDAU: Yeah. Can I then -- I'm
13 not going to apologize this time. I'm just going to
14 ask my question.

15 MS. LEMMENS: Yeah.

16 ARBITRATOR LANDAU: Without prejudging at
17 all the extent to which we might be influenced or take
18 on board the ICJ reasoning in the Certain Iranian
19 Assets case, I just wanted to follow up with a
20 question on its approach. If you look at
21 Paragraph 184 of that, that's the one actually which
22 you had cited in which Justice Bhandari took on in his

1 separate opinion, but just looking at the main
2 Judgment at 184 for the moment, the way that that
3 paragraph has been interpreted since is -- to -- well,
4 perhaps a lot of commentators will be focused on what
5 seems to be a requirement by the ICJ that the judicial
6 Decision itself was the cause of the expropriation.

7 So when it talks about a judicial entity
8 applying a law that itself might be expropriatory, it
9 is the application by the court that is causing the
10 diminution in value.

11 What could be said to be different in this
12 case from perhaps most of the authorities on judicial
13 expropriation is that, by the time of the Alberta
14 Court Decision, there had already been a deprivation
15 of value, a loss of value. There had already been, by
16 a number of years, what the Claimants have alleged was
17 very significant damage to themselves and their
18 business. And that had happened before the Court did
19 anything. So I don't know if you've got anything to
20 say in terms of how do we reconcile that, or is that a
21 significant difference?

22 MS. LEMMENS: Well, I think that your

1 question is starting to get into the effects of the
2 Regulatory Regime that we spoke about earlier
3 because -- is it the case that GSI was deprived of
4 anything the day before the Decision when it had all
5 of its Copyright Infringement Claims, and so far as we
6 knew, those were reasonable and valid and enforceable.
7 We did not have a Decision on the day before that
8 said, "you can't enforce your copyright because, in
9 fact, I'm going to find something overrides your
10 copyright in breach of your international -- Canada's
11 international obligations."

12 ARBITRATOR LANDAU: But I don't want to go
13 over ground that we've gone over before, but there's
14 still the issue that, if the Company is no longer a
15 going concern at that moment, that's the product of a
16 number of years of damages sustained before the court
17 has done anything.

18 MS. LEMMENS: I think I'm still going to
19 come back to the fact that -- and I think, I mean, the
20 Brattle Group even acknowledged this, that the day
21 before the Decision, in fact, there were the Claims
22 still. They still had some value. But, when we have

1 a Decision the next day that, in fact, those Claims
2 don't work, you don't have a copyright to enforce,
3 there is no infringement, that was not known the day
4 before. So I know GSI wasn't necessarily pulling in a
5 bunch of revenues. There's a lot of questions about
6 going concern and different definitions, and you might
7 be understandable of that from, like, an insolvency
8 perspective and all sorts of things; right? I mean,
9 from an insolvency perspective, they were a going
10 concern because they paid their debts as they come
11 due. Whether they were pulling in revenues from their
12 typical streams of business is another question, but,
13 if they, in fact, had the Copyright Infringement
14 Claims be successful, the damages remedy those things.
15 And so, in fact, yes, they could have been deprived
16 for a period of time, but if they were successful in
17 the Alberta Decisions and successful in their
18 Copyright Infringement Claims, they would be deprived
19 no longer.

20 ARBITRATOR LANDAU: Can you just help me on
21 this, to how we square that with the nature of the
22 Claim, because the Claim as quantified is a loss of

1 business rather than a loss of data.

2 MS. LEMMENS: For sure, and we viewed it as
3 GSI's main substance was its Seismic Data and the
4 licensing revenues that it earned on that data and so,
5 when it can't enforce its copyright on its Canadian
6 Seismic Data collection, which is the majority of its
7 Seismic Data collection, then you don't have a
8 business anymore. You're not going to be able to run
9 a business on -- I mean, on the licensing for sure,
10 and the licensing is what sustained the rest of the
11 business, going out and acquiring more data needed to
12 be sustained on licensing revenues.

13 ARBITRATOR LANDAU: All right. Thank you.

14 MS. LEMMENS: Okay. And so, just before I
15 turn to specific performance requirements, I just
16 wanted to bring it full circle on that three-part
17 test. As I said, Canada has not rebutted that
18 three-part test and they haven't given an analysis of
19 it in their materials, at least.

20 And we say that what the Boards were doing
21 is -- and now it's endorsed by the Alberta Decisions,
22 is they weren't confining it to certain special cases.

1 As we heard from the Boards' witnesses in this
2 hearing, they didn't care who it was that was
3 accessing the data. They didn't care how many times
4 it was being copied. They didn't ask questions or
5 inquire as to why people were using the data. They
6 generally -- and this is only some of the witnesses.
7 I think some of the witnesses said they didn't really
8 know whether it was for promoting offshore. I think
9 Mr. Dixit said that the NEB doesn't promote the
10 offshore oil-and-gas development, but I believe the
11 other two witnesses confirmed, which is what the
12 purpose of the CPRA is, which is to promote offshore
13 oil-and-gas development.

14 But there was no check or balance on
15 whether, in fact, giving out the Seismic Data to
16 anybody that walked in the door at the Boards was
17 actually fulfilling that purpose. And so, when we
18 talk about the first element being certain special
19 cases and confining it to that, I don't think that was
20 happening whatsoever, and it's certainly not happening
21 because the Alberta Decisions have now confirmed that
22 GSI has no ability to enforce its copyright after the

1 expiry of the Privilege Period, regardless of what is
2 being done.

3 And then, when you get to the second element
4 of the test, conflict with the normal exploitation of
5 the work, as I mentioned earlier, this directly
6 conflicts with what GSI's business was, to license its
7 Seismic Data.

8 The third element that it -- not just
9 "should not," it must not. A limitation on a
10 copyright must not unreasonably prejudice the
11 legitimate interests of the rights holder. As we can
12 see, it absolutely prejudiced GSI in the course of its
13 business.

14 So we believe that this three-part test
15 about what you can't do in a Compulsory License, it's
16 very clear that you couldn't do what is -- what has
17 happened here, and what has been endorsed by the
18 Alberta Decisions.

19 Turning to the specific performance.
20 Pardon, Mr. Landau, did you -- okay.

21 Turning to the specific performance
22 requirement element under Article 1106 of NAFTA. So

1 as I said, this is a distinct claim, but it is more a
2 distinct cause of action. And we still have the same
3 facts to play with here.

4 So 1106 says: "No Party may impose or
5 enforce any of the following requirements, or enforce
6 any commitment or undertaking, in connection with the
7 establishment, acquisition, expansion, management,
8 conduct or operation of an investment of an investor
9 of a Party or of a non-Party in its territory."

10 To (f): "To transfer technology, a
11 production process or other proprietary knowledge to a
12 person in its territory, except when the requirement
13 is imposed or the commitment or undertaking is
14 enforced by a court, administrative tribunal or
15 competition authority to remedy an alleged violation
16 of competition laws or to act in a manner not
17 inconsistent with other provisions of this Agreement."

18 And so when we go back to what we saw in the
19 Alberta Court of Appeal Decision, at Paragraph 104,
20 you see that the Court of Appeal says after the expiry
21 of the mandated Privilege Period: "Thereafter, GSI
22 has no legal basis or lawful entitlement to interfere

1 or to object to any Decisions made by the Boards
2 relating to its collected data."

3 And by doing that, it has enforced a
4 requirement to transfer proprietary knowledge in the
5 Seismic Data to third parties in Canada, being the
6 oil-and-gas companies.

7 And so I know that Canada contends in this
8 case, oh, well, this doesn't actually fall under
9 1106(1)(f). We think that it falls under 1106(3),
10 which is that you can have a performance requirement
11 whereby it's conditioned on an advantage being
12 granted. The Commentary would not support that view
13 of this. So Canada says, well, we gave you a permit
14 to go and conduct a Seismic Survey offshore.

15 First of all, there is an issue there
16 because the permit to conduct the Seismic Survey is
17 all about traveling in the Offshore Area. But you
18 have to recall that GSI actually creates the processed
19 Seismic Data not on the ship. It creates it back at a
20 processing center in Calgary.

21 So the activity of the processing and the
22 actual final version of the Seismic Data that gets

1 submitted is not actually conditioned on anything.
2 GSI spent millions of dollars, as we saw on some of
3 permits, acquiring the Seismic Data. I wouldn't call
4 that an advantage. It took the risk of wanting to go
5 and collect Seismic Data, so that it could then go out
6 and market it and have a business about it.

7 It goes back to its processing center in
8 Calgary. You don't need a permit to run a processing
9 center in Calgary. And so there becomes more of a
10 disconnect between the elements of what they think was
11 an advantage, apparently being able to go out and
12 create some Field Data in a ship because you're able
13 to regulate the Offshore Areas of Canada, with then
14 being able to get Seismic Survey Data submitted to the
15 Boards.

16 There is not a direct linear path there, in
17 terms of advantage and the benefit at hand. But,
18 additionally, you also have an issue with the
19 Authorities generally indicate that these types of
20 advantages are things like tax concessions,
21 infrastructure developments or subsidies. And so it's
22 not being interpreted in the way that Canada is now

1 suggesting in its arguments. It has been interpreted
2 in a much more narrow way.

3 Getting an actual benefit -- getting a tax
4 credit of some sort, not having to pay the taxes,
5 there's the benefit. But GSI didn't get any tax
6 benefits. In fact, what we heard was that GSI doesn't
7 get any of these allowable expenditure credits. Those
8 are the oil-and-gas companies. GSI doesn't get that
9 advantage at all.

10 So where is the benefit to GSI, is what I
11 would put back on that question? Because there isn't
12 one. GSI spent enormous sums to be able to collect
13 this Seismic Data and run a business.

14 And I just want to point out that, with the
15 1106 specific performance requirements, there was the
16 possibility that Canada could actually have some
17 exceptions to the application of 1106. That is
18 under -- you can have a reservation under 1108 of
19 NAFTA. But, in fact, in 1108, there are no exceptions
20 for the CPRA Section 101. But I want to point out
21 that -- and Section 101 is this Privilege Period that
22 we've all been talking about.

1 But I want to point out that the CPRA does,
2 in fact, have other exceptions reserved under 1108.
3 So clearly, Canada had put its mind to the idea that
4 the CPRA might require some exceptions that need to be
5 reserved from the specific performance requirements
6 under 1108, but they didn't include this section
7 related to Seismic Data.

8 So let's talk about Damages. That's what we
9 were doing earlier this week. So I wanted to give an
10 overview.

11 Damages: GSI was a company that was running
12 and had sizable revenues from 2000 to 2012. They had
13 in the magnitude of about \$300 million in revenues
14 over that time. So it wasn't as if it was a
15 struggling business at that time.

16 I also note that some questions have been
17 posed by you, Mr. Landau, with respect to copyright
18 valuation. These are things that we, of course,
19 considered. International law would suggest that
20 copyright valuations should take into account loss of
21 sales on that copyright material. So being the
22 further distribution. But also, in fact, the loss of

1 the right to charge a license or a royalty, whatever
2 it might be, for the actual use that's even happening
3 in the instance.

4 Those are things that we try to take into
5 consideration with PwC's valuation when they
6 were -- because, of course, this is a business that's
7 run on intellectual property. That's the nature of a
8 Seismic company is that they are an IP company. I
9 know they are not what we would normally consider like
10 a software company, but that's the reality.

11 And so when we thought about that, that's
12 what we were trying to do when they were normalizing
13 the revenues. We were talking about loss of sales
14 with the access data and that sort of thing, and
15 that's what we incorporated.

16 There are many different ways to value
17 copyright. We heard from Mr. Chodorow that he has
18 done IP valuations. In his testimony, he didn't do
19 one here. He talked about how there are different
20 ways to approach the question. There is no single
21 right answer about copyright Damages. It can go the
22 full gamut of disgorgement of profits to a License Fee

1 or a royalty.

2 I mean, typically, in Canada a Compulsory
3 License may have a royalty attached to it.

4 Mr. Sookman confirmed that. In the Broadcasting case
5 that we had spoken about, he confirmed that there was,
6 in fact, a royalty associated with that Compulsory
7 License, that the Supreme Court of Canada found.

8 And so if you're feeling like you don't have
9 enough information about what the value is at stake
10 here, that may be a product of the fact that it's an
11 IP company. So I think it was a valid question to ask
12 about valuing copyright Damages.

13 But we've got PwC, we've got Mr. Uffen, we
14 had Troika, and we have The Brattle Group providing
15 different information to the Tribunal with respect to
16 Damages. And so I wanted to review those with you
17 because none of them is necessarily the perfect
18 answer, but there's a pretty good answer in there.
19 And don't forget that the pretty good answer is
20 sufficient for this Tribunal.

21 You wouldn't be the First Tribunal to ask
22 some questions about the Damages. And we've seen in

1 some of the cases that, in fact, the Tribunal has done
2 its own analysis incorporating all of the different
3 valuations before it and using its discretion to come
4 up with a valuation. I'll get to that in a moment.

5 But what I can say is that there wasn't a
6 single person in front of this Tribunal that said that
7 there was no value. I think that was clear.

8 Everybody agrees that Seismic Data is expensive, costs
9 a lot to create, costs a lot of money to license, and
10 no one said it was zero.

11 Even The Brattle Group who spent a lot of
12 time criticizing PwC, admitted there was some value.
13 Even Mr. Uffen, who extended the Boyd valuation -- and
14 I said I would talk about the deficiencies in
15 that -- but he even said that there would be some
16 value. So no one is before this Tribunal indicating
17 no value.

18 It was disappointing that we didn't get more
19 assistance from an expert on Canada's side. I note
20 that Brattle was here to help the Tribunal. All they
21 did was criticize.

22 And so it also seemed as though they were

1 instructed to not provide a valuation. And so what we
2 did in PwC's Amended Report was we tried our best to
3 address the concerns raised and come up with the
4 resultant revised valuation. Because PwC does view
5 its professional obligation to be that it's an
6 independent expert that is here for you and it's to
7 assist the Tribunal in determining the value in this
8 matter.

9 So as I said, if the Tribunal requires new
10 calculations to be run because it has a different view
11 of things, PwC is available to be directed by the
12 Tribunal to run that calculation, if you so choose.

13 So let's look at PwC's valuation.
14 PwC -- this is the only valuation of GSI's business
15 that is before the Tribunal at this time. They
16 provided -- and we're referring here to the Amended
17 Report when we pulled these numbers.

18 So the Enterprise Value -- you might already
19 know this, but -- just -- I want to make it clear. So
20 the Enterprise Value is the GSI business value, but it
21 includes some debts because there are Shareholder
22 loans. So that's why you see a difference between the

1 Enterprise Value and the Fair Market Value to the
2 Einarssons and the Shareholders there.

3 So the Shareholders, the difference there is
4 that Russell Einarsson is not a Shareholder. So
5 that's the difference that goes on there. And so the
6 Equity Value is the end result of taking out the debt
7 or those types of things.

8 And PwC analyzed the value of GSI, as at the
9 date of the breach being in November 2017, but then
10 also at a date closer to the time of this Hearing.
11 And so we picked June 30, 2022, because that was close
12 to when we were tendering the PwC First Report in this
13 matter.

14 Mr. Uffen also did what I call the "Boyd
15 extension." So those three Boyd valuations from the
16 2000s period that GSI had, for financing purposes,
17 done on a liquidation basis to support those
18 financings -- what he did is he modified some elements
19 in the Boyd valuations and he came up with
20 approximately \$35 million in 2017.

21 So here is what is maybe missing from
22 Mr. Uffen's valuation of the Seismic Data alone. He

1 doesn't include GSI's Arctic data because he was
2 instructed to not include it as a result of the
3 current nonissuance of Exploration Licenses in
4 Canada's Arctic.

5 But as you heard from the Witnesses,
6 including Mr. Dixit himself, it's not necessarily a
7 forever thing that you aren't going to have licenses
8 issued in the Arctic. And the next review of the
9 Arctic development is in 2026.

10 We already know that President Trump on the
11 Alaska side of the Arctic is moving towards "drill,
12 baby, drill." So we're going to see probably some
13 changes in the Canadian market, as a result of that.

14 He doesn't include interest. So obviously,
15 interest would be a relevant component to have to
16 apply here. He also assumes no new Seismic Data would
17 get created. So I understand GSI was not creating
18 Seismic Data after it sold its Seismic ships, but if
19 GSI had been successful in the Alberta Decisions and
20 had been able to enforce its copyright, that would
21 have been a different story.

22 Mr. Einarsson would have continued to invest

1 in new Seismic Data, knowing that he has the copyright
2 protections that he should have had under
3 international law to protect Seismic Works.

4 And then Boyd's methodology just on the face
5 of it, when you look at the 2003 Report, for instance,
6 from Boyd, you can see that it's a bit short-sighted
7 because GSI is already generating significantly higher
8 revenues from the Seismic Works than Boyd was
9 estimating thereafter. So if you compare to GSI's
10 Financial Statements, you'll see that the
11 revenue-generating capacity that's reflected from
12 those financial statements is significantly higher
13 than what Boyd was estimating the Seismic Data would
14 actually produce.

15 And that's perhaps as a result of Boyd not
16 necessarily considering that GSI was in an ongoing
17 process of reprocessing its older Seismic Works. So
18 the Boyd valuation just didn't take that into account,
19 and, as a result, Mr. Uffen also doesn't take that
20 into account.

21 ARBITRATOR GOWDY: May I ask you a question?

22 MS. LEMMENS: Yes.

1 ARBITRATOR GOWDY: If there is no consensus
2 among the Experts in the field, how can three lawyers
3 that don't have any expertise in this field, and what
4 assumptions should we make? Like I think we were told
5 to assume a 100 percent success rate in litigation,
6 which I'm not a math expert, but that's a pretty high
7 percentage. We can't factor in defenses, to
8 Mr. Landau KC's point. We can't factor in litigation
9 expenses. So, how are three lawyers to arrive at a
10 valuation if the Experts themselves can't?

11 MS. LEMMENS: I'd like to just skip ahead to
12 answer your question to Slide 81, sir, because you
13 aren't -- as I mentioned, you wouldn't be the First
14 Tribunal that has some issues with determining, even
15 when there has been Expert valuations presented, what
16 the valuation should be. And we see that in the
17 Lion/Mexico case, which is another NAFTA case related
18 to Mexico.

19 And so, in fact what happened there, you can
20 see in the quote before you, sir, is at
21 Paragraph 645: "Given the wide spectrum of results
22 that different valuations may yield, Tribunals need to

1 retain a certain margin of appreciation in determining
2 the final compensation due. This does not mean that
3 the Tribunal becomes an amiable compositor because the
4 Tribunal's margin of appreciation can only be
5 exercised in a reasoned manner and within the
6 boundaries of the principles of international law for
7 the calculations of damages.

8 "In determining Lion's compensation for
9 Mexico's NAFTA breach, the Tribunal will take as its
10 starting point the valuations of the
11 Properties" -- which were at issue in that particular
12 matter -- "that each of the Parties' Experts have
13 presented. The Tribunal will thereafter make an
14 adjustment to reflect the Actual Value of properties
15 and the mortgages in the specific circumstances of
16 this case."

17 And so I appreciate that it's not an
18 enviable position to be in, perhaps, sir, that you
19 would have to look at the various data points that you
20 have before you, but I think in looking at the various
21 data points, you can see that it's not zero and it's
22 something higher than that by millions of dollars.

1 And we have various data points and different
2 approaches.

3 So I've talked about PwC doing a Capitalized
4 Cash Flow analysis of GSI's business. Perhaps, you
5 didn't like some inputs on it. You could always ask
6 for PwC to run different calculations using different
7 inputs based on your determination of potential
8 litigation risk. It might not be perfect, but that's
9 not necessarily what has to happen in any case is
10 perfection. This is, if there are damages, we should
11 do our best to try and resolve the issue.

12 Mr. Uffen has provided a valuation whereby
13 he extended the Boyd Reports. I've noted some of the
14 inputs might be not quite accurate, and so you can use
15 that as a data point, knowing potentially some of
16 those deficiencies.

17 You can look at the Troika Report. That
18 came from a replacement value perspective, so not
19 necessarily the same type of asset valuation as what
20 Mr. Uffen did.

21 And the Troika Report talks about the
22 quality of the data, that is workable and loadable,

1 because I noted that Mr. Uffen did not review the
2 data. Nobody seemed to review the data but Troika, so
3 that's why I raise Troika, because they do confirm
4 that it is on modern DLT tapes, and so questions about
5 whether there needs to be a physical review by
6 Mr. Uffen and then assess the valuation further down,
7 he also confirmed that a physical review might
8 actually assess it either way. You would need to
9 conduct the review, but he didn't do it.

10 So Troika talks about replacement values,
11 and some of those replacement values that you see get
12 used in the Troika Report. They actually are
13 supported by the old Boyd valuations that have data
14 Acquisition Costs incorporated into the Boyd
15 valuations. So you have a data point about how much
16 it costs to create data. You also have that from the
17 permits and authorizations. Certainly Canada was made
18 aware that the permit that we looked at, that the data
19 was going to cost 5 million something to create that
20 one line or survey of data. So I know that's a lot of
21 data points.

22 And then we've got Brattle's other idea of a

1 liquidation approach with two meaningful assets being
2 the Seismic Data collection of GSI, what's the value
3 of that, along with there was some value to GSI's
4 litigation.

5 So that's a lot of different approaches.
6 And it is entirely within the Tribunal's discretion to
7 consider all of those approaches and also come up with
8 its own ideas about whether they agree with an asset
9 valuation or a business valuation or some sort of
10 different inputs for any of those. I know that's not
11 a perfect answer, and I apologize.

12 So I think I had spoken about the Uffen
13 Valuation. And I think I have, frankly, spoken about
14 Troika as well. And I know the range before the
15 Tribunal, as I said, it is not starting at zero, it is
16 starting at -- Mr. Uffen says it is \$35 million and it
17 goes all the way up to Troika saying a replacement
18 value would be closer to \$800 million. So that's a
19 big range. We acknowledge that.

20 PwC's analysis was more in the ballpark
21 of -- let me just turn back to the numbers here so I
22 get it accurate -- in 2017, if it was the Equity

1 Value, we are looking at a range between \$267 million
2 to \$335 million, and if we bring it up to a closer
3 date to the Hearing -- so that means that we're adding
4 interest to that, we're getting to -- but we're also
5 doing a different calculation to also take account of
6 time passing, so we get to an Equity Value in the
7 range of \$225 million to \$282 million.

8 And so let's talk about the Brattle Group
9 criticisms. We talked a little bit about the
10 litigation risks. So I just want to note that, as we
11 know, the Copyright Infringement Claims that GSI had
12 the day before the Alberta Decisions, they
13 weren't -- if you just go to the next slide, we don't
14 know that it was a complete set of all the Copyright
15 Infringement Claims.

16 So because the Boards aren't recording
17 the -- who was accessing it and how much copying is
18 going on, we don't actually know how many Copyright
19 Infringement Claims there were. What we do know is
20 these are the ones that GSI knew about. So this is a
21 minimum level of the Copyright Infringement Claims,
22 not a ceiling.

1 We know that it ignores the Secondary
2 Submissions, so as we pointed out, the Secondary
3 Submissions are GSI's licensees that go and submit the
4 higher quality license data to the Boards and those
5 get recorded under the name of the party that submits
6 it. So not GSI.

7 And as you see from Canada's privilege log
8 in this proceeding, there are 67 Secondary Submissions
9 that they refuse to disclose in this proceeding. We
10 tried to compel them. We were unsuccessful before
11 you, Members of the Tribunal, to do that, and so that
12 remains elusive. We have no idea how many times the
13 Secondary Submissions of GSI's copyright works were
14 copied and accessed, again pointing to the Copyright
15 Infringement Claims being lower than what it may be.

16 It ignores how many copies were subsequently
17 disseminated by third parties. So as I mentioned, you
18 get an oil company coming to the door. We applied a
19 multiple of 2 to try to reflect that. You get a copy
20 company coming, we multiplied that by 3, and then we
21 accounted for the fair dealing defense by saying zero
22 for the universities and the government bodies because

1 we said, yeah, chance are you're going to get a fair
2 dealing defense on that.

3 So this may be an undercount on the
4 Copyright Infringement Claims. So when we start
5 talking about litigation risks and potential defenses,
6 I think I've already spoken to those earlier with
7 Mr. Landau. We don't view those as particularly
8 meritorious defenses. We understand they exist, but
9 that may be something that you consider in determining
10 whether 100 percent success rate is not the right
11 number, perhaps it is 80 percent, knowing that this
12 copyright infringement list is not the whole story.
13 We don't have all the goods, and we're missing 67
14 Secondary Submissions that Canada refused to produce,
15 and we have no idea how many times those were copied.

16 And so I just wanted to point out that
17 PwC -- with respect to the multipliers, I know there
18 was commentary in some of the Memorials about it, but
19 in fact when PwC was on the stand and when Mr. Paul
20 Einarsson was on the stand who testified to the
21 multipliers that PwC used, no one really challenged
22 him about the multipliers. And, frankly, the evidence

1 from Mr. Uffen and Mr. Hobbs about Exploration Group
2 Fees and Transfer Fees confirmed why the multipliers
3 were appropriate that it would be distributed further.

4 So PwC valued the Copyright Infringement
5 Claims alone with the multipliers applied at
6 \$877 million roughly. That is not even including
7 those things that I said we don't know about. That is
8 just the known. So you can see it's a pretty big
9 number, and that's not intended to be, you know,
10 provocative in any way, but I'm just trying to point
11 out that when we're talking about the PwC's business
12 valuation at the range that it's at, it appears,
13 frankly, in our view, quite reasonable.

14 Okay. I think I've spoken enough about
15 Damages at this time. So I've got two minutes
16 apparently, and I'm not going to go through the joint
17 list of issues again. These are the exact same
18 answers that we gave in the Opening Statement to our
19 joint list of issues. We have not changed our
20 answers. So I just wanted to include it as sort of
21 here are our answers again. Nothing to report about
22 changes to them.

1 Subject to any questions that the Tribunal
2 may have, those are our submissions in our Closing.

3 PRESIDENT WALLGREN-LINDHOLM: Thank you,
4 Ms. Lemmens.

5 We will then break for lunch, and that means
6 that we have scheduled also today for one hour and
7 15 minutes. So shall we break now for lunch? It is
8 probably a good idea. And shall we stick to the one
9 hour, 15 minutes?

10 MS. TABET: Yes.

11 PRESIDENT WALLGREN-LINDHOLM: Okay. So see
12 you all back then at 1:30.

13 MS. LEMMENS: Thank you.

14 PRESIDENT WALLGREN-LINDHOLM: Thank you.

15 (Whereupon, at 12:15 p.m., the Hearing was
16 adjourned until 1:30 p.m., the same day.)

17 AFTERNOON SESSION

18 PRESIDENT WALLGREN-LINDHOLM: So welcome
19 back, everyone.

20 We will now proceed to Canada's Closing
21 Presentation. Will that be Ms. Tabet?

22 MS. TABET: Thank you, Madam President.

1 PRESIDENT WALLGREN-LINDHOLM: Thank you.

2 CLOSING STATEMENT BY COUNSEL FOR RESPONDENT

3 MS. TABET: Yes, Members of the Tribunal.

4 At the beginning of the week in her Opening,
5 Ms. Lemmens said that Canada was trying to relitigate
6 the Alberta Court Decisions and that the Claimants
7 were not. They repeated that they are not challenging
8 the Regulatory Regime as inconsistent with NAFTA.
9 This was very clear in their written submissions.

10 As we understood it this week, GSI wants to
11 relitigate part of Alberta Court Decisions.

12 On the first question, that the fact that
13 copyright can subsist in the Seismic Data, the
14 Claimants are happy to accept that the answer is yes,
15 although they acknowledge that the right was legally
16 uncertain at the time they made the decision to
17 invest. But they are asking the Tribunal to review
18 the merits of the Alberta Decision with respect to the
19 determination of the second question, namely, whether
20 the Regulatory Regime prevails over the Copyright Act.

21 On this point you heard many of the same
22 arguments that were before Judge Eidsvik during the

1 Common Issues Trial, and many of the issues that GSI
2 has complained of over the years -- and that have
3 nothing to do with the Alberta Court Decisions have
4 been brought up by Mr. Einarsson in his testimony and
5 there by Ms. Lemmens in the questions to Canada's
6 witnesses.

7 As Canada stated in its Opening, it was
8 apparent -- and as was apparent during the Hearing,
9 the reality of the Claimants' case is about the
10 Regulatory Regime, and that Regulatory Regime allowed
11 disclosure of Seismic Data at the end of the
12 confidentiality period. That is really what GSI was
13 concerned about, they wanted to limit access to the
14 Seismic Data from the Boards. They didn't want it to
15 be -- the confidentiality period to cease.

16 And over the years, the Claimants have tried
17 many different arguments before the Canadian courts
18 and in their arguments to the Boards, including that
19 data submitted to the Board should only be disclosed
20 pursuant to the Access to Information Act. They
21 argued that it was protected by copyright and
22 trademarks and many other arguments.

1 They also included contractual provisions in
2 their License Agreements to prevent oil companies from
3 accessing data from the Boards. Their issue was not
4 really about the copying, again it was about limiting
5 access and viewing of their Seismic Data.

6 When they invested in Canada, they knew the
7 rules of the road, and Mr. Einarsson's
8 cross-examination showed that, when they invested in
9 Canada, they were aware of the Regulatory Regime and
10 the Boards' practices. They didn't like it, as
11 Justice Eidsvik said in her judgment, and they did try
12 to change it, but that does not change the fact that
13 the Regulatory Regime predates their investment.

14 ARBITRATOR GOWDY: Could I possibly ask you
15 a question? And I apologize for interrupting so
16 early.

17 MS. TABET: So early.

18 ARBITRATOR GOWDY: But you mention "rules of
19 the road."

20 MS. TABET: Yes.

21 ARBITRATOR GOWDY: When precisely should GSI
22 have known that the copyrighted material was not

1 protected?

2 MS. TABET: Right. So I will touch upon it
3 in a few minutes, but also my colleague, Mr. Luz will
4 directly address the question a little bit later on.

5 ARBITRATOR GOWDY: All right.

6 MS. TABET: Thank you.

7 I think the arguments that you heard and
8 that are before this Tribunal are really all the same
9 arguments that were before the Canadian courts, except
10 that, instead of challenging the Regulatory Regime, as
11 they did before the Canadian courts, they are now
12 challenging the Alberta Decision and saying that it is
13 the Decision that was responsible for their business
14 failure.

15 But the damages case that they put to you
16 highlights that it's not really limited to the Alberta
17 Decisions and the unenforceability of their copyright
18 after the confidentiality period.

19 What they are seeking is -- are damages for
20 the failure of their business unrelated to any NAFTA
21 breach resulting from the Court Decision.

22 Now, before I proceed to discussing the -- a

1 summary of what you heard from the witnesses and the
2 Merits, I do want to emphasize that this Tribunal has
3 a limited jurisdiction on NAFTA Chapter 11 based on
4 the Agreement. NAFTA Chapter 11, specifically
5 Articles 1116, 1117, and 1121, and that it is -- that
6 is the basis for the consent to arbitrate. The
7 Tribunal is not a Court of Plenary jurisdiction.

8 It can only consider breaches of Chapter 11,
9 not breaches of Chapter 17, and I will come back to
10 this issue. It is also important to recall that it is
11 the burden of the investor to show a breach and
12 damages related to that breach, and, finally, that it
13 is also the Claimants' burden to fit within the
14 three-year time limitation period.

15 Now, notwithstanding the evidence that you
16 heard about the Alberta Decisions, and as Mr. Gowdy
17 recognized, this Tribunal does not -- does not sit in
18 appeal of the Alberta Decision, nor is it a copyright
19 infringement case. And a lot of what you've heard has
20 tried to portray this as inviting the Tribunal to
21 decide whether there was a copyright infringement.

22 But if the Courts were to consider that

1 question, in each case copyright would have to be
2 established, and this Tribunal cannot assume that
3 copying under the Regulatory Regime would have been a
4 copyright infringement, even if Judge Eidsvik had not
5 reached her Decision that the Regulatory Regime
6 prevailed and was a complete answer to GSI's
7 allegation of copyright violations.

8 And I'll come back to this point
9 specifically, but just to note at the outset,
10 you -- the Tribunal does not have evidence on the
11 extent of copying -- and I think Ms. Lemmens
12 acknowledged that -- and whether the Courts would have
13 found that other defenses to copyright infringement
14 like fair dealing were applicable or whether the
15 Courts would have rejected copyright infringements for
16 other reasons like time limitation.

17 Again, I will come back to this issue, but I
18 just at the outset wanted to state clearly our
19 position on the Tribunal's remit.

20 Similarly, the Tribunal does not have
21 jurisdiction to decide whether the Regulatory Regime
22 was fair or not, and you've heard this morning, the

1 Claimants now trying to expand the Tribunal's
2 jurisdiction into an equitable jurisdiction to
3 consider whether the Claimants suffered unfairness.

4 Canada's position is that this Tribunal does
5 not have the jurisdiction to do that. The only
6 breaches that are before the Tribunal are breaches of
7 Article 1110 and Article 1106, based on the Alberta
8 Court Decision.

9 Also keep in mind that the Claimants did not
10 allege a claim for creeping expropriation or a denial
11 of justice, and therefore, these cannot be considered
12 as a basis of liability vis-à-vis Canada. From a
13 procedural perspective, it would be unfair and
14 contrary to due process for the Tribunal to consider
15 other issues because Canada has not had a proper
16 opportunity to brief these issues.

17 The Claimants have alleged that the Alberta
18 Decision expropriated their business, GSI, and I think
19 this was well understood, and that is the case they
20 must meet.

21 Now, let me just start with answering
22 briefly the question that was put by Mr. Landau in the

1 Opening earlier -- I guess last week -- as to what it
2 means for the Claim, and that the Claimants are not
3 challenging the Regulatory Regime. And I'll provide a
4 brief answer, and I think we'll come back to many of
5 these elements later on, but essentially it means that
6 submitting and accessing data from the Boards after
7 the confidentiality period cannot be a breach.

8 So the Tribunal has to assume that companies
9 could access GSI's data, and you'll hear from Mr. Luz
10 regarding the evidence about the Boards' practices,
11 which was preexisting also on what access entails and
12 that it entailed copying.

13 Therefore, any impact of access under the
14 Regulatory Regime, including any diminishment in
15 licensing revenues cannot be caused by the Alberta
16 Court Decision and cannot be considered in the
17 analysis of whether the Alberta Decisions are a
18 breach.

19 We've already explained in the Opening
20 Statement why the Alberta Court Decisions are simply
21 an interpretation of the Regulatory Regime. I'll come
22 back to this point in a minute, but the result of that

1 essentially is that the Claimants' case must fail on
2 the basis of time bar because the Regulatory Regime is
3 outside of the limitation period but also on the
4 merits because the Alberta Decision was not taking
5 away any rights. Any effect basically on GSI's
6 copyright stems from the Regulatory Regime.

7 Now, I'll just turn to a bit of an overview
8 of what you heard from the witnesses over the course
9 of the last 10 days or so, and then I'll turn to
10 merits. First, starting with the Board witnesses, and
11 Mr. Einarsson. I think there are three main takeaways
12 from these -- testimony. First, that there was no
13 clearly-established right to copyright in Seismic Data
14 before the Alberta Court Decision.

15 I don't think this issue is contested.
16 We've heard from Ms. Lemmens herself say the same
17 thing, and it was also in written submissions to
18 Canadian Courts. The Board witnesses, however,
19 explained that, regardless of whether there was
20 copyright -- the position was clearly communicated to
21 GSI that, regardless of whether or not there was
22 copyright, the Board felt that it had the authority to

1 disclose the submissions under the Regulatory Regime
2 and then to provide copies.

3 Why didn't they take a position on
4 copyright? Well, simply because it's not within the
5 Boards' authority to take such a position. Really, it
6 was up to the Canadian Courts to make that
7 determination of whether or not there was copyright
8 and even the possibility of whether we saw copyright
9 could subsist in Seismic Data had not been clearly
10 established.

11 ARBITRATOR GOWDY: What are we to make of
12 the placards, of the notifications putting people on
13 notice that copyright protection may exist? What's
14 the relevance of that?

15 MS. TABET: Well, the relevance is that the
16 Boards themselves were not taking a position,
17 basically. They did not -- they -- there had been no
18 clear precedent that there could be copyright or that
19 there was copyright. So the Boards were not taking a
20 position, and Mr. Luz will come back to that, but the
21 language was, it may exist.

22 That was -- and the reason why the Boards

1 put up those placards is because GSI kept sending
2 letter after letter for many years saying -- and
3 submissions from their lawyers say, we believe this is
4 copyright protected. The Boards didn't take a
5 position on that. They just said, well, maybe it is,
6 maybe it isn't. But we still have the Regulatory
7 Authority to disclose the information.

8 The second point with respect to the
9 witnesses from the Boards and Mr. Einarsson is that,
10 when the Claimants invested, they had full knowledge
11 of the Regulatory Framework. Mr. Einarsson knew the
12 "rules of the road." And I'll come back to -- to
13 whether there was a change, but certainly they knew or
14 should have known that there was disclosure and that
15 it included copying. And again, Mr. Luz will address
16 that point.

17 And, thirdly, what was clear is that a lot
18 of the same allegations have been made starting in
19 1993, 1998, and certainly before 2010. There were a
20 lot of these same issues have been communicated back
21 and forth.

22 And Mr. Luz took Mr. Einarsson through

1 extensive documentation that clearly showed that GSI
2 was well aware of the practice and took issues
3 regarding certain of the Boards' disclosure practices,
4 long before the Common Issues Trial began.

5 Now, on the Experts, Mr. Hutchison -- sorry.
6 Professor Hutchison, Professor Sookman and -- sorry.

7 Professor Hutchison, Professor Bankes, and
8 Mr. Sookman, you heard from Mr. Sookman who provided a
9 very thorough and thoughtful in-depth analysis of
10 Judge Eidsvik's Decision. Mr. Sookman is a leading IP
11 practitioner in Canada and provided you some hopefully
12 useful insight.

13 On the approach to interpretation and
14 overlapping statutes and the role of presumptions at
15 the end of the day, there seemed to be very little
16 difference between the different Experts. All three
17 recognized that it was appropriate for the Judge to
18 apply the modern principle and that *lex specialis* was
19 one of the -- interpretive tool within the armory of
20 the judges and not a presumption of last resort.

21 While it appeared that, from
22 Professor Hutchison's written Report that he had a bit

1 of a different academic view, ultimately in his oral
2 presentation and in cross-examination, he appeared to
3 nuance that position. And Professor Hutchison also
4 confirmed that the Trial's -- Judge's reading of
5 under -- of the word "disclosure" under the Regulatory
6 Regime could include copying.

7 He said that it was one of the possible
8 readings of the term and that the meaning of that term
9 would have to be considered in light of the intended
10 goal of the Regulatory Regime to disseminate
11 information and how that could be achieved.

12 Now, in terms of the Seismic Data Experts,
13 you've heard from Mr. Hobbs and Mr. Uffen who are
14 Experts in the industry, maybe two key takeaways from
15 those testimony. First, that it highlighted that the
16 Claimants' allegation about the value of their Seismic
17 Data bore no relation to reality. And that really the
18 value of Seismic Data including any associated rights,
19 is in the first five years of acquisition at a time
20 where it is still covered by the confidentiality
21 period.

22 And the second takeaway is that the market

1 for GSI's Seismic Data was fairly small. There were
2 about 15 to 20 oil companies, as Mr. Einarsson
3 confirmed and, as a result, there is no question that
4 GSI's litigation strategy affected these
5 relationships, and that is not a result of the Alberta
6 Decisions.

7 And, finally, you heard from a damages
8 Expert, and my colleague Mr. Luz will address damages,
9 but just at this point, I want to note that Brattle
10 raised some very serious concern with the PwC
11 analysis. It is apparent from the analysis that they
12 conducted that the instructions that were provided to
13 Mr. Sharp are such that they haven't really tried to
14 measure the actual damages related to the Alberta
15 Decisions.

16 On his own admission, Mr. Sharp said that he
17 did not try to isolate the effect of the Alberta
18 Decisions. It's, therefore, not surprising that, when
19 you look at the result of PwC's damage analysis, it
20 actually yields a higher value for GSI than if it had
21 won the Alberta Decision and there was no breach. And
22 so Mr. Sharp's efforts to reimagine GSI's business

1 decisions prior to the Alberta Decision is of no
2 assistance to this Tribunal.

3 So let me turn to the applicable law, and
4 I'd like to reiterate, first, a point that we made
5 during the Opening, that the Tribunal's analysis on
6 expropriation must be conducted by considering the
7 challenged measure and the property right that is
8 alleged to have been expropriated.

9 In this case, again, to repeat it, but it is
10 important to keep in mind that the case -- the
11 Claimants' case is that the Alberta Decision
12 expropriated GSI's business. The evidence before you
13 and Mr. Sharp's instructions show that GSI's business
14 was essentially destroyed before and not because of
15 the Alberta Decision, and, in Canada's submission,
16 this should be the end of the matter.

17 Mr. Gowdy posed a question to Mr. Maniatis
18 about creeping expropriation, but, to be clear, the
19 Claimants have never alleged this, so that is not the
20 basis of their argument.

21 On expropriation through Court Decisions,
22 through judicial conduct, Canada has, in its written

1 submissions, provided many authorities in support for
2 its position that there can be no judicial
3 expropriation absent denial of justice. And as was
4 confirmed during the Opening, and again by Ms. Lemmens
5 this morning, the Claimants do not allege denial of
6 justice, nor do they -- their position is that they do
7 not need to do so to establish a breach of
8 Article 1110, but that position is unsupported, in
9 Canada's view.

10 The Claimants' case on this seems to be that
11 the Court Decision was novel and an unexpected change
12 of law, not that it was a pretense, not that there was
13 something fundamentally so egregious in the Court's
14 Decision that it was just a complete pretense and that
15 the Court's actions were so egregious that it cannot
16 be seen as having applied the law. But there's no
17 allegation of a pretense and, therefore, the Court's
18 Decision really cannot be the basis of a judicial
19 expropriation.

20 What the Claimants have relied on is the
21 Azinian Decision, and they've put a lot of weight on
22 that Decision to suggest that a breach of NAFTA

1 Chapter 17 could justify a breach -- could justify an
2 expropriation absent a denial of justice.

3 As Canada explained in its written pleading,
4 the Claimants' reliance on Azinian is misplaced. If
5 you read the whole Decision, it is clear that that
6 Award does not stand for the proposition that a breach
7 of another treaty obligation can be relevant to a
8 finding of judicial expropriation. And, in fact,
9 applying the Azinian standard, it says: "The
10 Claimants must show either a denial of justice or a
11 pretense of form to achieve an internationally
12 unlawful end." Even applying that standard, it's
13 clear that the Claimants do not even try to make that
14 case, and so that is not an Authority that is of
15 assistance to them.

16 In Canada's view, the
17 expropriations -- expropriation obligation and
18 Canada's responsibility in relation to the investor
19 under Article 1110 has nothing to do with Canada's
20 obligations to the United States and Mexico under
21 Chapter 17. Those are two separate obligations, and
22 the investor cannot challenge a breach of Chapter 17.

1 In fact, there is no intention of the NAFTA
2 Parties to bring in any other international obligation
3 vis-à-vis the investor, except those set out in
4 Chapter 11. And I do draw your attention to the Free
5 Trade Commission 2001 Note of Interpretation of the
6 NAFTA Parties. And although that interpretation
7 related to the Minimum Standard of Treatment, the
8 three NAFTA Parties clearly stated that a breach of
9 another international obligation or a breach of
10 domestic law does not amount to a breach of
11 Article 1105, the Minimum Standard of Treatment, and
12 that's a binding interpretation on Tribunals.

13 Now, cases that have considered judicial
14 expropriation have generally arisen out of situations
15 where the actual source of the deprivation, the cause
16 of the deprivation, lies in the conduct of the
17 judicial organ itself and there is no underlying
18 regulatory measure. So, for example, a lot of the
19 cases that are the Authorities before the Tribunal are
20 cases where the Court orders bankruptcy or seizure of
21 assets, and that is very different from the case here
22 where the Courts are interpreting an existing law.

1 The Claimants have also referred to the Eli
2 Lilly Decision. Again, Canada's position is that the
3 Award in Eli Lilly is not of great assistance at all
4 to this Tribunal or to the Claimants, in fact, because
5 two things.

6 First, the threshold that was set in Eli
7 Lilly was very high. There's a reference in Eli Lilly
8 to requiring -- to the fact that domestic courts
9 should be accorded considerable deference except in
10 very exceptional circumstances where there is clear
11 evidence of egregious and shocking conduct. That is
12 at RLA-25, in the Award's Paragraph 221 and 224. And
13 in that case, as we mentioned before, what was at
14 issue is judge-made law, so invalidation of a patent
15 based on the promised utility doctrine. There was no
16 underlying regulatory measure, per se, and, in any
17 event, the Court did not find judicial expropriation.

18 There was a reference to the Sistem case
19 again. We have addressed this extensively in our
20 written submission because that's the only case that
21 the Claimants use to say that there was a finding of
22 judicial expropriation, absent denial of justice.

1 But, as we noted, in the judicial review proceedings
2 of that case in Ontario Courts, the Canadian Courts
3 said -- commented on what was going on through the
4 Kyrgyz Courts and what was at issue in that Arbitral
5 Award and said that -- the Court made a comment about
6 the capacity of the Kyrgyz Courts to administer
7 justice in an even-handed manner. So there were
8 concerns about the Court's conduct.

9 And even in the Saipem case, which the
10 Claimants have also referred to, there was a reference
11 to extraordinary circumstances and, again, that was a
12 case of interference by the Courts with an Arbitral
13 Award -- an Arbitral Tribunal.

14 Now, with respect to the additional
15 Authorities that the Tribunal has invited the Parties
16 to consider and have now been put on the record, I
17 will briefly address them today. And hopefully we can
18 quickly address them, but we do reserve the right to
19 make additional submissions on these, if necessary, in
20 Post-Hearing Briefs.

21 Now, Vöcklinghaus and MNSS -- maybe I'll
22 start with those two first two cases, although the

1 factual circumstances, again, were very different from
2 the present scenario. Those two cases involved court
3 bankruptcy proceedings, and both those Decisions stand
4 for the proposition that there can be no judicial
5 expropriation in the absence of denial of justice.

6 So in MNSS v. Montenegro, there was
7 relatively little decision in the Tribunal's analysis
8 of the expropriation claim by the Courts, but the key
9 finding was that a court decision cannot be considered
10 a direct expropriation unless a denial of justice is
11 found. And because it had not been pled, the Tribunal
12 rejected the claim of expropriation.

13 And then in the Vöcklinghaus v. Czech
14 Republic case, the issue was -- of denial of justice
15 and expropriation were dealt together and it was clear
16 that the Tribunal considered that it must avoid the
17 assumption of the role of a court of appeal over
18 foreign domestic courts. It is equally
19 well-established that mere judicial error, even if it
20 results in serious injustice, does not amount to a
21 denial of justice. And the Tribunal goes on to
22 consider the Loewen case and what is required to find

1 denial of justice. What was referred to in the Loewen
2 case as "needing to show manifest injustice, gross
3 unfairness, flagrant and inexcusable violation, bad
4 faith, not judicial error, and a failure of the
5 judicial system as a whole." And on the basis of
6 that, the Tribunal concludes that it is a far cry from
7 this case. None of the Decisions of the Czech
8 Tribunal reviewed in the course of the Award could be
9 described as clearly improper or discreditable on any
10 objective analysis.

11 ARBITRATOR GOWDY: Could I ask you a
12 clarifying question?

13 MS. TABET: Please.

14 ARBITRATOR GOWDY: Denial of justice, is it
15 both a subset under fair and equitable treatment and
16 also both under the heading of judicial expropriation?
17 That phrase, does it exist as an element within both?
18 I understand one was not pled and one was, but does
19 denial of justice exist under judicial expropriation?
20 And if the answer is yes, what do you make of the
21 repeated or twice-used word "unfair" in the Common
22 Decisions Opinion?

1 MS. TABET: Okay. So, first of all, let me
2 start by saying unfairness -- denial of justice is not
3 unfairness. So -- and I want to -- I will come back
4 on the reference, the Judge Eidsvik's reference to the
5 Regulatory Regime and the words "unfair," how they're
6 used in that Decision. I will specifically come back
7 to that point.

8 But, to respond to your question, Mr. Gowdy,
9 yes, denial of justice is part of the Minimum Standard
10 of Treatment and, in the context of expropriation, an
11 expropriation, to be legal, has to be conducted in
12 accordance with the Minimum Standard of Treatment. In
13 addition, when a judicial measure is the basis for an
14 allegation of expropriation, what we're arguing is
15 that there has to be a denial of justice. That is the
16 only way that a court can essentially effect -- or you
17 can find an expropriation on the basis of the Court's
18 action.

19 Now, in other context, so if the Government
20 passes a law expropriating physical assets, for
21 example, or taking a license agreement, it may be
22 that -- so in that case, you would not need to find

1 denial of justice. You would consider whether there's
2 an expropriation. Yeah.

3 If I can go on to address the Certain
4 Iranian Assets case. In Canada's view, the ICJ
5 Decision is of limited relevance to this present case,
6 in part, because the factual circumstances in Certain
7 Iranian Assets were very different from the present
8 case. What was at issue was not only the actions of
9 the court but all of the measures that were taken by
10 the different branches of Government. And in that
11 case, the U.S. Courts were not acting in an
12 adjudicatory role in the sense of interpreting
13 existing legislation. They were applying the
14 existing -- they were applying measures from the U.S.
15 Government, Executive Orders. And the ICJ made it
16 very clear that it was considering the legislative,
17 executive, and judicial acts adopted by the United
18 States as a whole.

19 And secondly, the ICJ case has to be
20 understood in light of the different jurisdiction of
21 the International Court of Justice, which has a
22 broader jurisdiction than that of NAFTA Chapter 11

1 Tribunals. Obviously, the ICJ case was a
2 State-to-State dispute, not an investor-State dispute,
3 and, therefore, obligations that States owe to each
4 other are different than what an investor can pursue
5 vis-à-vis the State.

6 Again, the approach that the ICJ adopted by
7 looking at the whole of what the Government did could
8 not be applied in this case because the Regulatory
9 Regime and the actions taken by the Boards and any
10 other measures other than the Alberta Court Decisions
11 are not challenged and are time-barred.

12 Now, there was a discussion this morning
13 about the dissenting Opinions of Judge Bhandari. I
14 also want to briefly talk about the Opinion of ad hoc
15 Judge Barkett and Judge Charlesworth. But, as a
16 general comment, the ICJ did not adopt a very thorough
17 analysis of investment Tribunals' jurisprudence and/or
18 the doctrine on the issue of judicial expropriation.
19 As Judge Bhandari says in his Opinion, he criticized
20 the majority and referred to -- so he criticized the
21 majority as being, you know, short on discussion of
22 the precedence and he said: "The Court should be

1 extremely cautious when making such broad statements
2 of law." And he says that: "It is not -- the
3 majority Decision was not necessarily in keeping with
4 the prevailing understanding of expropriation in
5 connection with Decisions by domestic court."

6 And, finally, he goes on to say that -- in
7 reference to Paragraph 184, where the Court had
8 referred to this element of the legality, he goes on
9 to say, "it's a debatable proposition," and he says:
10 "The prevailing understanding amongst international
11 tribunals is that, in order for a judicial decision to
12 constitute an expropriation, an element of
13 international unlawfulness must taint the judicial
14 Decision itself."

15 So I think that's an important distinction
16 here, and the -- he goes on, at Paragraph 6 -- it's
17 not in the slides before you, but he says: "The
18 Decisions of investor-State Arbitral Tribunal, the
19 primary international tribunals to adjudicate
20 expropriation claims today largely accepts the
21 requirement that the domestic judicial Decision itself
22 must taint -- must be tainted by unlawfulness."

1 And he concludes that, after a long
2 discussion of the different jurisprudence in
3 investment Tribunals, that most international
4 Decisions support a stance different from the one
5 adopted in this Judgment.

6 Now, if we go to the other separate Opinion,
7 I'll maybe just quickly talk about Judge Barkett's
8 decision -- or, his Opinion, sorry. It says
9 that: "Judicial Decision does amount to an
10 expropriation if it applies legislative or executive
11 measures that infringe international law and thereby
12 causes a deprivation of property. I find no support
13 for such a stark and extraordinarily broad
14 pronouncement that recasts the notion of judicial
15 expropriation."

16 He goes on to say that there has to be --

17 MR. LANDAU: She. She.

18 MS. TABET: I'm sorry -- a failure in the
19 administration of justice amounting to a denial of
20 justice.

21 Yes, thank you, "she."

22 Okay, regarding the Frontier Petroleum case,

1 Canada's view is that the Decision is not entirely
2 relevant as it did not involve a judicial
3 expropriation claim. And I don't want to spend too
4 much time on Professor Douglas' very
5 well-thought-through article, which was not in the
6 record but we thank Mr. Landau for bringing it to
7 everyone's attention. And I think there, if we can go
8 to the next slide, please, and the conclusion of
9 Professor Douglas, it is very clear that there must be
10 a denial of justice to find a breach based on judicial
11 conduct. And he goes on in the -- if we can go to the
12 next slide -- to explain why it would not make sense
13 to consider other breaches of other treaties and that
14 really no delictual responsibility towards foreign
15 nationals can arise from other treaty breaches.

16 So I will conclude on these Authorities and
17 just, now, if I may turn to the Claimants' arguments
18 that the Alberta Decision expropriated GSI. So what I
19 will do is I will quickly go through the nature of the
20 Decision and then address the points about the use of
21 terms "unfairness" and "confiscatory," and then talk a
22 little bit about substantial deprivation. And then I

1 will turn it to Mr. Luz.

2 The only evidence that you have before you
3 regarding the effects of the Alberta Decision relates
4 to the Claimants' inability to pursue copyright claims
5 for disclosures under the Regulatory Regime.

6 And I want to start from the proposition
7 that you cannot expropriate a right to litigate. You
8 can only expropriate a property interest. And the
9 fundamental problem here is that there is -- the
10 Claimants have not established an expropriation of
11 their copyright. There was no finding that their
12 copyright was expropriated. The evidence does not
13 support that. And, in any event, more importantly,
14 because their case is about expropriation of GSI, they
15 have not established a substantial deprivation of
16 their investment in GSI.

17 They argue that, after the Alberta
18 Decisions, GSI had no value, and that the Alberta
19 Decision negatively affected their ability to sue for
20 a copyright infringement. But they don't explain how
21 that caused a substantial deprivation of GSI.

22 So the two points I will make: The first

1 one is that the Decision did not take away property
2 rights. It was an interpretation of the Regime and
3 how the Regime affects copyright after the disclosure
4 period, and really only certain elements of copyright
5 after the end of the confidentiality period.

6 And the second point I will make is explain
7 why it is not a substantial deprivation of GSI. But,
8 I think, it is important to see that there's a logical
9 leap between the argument that the Alberta Decision
10 affected or substantially deprived GSI of their
11 business and their Damages Claim because they really
12 have not provided any evidence that goes to the latter
13 point.

14 ARBITRATOR GOWDY: Would you be willing to
15 extrapolate on why a potential litigation claim is not
16 a property interest?

17 MS. TABET: Well, in Canadian law, a
18 litigation claim is not a property interest. The
19 copyright is a property interest, but a litigation
20 claim is not. And Canadian law would be governing in
21 terms of determining what is a property right, even
22 for the purpose of this NAFTA Claim.

1 So on the nature of the Alberta Decisions,
2 you heard from the Experts, Mr. Sookman,
3 Professor Hutchison and Professor Bankes, as to how to
4 understand the Decision. We know that there was -- in
5 the cross-examination of Mr. Bankes, there was
6 attention brought to the Judgment roll itself.

7 It's evident that the finding was that it
8 was a complete answer. There was no finding of
9 expropriation of copyright. And Mr. Sookman
10 explained, also in his testimony, that the Judgment
11 didn't really effect a taking.

12 And when you look at how Judge Eidsvik
13 arrived to her Decision, I think this was very telling
14 in the cross-examination of Professor Hutchison,
15 frankly, even Professor Bankes.

16 If we can go to the next slide.

17 Professor Hutchison said -- agreed that it
18 was not a mechanical exercise. Statutory
19 interpretation is not a mechanical exercise. Judges
20 have to exercise their judgment. I think everybody
21 agrees on that.

22 There was also agreement that the Judge

1 actually set out to apply the Modern Principle and to
2 identify the intent of Parliament.

3 If we can go to the next slide.

4 And Mr. Hutchison actually acknowledged that
5 Judge Eidsvik did a very good job at canvassing the
6 legislative record to look at the intent of
7 Parliament. And he then, you know, goes on -- I mean,
8 I think there was a bit of discussion of, you know,
9 when it was appropriate to look at *lex specialis*?

10 If we can go to the next slide.

11 As I mentioned, at the end of the day, it
12 seems that all three Experts agreed that *lex specialis*
13 is one of the tools that can be used and that it's not
14 a presumption of last resort. So there is nothing
15 unusual in what Judge Eidsvik did.

16 Now, on the issue of whether there was a
17 conflict. There was a bit of disagreement as to
18 whether there was a conflict. But as Professor Bankes
19 recognized, that's something that any judge -- judges
20 often disagree on if there's a conflict or not. That
21 is not -- you can reasonably disagree as to whether
22 there's a conflict.

1 And so Canada's submission is that really
2 this is -- it would be inappropriate for this Tribunal
3 to revisit the Decision because, in its view, there is
4 no conflict.

5 Professor Hutchison did suggest that
6 Judge Eidsvik should have considered other possible
7 interpretations to avoid the conflict. And one of the
8 things he suggested was viewing access. And you'll
9 recall this reference to the memory test. But he said
10 it would depend on whether it could accomplish the
11 purpose of disseminating information, which was the
12 object of the Regulatory Regime.

13 And he acknowledged that Judge Eidsvik,
14 having considered in detail the legislative history,
15 was of the view that the intent of Parliament would
16 not be met by simply allowing access.

17 He then went on to suggest that, perhaps,
18 providing digital copy or internet copy could be an
19 option. I don't know if that was ever discussed or
20 suggested. But, as we understand the evidence in the
21 record, GSI was really opposed to providing any of the
22 information digitally. And I don't recall

1 Professor Hutchison ever talking about a "pay wall."
2 So I think Ms. Lemmens suggested that, but it is not
3 in the record.

4 And certainly, as I said, the evidence is
5 GSI didn't want access to the information, digitally
6 or otherwise.

7 Now, Mr. Einarsson in his testimony said he
8 didn't know what the word "disclosed" meant in the
9 CPRA. But in his cross-examination, Mr. Luz took him
10 through many transcripts and exhibits-- sorry, many
11 exhibits that showed he was well aware of the copying.

12 And I refer you to the Transcripts starting
13 at Page 291 and to Exhibit R-269, a letter to the
14 Boards in 1997 where the head of their marketing
15 department said that -- was asking the Boards to only
16 provide paper copies and limit the copying to oil
17 companies.

18 And in Mr. Einarsson's testimony, he said
19 that this VP Marketing in charge of licensing -- what
20 he was representing to the Board did not actually
21 represent the position of their company. And he
22 said: "Our position is that the data is confidential

1 and shouldn't be disclosed at all." That is really
2 what they were after. Their concern was not about
3 copying. It was about disclosure and confidentiality
4 periods.

5 And then on the meaning of the word
6 "disclosed." If you go to Professor Hutchison's
7 testimony, he clearly said "disclosed" could mean any
8 one of the things. So it's not an unreasonable
9 interpretation. He said it could mean copying. It
10 depends on context.

11 His criticism of Judge Eidsvik was that he
12 didn't think that the Judge was thorough enough on the
13 ordinary meaning, but he didn't suggest that it was
14 necessarily an incorrect reading of the words.

15 Ms. Lemmens said that it was a surprising
16 result to the legal community. I don't know what this
17 comment is based on. There is certainly no evidence
18 of it.

19 There was -- Professor Bankes provided some
20 blogs attached to his Reports that were in
21 disagreement with the Court's Decision. Frankly, I'm
22 not aware of any Court Decisions that -- in the legal

1 community that cannot be criticized or discussed. I
2 don't think that means that it is egregious or
3 surprising to the legal community.

4 And, in fact in response to
5 Professor Landau's specific question to -- sorry,
6 Mr. Landau's question to Professor Hutchison, as to
7 whether there was anything shocking in the Alberta
8 Decisions, Professor Hutchison did not say there was.

9 ARBITRATOR LANDAU: Sorry.

10 MS. TABET: I felt you wanted to interrupt.
11 Please.

12 ARBITRATOR LANDAU: I was trying not to be
13 obvious, but I wasn't sure. I missed my moment and
14 now I want to ask you a question still. Again, I'm
15 going to apologize for this one.

16 Can I take you back to an earlier slide, if
17 you'll forgive me for this. Slide 26. I've got it as
18 PDF 26. I don't know if that is -- yes. Yeah.

19 When thinking about the effect of the
20 Decision itself, I'm not clear, in a sense on this.
21 And I'm not sure how assisted I am by this slide with
22 this answer from Mr. Sookman. The question is -- he

1 testified: "GSI has full copyright and other
2 proprietary rights over its Seismic Data, subject, of
3 course, to the effect of the License."

4 So the question is, why isn't it right that
5 the Alberta Court has taken away something? It is not
6 full -- couldn't it be said, it is not really full
7 copyright anymore? And what is the position now in
8 terms of GSI's ability to pursue infringement?

9 MS. TABET: So I think the -- what I will
10 say, in answer to your question, is that the Court
11 does not expropriate the copyright. It is - it's
12 true, however, that certain copyright claims, certain
13 infringement claims, can no longer be brought.

14 So that's to the extent that a company is
15 getting copies from the Board, or making copies of
16 what they get from the Board. That is, in
17 Judge Eidsvik's Decision, that is not a copyright
18 infringement and those claims cannot be pursued.

19 But copyright is broader than that. I don't
20 want to speculate as to exactly what is left and what
21 other types of copyright infringement could be made.
22 But one of the things that we know is that, for

1 example, we have heard a lot of commentary about
2 Secondary Submissions and vectorization.

3 I don't think Judge Eidsvik addressed that.
4 There is nothing on that in the Common Issues
5 Decision. And so to the extent that these issues, for
6 example, could be said to be a violation of GSI's
7 copyright, I don't think the Decision addresses it.
8 And, you know there's, frankly, there is no evidence,
9 exactly, as to what Secondary Submissions or
10 vectorization is happening.

11 And that's -- you know, whether it's a
12 violation of the licensees getting certain data from
13 GSI and filing it, that could be a violation of their
14 contractual agreement. But I don't think the Decision
15 deals with these issues. And so there are many
16 potential other issues that mean that the copyright
17 itself is not expropriated.

18 The other thing is, it is important to keep
19 in mind that, you know, when you look at GSI's
20 copyright, they -- which we find out through the
21 Alberta Decisions, they can actually have copyright in
22 Seismic Data.

1 A lot of the data they purchased in 1993
2 from Old GSI was data from the 1970s and '80s. So by
3 the time that the Alberta Decisions gets issued, the
4 data is like 40, 50 years old. So the period of time
5 of -- maybe I'll address this in substantial
6 deprivation, but the period of time of copyright is,
7 like, is limited that is left.

8 ARBITRATOR LANDAU: Just getting back to
9 this direct examination presentation. The
10 sentence: "In my view, GSI has full copyright and
11 other proprietary rights over its Seismic Data," one
12 could say might not be quite accurate because it may
13 have copyright but it can't assert it in all respects
14 in the way it might have been before.

15 MS. TABET: True. And I think Mr. Sookman
16 says except to the extent that the Regulatory
17 Regime -- it conflicts with the Regulatory Regime.

18 ARBITRATOR LANDAU: Yeah. All right.

19 MS. TABET: Yes.

20 So there was some question as to the use of
21 different terminology in the -- sorry, I have many
22 slides. I may skip over some of them.

1 But I think one of the points that we wanted
2 to emphasize is that the Judge could have also
3 found -- and it's not clear whether the Judge found
4 that there was an implied license. We have referred
5 to this further or in the alternative finding. But
6 even if the Judge had not reached the Decision, based
7 on *lex specialis* and the conflict, the same result
8 could have been achieved through a finding of Implied
9 Licensing.

10 I think there was a question this morning as
11 to whether there was a finding of Compulsory License
12 or Implied License? It appears that, although the
13 terminology was not entirely clear by
14 Judge Eidsvik -- and I don't want to speculate -- but
15 that there was a recognition that the participation of
16 GSI in the Regulatory Regime meant that, in some way,
17 whether voluntary or not, they consented to a License.
18 And I'll come back to this a little later.

19 But, you know, if you look at the TGS-Nopec
20 case in the United States, which was about the
21 Canadian Regulatory Regime -- U.S. company accessing.
22 It was litigated in the U.S. because of the U.S.

1 application of copyright in the U.S. over this same
2 data. But the Judge clearly found, on the basis of
3 this same Regulatory Regime that we're discussing
4 here, that there was an Implied License; and,
5 therefore, it came to the conclusion that there was no
6 taking of copyright.

7 So I want to leave the Tribunal on this
8 point with a consideration that even though the
9 Judge's main finding is on the basis of conflict, the
10 result could have been the same and, potentially, was
11 the same on the basis of Implied License.

12 Now -- sorry, I'm jumping all over the
13 place. Let me organize my notes for a moment.

14 Yes. Perhaps, on this point of Implied
15 License, Professor Hutchison -- if we can go to
16 Professor Hutchison's Transcripts at Page 822. He
17 certainly was commenting on the Judge's finding there
18 and saying that it was a fairly novel way of looking
19 at it, but he didn't disagree with the concept that
20 you can have an Implied License from
21 participation -- knowingly participating in a regime.

22 And, again, at R-587.

1 If you look at GSI's own submissions in
2 their appeal -- Leave to Appeal to the Supreme Court
3 of Canada -- they say that that was what Judge Eidsvik
4 found. That there was a finding that the Regulatory
5 Regime was an Implied License.

6 Now, the Claimants obviously said, we were
7 arguing anything just so we can get the Court to
8 consider it. But, with all due respect, I think it is
9 telling that that is, at least, a possible reading of
10 the Judge's conclusions.

11 Now, it's also important to keep in mind
12 that what the Courts were doing here is interpreting
13 the Regulatory Regime and not creating any new law.
14 And they were engaged in statutory interpretation and
15 giving effect to the words of the statute.

16 And it's also -- if you look at what
17 Mr. Sookman said on the -- yes, thank you. That
18 slide. When the Court Decision is issued, that is
19 when there's a recognition of the right. But at the
20 same time, there is also a recognition that the right
21 is limited by the Regulatory Regime.

22 So in a way, I think Mr. Sookman described

1 it as being encumbered. But regardless of how you
2 describe it, I think this Tribunal cannot ignore the
3 fact that, when they made the Decision prior to the
4 Alberta Decision, they could have no investment-based
5 expectation regarding copyright because that wasn't a
6 clearly-established right. And if the Court cannot be
7 said to have created a right, this copyright, then it
8 can also not be said to have taken it away.

9 Let me just turn to the terms "unfairness"
10 and "confiscatory" because there were a few questions
11 by Mr. Gowdy on the use of these terms and the
12 Decisions. And the word "unfair" does, indeed, appear
13 once or twice in the Judgment. But, in fairness, when
14 you read it in context, it is not clear if the Judge
15 is referring to GSI's view that the Regulatory Regime
16 was unfair or if she is simply stating that, if the
17 Regulatory Regime was unfair, GSI could have chosen
18 not to participate.

19 Regardless, as I mentioned earlier, this
20 Tribunal does not have jurisdiction to decide on the
21 fairness of the Regulatory Regime. Now, in the
22 context of expropriation, what is relevant are whether

1 there are reasonable investment-backed expectations
2 regarding GSI's rights.

3 What was the quid pro quo or the
4 investment-backed expectation? They were -- that
5 there would be a confidentiality period and that there
6 would be access to Crown land and that in exchange for
7 that Seismic Data would have to be submitted to the
8 Board and could be disclosed at the end of the
9 confidentiality period.

10 You heard from Mr. Hobbs in his testimony
11 that different Regulatory Regime have different
12 confidentiality periods, and that is really the main
13 consideration for companies in deciding to invest.

14 And when he was asked about copyright, he
15 said that the confidentiality period was really the
16 relevant quid pro quo, not the copyright. He
17 explained that copyright was not a concept that was
18 used very much in the industry.

19 The basic rules of the game on this
20 confidentiality period did not change, and the
21 obligations to comply with the Regulatory Regime were
22 a condition that were referred to in the

1 authorization. And Mr. Einarsson did testify that the
2 rules were not fixed, but that was an issue that was
3 considered by the Alberta Courts. And as
4 Professor Sookman noted in his response to Mr. Gowdy's
5 question, Judge Eidsvik actually considered the issue
6 and made a factual finding that the basic rules remain
7 essentially the same. That's at Paragraph 316 of the
8 Decision.

9 Again, as she says: "It is true that the
10 period of disclosure changed over the years, but only
11 in favor of the Claimants." And so, in cross you
12 heard from Ms. Lemmens. She was asking questions and
13 suggested that there was a bit of a change of
14 practice. But, to be clear, it's not evident what the
15 change of practice is. I think what she was referring
16 to is the fact that there was potential discussions of
17 going to a digital repository. This didn't happen,
18 and in any event, GSI's data was never released
19 digitally or otherwise, except as it had been on -- in
20 paper copies.

21 ARBITRATOR GOWDY: Could I ask you one
22 follow-up question? Because there is another part of

1 the Decision where the Court says: "It is perhaps
2 true the provisions for submission have become more
3 onerous over time and the quality of the material
4 submitted have become better further encroaching on
5 GSI's ability to license its data to others. But the
6 provisions have always been there."

7 So I thought I understood your previous
8 comment to mean that the changes were to the "benefit"
9 of GSI, but this suggests otherwise.

10 MS. TABET: So in terms of the submissions
11 themselves, I think the evidence in the record is that
12 the submissions themselves to the Board are different
13 from what is disclosed to the public. And that is the
14 submission themselves to the Board are not really at
15 issue in this Arbitration. What is being challenged
16 is the access and disclosure to certain information.
17 So what the Board gets from the companies is not the
18 same thing as what they disclose or what is -- becomes
19 publicly available.

20 Now, if I can just address the use of the
21 term "confiscatory." I already referred to this
22 earlier in the Judgment-roll. You know, we know that

1 the term "confiscatory" is not used. There is no
2 determination that there's an expropriation of
3 copyright. When the term is used in the context of
4 Judge Eidsvik's decision, it is in reference to
5 Senator Hays' comments. And, I think, Mr. Gowdy, you
6 put a question to Professor Hutchison on what it means
7 to use the term "confiscatory," and he
8 responded: "I'm not sure what the legal significance
9 of what that is."

10 Now, in truth, that term was used without
11 any specific definition or because it is often just
12 used -- when it is used in the decision, it is with
13 reference to what Senator Hays said. But Mr. Sookman
14 explained that, when it comes to compulsory licenses,
15 there was a bit of perhaps lack of clarity in the
16 terminology that was used, but that, in the strict IP
17 sense, it could not be understood as a finding that
18 the Regulatory Regime took the IP right.

19 After the Alberta Court Decision, the
20 Claimants went to the federal court, and they
21 challenged -- they asked, amongst other things, for a
22 declaration that the Regulatory Regime amounted to a

1 de facto expropriation of GSI's copyright. That is at
2 C-298.

3 And they sought compensation for that in
4 respect of that alleged expropriation. Now, we don't
5 know what would have come out of these proceedings.
6 What we have is an order from a prothonotary that
7 struck the Statement of Claim with leave to amend on a
8 summary basis.

9 And then that striking of the claim on the
10 summary basis was appealed to Judge Boswell. That is
11 R-434. And, but the case was later dropped and so
12 there was no decision on the issue of whether the
13 Regulatory Regime amounted to a de facto
14 expropriation.

15 I want to just maybe - just give me a
16 second.

17 I will spend a few minutes on the
18 substantial deprivation before I turn it to Mr. Luz to
19 address some of the time-bar and damages issues.

20 On substantial deprivation, we've already
21 touched upon it a little bit earlier, but the
22 Claimants have never attempted to measure the lost

1 value of their copyright in disclosed Seismic Data.

2 The harm caused by the Alberta Decision, if any, would
3 be the difference between the value of GSI's Seismic
4 Data after the confidentiality period if viewing, but
5 no copying was allowed, versus if copying is allowed,
6 as was determined by the Alberta Decision.

7 So you would have to look at the value of
8 the copyright over Seismic Data in 2017, keeping in
9 mind that by that point, as I mentioned, the Seismic
10 Data from the 1970s and '80s, which represented 50 to
11 70 percent of their Seismic Data library was 40 to
12 50 years old, and the copyright period was almost
13 over.

14 With respect to Copyright Infringement
15 Claims that had already been brought to the Courts,
16 this requires consideration of the likelihood of
17 successful Copyright Infringement Claims. And as I
18 mentioned, even if Judge Eidsvik hadn't reached her
19 conclusion based on conflict of legislation, she could
20 have concluded that, or perhaps did, that there was an
21 Implied License, therefore, no copyright infringement.

22 We don't know what would have occurred had

1 she reached her -- if this had been upheld on appeal.
2 But, you know, again the appellate body did consider
3 it and conclude that it was correct on the merits.

4 We also don't know what the damages would
5 have been for Copyright Infringement Claims. We heard
6 from the Claimants that they think the damages would
7 have been extraordinary, but the only case that
8 actually commented on potential copyright was in the
9 CalWest case where the Judge said, well, if I'm wrong,
10 on this -- the Regulatory Regime prevailing over
11 copyright, I would have found nominal damages.

12 And the fact that the copyright wasn't clear
13 when it was alleged to have been infringed might have
14 been a consideration. It was certainly a
15 consideration in the CalWest Case.

16 So because their case is about substantial
17 deprivation of GSI, and they don't establish that the
18 lost value of their copyright represents a substantial
19 deprivation of the value of GSI, the expropriation
20 claim cannot succeed. The Tribunal would have to look
21 at the value of GSI immediately before the Alberta
22 Decision, and after the Decision, and determine if it

1 is the Court Decision that resulted in a substantial
2 deprivation.

3 Now, we heard from Mr. Einarsson earlier
4 last week, in his own words, that GSI is still a going
5 concern. And he said that they still have Seismic
6 Data which they can license. And I'm not sure what
7 the Claimants' case is, but it seems to be that, the
8 Seismic Data they have still has some value, even
9 though it's old. So it is -- it seems to be difficult
10 to reconcile this with their expropriation claim
11 that -- the fact that they are saying that GSI's
12 expropriated but it's still a going concern and still
13 has the Seismic Data.

14 The evidence on the record actually shows
15 that the Company was already substantially struggling
16 in 2008-2010, leaving aside the word "going-concern,"
17 and we have no evidence that they were struggling
18 because of the Regulatory Regime.

19 In fact, when you look at the evidence, you
20 have to keep in mind the fact that the old data that
21 they purchased was already public when they purchased
22 it, so there was already a disclosure in copying when

1 they purchased the data. So that can't have been the
2 cause of their struggles. And in fact, the new data
3 that they purchased, that they acquired starting in
4 1998, as you heard, had not started to become public
5 until much later, until after 2008.

6 So it can't be that it is the making of the
7 data confidential and/or allowing copying if that
8 resulted in the Company not being a going concern
9 around 2008-2010.

10 The Company was really, by that time, only a
11 litigation company. They weren't acquiring any new
12 data, and I think that's something that the Tribunal
13 must consider in their substantial deprivation
14 analysis.

15 The Alberta Decision didn't take physical
16 assets like vessels or reprocessing equipment. It
17 didn't affect the contract claims which were a big
18 part of what GSI says the value of its litigation
19 claims were. And it didn't affect GSI's ability to
20 contractually prevent companies from accessing the
21 data from the Board because they had these contractual
22 provisions already in their licensed agreements, which

1 they already had license agreements with many of the
2 players in the industry that included provisions
3 saying you can't go and access data from the Board.

4 The Alberta Decision only affected the very
5 small limited portion of the copyright claims. And it
6 did not take their Seismic Data library.

7 Now we know the value of their copyright has
8 to be lower, necessarily lower, than the value of the
9 Seismic Data, and you would have to accept that that
10 Seismic Data would no longer be confidential and can
11 at least be accessed, if not copied, because the
12 Regulatory Regime is not being challenged.

13 Maybe, to conclude on this point of
14 substantial deprivation, Brattle showed you -- the
15 Brattle Group showed you a graph that showed that most
16 of the licensing, but not all, followed very closely
17 the year of data acquisition, within a year after the
18 data acquisition. That's when most of the licensing
19 was happening. And they also showed you that there
20 was not much licensing, if any at all, happening after
21 2012.

22 And you heard from Mr. Uffen and Mr. Hobbs

1 on this. Again, companies prefer more recent data,
2 and Mr. Hobbs explained that the depreciation of the
3 Seismic Data was really within the first five years at
4 the time where the confidentiality period protects it
5 from disclosure.

6 So it is difficult to reconcile all of this
7 with the substantial deprivation claim that the
8 Claimants have brought.

9 I won't go over the Article 1106 claim
10 because we have addressed it at length in our Opening
11 Statement, and there wasn't much in the testimony that
12 you heard in the last 10 days or so that really went
13 to the issues regarding 1106. But, to reiterate, that
14 claim cannot be sustained if you accept that the
15 Regulatory Regime cannot be challenged, as the
16 Claimants have said.

17 All right, I will now turn the floor over,
18 unless there are questions on this section, I will
19 turn the floor to Mr. Luz.

20 PRESIDENT WALLGREN-LINDHOLM: I actually
21 have a question that is from earlier on in your
22 presentation, Ms. Tabet, and I thought this was a good

1 moment before we change speaker to ask it.

2 You said something, and I'm paraphrasing
3 freely, that it was not within the Boards' authority
4 to take a position on copyright.

5 Now, my question is, is it conceivable that
6 the AIA could have applied to disclosures of Seismic
7 Data by the Boards?

8 MS. TABET: The Access to Information Act?

9 PRESIDENT WALLGREN-LINDHOLM: Yes.

10 MS. TABET: So that issue was litigated and
11 the domestic courts found that it was not limited to
12 disclosure -- that the disclosure was not limited to
13 the Access to Information process.

14 So, in fact, in 2003 Judgment-- I think that
15 is C-197, Judge Gibson confirmed that, after the
16 expiry of the confidentiality period, it was open to
17 the Boards to make Seismic Data available. That's
18 back in 2003 and didn't have to go through the Access
19 to Information process.

20 PRESIDENT WALLGREN-LINDHOLM: But had
21 it -- if the Access to Information Act would apply in
22 some instances -- or could have applied prior to the

1 Courts deciding that, no, what would the Boards then
2 have done? Then they probably would have had -- the
3 onus would have been on them to manage whether there
4 was copyright or not.

5 MS. TABET: No, not necessarily. I think
6 the issue would have been whether -- if -- under
7 Access to Information, there are provisions that
8 allow, if there's third-party information for
9 consultation before release, but that would have been
10 contrary to the whole point of allowing a
11 dissemination of information.

12 So, again, I think that's the reason why
13 Judge Gibson concluded that there was -- that was not
14 the applicable process, that the CPRA actually allowed
15 for disclosure outside of the Access to Information
16 Act.

17 PRESIDENT WALLGREN-LINDHOLM: Thank you.
18 Yes. The reason I ask is I recall there was, from the
19 Einarssons there was a consistent view for a lengthier
20 period of time, I believe, that that act applied, to
21 my understanding, without checking that, based upon
22 the fact that their trade secrets, for example, were

1 protected.

2 MS. TABET: Yes. I do think that was one of
3 the many arguments that GSI was making to the Boards
4 to prevent release of their information, and it was
5 litigated before Canadian courts. As I said, it
6 resulted in a judgment in 2003 on this issue.

7 PRESIDENT WALLGREN-LINDHOLM: Thank you very
8 much, Ms. Tabet.

9 And then we have another question, namely,
10 we need to take a break at 3:00 p.m. And this was, of
11 course, tribunal time as you know. We need to take a
12 break at 3:00 p.m. So should we take it now maybe and
13 then we will return to Mr. Luz in 15 minutes from now,
14 which is 3:05 p.m.

15 MS. TABET: Thank you very much.

16 PRESIDENT WALLGREN-LINDHOLM: Thank you.

17 (Brief recess.)

18 PRESIDENT WALLGREN-LINDHOLM: Mr. Luz, may I
19 ask you to continue the Closing Statement of
20 Respondent?

21 MR. LUZ: Thank you, Madam Chair. Can you
22 see me over the thing? I'm going to sit up as

1 straight as I can. So we -- I get the full --

2 (Overlapping speakers.)

3 PRESIDENT WALLGREN-LINDHOLM: I shall also.

4 MR. LUZ: With the full eye contact with the
5 Tribunal.

6 I'm going to start off answering a question
7 that Arbitrator Gowdy brought up on the very first day
8 and brought up again this morning as to what point was
9 it clear that there was a conflict between the view of
10 the Boards with respect to their authority under the
11 Regulatory Regime to release Seismic Data and GSI's
12 view that its data was confidential, proprietary,
13 trade secrets, and, in particular, copyright.

14 The answer is 1999. That is the date -- the
15 year in which this whole thing came together. Now, I
16 think Madam Chair alluded to an earlier position taken
17 by the Claimants, by GSI, in 1993. It was a letter in
18 November 1993 by Parlee McLaws that took the position
19 that the Boards did not have the authority to release
20 GSI's Seismic Data.

21 Of course as we know, the Boards continued
22 to do so for the '90s, and then, of course, the

1 Claimants came back and I took Mr. Einarsson through
2 the various documents in 1997, 1998, and the key
3 document -- and it goes on to the next slide here is
4 when the Claimants --

5 ARBITRATOR GOWDY: Before you leave that,
6 can I ask you one follow up or, perhaps, two?

7 MR. LUZ: Please do. Please do.

8 ARBITRATOR GOWDY: When did the placards
9 begin to appear? And what, if any, impact could that
10 have had on GSI? And then the second question would
11 be, was there any correspondence between Canada and
12 GSI that may have led to any ambiguity on GSI's behalf
13 as to what you say was clear in 1999?

14 MR. LUZ: Sure. So I think the Board
15 witnesses talk about the notices that were going up,
16 and this was all in the early 2000s, and I'm going to
17 get to some of it very soon in answer to your
18 question. And I think the answer to your question as
19 to whether there was any ambiguity is no.

20 In fact, as we'll see in just a moment, even
21 Mr. Einarsson knew that the Boards were consistently
22 falling back on their position that they had the

1 authority under the Regulatory Regime to release the
2 data. So I'll get to it in a second, but just let me
3 go back to how this whole thing went in.

4 So the Code Hunter Wittmann memo from 1998
5 that GSI submitted to the C-NLOPB, that was the very
6 first elucidation of the copyright position and took
7 that position. And then we see that the Board
8 received the memo, thought about it. There was more
9 correspondence over the course of the year as the
10 Board continued to release the Seismic Data.

11 And then there was a series of
12 correspondence between the Board and GSI. And I want
13 to note -- and it's pretty interesting because the
14 Claimants distributed this timeline this morning. GSI
15 did not have notice that it could not enforce its
16 copyright until the Alberta Decisions.

17 We are going to say something about it
18 because we didn't realize there was going to be an
19 additional timeline submitted, but, in fact, doing so
20 is quite telling, just like there were two paragraphs
21 missing in the PricewaterhouseCoopers Report, there
22 are two documents that are missing in this timeline.

1 Specifically, Exhibit R-271, June 1, 1999.

2 If you go to the next slide, it is excerpted. But
3 that's the letter from Mr. Davey Einarsson to the
4 Board responding to their position that they were
5 going to continue releasing Seismic Data. And he
6 said: "Your letter is absolutely inconsistent with
7 our detailed legal position previously given by the
8 Board."

9 And then the other document that is missing
10 on the Claimants' timeline here is the response of the
11 Board, June 18, 1999. That is Exhibit R-274. That's
12 the one where the Board said: "While the Board
13 understands your position, the Board does not agree
14 with the legal analysis offered on your behalf
15 respecting the release of the Seismic Data provided by
16 GSI." And then it goes on to explain.

17 So there are -- you know, this is where
18 things became engaged, where GSI knew that the Boards
19 were releasing Seismic Data. The C-NLOPB took the
20 position that the Regulatory Regime allowed it to do
21 so, and it continued to do so.

22 ARBITRATOR GOWDY: So would it be your

1 position that the issues were sufficiently joined at
2 that point for a NAFTA Claim to have been brought, if
3 at all?

4 MR. LUZ: I think that's absolutely the
5 case.

6 ARBITRATOR GOWDY: It would have been ripe.

7 MR. LUZ: It would have been ripe because,
8 as we'll see from the next slide -- if you go to the
9 next one. Oh, actually, sorry. It'll come to it in a
10 little bit, but at that point -- and we saw from some
11 of the letters, and include -- as well as the Code
12 Hunter Wittmann letter itself, that GSI had alleged
13 that it had already suffered loss of licensing because
14 of the Board's disclosures.

15 So that was in the 1997 letter from Mr. Sam
16 Nader, I'm forgetting the exact exhibit number, but I
17 took Mr. Einarsson through it last week. The Code
18 Hunter Wittmann memo says exactly the same thing.
19 There were two companies that refused to license data
20 for their full value because of -- they could get it
21 from the Boards.

22 So that's the trigger for a NAFTA Claim. It

1 is knowledge of breach and loss. So arguably by that
2 point there was a ripe NAFTA Claim, and certainly at
3 the very least, a basis on which one could go to the
4 Court for a Declaratory Relief or an Injunctive
5 Relief, just as the lawyers in Code Hunter Wittmann
6 said they could. So -- I don't have it in front of me
7 but there's a line -- oh, yes, there's a line in
8 there.

9 Actually, it was on the previous slide, if
10 you could go back, Chris.

11 The very last line from the Code Hunter
12 Wittmann said: "The infringer in the case
13 of" -- they're talking about copyright -- "the
14 infringer in the case of data released by the
15 respective Boards would be the Board."

16 So GSI's own lawyers are saying that the
17 Boards in releasing this are violating GSI's
18 copyright. So at that point there is knowledge
19 of -- at least -- I don't want to say a NAFTA breach,
20 because it may or may not necessarily be a NAFTA
21 breach per se, but it's -- if NAFTA requires knowledge
22 of breach and loss and this is exactly the time that

1 it's triggered.

2 ARBITRATOR GOWDY: I keep saying one more
3 question and then I keep coming up with one more.

4 MR. LUZ: Please do.

5 ARBITRATOR GOWDY: My limited understanding
6 of NAFTA says there can be what we call a "taking,"
7 but there must be compensation.

8 So what would the compensation have been
9 under a NAFTA analysis had there been an action taken
10 back when you say it should have been taken?

11 MR. LUZ: Well, I think it would depend on
12 the thing -- I mean at the time. I guess you would
13 have to -- certainly at that point GSI had not been
14 expropriated as a Company, as the Claimants are
15 claiming now. It was an operating Company. It
16 was -- it had purchased data, it was reprocessing
17 data, it had employees, it had -- soon thereafter it
18 would have ships. So certainly it wouldn't be an
19 issue of taking of the Company.

20 If there was a view that there was a
21 violation of a copyright at the time, well, I guess it
22 would just depend on what exactly was being violated

1 at the time. So this isn't really one of these things
2 that was, you know -- in typical expropriations, you
3 have an asset that was taken away from you, and -- or,
4 for example, a right that you thought you had that was
5 chopped and brought back down.

6 That never happened here, and there was a
7 lot of noise about the supposed changing rules of the
8 game and so on. This never changed. Throughout the
9 2000s, there was discussions as to whether or not they
10 could have a Shared Data Repository or perhaps release
11 digital data and so on. There was a lot of
12 discussions about it, and that's where GSI was mostly
13 involved in arguing that none of this should be
14 allowed anyway, but the Boards continued to exercise
15 their regulatory discretion.

16 So I've gotten off the slides but it's going
17 to feed into it, and if you go into the next slide,
18 is -- Mr. Einarsson said, look, the Boards were
19 generally consistent. They never tried to solve the
20 problem and come sit down and understand what was
21 going on. They would always just restate their
22 problem -- their position, I'm sorry.

1 And we heard the same thing from the Board
2 witnesses. If you go to the next one, the -- you
3 know, from the C-NLOPB said, well, do we take any
4 steps to inform about copyright? Well, no, because
5 the Accord Act allowed the disclosure of the
6 information.

7 If we go to the next slide, Mr. Dixit from
8 the NEB, in response to Arbitrator Gowdy, same thing:
9 "Our interpretation was that the CPRA governs when the
10 information that is provided to us can be disclosed."

11 Next slide.

12 Similar. It's -- my interpretation is "CPRA
13 required the Regulator to make the information
14 available, and the FIO for people to read, review,
15 take away, make copies."

16 Next slide.

17 Again, another one from Mr. Dixit about the
18 CPRA.

19 Next slide, Chris. I'm just putting sort of
20 all the evidence in there.

21 And Mr. Makrides said -- he wasn't qualified
22 to answer the question on -- about copyright, but he

1 said: "I think, regardless of what it is or isn't, I
2 guess my comment would be that the Board retains the
3 ability to disclose the data at the end of the period.
4 So the copyright issue, to some extent is not relevant
5 to that, I guess, as far as the legislation is
6 concerned."

7 The next slide.

8 Same thing. So this was the position of the
9 Board starting in 1999. And they maintained it
10 throughout.

11 Now, one could ask what did GSI know about
12 it at the time? Well, we already established
13 factually it was well-known before the 1999 letter
14 from Code Hunter Wittmann that the Boards were
15 releasing data and people were copying it. That's
16 what prompted the legal memo in the first place.

17 If you go to the next slide -- and this was
18 the document that I brought Mr. Einarsson to. And you
19 know, he recognizes this, and himself went to the
20 National Energy Board just down the street to get
21 copies of GSI's Seismic Data.

22 So, again, it's not like it was a secret.

1 If GSI felt that their copyright was being violated by
2 the practice of the Boards releasing the Seismic Data,
3 it had every opportunity to be able to go to court
4 just like their lawyers twice, Parlee McLaws and Code
5 Hunter Wittmann said you should be successful in
6 getting an injunction or an -- Declaratory Relief
7 against the Boards from doing this, maybe.

8 So that was the -- you know, that was the
9 thought that, could it be done? That's where the --,
10 you know, how far back this dispute really goes.

11 And there were a few other things that I
12 have to sort of remind the Tribunal about. And
13 Ms. Tabet brought this up. In 2003, the Federal Court
14 of Canada issued the Judgment that said that the
15 Boards were required to disclose who was borrowing the
16 materials from the Boards. And in that
17 Judgment -- and I brought Mr. Einarsson to that
18 Judgment because there was the quote that said -- the
19 Court said, the Boards are free to release the
20 information at the expiry of the confidentiality
21 period.

22 So that vindicated the Boards' position that

1 they could do it, and if GSI felt that they had a
2 copyright that was being violated and conflicted with
3 the Regulatory Regime, it was open to them to get the
4 Court to resolve that.

5 They chose not to, and one thing I should
6 say that came out of something that Ms. Lemmens
7 mentioned this morning about the releases, the Board
8 releases and so on. There's an exhibit suggesting
9 that the Claimants didn't know who was getting the
10 information and so on. I brought the
11 Claimants -- Mr. Einarsson, to several of the Access
12 to Information Releases that came out after 2003.

13 And I wonder if, Chris, if you could just
14 pull up very quickly -- there is many of them, but I'm
15 just picking up Exhibit C-408 because it is -- you
16 know, this is a 120-page document in 2005,
17 December 2005, where the National Energy Board
18 provided, as it was required to do by Justice Gibson's
19 Decision, all the copies of the borrowers, the people
20 that had taken out.

21 If you go to the next page, you can just
22 see, it's like, this is December '05. It's a

1 borrowing form by Olympic Seismic. So it's -- the
2 Claimants not only knew what was happening from the
3 Boards, but they actually were getting information
4 with respect to who was borrowing and so on.

5 Now, of course there were subsequent Access
6 to Information Requests that the Claimants made and so
7 on and so forth, but it really does go to show you
8 that this is something that the Claimants knew that
9 was going on for a long, long time.

10 So, Chris, if we could just go back to the
11 slides, and we'll go on to -- I think it is Slide 11
12 coming up or the next one. Right.

13 So, again, throughout the 2000s, there were
14 a lot of discussions about the Share Data Repository
15 and other things that as whether the Boards could do.
16 There's a lot of noise about sort of grievances that
17 were made in the 2000s and disputes between GSI and
18 the Boards that were brought up. They're not really
19 relevant, but that sort of informed what happened
20 towards the end of the 2000s.

21 And again, the issue was engaged, and in
22 2009, 2010, you had a lot of discussion going on, and

1 if the Tribunal was looking for the words as to when
2 the positions cannot be reconciled, well, here's a
3 letter from the Newfoundland Board that specifically
4 says -- I'm trying to find it.

5 Yes, that's right. "As it is obvious that
6 our positions cannot be reconciled, they do not feel
7 there is any value in engaging in a protracted debate
8 on the relative merits of our interpretation of
9 various pieces of legislation."

10 And Mr. Einarsson, you know, said the letter
11 speaks for itself. Please.

12 ARBITRATOR GOWDY: I've seen a letter and
13 I've seen a law firm opinion. It doesn't matter how
14 prestigious a law firm they may or may not be, it
15 still doesn't carry the same weight as a judicial
16 opinion. So if the theory is a judicial
17 expropriation, how does this help? How does this help
18 your position? I get that they were on notice. I get
19 that there was a law firm that said, you may have a
20 cause of action, but there was no judicial Decision,
21 or was there?

22 MR. LUZ: Not until the Alberta Court

1 Decisions, but what this all means is it puts very,
2 very significant barriers on the Tribunal's
3 jurisdiction as to what it can decide and what it
4 can't decide.

5 This is all to do with the Regulatory Regime
6 and Board disclosures. All of it is completely
7 outside the jurisdiction of the Tribunal. It goes
8 back to the question Arbitrator Landau brought up:
9 What does it mean?

10 Well, it means that, in 2017, you take GSI
11 for what it was. You also take the Regulatory Regime
12 and all the Board disclosures that entire time for
13 what it was: Legal. There's no ability for the
14 Tribunal to import all of that into the issue of
15 whether there's a judicial expropriation from the
16 Alberta Court Decisions. That's why all of this is so
17 important.

18 I'll skip ahead a little bit because I do
19 want to save enough time to be able to get to damages.
20 If we skip -- there's some more correspondence and so
21 on that goes in as between the Boards and GSI, so,
22 Chris, if you could skip this one, go to the next

1 slide.

2 So, again, there's the Boards having this
3 discussion on the position of copyright between GSI
4 and the NEB in 2010, saying that they have the right
5 and the library exception to be able to do it. If you
6 go to the next slide, there is -- that's the NEB
7 again.

8 Next slide.

9 This is between the C-NSOPB again. This is
10 just from a long time, a long set of discussions that
11 had been going on on whether or not the Regulatory
12 Regime or copyright should take precedence. The Board
13 said, "look, we are governed by the Regulatory Regime,
14 and we are going to exercise our discretion." If GSI
15 felt that the Regulatory Regime conflicted with its
16 copyright, it had the ability to bring it to court.
17 And it did, in 2011 through 2014.

18 And if you go to the next slide, yes -- next
19 slide, please.

20 I know the Tribunal is interested in all of
21 the different litigations that happened, but these are
22 all -- it was in our Counter-Memorial, all of the

1 citations are in there. We'll put together more for
2 the Tribunal, but this is where the Claimants started
3 arguing that the Regulatory Regime was an
4 expropriation of its copyright and of its business.
5 So they were already alleging an expropriation well
6 before the judicial expropriation. And, in fact, they
7 were alleging the Regulatory Regime was an
8 expropriation after the Alberta Court Decisions, as we
9 saw from their Statements of Claim in the Federal
10 Court. The only reason why they changed is because
11 they knew that they couldn't bring a claim under the
12 NAFTA. They had to target the Decision itself. That
13 is the problem for the Claimants because the legal
14 standard of the NAFTA does not allow an appeal on the
15 Judgment of a Canadian court. But that's the only
16 thing that they can try to do because everything else
17 is outside the Tribunal's jurisdiction.

18 And so I've kind of brought the Tribunal
19 right through this whole process to understand where
20 the boundary is for the Tribunal's ability to make a
21 decision. And that is, in 2017, what was GSI? It was
22 a company that, for many years, had had problems, you

1 know, some external. The Global Financial Crisis and
2 the collapse in seismic spending obviously hurt GSI.
3 There were the issues of increased competition after
4 the Coasting Trade Act allowed other ships to be able
5 to come in. There were a lot of issues that had
6 nothing to do actually with the Regulatory Regime that
7 caused -- that put GSI into the position that it was,
8 including, by the Claimants' own admission, its
9 litigation against its licensees. That caused a lot
10 of what the reputation -- the goodwill damage that it
11 had. That's not the Regulatory Regime. That preceded
12 the Alberta Court Decision. So even if it was
13 Canada's -- attributable to Canada, which obviously it
14 isn't, it just can't form part of the Claim. It just
15 precedes everything.

16 So that's where the jurisdiction, merits,
17 and even damages come into play. What is the value of
18 GSI immediately before the expropriation in 2017? The
19 Claimants haven't given you what you can do with that.

20 ARBITRATOR GOWDY: That leads to one
21 question that I asked Ms. Tabet, which is whether or
22 not there is any property interest in a potential

1 claim. And I think she said, under Canadian law,
2 there is no property interest, no value, if you will,
3 in a potential litigation claim.

4 Is that correct? Is that Canada's position?

5 MR. LUZ: So I think -- I don't think it
6 would be proper to characterize it as a property right
7 itself. I mean, it might be an asset or something of
8 potential value, but I don't think it's the kind of
9 thing that -- and it's not even really the issue here,
10 per se. I mean, the Alberta Court Decisions made it
11 such that the copyright claim issue for certain
12 aspects -- and, perhaps, there's debate as to what it
13 actually did in terms of limitation of that. So I
14 can't really speculate on what was taken away, how
15 much was taken away. But I think the issue is, the
16 claim is about GSI having been expropriated as a
17 business. So it's not necessarily the kind of thing
18 where you have a much more narrow right of -- a right
19 to litigate. I don't think that's -- I don't think
20 we've heard that before.

21 ARBITRATOR GOWDY: But that would be part of
22 their business portfolio, that they had potentially

1 outstanding copyright actions that they could -- and
2 if you go to the day before the Decision was signed by
3 Her Honor, those rights, you could argue, existed.
4 And then the day the issue -- the day the Opinion was
5 issued, those rights no longer exist. And I'm trying
6 to assign the value between that day -- that 24-hour
7 time period where they thought they had copyright
8 actions and were told they did not.

9 MR. LUZ: Sir, you can't assign a value
10 because the Claimants haven't given one. I mean,
11 there's no -- if that was a valuation that the
12 Claimants wanted to put forward, they could have done
13 so. They didn't. So and in fact, that was exactly
14 the question that I asked Mr. Sharp: Did you value
15 the diminishment in copyright for the period of time
16 between the 10 years of no copying versus the -- I
17 guess, 40 years or however much time it is under the
18 copyright of copying.

19 One would suspect that that's not a
20 big -- not necessarily a big value because, as we've
21 seen, the evidence is that the value of Seismic Data
22 is mostly in the first five years. It doesn't

1 necessarily mean that there is no value after the
2 confidentiality period, but there's no value -- that's
3 not what they valued. So the Tribunal can't do it and
4 I don't think we can venture that either.

5 So I think -- and just one final point is
6 that, whatever that might be could have also been
7 valued as part of the value of GSI as a whole, but,
8 again, they haven't done that.

9 I don't know how much time I've got.

10 ARBITRATOR GOWDY: So far, I've taken most
11 of it, so I think you have plenty left.

12 MR. LUZ: I've enjoyed having the
13 debate -- not the debate -- the discussion so much
14 that I completely lost track of time.

15 PRESIDENT WALLGREN-LINDHOLM: Can we know
16 how much Mr. Luz has left.

17 SECRETARY FISCHER: Canada has 12 minutes
18 left.

19 MR. LUZ: Okay. I'm going to have to speed
20 through, but that's fine.

21 PRESIDENT WALLGREN-LINDHOLM: Thank you.

22 MR. LUZ: If we go back -- I'm just going to

1 go to the first slide on damages. This is something
2 that -- I mean, I'm not going to belabor on, but it is
3 the Claimants' burden to prove their damages. And as
4 we've seen in cases like Eco Oro, Infinito Gold, if
5 the Claimants do not fulfill their burden, they get
6 zero damages.

7 I heard the Claimants suggesting that it
8 was, you know, sort of for the Tribunal to kind of
9 come up with its own if it didn't feel that its
10 Damages Assessment is worthwhile. That is not
11 something that would be permissible under the NAFTA to
12 be able to do. It is the Claimants' burden to prove.
13 They have not passed that burden.

14 And we've got to the causation and so on.
15 Actually, I should note -- I'm not that this point
16 yet, but we are probably going to refer to a couple of
17 confidential documents. So maybe we can just -- I may
18 have to speed ahead, and so maybe we should just go
19 into confidential session.

20 (End of open session. Confidential
21 information follows.)

22 CONFIDENTIAL SESSION

[illegible]

[illegible]

The image is entirely black and contains no visible content.

[illegible]

The image consists entirely of a solid black field with no visible features, text, or patterns.

[illegible]

1 valuation. He just simply said that is a ceiling.
2 Let's rely on GSI's own documents. The Claimants
3 could have done their own valuation. They decided not
4 to, even though they had a template for doing it. And
5 Mr. Uffen had explained in his Second Report how that
6 "ceiling" is just one that would actually, in reality,
7 likely be much lower for all the reasons that he
8 explained in his Report.

9 So I think that -- I think I'm out of time.
10 I was told I had 10 seconds and I'll use that time to
11 say thank you for the Tribunal's indulgence.

12 PRESIDENT WALLGREN-LINDHOLM: That is always
13 allowed. Thank you.

14 Now, would either co-arbitrator have any
15 questions now for Mr. Luz? No.

16 So will there be rebuttals and surrebuttals?

17 MS. LEMMENS: Yeah. I think I need to
18 clarify some things on the record that were a little
19 inaccurate there.

20 PRESIDENT WALLGREN-LINDHOLM: Okay. So we
21 will have a break now anyway. So we take the
22 15 minutes. Is that fine, or -- did you ask actually

1 to have less?

2 MS. LEMMENS: I was simply ready to go if
3 you wanted me to start, or we could take a break.

4 PRESIDENT WALLGREN-LINDHOLM: That's fine.
5 Why not? Everybody looks very hopeful.

6 Okay. Ms. Lemmens, please, proceed.

7 REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANTS

8 MS. LEMMENS: And because I'm not taking a
9 break, it is not necessarily in an organized set of
10 notes. So I apologize if I'm jumping around a little
11 bit.

12 But I wanted to address Mr. Gowdy's question
13 about whether a piece of litigation is a property
14 right? In fact, in Canada it is a property right.
15 It's called -- we call it a "chose in action." You
16 may be familiar with that. It's a French term, and so
17 that's where it comes from. But, in fact, you can
18 assign a piece of litigation to another party. You
19 can -- it has all of the elements of a property right.

20 When you think about copyright, in
21 particular -- copyright, as we spoke about with
22 Mr. Sookman, Canada's Expert, is a bundle of exclusive

1 rights. And those are property rights under the
2 Copyright Act. So the bundle of exclusive rights is
3 the ability to exclusively do things like reproduce a
4 copyrighted work, publish it, or perform it. I don't
5 think we're worried about performances here.

6 And so when you no longer have that
7 exclusive right, you've actually lost a property
8 right. And the property right is, in fact, a property
9 right.

10 So I just wanted to clarify that point for
11 you.

12 ARBITRATOR GOWDY: Could I ask you to
13 clarify one other point? And I want to make sure I
14 frame this question correctly. And if I do not, I
15 want Canada to tell me that I have not framed it
16 correctly. But I thought that they represented that
17 you were on notice that your copyright was not being
18 protected and took no action.

19 MS. LEMMENS: I don't think that's correct.
20 So that comes later in my notes. I can jump there
21 now.

22 ARBITRATOR GOWDY: No. No. No. Do it the

1 way you want to do it.

2 MS. LEMMENS: Okay. I have some stuff about
3 the chronology, as well. But I also wanted to clarify
4 that I said Dr. Hutchison said "pay wall". It's in
5 our presentation from this morning.

6 What he says is at Page 845 of the
7 Transcript, he says this: "I don't really see
8 her" -- that is Justice Eidsvik -- "unpacking what
9 'disclosure' means. At least, in terms of what I'm
10 suggesting, which is, well, you can disclose things in
11 many ways. You can, you know, make it concrete in
12 this case. You could allow somebody
13 password-protected access on a screen. You could send
14 out copies. You could provide unlimited number of
15 copes. So disclosure could take many forms. So I
16 would have liked to have seen more of a discussion of
17 what 'disclosure' means. I mean, I think at the end
18 of the day, it's not -- it doesn't
19 really -- disclosure can mean any of those things
20 probably. But in terms of her analysis, I don't think
21 it was thorough enough on the ordinary meaning."

22 So when I said "pay wall," that was intended

1 to be a short-form term for the password-protected
2 access on a screen.

3 I heard Canada say that the Common Issues
4 Decision doesn't address Secondary Submissions. I
5 take issue with that because the Common Issues
6 Decision was so broad in the way that it took away
7 GSI's exclusive right about reproduction that it does
8 affect all of the Seismic Data at the Boards.

9 At the end of Common Issues Decision, at
10 Paragraph 323, Justice Eidsvik said -- and I'm focused
11 here on the last sentence in that paragraph: "For the
12 oil companies, it establishes that there is nothing
13 unlawful about accessing or copying the information
14 from the Boards, leaving open other contractual issues
15 in each case."

16 There is no differentiation between the
17 Secondary Submissions or the non-Secondary
18 Submissions. All of the Seismic Data is being
19 addressed there because all of the Seismic Data is
20 made available after the expiry of the Privilege
21 Period.

22 I also note that I had certain questions

1 in -- I can't remember who I was cross-examining now.
2 I apologize. But I confirmed that, in
3 fact -- actually, I think it was a redirect of
4 Mr. Einarsson about the Secondary Submissions and
5 whether they were required by Canadian law. And I had
6 pointed Mr. Einarsson to the Decision. I think he had
7 actually raised it.

8 And it is a GSI and Encana Decision of our
9 Alberta Court of Queen's Bench as Exhibit C-201. And
10 at Paragraph 79, the Court specifically said -- and
11 it's really the last sentence. "Further, such
12 submission was required by Canadian law to obtain the
13 credits against the deposits it made with the
14 Government for Exploration Licenses."

15 These are the Secondary Submissions that are
16 being addressed here. You can read the rest of the
17 analysis there, but I leave that to you to do. It's
18 just it's very clear that the Court has said that the
19 Secondary Submissions are required. And then they are
20 dealt with in the normal course, as all of the Seismic
21 Data is at the Boards.

22 I heard reference to the TGS-Nopec case from

1 the U.S., which made some comments about Implied
2 License with respect to the Regulatory Regime. So
3 just so everyone understands, that's a U.S. case. It
4 is not the law in Canada.

5 The law in Canada is the Alberta Decisions,
6 and the U.S. case followed U.S. copyright law, which
7 is a bit of a different beast all together. There is
8 a lot of different law about copyright in the U.S.
9 than there is in Canada.

10 I also want to point out that I heard
11 Ms. Tabet reference that the Seismic Works were
12 getting quite old, you know, 40 years, things like
13 that. I just want to point out that the Seismic
14 Works, if they were enjoying their regular copyright,
15 what they get is copyright for the life of the author.

16 So if you have a bunch of employees working
17 on a copyright work for a company, as in the course of
18 their employment, the last remaining person that is
19 surviving out of author group is where we determine
20 when the life of the author is going to end. And then
21 after that, you still get 50 years.

22 We have a Witness Statement from

1 Mr. George Lau, who worked for GSI Delaware and was
2 creating Seismic Data in the 1980s, that is part of
3 the Seismic Works at issue here. He's still alive.

4 So you can see how the copyright protection
5 would actually still be very much up and running right
6 now. He's alive, so it hasn't even gone to the point
7 where we're running the 50-year term. And now, under
8 the Canadian Copyright Act, it would have been
9 70 years, after the change from the USMCA.

10 And I also wanted to point out that when the
11 Seismic Data is reprocessed, it actually creates a new
12 version of Seismic Data. And that new version has an
13 altogether new term of copyright. So you have a new
14 author that has reprocessed that Seismic Data. So now
15 we have a new life of the author in that new version,
16 and that's when the term would run from.

17 Madam Chair, you had a question about the
18 Access to Information Act. And it reminded me that
19 you had asked a question about Mr. Einarsson's Witness
20 Statement.

21 We had -- and I'm not trying to waive any
22 solicitor-client privilege here. We had gone back to

1 try and find the citation for that one paragraph that
2 you had mentioned. And the way that Canada had
3 produced its documents is not entirely searchable. As
4 you can see some of the documents are older and so
5 they're not searchable. There is something like
6 30,000 pages of documents.

7 In this period of time, we have not been
8 able to locate the exact document. So what we did was
9 we went back to Mr. Paul Einarsson's notes that he
10 provided for the purposes of preparing his Witness
11 Statement. And his notes -- when he reviewed the
12 documents that Canada had produced, included that
13 note. We just have not been able to locate the actual
14 document because of the lack of searchability in the
15 database.

16 What we do know is that it does not appear
17 to have been produced in the record, unfortunately.
18 So we don't have it in evidence because we are able to
19 search all of those documents more easily because they
20 have been made searchable by our office. But we have
21 not been able to do it with the other documents that
22 are not in the record. So I apologize for that.

1 However, I do have an answer to one of your
2 questions today about the Access to Information Act,
3 Madam Chair.

4 And so you had asked about whether there was
5 any consideration of whether the data would be
6 governed by the Access to Information Act? And, in
7 fact, the Respondent Canada had pointed Dr. Hutchison
8 to a briefing book about the CPRA. That was a
9 briefing book prepared in conjunction with the new
10 CPRA coming into effect in the '80s.

11 And that briefing book actually said that
12 the Access to Information Act would have some
13 application. So it's not -- it's not that the Access
14 to Information Act wasn't engaged. And so I just
15 wanted to point that out to you. So it is at
16 Exhibit C-164. This briefing book.

17 When we see the references to the Act here,
18 it's to the CPRA. So "The Act also provides for a
19 number of amendments to the Oil-and-Gas Production and
20 Conservation Act to ensure effective regulation and
21 administration of frontier activities, as well as
22 consequential amendments to the Petroleum Incentives

1 Program Act and the Access to Information Act."

2 We then -- that's at Page 10 of the PDF, not
3 the document. I see there is page numbers there. But
4 then I also wanted to point out that it says -- "In
5 addition" -- but we'll skip the first part, "but the
6 Access to Information Act is amended to include the
7 CPRA in Schedule 2 of that Act."

8 And then further in the document, Page 33 of
9 the PDF. So here we are looking at the very section
10 at issue about disclosure, Section 101. And it says
11 in the bottom highlighted paragraph there, "The
12 section prevails over the general provisions of the
13 Access to Information Act by virtue of its inclusion
14 in Schedule 2 of that Act."

15 So there was consideration about the Access
16 to Information Act. You were right to point that out.

17 PRESIDENT WALLGREN-LINDHOLM: Thank you.

18 MS. LEMMENS: With respect to the
19 chronology, as I mentioned, we were trying to provide
20 a targeted chronology. There was no intention to not
21 include certain documents. And I'm, frankly, more
22 than happy to address the 1999 letter that may have

1 been missed. This was a document that we were trying
2 to put together in a very short period of time to try
3 and show, generally, what was happening.

4 And, I guess, we didn't view this 1999
5 letter that you find at R-274 to be particularly on
6 point because what we see is, it indicates, "While the
7 Board understands your position" -- now this is with
8 respect to the Code Hunter Wittmann Opinion -- "While
9 the Board understands your position, the Board does
10 not agree with the legal analysis offered on your
11 behalf respecting the release of the subject data
12 provided by GSI. We have for policy reasons,
13 nonetheless, agreed to withhold such data for a period
14 of 10 years, as stated in my February 24, 1999, letter
15 sent to you."

16 It does not address the copyright analysis
17 at all. So I guess, we didn't view it as,
18 particularly, on point with respect to copyright. It,
19 actually, only addresses the legal analysis offered on
20 behalf of GSI respecting the release of the subject
21 data.

22 And the 1999 letter, as we also know from

1 some of the testimony that we heard, the C-NLOPB had
2 also got a similar letter at this time in 1999 from
3 GSI, in which they enclosed the Code Hunter Wittmann
4 Opinion. And the C-NLOPB was looking into the issue
5 and doing some analysis on it.

6 We see that GSI, after sending out the Code
7 Hunter Wittmann Opinion, starts its Access to
8 Information Act Requests in the fall of 1999 and into
9 early 2000. Those became the subject of the Federal
10 Courts compelling the Boards to provide names of the
11 parties accessing the data.

12 GSI got those lists. It had no information
13 about whether the parties had copied it. That
14 resulted in further inquiries with the Boards through
15 the Access to Information Act. It resulted in demand
16 letters being sent out to various oil companies
17 saying, do you have my data? What did you do with it?
18 Did you copy it? It's copyright. It's protected, all
19 of those things.

20 And those result in the Copyright
21 Infringement Claims, ultimately. So to suggest that
22 GSI was just sitting idle while this was going

1 on -- GSI was doing everything it could to try to
2 figure out what was happening and trying to protect
3 what it saw as its property right in its copyright.

4 I know that Mr. Luz had mentioned that this
5 Federal Court Decision that I had just mentioned, as
6 well -- the 2003 one, compelling the Boards to provide
7 information -- that Decision only commented that the
8 data could be accessed or disclosed. It doesn't pass
9 any comment on copyright.

10 Part of this period of time, we looked at
11 one exhibit. I don't know if this particularly
12 matters because I think I've already explained it, but
13 I know Mr. Luz had brought up this C-408.

14 I just want to make it clear that this a
15 letter in 2005, late 2005, from the NEB. And what had
16 happened here was not actually the names, the lists of
17 names that GSI received after the Federal Court
18 Decision. This is a further inquiry that was made
19 after that.

20 So if you look at the letter, it actually
21 indicates that GSI made another Access to Information
22 Request, November 2005. And that the NEB was

1 responding to that because this is all part of what
2 GSI was trying to do. It was trying to find out what
3 was going on.

4 So yes, it got lists of parties that
5 accessed the data, no information about copying, and
6 then it was trying to find out more information about
7 what the parties had done.

8 And as we heard from the Board witnesses,
9 they don't necessarily keep track. And I found it
10 interesting that Mr. Luz says, Oh, isn't it
11 interesting that there is actually not that much
12 access going on after 2005. Well, yeah, because the
13 Board stopped keeping track. They were compelled to
14 produce the information about who was accessing the
15 data, and then they said, I don't need to track this
16 anymore. So they stopped tracking it, and now there
17 is no information about what is going on.

18 So, no, I don't think it is accurate to say:
19 "Oh, isn't it funny that there is actually not that
20 much access going on anymore?" I think the reality
21 is, is that they stopped keeping track of the
22 information.

1 Mr. Luz also pointed us to another exhibit
2 at R-276. This was a C-NLOPB Decision -- or letter,
3 sorry, in 2010, and it says that the positions cannot
4 be reconciled. And, "I do not feel there is any value
5 in engaging in a protracted debate on the relative
6 merits of our interpretation of various pieces of
7 legislation." Well, I can tell you that what GSI did
8 is it sued the C-NLOPB in 2011. So GSI was trying to
9 figure out what to do with that impossible
10 reconciliation. That's what -- that's the end result
11 of that.

12 When you ask questions about whether in fact
13 in 1999 GSI could have gone to a NAFTA Tribunal to
14 have these issues resolved, I have no doubt in my mind
15 that the NAFTA Tribunal would have said, well, but do
16 you have copyright? Do you have an investment at all,
17 and why don't you go to the Canadian court and prove
18 that you actually have that copyright before you come
19 to me as the NAFTA Tribunal to determine whether it's
20 been expropriated?

21 ARBITRATOR LANDAU: Can I ask why would a
22 NAFTA Tribunal have to defer to a municipal court in

1 order to rule upon a jurisdictional issue as to the
2 existence of an investment?

3 MS. LEMMENS: The NAFTA Tribunal doesn't
4 actually, in my view, have the jurisdiction to
5 determine whether a copyright subsists in something.
6 So it defers to the domestic law about whether
7 copyright can be found in a copyrighted work. So --

8 ARBITRATOR LANDAU: Isn't that a -- sorry.

9 MS. LEMMENS: So I view Berne as speaking
10 about the protections of copyright works, but the
11 actual question of whether copyright exists is a
12 domestic law question.

13 ARBITRATOR LANDAU: Now, there are two
14 different issues, aren't there, one is governing law
15 and the other is the forum that can decide it. So the
16 question of whether or not copyright subsists and
17 whether there is property or not, whether something
18 constitutes an investment will be dictated by
19 municipal law, but that doesn't tell you who decides
20 that. International investment Tribunals regularly
21 decide those issues on a municipal law.

22 MS. LEMMENS: I think that a NAFTA Tribunal

1 would have declined the question. I think there
2 is -- it's too difficult of a question, I think, for a
3 NAFTA Tribunal to even consider, and so we also don't
4 know that these things even conflict. So we've got a
5 situation where the Boards are talking about releasing
6 and disclosing, and GSI is saying, well, I have
7 copyright. And then the Boards are using the signage
8 that says, copyright laws may apply.

9 So we don't even know that we have the
10 conflict to even bring to a NAFTA Tribunal.

11 ARBITRATOR LANDAU: But GSI was suffering
12 loss. It was complaining about loss. It was
13 complaining about loss, for example, of license,
14 potential license income.

15 MS. LEMMENS: So I don't actually know if
16 GSI was suffering loss. I know it was complaining
17 about it, but you can see that its revenues were doing
18 just fine in 1999.

19 ARBITRATOR LANDAU: I see.

20 MS. LEMMENS: The idea that GSI could not
21 create more Seismic Data because it sold its ships, I
22 think that's just ignoring the fact that you can

1 charter ships. We talked about that with Mr. Hobbs,
2 that that's a business model, that you can charter
3 ships. So just because it doesn't have seismic
4 vessels doesn't mean it couldn't have been renting
5 ships and creating ships in that period of time when
6 it didn't have the seismic vessels.

7 I think the reality is, is that the -- the
8 Seismic Data is valuable. You heard no witness tell
9 you that it wasn't valuable, and that's exactly why it
10 is being handed out for free by the Canadian
11 government. And the fact that it is being accessed by
12 parties to promote the offshore oil-and-gas
13 development means that those parties see it as
14 valuable too.

15 When we talk about the damages question, I
16 think I already said this: I don't think it's an
17 answer to -- we provided a valuation, so, to be clear,
18 I disagree with my friends on the other side because
19 they suggest that we didn't provide a valuation. We
20 did. We did that work. We provided a business
21 valuation that incorporates copyright damages in it or
22 how you might value a copyright work.

1 We also went to the trouble of getting
2 Troika to prepare a valuation of the Seismic Data. It
3 reviewed the Seismic Data. It commented that the
4 quality was there, that it could work it in the
5 workstation and upload it, and it's on modern DLT
6 tapes.

7 And then it additionally said, this industry
8 is so secretive -- and I am not saying that these are
9 exactly Troika's words, just to be clear. But the
10 reality is that the industry is so secretive that
11 Troika went to go get market information about what
12 this data might be worth, and it contacted companies
13 that are also operating in this area, Seismic Data
14 brokers, and they will not give out the information.
15 You heard from Mr. Hobbs, Canada's Expert, when I
16 asked him about whether he knew what the price of data
17 in these areas would be, he doesn't have that
18 information. He doesn't have the market information.

19 So the reality is, is it's a very secretive
20 industry, and it makes it a little more difficult to
21 provide a valuation, but it doesn't mean that you
22 can't have a valuation of it. We believe that we have

1 tendered that evidence in this matter.

2 I believe I already referred you to the
3 other NAFTA case in Lion-Mexico in which the Tribunal
4 had conducted its own analysis of the valuation. So I
5 don't think I need to go over that again. It is also
6 in our presentation materials.

7 Oh, I see, we missed the authority reference
8 there is what Ms. Lyseng is pointing out. So the
9 Lion-Mexico case, you can find it in the Authorities
10 at CLA-108. Thank you.

11 PRESIDENT WALLGREN-LINDHOLM: Thank you very
12 much.

13 ARBITRATOR LANDAU: Nothing more.

14 PRESIDENT WALLGREN-LINDHOLM: Nothing.

15 We are a bit off schedule, but we had
16 scheduled a break between the rebuttal and the
17 surrebuttal.

18 Do you want to maintain it, or you want to
19 proceed? We need to be mindful, though, that in about
20 23 minutes, we need to take a break, anyway.

21 MS. TABET: Thank you, Madam President. We
22 have a few very short points, so we -- I think we'll

1 be no more than 10 minutes. Five minutes possibly.

2 PRESIDENT WALLGREN-LINDHOLM: Thank you very
3 much. Sorry. There was one question I had to
4 Ms. Lemmens.

5 Could you please tell me the -- you referred
6 to a French term that wasn't described in
7 the -- defining the value of a pending litigation.

8 ARBITRATOR LANDAU: Chose in action.

9 MS. LEMMENS: Yeah, C-h-o-s-e.

10 PRESIDENT WALLGREN-LINDHOLM: I have to ask
11 you to repeat that.

12 MS. LEMMENS: Chose, as in French.

13 PRESIDENT WALLGREN-LINDHOLM: Right. But
14 "chose in action"?

15 MS. LEMMENS: Chose in action.

16 ARBITRATOR LANDAU: It's an English term.

17 PRESIDENT WALLGREN-LINDHOLM: Okay, I see.

18 Well, I guess here --

19 MS. TABET: A common law term in French.

20 PRESIDENT WALLGREN-LINDHOLM: And I see I
21 seem to be getting in this multi, multi lingo. Okay
22 because what I couldn't understand -- this is

1 completely relevant, and this is Tribunal time, is how
2 it could be French and English.

3 ARBITRATOR LANDAU: It is old French, which
4 is why it is now English.

5 PRESIDENT WALLGREN-LINDHOLM: Yeah. That I
6 know.

7 Okay. Respondent.

8 SURREBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

9 MS. TABET: Thank you, Madam President. I
10 only have a few brief points and I believe my
11 colleague Mr. Luz may have one or two short points as
12 well.

13 On the issue of Secondary Submission, again,
14 if you look through the Trial Court Decision, there is
15 no mention of the issue. It was not briefed. It was
16 not addressed.

17 As we understand it, what we are discussing
18 and what was discussed with the Boards is the fact
19 that the Board witnesses explained that they did not
20 disclose any Secondary Submission based on GSI data
21 before the end of the confidentiality period for the
22 original data. There is no obligation to submit

1 reprocessed data to the Boards, and, frankly, if an
2 oil company licensed GSI's reprocessed Seismic Data
3 and filed it with the Boards to get allowable
4 expenditures, whether it had a right to do so is a
5 contractual issue, and you'd have to look at the
6 license agreement.

7 Whether there is a copyright infringement,
8 if it filed it -- if it licensed the Field Data from
9 GSI and then itself reprocessed it, again, you'd have
10 to look at the contract. And it's not been addressed,
11 either in evidence or in the Alberta Decisions.

12 On the issue of the Access to Information
13 Act, we went very quickly through this. Again, not
14 addressing the Alberta Decision. There were changes
15 to the Access to Information Act to deal with the fact
16 that information could not be disclosed before the end
17 of the Privilege Period, and so that's a bit of a
18 separate issue.

19 To two more points.

20 On the right to sue, whether you can
21 expropriate a right to litigate. That would be rather
22 an unusual concept, to my knowledge, that has

1 never -- there has never been a finding of
2 expropriation of a right to litigate on its own. So
3 you'd have to consider the right to litigate tied to
4 the property right and together with the property
5 right.

6 And, here, because of the way the case was
7 framed, it has to be considered an asset of GSI, and
8 whether it was -- the value of that asset, the right
9 to litigate for copyright infringement was significant
10 vis-à-vis GSI as a business, but also in light of the
11 value of the copyright, which had already been
12 protected, you know, was not in any way infringed
13 by -- for the first 10 to 15 years because there was a
14 confidentiality agreement.

15 ARBITRATOR LANDAU: Can I just raise one
16 point now?

17 MS. TABET: Yes, please.

18 ARBITRATOR LANDAU: We do have in this field
19 expropriation, for example, of arbitral awards, which
20 might not be that different from a chose in action.

21 MS. TABET: I mean, I think it's a bit
22 contested whether an Arbitral Award is an investment

1 and does qualify as property, but I think a right to
2 litigate is a bit of a different nature than even an
3 award where you actually have a consolidation or a
4 concrete amount that has been found as opposed to a
5 potential right to get an amount.

6 Then Ms. Lemmens took you to the Encana
7 decision, and just to be clear, I think it was C-201,
8 but I could be corrected, what the Judge was
9 considering in that case was the interpretation of a
10 contract. So that decision has to be looked at in
11 that case, whether -- under the contract, it was
12 acceptable for the licensee to have filed the data
13 with the Board to get allowable expenditures.

14 I think that addresses all the points I
15 wanted to raise.

16 Mr. Luz

17 MR. LUZ: Thank you. I'll be brief. There
18 is just two points, and it just came out of the
19 conversation about a potential NAFTA claim and when
20 and so on.

21 So there are -- well, there are several
22 conditions precedent to arbitration in the NAFTA and

1 in most investment treaties that engages the consent
2 of the respondent state to arbitrate.

3 One of them is, you must file within
4 three years of acquiring -- first acquired knowledge
5 of the breach and loss.

6 Another one is a waiver of your right to
7 continue after the Notice of Arbitration claims for
8 damages. However, you can seek injunctive and
9 declaratory relief simultaneously with a NAFTA Claim.
10 So if there was an issue as to, you know, as to a
11 question of Canadian law or an injunctive -- a
12 claimant is able to get declaratory relief and still
13 file their NAFTA claim at the same time.

14 So it's not -- you know, as my colleague
15 mentioned on the very first day, NAFTA doesn't require
16 an exhaustion of local remedies. So, you know, again,
17 we're not going back to reinvent history, but that is
18 the way that -- the ability of a NAFTA party -- a
19 NAFTA parties' consent to arbitrate can be engaged,
20 and when a claimant -- it's -- you know, the
21 Limitations Period is one that is significant, and
22 past NAFTA cases have dealt with this kind of thing

1 before.

2 And just on the last point, and the Troika
3 Report, and this was something that was addressed in
4 Mr. Uffen's Report and Mr. Hobbs' Report what
5 they -- you know, explained why 12 paragraphs of
6 analysis resulting in an \$800 million Replacement Cost
7 Valuation is not reliable. So I will just point the
8 Tribunal to that. And also note that the -- even
9 Mr. Sharp himself doesn't rely on it. So we're not
10 really sure what the import of the Troika analysis is
11 when they didn't actually do a full inspection of the
12 full Seismic Data library in the way that Mr. Uffen
13 had explained.

14 That is, again, one of these things that
15 sort of goes back to: What is the ability of
16 Tribunal, if in the event of a breach, which we
17 respectfully submit there is not, would do with
18 damages. And the Claim is not one that is found -- is
19 not found well formulated. The Tribunal doesn't have
20 the ability to just make up a Damages Assessment. It
21 is the burden of the Claimants to prove their damages
22 with reasonable certainty. They have not done so, and

1 so, if there is a breach of the NAFTA, this is a
2 situation similar to that of Eco Oro and Infinito Gold
3 where there is zero Damages Awarded.

4 That's all, Madam Chair.

5 PRESIDENT WALLGREN-LINDHOLM: So that
6 concludes the Surrebuttal on Respondent's part.

7 Thank you. I then note that we have
8 scheduled for a 15-minute break, and then one hour
9 15 minutes additional time and final ceremonies.

10 I propose that, since the transfer time to
11 our breakout room is five-plus minutes, that we take a
12 bit longer break so we have a chance to go through
13 between ourselves if there is something in addition to
14 what we already know that we like to tell you, and,
15 therefore, what if we meet back here at 4:45? Would
16 that be agreeable to everyone? Thank you.

17 (Brief recess.)

18 POST-HEARING MATTERS

19 PRESIDENT WALLGREN-LINDHOLM: So now, before
20 the curtain falls for this stage, I'd like to revisit
21 some of the points we had in PO11, which regards the
22 Post-Hearing Measures. And we have prepared a

1 tentative Draft Procedural Order Number 12 for you to
2 have the exact timeframes and all for what we will be
3 agreeing here.

4 And the first point that I'm getting to in
5 our Draft -- and I'll take them in this order. It's
6 not necessarily order of priority, are the Transcript
7 corrections. We thought that 21 days would be
8 suitable.

9 Is that fine with you all? And then
10 if -- in the event that you would disagree, then we
11 would resolve whatever is left.

12 Is that agreeable?

13 MS. LEMMENS: Yes, Madam Chair, that is not
14 a problem for us.

15 MS. TABET: Yes.

16 PRESIDENT WALLGREN-LINDHOLM: Very good.

17 And then we have the Post-Hearing
18 Submissions. You will have seen that we sent to you
19 yesterday a tentative suggestion, thus, to have
20 something on paper of how the tabular Post-Hearing
21 Submission could look like and then leaving to you to
22 put in the subheadings. But it substantially follows

1 what you have already produced to us.

2 I thank you for that. I think the list of
3 issues was a good document. So thank you for that.
4 Then -- and we will talk about the timing in a bit.

5 Then there would be Rebuttal Post-Hearing
6 Briefs where we thought that there would be a column
7 for the opposing Party to actually rebut in a column.
8 But obviously it is possible to delete some of the
9 other Party's entries in that tabular form, and then
10 you could rebut following the same, rather succinct
11 format as in the PHBs. If there any comments at this
12 point, we crafted this together yesterday, but if you
13 have better suggestions, this is not prescriptive.

14 So Claimants?

15 MS. LEMMENS: So after we received your
16 email, I emailed Canada's Counsel, and I advised that
17 I don't have any comments with respect to the format.
18 That was what I had expected it to look like. I'm not
19 sure what Canada's position is on the format, and I
20 also had proposed dates for the submissions.

21 I had proposed something approximately one
22 month out but also taking into consideration that

1 people are traveling, and so I had proposed April 16
2 being the Wednesday before Good Friday, Easter time.
3 I don't think we want it to be on a Monday because we
4 inevitably are scrambling on Monday trying to pull
5 materials together, and I don't think we want it on a
6 Friday, certainly not Good Friday either because most
7 people take it as a holiday.

8 I think that Canada will let us know if that
9 date is okay. It sounded like it was, because I don't
10 want to speak on -- okay. I'm getting a nod. So it
11 looks like it is probably okay.

12 But I understand that Canada had a
13 suggestion about rebuttals. I had suggested
14 three weeks later on May 7, another Wednesday, of no
15 particular importance, to my knowledge. But I think
16 Canada has a comment about rebuttals altogether.

17 PRESIDENT WALLGREN-LINDHOLM: Okay. Thank
18 you very much.

19 So April 16 you have proposed for the
20 Post-Hearing Briefs, and then for the rebuttals,
21 May 7. I -- we will also provide -- probably this is
22 what you also envisaged -- that they would be sent

1 only to the Tribunal, and we would redistribute them
2 upon receipt, the first ones.

3 MS. LEMMENS: So I understood it to be what
4 we would refer to as "shotgun" Briefs, where we
5 exchange them at the same -- simultaneously. And so I
6 think what you're saying is that we would just simply
7 submit them to the Tribunal, not to one another, and
8 then you would redistribute them?

9 PRESIDENT WALLGREN-LINDHOLM: Yeah.

10 MS. LEMMENS: No problem with that.

11 PRESIDENT WALLGREN-LINDHOLM: I thought
12 the -- it comes out more or less to the same. Okay.
13 Fine.

14 Okay. So we will hear Canada now.

15 MR. LUZ: Thank you, Madam Chair. And I do
16 appreciate it. I apologized to Matti this morning for
17 not responding last night to be able to say that we
18 don't have any problem with the format. I mean, we'll
19 work on it together just to get the format proper, and
20 despite other matters that are going to explode in the
21 next little while, we think that the proposal of
22 April 16 is fine.

1 PRESIDENT WALLGREN-LINDHOLM: 16, yes.

2 MR. LUZ: So thank you for taking the
3 initiative on that.

4 If the Tribunal would like rebuttal
5 Post-Hearing Submissions, then we will be willing to
6 do it. We weren't sure if it was necessarily -- given
7 the format, if it's going to become so overly
8 cumbersome that it's not useful for the Tribunal, I
9 don't know just because -- I mean, we have done
10 Post-Hearing submissions in the tabular format before,
11 and it can be useful, but it's also cumbersome.

12 And I just -- it was just one of the things,
13 if the Tribunal would like it, of course we are
14 willing to do it, but...

15 PRESIDENT WALLGREN-LINDHOLM: Are you saying
16 that, if we want rebuttals as such, or whether we want
17 them in tabular form? It wasn't clear to me whether
18 you thought that we wanted rebuttals or whether that
19 we wanted rebuttals in tabular form.

20 MR. LUZ: Well, rebuttals at all. We would
21 be happy not to have the Rebuttal Memorial form after
22 that.

1 MS. LEMMENS: I mean, we can be amenable.
2 But you can see that everybody seems to have a
3 different interpretation of even the same documents.
4 So I wonder whether it is helpful to the Tribunal to
5 have that type of information available so that you
6 can see the two different sides of whatever those
7 items might be in the Closing Submissions, but I also
8 understand, obviously, it's more work. So it's what
9 is most helpful to the Tribunal.

10 PRESIDENT WALLGREN-LINDHOLM: But do I
11 understand that you may prefer that there is a
12 possibility for rebuttals?

13 MS. LEMMENS: Probably, because it seems
14 that we sometimes speak about the same document in
15 different ways, so that's probably helpful to the
16 Tribunal.

17 PRESIDENT WALLGREN-LINDHOLM: Well,
18 obviously, there's -- yes, if you want to say
19 something. But, before Mr. Landau speaks, I will say
20 that we can factor it in, and then, if you agree that
21 there's really no reason for them, then we obviously
22 can dispense with them. I was going to add that I

1 take the point of being too complicated a document,
2 but I was thinking that, if some of the other columns
3 were removed, then there would -- just could be a very
4 brief last column.

5 And as I think I stated a couple of days
6 ago, obviously it is nice if they don't become long
7 tables. Thank you.

8 You wanted to say something.

9 ARBITRATOR LANDAU: I made a noise.

10 PRESIDENT WALLGREN-LINDHOLM: I think that's
11 a sign.

12 So we have now -- I have April 16 as the
13 first date and then May 7 as the potential rebuttal.
14 We schedule them, and then, if you think you don't
15 need them, then that's fine with us. May 7. Okay.

16 Now, then, Costs Statements. I would first
17 like to say that we are very happy to have summary
18 statements. We don't need all the underlying
19 information or any detail, and at least I would
20 not -- we didn't discuss this specifically -- expect a
21 submission, also a full submission on Costs, but, of
22 course, I have nothing against it. So what do you

1 say? What would you see as what you'd be expecting to
2 submit?

3 MS. LEMMENS: I think we could actually just
4 add Costs Submissions to the submissions that we're
5 making. I know lots of people like to leave it until
6 the very end after they know what the outcome was, but
7 I think it's also helpful to have the Parties think
8 about it as they're making their submissions at First
9 Instance.

10 PRESIDENT WALLGREN-LINDHOLM: When you say
11 as you are making your submissions --

12 MS. LEMMENS: So, in other words, I'm
13 suggesting that we would actually address Costs in our
14 Post-Hearing Briefs on April 16.

15 PRESIDENT WALLGREN-LINDHOLM: Where you
16 would argue it, and then we would get the summary
17 statement afterwards?

18 MS. LEMMENS: You mean with the numbers
19 involved?

20 PRESIDENT WALLGREN-LINDHOLM: Yes.

21 MS. LEMMENS: I think that we would also --

22 ARBITRATOR LANDAU: You may not know what

1 the numbers are until you finish your --

2 MS. LEMMENS: I guess. Fair.

3 PRESIDENT WALLGREN-LINDHOLM: That's what I
4 was assuming.

5 MS. LEMMENS: So we could argue the points
6 but leave the numbers out.

7 PRESIDENT WALLGREN-LINDHOLM: I will try,
8 which is always a dangerous game, try to summarize
9 what I thought you said, but that you would argue in
10 the last submission why you think that the Cost
11 decision would go a certain way and why. And then the
12 numbers would come afterwards.

13 MS. LEMMENS: That's right.

14 PRESIDENT WALLGREN-LINDHOLM: Yeah.

15 And Canada?

16 MR. LUZ: We would prefer to do it
17 separately, not only because we're going to be very,
18 very pressed for time even to get the First Submission
19 in, but because it is a distinctive kind of issue.
20 The way that we usually do it is after all of the
21 Post-Hearing Briefs are done and that's all finished,
22 and we can kind of project that we're just going to be

1 sitting around waiting for the Tribunal, it's at that
2 point where a short submission on the allocation of
3 Costs can be made, and as well to be able to marshal
4 the actual summary of those Cost, which do take some
5 time. So our preference would be not to do it with
6 the other stuff as well.

7 MS. LEMMENS: That's no problem, but I would
8 think that we would do it before we get the Decision.

9 PRESIDENT WALLGREN-LINDHOLM: Oh. Yes.
10 Yes. So I mean, our proposal would be that, in this
11 case, I don't know how long it will take for you to
12 collect all the Costs and the numbers, but, actually,
13 you are in the same jurisdiction. They are not local
14 Counsel spread around the world that you need to
15 collect. So we would have thought that maybe two or
16 three weeks after the PHB or the rebuttal PHB, if we
17 have one, two or three weeks thereafter, and then you
18 would send, obviously, the numbers, and then, I
19 assume, a short submission on why our Cost decision
20 should go a certain way.

21 MS. LEMMENS: Very good. And May 28 would
22 be three weeks after the May 7 date, and I'm avoiding

1 the two weeks after it because we have a holiday here
2 in Canada on that weekend.

3 PRESIDENT WALLGREN-LINDHOLM: May 28 is
4 proposed. Okay. Thank you.

5 MS. LEMMENS: The one before; right? So I
6 think if we had it on May 21, it would be a holiday
7 right before that, Victoria Day.

8 MR. LUZ: That's totally reasonable. Yeah.

9 PRESIDENT WALLGREN-LINDHOLM: Okay. But
10 then we were expecting that you would also like to
11 send in a commentary on the other Party's Cost
12 submission. No?

13 MS. LEMMENS: Maybe we'll just have a
14 placeholder and see if we need to do that.

15 PRESIDENT WALLGREN-LINDHOLM: That's fine.

16 MS. LEMMENS: So a placeholder on two weeks
17 later. I'm not sure what that date is, but June
18 something.

19 PRESIDENT WALLGREN-LINDHOLM: That's fine.
20 You will tell me -- Ms. Lyseng will tell me in a bit.

21 MS. LEMMENS: June 11.

22 PRESIDENT WALLGREN-LINDHOLM: June 11.

1 Okay. June 11 would be the Commentary to the other
2 Party's Cost submission.

3 I beg your pardon?

4 MR. LUZ: We don't usually do commentaries
5 to the other submission, we just put them in. But if
6 that's -- if it's deemed necessary, but I don't think
7 it's essential. We put the Cost submissions in.

8 PRESIDENT WALLGREN-LINDHOLM: I tell you
9 what. We do not insist on a commentary. I was just
10 expecting you to wanting that, yes.

11 MR. LUZ: Thank you. No. Canada is not
12 inclined to do that --

13 PRESIDENT WALLGREN-LINDHOLM: I beg your
14 pardon?

15 MR. LUZ: Canada is not inclined to want to
16 have a separate response on Costs.

17 PRESIDENT WALLGREN-LINDHOLM: I think that
18 is -- it's a reasonable attitude.

19 So is there anything on what we now have
20 said that raises any questions or concerns? Anything
21 else that raises any concerns? Because then I will
22 commence the farewells. Okay.

1 So we will now proceed to close the
2 proceedings, but before I do that, we want to thank
3 the Parties for what we have found to be a very
4 cordial and collegial proceeding. I particularly
5 appreciate that we have spent quite little time on
6 procedural forks in the road, which is always
7 agreeable to the Tribunal, and also the seamless
8 functioning of the teams have been apparent.

9 No technical glitches other than something
10 very minor, so this has been a very pleasant
11 environment for the Tribunal and also the
12 arrangements -- the Hearing arrangements and also the
13 catering.

14 And on that note, and before I start
15 thanking one and all, I'd like to ask the Parties if
16 there is anything that they would like to object to in
17 the manner that we have conducted this proceedings.

18 MS. LEMMENS: Not from the Claimant's
19 perspective.

20 PRESIDENT WALLGREN-LINDHOLM: Thank you.

21 MR. LUZ: And nothing but other than to say
22 thank you to the Tribunal and to our friends on the

1 other side. It really has been very collegial
2 and -- and we have appreciated that. And to the
3 Einarssons as well, because they have been here the
4 whole time, so we appreciate that.

5 And also to the Tribunal's Secretary and
6 Court Reporter and to the staff. I must admit that we
7 were a little worried about how things were going to
8 go, but it really has been excellent, and I'm not just
9 saying that because there are sugared donuts outside
10 the door, which I will probably eat some more. So
11 thank you.

12 PRESIDENT WALLGREN-LINDHOLM: I wonder if
13 there are any more.

14 MR. LUZ: Well, get there before I do,
15 otherwise you won't have any.

16 So thank you on behalf of our whole team and
17 to our friends on the other side.

18 PRESIDENT WALLGREN-LINDHOLM: Thank you. I
19 wanted to say my thank-yous to the teams first. Thank
20 you all, without naming everybody, I really thank you
21 for your contributions, and also the Parties and Party
22 representatives, to the Einarsson family, and I also

1 want to give a special thanks to the paralegal teams
2 because I think that exhibits have appeared on the
3 screens with commendable efficiency.

4 The tech team also. I know I said that
5 there has not been many glitches, but to my
6 understanding, there haven't been any, at least not
7 visible once.

8 And I also want to thank our Court Reporter.

9 REALTIME STENOGRAPHER: You are very
10 welcome. It was a pleasure.

11 PRESIDENT WALLGREN-LINDHOLM: Thank you.

12 And then, of course, my co-arbitrators. I
13 don't know if I should say this on the record, but
14 they are very fun.

15 (Laughter.)

16 ARBITRATOR LANDAU: Can we delete that?

17 (Laughter.)

18 PRESIDENT WALLGREN-LINDHOLM: And then,
19 Geraldine, who, of course, has been an invaluable
20 support and help to us. Thank you very much.

21 And are there any requests? Nothing
22 pressing on the other side.

1 (Comments off microphone.)

2 PRESIDENT WALLGREN-LINDHOLM: So then I
3 will -- I don't have a gavel, but I will close this
4 Hearing. Thank you very much.

5 MS. LEMMENS: Thank you.

6 PRESIDENT WALLGREN-LINDHOLM: Safe travel.

7 (Whereupon, at 5:05 p.m., the Hearing was
8 concluded.)

POST-HEARING REVISIONS

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter,
do hereby attest that the foregoing English-
speaking proceedings, after agreed-upon
revisions submitted by the Parties, were
revised and re-submitted to the Parties per
their instructions.

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.

[Signed]

Dawn K. Larson