

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

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 In the Matter of Arbitration :
 Between: :
 :
 MOBIL INVESTMENTS CANADA, INC., :
 : ICSID Case No.
 Claimant, : ARB/15/6
 :
 and :
 :
 GOVERNMENT OF CANADA, :
 :
 Respondent. :
 :
 - - - - -x Volume 3

HEARING ON JURISDICTION, MERITS AND QUANTUM

Wednesday, July 26, 2017

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

The hearing in the above-entitled matter
came on at 9:30 a.m. before:

PROF. CHRISTOPHER GREENWOOD, Q.C., President

DR. GAVAN GRIFFITH, Co-Arbitrator

MR. J. WILLIAM ROWLEY, Q.C., Co-Arbitrator

ALSO PRESENT:

MS. LINDSAY GASTRELL
Secretary to the Tribunal

MR. ALEX KAPLAN
Legal Counsel

Court Reporter:

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1 tabs.

2 PRESIDENT GREENWOOD: Let me pay him a
3 compliment that it certainly didn't appear confusing.
4 We had all the exhibits when we needed them.

5 Also, today, I remembered to bring both sets
6 of glasses.

7 MS. SQUIRES: We're set, then.

8 CONTINUED CROSS-EXAMINATION

9 BY MS. SQUIRES:

10 Q. Good morning, again, Mr. Sampath.

11 A. Good morning.

12 Q. I'm going to pick up where we left off
13 yesterday in running through some of the different
14 R&D expenditures.

15 A. Before we start, may I make one correction?

16 Q. Absolutely.

17 A. I misspoke yesterday on the first Project
18 that you showed, [REDACTED] I took the M to be the Roman
19 Numeral M for a thousand, and I mentioned [REDACTED] I
20 think that was the original application for
21 [REDACTED].

22 Q. Okay. Thank you for that correction.

1 Let's discuss the R&D Applications of iceberg
2 profiling expenditure, and that's at Paragraph 113 of
3 your First Witness Statement and 124 of your Second.

4 A. Okay.

5 Q. Now, this R&D activity built on a 2012
6 Project that collected data on icebergs; is that
7 right?

8 A. That's correct.

9 Q. And that 2012 Project was part of a
10 \$10 million legacy fund obligation that ExxonMobil
11 had to the Province?

12 A. That the HSE Project had.

13 Q. And so, that original 2012 spending was not
14 as a result of the Guidelines?

15 A. No. It was a separate agreement.

16 Q. And, as a result, it's not--it doesn't form
17 part of damages in this arbitration?

18 A. That is correct.

19 Q. Now, this phase, then, takes that data that
20 came out of the 2012 Project and uses it to enhance
21 current simulation modeling with respect to icebergs?

22 A. Amongst other things. I think there was five

1 or six projects that were part of the proposal. A
2 couple of them were relevant to modifying the
3 software. A couple of them had different objectives.

4 Q. Okay. You characterized this in your Witness
5 Statement, then, as academic research?

6 A. Pretty much.

7 Q. And, in the ordinary course of business,
8 ExxonMobil does spend a portion, albeit maybe a small
9 one, of its overall R&D budget on research undertaken
10 at academic institutions?

11 A. Yes, that's correct.

12 Q. So, is it fair to say that it's not merely
13 the academic nature of this R&D activity that makes
14 it incremental, there is more than just that?

15 A. Again, let's keep ExxonMobil separate from
16 HMDC.

17 Q. Okay.

18 A. HMDC may give occasionally \$3-5,000 to the
19 University to fund a certain Project, but nothing on
20 this scale. Even within ExxonMobil, most funding to
21 universities, academic institutions tend to be in the
22 10,000 to \$30,000 range.

1 Q. So, they do do some funding to--both
2 ExxonMobil and HMDC would do some funding to academic
3 institutions, but it would be at a very small
4 quantity?

5 A. More so ExxonMobil than HMDC.

6 Q. Let's turn to Tab 22 of your binder, which is
7 Exhibit C-283. This is the Pre-Approval Application
8 that you would have submitted for this expenditure.

9 A. Yeah.

10 Q. And this one is signed, I see. And we're
11 going to turn to the second page of the Project
12 aspect, and look at the heading entitled
13 "technological uncertainties." It's Section F.

14 And it notes there that: "This is a
15 necessary and high value wrap-up of the 2012 iceberg
16 survey, already approved by CNLOPB. There is low
17 risk in all eight projects."

18 Do you see where I am there?

19 A. Is that Section G?

20 Q. Section F, "technological uncertainties."

21 A. Okay.

22 Q. So, based on this sentence, then, HMDC saw

1 this R&D expenditure as a necessary continuance of
2 the 2012 study?

3 A. I'm not sure we saw it as a necessity.

4 Again, as I mentioned, these are the words of
5 the principal investigators, and I was not in the
6 habit of editing them before I submitted them.

7 Q. Would you disagree with that statement, then?

8 A. Necessary? Yes, I would definitely disagree
9 with that.

10 Q. Okay. Let's turn back a page, then, and look
11 at heading C: "Applicability." It notes there that:
12 "All tools, data and studies are of direct
13 applicability to iceberg design and management
14 operations of offshore facilities on the Grand
15 Banks."

16 So, if successful, this R&D activity then
17 would have applicability in the Newfoundland area?

18 A. Possibly.

19 Q. And we established yesterday that ExxonMobil
20 has interest in other projects aside from Hibernia
21 and Terra Nova in that area; correct?

22 A. I know we have some exploration acreage.

1 Beyond that, I'm not aware of any actual operations
2 that HMDC has.

3 Q. Well, ExxonMobil, though, would have other
4 operations?

5 A. No.

6 Q. Okay.

7 A. Not in the Grand Banks area.

8 Q. In the Newfoundland offshore?

9 A. No.

10 Q. The Hebron Project?

11 A. Hebron, yes.

12 Q. And if we continue to read there, it says:

13 "Furthermore, with these unparalleled studies and
14 tools, they are applicable worldwide, for example in
15 the [REDACTED]

16 [REDACTED]."

17 Again, if this R&D activity is successful, it
18 would be useful for ExxonMobil in other parts of the
19 world?

20 A. I'm not sure because when you look at the

21 [REDACTED] there is less concern about icebergs
22 and more about floating ice. The nature of the

1 [REDACTED] is very different from the nature of
2 the Arctic in Canada.

3 Q. So, not certain but a possibility, if
4 successful?

5 A. I think it's a remote possibility.

6 Q. We spoke yesterday that ExxonMobil enters
7 into Joint Industry Projects, or "JIPs," in the
8 ordinary course of business; right?

9 A. Yes, they do.

10 Q. And you would agree with me that, just
11 because an R&D activity forms part of a Joint
12 Industry Project, that doesn't necessarily make it an
13 incremental activity?

14 A. ExxonMobil--I'm sorry, I'm a little confused:
15 Again, I think you're confusing between ExxonMobil
16 and HMDC. ExxonMobil does enter into joint industry
17 partnerships, but it's usually on a very different
18 scale of agreement: The partners usually contribute
19 equal amounts to get equal rights to the results of
20 the JIP, whereas whatever is being funded here
21 because of the nature of the obligations in the Joint
22 Operating Agreement, even [REDACTED] with a [REDACTED]

1 interest has the same rights as ExxonMobil with a
2 33.125 percent interest in the Projects.

3 So, a JIP is not a JIP is not a JIP.

4 Q. Okay. So, on that point then of the
5 Operator's agreement and the relative percentages of
6 the different Owners or interest holders, that
7 arrangement, the fact that the IP rights, then, are
8 shared--everybody gets equal rights but they're not
9 paying equal amounts, that's not as a result of the
10 Guidelines; correct?

11 A. No, that's the result of the Joint Operating
12 Agreement.

13 Q. I would like to look at two of the JIPs that
14 were entered into by HMDC, and I want to turn to the
15 Dual Polarized Radar and the Ice Radar Enhancement
16 Projects.

17 PRESIDENT GREENWOOD: I'm sorry to interrupt
18 you but you're going rather fast. Could you slow
19 down a bit, please.

20 MS. SQUIRES: Absolutely.

21 PRESIDENT GREENWOOD: They're quite difficult
22 questions and you if speak a little bit more slowly I

1 think it will be easier for Mr. Sampath to follow
2 you.

3 MS. SQUIRES: Not a problem.

4 BY MS. SQUIRES:

5 Q. We're going to look at the Dual Polarized
6 Radar and the Ice Radar Enhancement Project.

7 A. Okay.

8 Q. And they are at Paragraph 26 of your First
9 Witness Statement and 46 of your Second.

10 A. Yeah.

11 Q. Now, both of these JIPs are between HMDC,
12 other operators, and Rutter, which is the St.
13 John's-based Contractor; is that right?

14 A. Yes.

15 Q. And, at the end of the day, Rutter retains
16 the right to the technology in each of these R&D
17 expenditures?

18 A. I would think so, yes.

19 Q. Well, in your First Witness Statement, you
20 raised concerns about having to fund an R&D activity
21 with ExxonMobil's competitors for new radar
22 technologies that at the end of the day ExxonMobil

1 would not own; is that right?

2 A. Yes, from an ExxonMobil standpoint.

3 Q. And--but the Guidelines themselves did not
4 require HMDC to fund this particular R&D activity; is
5 that right?

6 A. That is correct.

7 Q. And if ExxonMobil or HMDC--if HMDC wanted to
8 avoid such situation, it could fund R&D activities
9 that didn't involve proprietary issues; is that
10 right?

11 A. I'm sorry, I don't understand.

12 Q. If HMDC has concerns about sharing
13 proprietary information or losing possible--money
14 they could make off Intellectual Property, instead of
15 funding those R&D activities, they could choose other
16 ones to fund, like a community contribution, for
17 example?

18 A. To my knowledge, HMDC was not interested in
19 capturing Intellectual Properties. They're in the
20 business of producing oil and making money for the
21 entity. I don't think IP issues were ever a concern
22 for HMDC.

1 Q. It would be a concern for ExxonMobil?

2 A. It would be a concern for ExxonMobil.

3 Q. Let's turn to Tab 23 of your binder. This is
4 Exhibit C-229. And this is the Contribution
5 Agreement between HMDC, Husky Oil, Suncor, ExxonMobil
6 as Operator of the Hebron Project, and Petroleum
7 Research Atlantic Canada, which is also known as
8 "PRAC" at the time.

9 And I want to turn to Appendix B, and at the
10 bottom right-hand corner of the pages there you'll
11 see there's a bunch of numbers, and I am going to
12 Page 4444.

13 A. Okay.

14 Q. And under the introduction there, it notes in
15 the second line that [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Do you see where I am there?

22 A. Yes.

1 Q. So, ExxonMobil has operations in areas or is
2 exploring in areas that would have multi-year ice or
3 first-year ice; is that's right?

4 A. Probably.

5 And I say probably because two years ago or
6 three years ago I would have said yes, but now with
7 the oil price where it is, I'm not sure where the
8 Arctic program is currently.

9 Q. Okay. If successful, then, and if that
10 exploration was to continue, would you agree that
11 this R&D activity would be useful to ExxonMobil?

12 A. Possibly, but I must add, I had the
13 opportunity to look at the Final Report from this
14 project which came out a couple of months ago, and
15 the Project was unsuccessful, as some R&D Projects
16 tend to be.

17 Q. Give me one minute, Mr. Sampath.

18 A. Sure.

19 (Pause.)

20 MS. SQUIRES: I don't have any more questions
21 for you, Mr. Sampath, so thank you very much for your
22 time.

1 PRESIDENT GREENWOOD: Mr. Sampath, just stay
2 where you are for a minute.

3 Any questions on redirect?

4 MR. NICHOLS: Yes, very briefly.

5 PRESIDENT GREENWOOD: Please go ahead,
6 Mr. Nichols.

7 MR. NICHOLS: Thank you.

8 REDIRECT EXAMINATION

9 BY MR. NICHOLS:

10 Q. Mr. Sampath, we were just talking about the
11 Dual Polarized Radar Project, and I believe I heard
12 you say that you received a final report of the
13 results of that Project?

14 A. Yes.

15 Q. And what were the conclusions contained in
16 that report?

17 A. [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 Can you hear me? I'm sorry, I'm speaking too
21 softly.

22 Q. Mr. Sampath, I'd like to turn back to--

1 PRESIDENT GREENWOOD: Mr. Nichols, sorry,
2 before we go on, if much is going to be made of that,
3 then we're going to need to see the results of this
4 R&D. But, in any event, I would have thought what
5 was going on at the time that the research was
6 commissioned rather than the final outcome of the
7 research, which is important.

8 MR. NICHOLS: I believe Mobil would agree
9 with that.

10 BY MR. NICHOLS:

11 Q. Mr. Sampath, have you inquired into the
12 results of other R&D Projects contained in your First
13 and Second Witness Statements?

14 A. Yes, I did.

15 Q. And how did you go about that, sir?

16 A. I contacted Kamran Gul who replaced me as R&D
17 Manager in HMDC.

18 Q. And what were--upon--well, first of all, did
19 you complete your review of the R&D Projects
20 contained in your First and Second Witness
21 Statements?

22 A. Could you repeat the question, please?

1 Q. Sure. Actually, I will rephrase it.

2 Mr. Sampath, which R&D Projects covered in
3 your First and Second Witness Statements did you look
4 into?

5 A. I looked at wherever they had reports, I
6 looked at the Executive Summaries. I looked at a
7 total of 32 projects.

8 Q. Okay. And, in having looked at those 32
9 projects, which, if any, of those were determined to
10 be successful?

11 A. I think the NMR--

12 MR. DOUGLAS: Judge Greenwood, I do apologize
13 for interrupting. I just don't see, first of all,
14 how this is relevant and, two, if there have been
15 results, we certainly haven't seen any documents
16 associated with those results.

17 PRESIDENT GREENWOOD: I think that's a fair
18 objection.

19 We cannot now open up a totally different
20 line of inquiry. Redirect questioning has to be
21 based on what was put in cross-examination, and the
22 outcome of the research was not put in

1 cross-examination.

2 MR. NICHOLS: Okay.

3 MR. O'GORMAN: Mr. President, the Respondent
4 is claiming that both Hibernia as well as ExxonMobil
5 have received some ultimate benefits from these
6 Projects. They put that squarely at issue. And I
7 think it is fair to allow us to ask Mr. Sampath if
8 he's looked into whether any of these Projects have
9 actually resulted in any benefits. That's a direct
10 defense that has been raised by the Respondent, and
11 it was implicit, if not express, in the line of
12 questioning that was raised by Ms. Squires,
13 implicating that there was some motivation or some
14 benefit that ExxonMobil or Hibernia itself, which was
15 the direct party that was making these expenditures,
16 derived from these Projects, and I think it's under
17 those circumstances, I think the issue, it's entirely
18 fairly to be joined by Mr. Sampath at this point
19 through the questions of Mr. Nichols.

20 PRESIDENT GREENWOOD: All right. We will
21 take a moment's pause, and I will consult my
22 colleagues.

1 (Tribunal conferring.)

2 PRESIDENT GREENWOOD: Thank you. We've
3 conferred about that, and the ruling I made a moment
4 ago stands. It wasn't put in cross-examination, and
5 we will not allow questions on the outcome of the
6 research relating to papers that have not been
7 disclosed in the proceedings.

8 MR. O'GORMAN: Thank you, Mr. President.

9 MR. NICHOLS: Understood.

10 No further redirect.

11 PRESIDENT GREENWOOD: Thank you.

12 Mr. Sampath, you can now stand down. Thank you very
13 much for your assistance.

14 (Witness steps down.)

15 PRESIDENT GREENWOOD: I'm afraid I have
16 forgotten who the next witness is. Mr. Durdle?
17 Mr. Dunphy.

18 ROBERT DUNPHY, CLAIMANT'S WITNESS, CALLED

19 PRESIDENT GREENWOOD: Ms. Hoffmann, I see
20 you're going to be doing the cross-examination.

21 I realize it's difficult to predict how long
22 you will need, but are you--is it likely to be the

1 case that we can break for coffee after Mr. Dunphy?

2 MS. HOFFMANN: Yes.

3 PRESIDENT GREENWOOD: Thank you. I think
4 that would probably be beneficial to the Court
5 Reporter as well as to the Tribunal and, indeed to
6 counsel.

7 (Pause.)

8 PRESIDENT GREENWOOD: Good morning,
9 Mr. Dunphy. Please help yourself to a glass of
10 water, if you would like one.

11 Now, on the laminated sheet in front of you
12 is the Witness Declaration, if you would be kind
13 enough to read that out.

14 (Pause.)

15 PRESIDENT GREENWOOD: I suggest you leave
16 that switched on throughout the Hearing. I don't
17 think that will interfere with counsel's microphones.

18 THE WITNESS: Okay. Thank you.

19 I solemnly declare upon my honor and
20 conscience that I shall speak the truth, the whole
21 truth, and nothing but the truth.

22 PRESIDENT GREENWOOD: Thank you very much.

1 Mr. Nichols, are you going to be opening?

2 MR. NICHOLS: I will.

3 PRESIDENT GREENWOOD: Please, go ahead.

4 MR. NICHOLS: Thank you.

5 With the Tribunal's permission, may I put his
6 two Witness Statements in front of Mr. Dunphy?

7 PRESIDENT GREENWOOD: Certainly.

8 MR. NICHOLS: Thank you.

9 DIRECT EXAMINATION

10 BY MR. NICHOLS:

11 Q. Good morning, Mr. Dunphy. Could you
12 introduce yourself and your relationship to the
13 Hibernia and Terra Nova Projects.

14 A. Good morning. My name is Robert Dunphy. I
15 work with Hibernia Management Development Company for
16 approximately 13 years as the Environment Lead,
17 Environment Advisor there.

18 COURT REPORTER: Keep your voice up.

19 PRESIDENT GREENWOOD: I'm so sorry. If you
20 could speak a bit louder. I should have explained,
21 Mr. Dunphy, that the Court Reporter is sitting behind
22 you, and he has to be able to hear everything you say

1 for the transcript.

2 THE WITNESS: Okay.

3 PRESIDENT GREENWOOD: And I also should have
4 said at the beginning it's very important not to
5 speak too quickly because we need an accurate record
6 of everything that's said.

7 Sorry, please, do continue.

8 THE WITNESS: Okay. I will repeat myself.
9 Hopefully this will be better.

10 My name is Robert Dunphy. I was seconded
11 into the Hibernia Management Development Company in
12 2002. I worked there for approximately 13 years as
13 the Environmental Advisor.

14 I also participated through the industry
15 association in various meetings and issues with the
16 Terra Nova operation, through my interactions with my
17 counterparts there.

18 Q. Mr. Dunphy, you have submitted two Witness
19 Statements in this proceeding; isn't that correct?

20 A. Yes, I have.

21 Q. Do you have them in front of you?

22 A. Yes, I do.

1 Q. All right.

2 A. Witness Statement one, and the Second Witness
3 Statement.

4 Q. Your First Witness Statement of March 1st,
5 2016, CW-8, that is in front of you?

6 A. Yes, it is.

7 Q. Do you reaffirm the contents of that
8 statement, sir?

9 A. I do.

10 Q. Do you wish to make any corrections to that
11 statement, sir?

12 A. No, I do not.

13 Q. Do you also have your Second Witness
14 Statement of September 9th, 2016, which has been
15 marked CW-13?

16 A. Yes, I do.

17 Q. Do you reaffirm the contents of that
18 statement, sir?

19 A. Yes, I do.

20 Q. Do you wish to make any corrections to that
21 statement?

22 A. No, I don't.

1 MR. NICHOLS: Mobil passes the witness.

2 PRESIDENT GREENWOOD: Thank you.

3 Ms. Hoffmann.

4 CROSS-EXAMINATION

5 BY MS. HOFFMANN:

6 Q. Good morning, Mr. Dunphy. My name is
7 Michelle Hoffmann and I--

8 MR. NICHOLS: I'm sorry to interrupt, but we
9 are just receiving now the Cross-Examination Bundle,
10 if you could please hold on.

11 PRESIDENT GREENWOOD: Thank you, if you could
12 just hold on for a moment, please, Ms. Hoffmann, we
13 will get the bundle of documents out.

14 And Mr. Dunphy, you have in front of you a
15 lever arch file or ring binder, that those are the
16 documents you will need to refer to while counsel is
17 cross-examining you.

18 BY MS. HOFFMANN:

19 Q. Good morning, Mr. Dunphy. My name is
20 Michelle Hoffmann, and I'm counsel for the Government
21 of Canada in these proceedings.

22 A. Good morning.

1 Q. I'm going to ask you a few questions so that
2 I can understand the Witness Statement you have
3 submitted--

4 PRESIDENT GREENWOOD: I'm terribly sorry.
5 You're going to have to speak up a bit as well,
6 Ms. Hoffmann. Thank you.

7 BY MS. HOFFMANN:

8 Q. I'm going to ask you a few questions so that
9 I can understand the Witness Statements that you
10 provided on behalf of the Claimant in this
11 arbitration. If you find my question unclear, just
12 let me know, and I will repeat or rephrase it. If
13 the answer to my question is a yes or a no, I would
14 appreciate if you can start your response that way so
15 that we have a clear record.

16 I will also be referring to the binder in
17 front of you, which contains numerous documents. The
18 documents are each identified by a tab number, so you
19 can locate them easily.

20 A. Okay.

21 Q. So, you began your career at HMDC in 2002?

22 A. That's correct.

1 Q. And you were then seconded to ExxonMobil in
2 2003?

3 A. That's correct.

4 Q. And while at HMDC, you suggested
5 environmental-related projects that HMDC could
6 undertake?

7 A. Yes, I did, yeah.

8 Q. And you suggested projects to Bill Swett.

9 A. Yes, I did.

10 Q. And he's Mr. Sampath's predecessor?

11 A. Yes, he is.

12 Q. You are currently employed as the Safety,
13 Security, Health and Environmental Lead at Hebron; is
14 that correct?

15 A. No, I have since moved on to another role.

16 Q. Okay.

17 A. I'm now back seconded with HMDC.

18 Q. Okay.

19 A. As the Offshore Services Supervisor.

20 Q. Okay.

21 A. For about six-eight months now.

22 Q. Okay. Have you ever worked for Suncor?

1 A. Not directly.

2 Q. Okay. Let's discuss your responsibilities as
3 Environmental Lead at HMDC.

4 In 2003, HMDC adopted ExxonMobil's corporate
5 environmental policy; is that correct?

6 A. That is correct.

7 Q. And part of Exxon's corporate environmental
8 policy includes the "Protect Tomorrow, Today"
9 initiative; is that right?

10 A. That is correct. It's a global initiative
11 that's communicated to all assets.

12 Q. Okay. And part of the "Protect Tomorrow,
13 Today" initiative involves risk mitigation and
14 monitoring?

15 A. Certainly, yes.

16 Q. So, basically, the point is to be a diligent
17 Operator with respect to the environment?

18 A. That is correct.

19 Q. Okay. Let's discuss Environmental Effects
20 Monitoring in the Newfoundland Offshore.

21 As the Environmental Lead, your
22 responsibilities also included the Environmental

1 Effects Monitoring programs; is that right?

2 A. That is correct.

3 Q. So, Environmental Effects Monitoring, or
4 "EEM," is the monitoring of the environment to
5 determine the effects of an industrial activity,
6 basically?

7 A. That is correct.

8 Q. And HMDC has an obligation to do EEM under
9 the Benefits Plans; is that right?

10 A. Not under the Benefits Plan, I do not think.

11 It's actually required under the Petroleum
12 Regulations section, I think it's Section 9 of the--

13 Q. Okay.

14 A. --of the regulations require an Environmental
15 Protection Plan; and, under that plan, there are a
16 number of additional requirements, one of which is
17 the Environmental Effects Monitoring plan.

18 Q. Okay. Under the Benefits Plan, the
19 requirement is that the Proponent submits its plans
20 for environmental compliance and effects monitoring
21 programs, so just generally; is that right? Like the
22 Benefits Plans are more general and, as you said, the

1 regulations are more specific? Is that accurate?

2 A. I cannot comment on that. I'm not familiar
3 with that terminology in the Benefits Plan.

4 Q. Okay. We can turn to it, if you would like.

5 A. Sure.

6 Q. It's at Tab 2 of your binder, Exhibit C-37.

7 A. Yes.

8 Q. This is the Hibernia Benefits and Development
9 Plan, so we have an excerpt there of Page 81.

10 A. Okay.

11 Q. I will just wait for the screen to kick in.

12 Okay. If we look at Condition 12, it says:
13 "It is a condition of the approval of the Hibernia
14 Development Plan that prior to production, the
15 Proponent submit, for the Board's approval, its plans
16 for environmental compliance and Effects Monitoring
17 Programs."

18 A. That was a condition of the approval of the
19 Development Plan, that is correct.

20 Q. Okay.

21 PRESIDENT GREENWOOD: I'm terribly sorry to
22 interrupt you.

1 Mr. Dunphy, you're turning away from the
2 microphone, and it's making it difficult for us to
3 pick up what you're saying. I realize this it's
4 awkward because you inevitably look at the person who
5 is asking the questions but I think you need to look
6 to us on the Tribunal and speak directly into the
7 microphone.

8 THE WITNESS: Okay.

9 So, what I'm seeing here, then, as
10 Condition 12, this one I see here, this is one of the
11 numerous conditions that was attached to the Decision
12 by the CNLOPB at the time with the approved Hibernia
13 Development Plan.

14 BY MS. HOFFMANN:

15 Q. Okay. Thank you.

16 So, the EEM programs are conducted every two
17 years?

18 A. Yes.

19 Initially, they're conducted every year for
20 three consecutive years, and thereafter it's every
21 two years.

22 Q. Okay. Generally, the EEM programs sample

1 marine sediments and one or more fishery species both
2 near the installations and at more distant control
3 sites?

4 A. Sediment samples and one fish is sampled,
5 it's known as flatfish, American plaice.

6 The species is known as American plaice,
7 P-L-A-I-C-E.

8 Q. Thank you. So, in general, with these EEM
9 programs, monitoring tools are well developed for
10 fish?

11 A. Reasonably well for fish for that fish in
12 particular. It was not originally part of the EEM
13 design for Hibernia, it was added on in 2004 and
14 thereafter.

15 And it's still somewhat emerging in terms of,
16 you know, the technique and understanding the data.

17 Originally, Hibernia was reluctant to add--

18 Q. Sorry?

19 A. Originally, Hibernia was reluctant to add
20 that component to our EEM program because of
21 the--there wasn't a solid understanding of the--based
22 on the information that was out there, and the

1 concern was there would be--natural variation would
2 be misinterpreted to as an effect. Eventually, we
3 were encouraged by the regulator to add it, which we
4 did in 2004.

5 Q. Okay. But for invertebrates and other marine
6 species, the monitoring tools are not well developed?

7 A. We have no invertebrate species included in
8 the Environmental Monitoring Effects Program right
9 now.

10 Q. So, HMDC generates detailed reports from
11 these EEM programs. These results are sent to the
12 Board?

13 A. That is correct.

14 Q. Okay. And a potential issue with the EEM
15 program is that the results can lead to false
16 positives because of lack of information on natural
17 variation? Did I understand that from your
18 statement?

19 A. The original concern about utilizing American
20 plaice was the absence of a long-term baseline and to
21 really understand what happened happens naturally.
22 Some of the Bioindicators that are examined, they

1 vary naturally--

2 The natural variation occurs--arises from
3 differences in the sexes, a difference in age, a
4 difference in the type of habitat and feed that the
5 animal is utilizing. So, there is this naturally
6 occurring variation that is uncomfortable from an
7 Operator's perspective when it can be confused with
8 an effect.

9 Q. Sure.

10 A. Fortunately, since 2004, we've developed a
11 reasonably good baseline, and the natural variation
12 is slowly coming through in the data.

13 Q. A baseline of American plaice?

14 A. Correct.

15 Q. Okay. In your Second Witness Statement, at
16 Paragraph 13--I will give you a chance to turn to
17 that--you mentioned the Oil Spill EEM?

18 A. Right.

19 Q. So, to be clear, the Oil Spill EEM has not
20 started yet. It will begin once a spill actually
21 occurs?

22 A. Yes. That was intended as a general guide,

1 and what we would do to monitor the marine
2 environment after a substantial, very large oil
3 spill.

4 Q. Okay. And the Oil Spill EEM will focus on
5 fish health; is that right?

6 A. The Oil Spill EEM will include the same
7 species that we just spoke of, and the Bioindicators,
8 that are already utilized because there is existing
9 dataset, as well as sediment sampling, and my
10 recollection is water sampling as well.

11 Q. Okay. Thank you.

12 So, let's talk about the Bioindicators Joint
13 Industry Project, or JIP, which you discuss at
14 Paragraphs 19 and 20 of your First Witness Statement
15 and Paragraphs 12 to 16 of your Second Witness
16 Statement.

17 The R&D Application that you submitted to the
18 Board is at Tab 6 of your binder. That's Exhibit
19 C-322, for the record.

20 MR. NICHOLS: I'm not sure that this document
21 reflects that Mr. Dunphy submitted this to the Board.

22 MS. HOFFMANN: Oh, sorry. It's the document

1 that HMDC submitted to the Board.

2 THE WITNESS: Yes, it appears to be the
3 document submitted by Bill Swett, the R&D Coordinator
4 at the time.

5 BY MS. HOFFMANN:

6 Q. Right. Thank you.

7 This is a [REDACTED] approximate expenditure;
8 is that right?

9 A. It's been a while. I don't recall the exact
10 dollar value.

11 Q. Okay. And it's a Joint Industry Project that
12 both Hibernia and Terra Nova are participating in?

13 A. Yes.

14 Q. And the Claimant, Mobil Investments Canada,
15 has a 33.125 percent ownership interest in Hibernia
16 and 19 percent in Terra Nova. Does that sound about
17 right to you?

18 A. That sounds about right.

19 Q. So, the net for ExxonMobil Canada--sorry, for
20 Mobil Investments Canada, Inc.--I'll rephrase my
21 question.

22 So, the net claimed for Mobil Investment Canada,

1 Inc. would be about [REDACTED]? It's okay if you
2 can't--

3 A. I lost the line of sight on the precise
4 dollar values of these a long time ago, and I can't
5 comment.

6 Q. All right, that's fine.

7 So, the Project takes place over a five-year
8 period from 2012 to 2016?

9 A. Yes, that sounds about right.

10 Q. Okay. And the Bioindicators Project is not
11 part of the Hibernia EEM program?

12 A. No, it's not.

13 Q. Okay. So, the Bioindicators Project is about
14 collecting and studying samples of seven different
15 marine species found in the Grand Banks?

16 A. I think that was the original intent. I
17 think the number may have decreased since it was
18 implemented.

19 Q. Okay. In the initial application that we
20 have on the record, it says the species are
21 zooplankton, snow crab, scallop, shrimp, sea star,
22 sand lance and cod; does that sound right?

1 A. Originally that's the case.

2 Q. Okay. And these species were chosen because
3 they are either commercially important or they're
4 part of the food chain for commercially important
5 fish?

6 A. That's correct.

7 Q. And sampling in this Project occurs twice a
8 year, in the summer and in the fall?

9 A. That was the intent to get seasonal sampling
10 conducted, that's correct.

11 Q. Okay. So, the Bioindicators Project looks at
12 the baseline health of various marine ecosystem
13 components; is that right? That's the baseline?

14 A. It looked at the fish--the health of various
15 marine organisms, yes.

16 Q. Okay. And then the baseline--

17 PRESIDENT GREENWOOD: Sorry, Mr. Dunphy,
18 you're dropping your voice again. It's very
19 difficult for us to hear you. I realize it's in a
20 room of this kind one tends to speak softly, but you
21 need to keep your voice up and remember that you're
22 projecting it not only forwards but backwards to the

1 Court Reporter.

2 THE WITNESS: Thank you. Will do.

3 Could you repeat the question, please?

4 BY MS. HOFFMANN:

5 Q. Yes. I was on to my next question.

6 (Whereupon, the Court Reporter read back the
7 previous question.)

8 THE WITNESS: I heard that. The various
9 ecosystem components, I guess, to more accurately
10 state it, is assessed based on health of various
11 marine organisms, the seven that you mentioned
12 earlier.

13 BY MS. HOFFMANN:

14 Q. Okay. And then this baseline can help to
15 compare natural conditions versus the effects of an
16 oil spill?

17 A. That was the intent.

18 Q. Let's turn to Page 3 of the R&D Application
19 for this expenditure. It's still at Tab 6 that you
20 have there. It's Bates Number 5739 at the bottom.

21 A. B-3? Is that correct?

22 Q. It's Bates Number 5739, at the bottom right

1 of the page. The little number at the bottom.

2 So, this should be the Annex B Project
3 description?

4 A. Yes, I have it.

5 Q. Okay. About halfway down the page, the
6 benefits of this project are listed. The first
7 bullet point says: [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 Do you see where I am?

15 A. Yes, I do.

16 Q. Okay. So, [REDACTED], is that the oil
17 spill on the [REDACTED].

18 A. Yes.

19 Q. On the [REDACTED] platform?

20 A. Yes.

21 Q. Okay. So, at the time the Bioindicators
22 Project was proposed in 2012, the [REDACTED] was

1 on people's mind industry-wide?

2 A. Yes, it was.

3 In fact, we sit on an organization known as
4 One Ocean with the fishing industry and a small group
5 from that organization, representatives of both the
6 oil and gas and fishing industry, took a trip to the
7 [REDACTED] to understand some of the lessons
8 learned that we could take back. That's how these
9 came to our attention.

10 Q. Okay. Thank you.

11 I want to take you to a few documents related to
12 the Bioindicators Project.

13 A. Okay.

14 Q. First, let's look at Tab 4 of your binder,
15 that's R-106 for the record.

16 A. Yes, I have it.

17 Q. Okay. This is an e-mail exchange between
18 yourself and Bill Swett.

19 A. Yes, it is.

20 Q. Dated July 16, 2011, about 11 months before
21 the R&D Application for this expenditure was
22 submitted to the Board?

1 A. Mm-hmm, yes, it is.

2 Q. Okay. The attachment to your e-mail at Bates
3 Number 5340--I think it's a couple of pages in.

4 A. I have it. It's an [REDACTED] document.

5 Q. Okay. The second paragraph states:

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 Do you see where I am?

15 A. Yes, I do.

16 Q. Okay. If we turn to Tab 9 of your binder,
17 that's R-107 for the record. This is e-mail--this is
18 an e-mail about a month later dated August 24th,
19 2011, between yourself and Terry Hubele from
20 ExxonMobil Canada?

21 A. Yes, is it. Terry Hubele, yes.

22 Q. Oh, sorry. Can you please read aloud for the

1 record what you stated at Bates Number 5343 in the
2 fourth paragraph at Page 2?

3 A. Fourth paragraph?

4 Q. The fourth paragraph, please.

5 A. That starts with "one of the
6 recommendations"?

7 Q. Yes.

8 A. [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 Q. Thank you. Now, let's turn to Tab 5 of your
16 binder.

17 A. Okay, I'm there.

18 Q. This is Exhibit R-108 for the record.

19 This is an e-mail exchange dated August 24,
20 2011 between yourself, Andre Cerquiera from Exxon
21 Canada, and Bill Swett; is that right?

22 A. Yes, it is.

1 Q. In the attachment of Page 3 the PDF, Bates
2 Number 5346?

3 A. Yes, I have it.

4 Q. It's a PowerPoint presentation. If we look
5 on the left-hand side under "technical
6 uncertainties," in the third bullet point there, it
7 says "lesson learned from [REDACTED] spill was lack of data
8 on normal health on various marine organisms."

9 A. Yes, I see it. That's correct.

10 Q. And then if we look under--on the right-hand
11 side on the bottom under "Project drivers"?

12 A. Mm-hmm.

13 Q. We have "potential to reduce regulatory drive
14 towards more stringent requirements."

15 Do you see where I am?

16 A. Mm-hmm, I do.

17 Q. Okay. If we go to Page 8 of the same
18 document, same tab, it's Bates Number 5351.

19 A. 5351?

20 Q. Yes.

21 A. Okay.

22 Q. If we look under Section B, "Project

1 Objectives," it says: "To develop a background
2 database that could be [REDACTED]

3 [REDACTED]

4 And under Section D, "applicability."

5 A. Yes, I see.

6 Q. We have: "In the event of a large oil spill,
7 a broader assessment of the health of the marine
8 environment is required."

9 A. I see that, yes.

10 Q. And again, under "applicability," the next
11 point, [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 Do you see where I am there?

16 A. Yes.

17 Q. So, these e-mail exchanges were all in 2011
18 prior to HMDC submitting its R&D Application to the
19 Board. You will agree with me, then, that the
20 [REDACTED] was a driving factor in Mobil
21 Investments Canada or HMDC creating the Bioindicators
22 Joint Industry Project?

1 A. The main driving factor to do this study, as
2 well as the others, was to satisfy spending
3 requirements under R&D Guidelines.

4 Q. I understand that's the position that you
5 stated in your Witness Statement, but if we turn to
6 Tab 8 of your binder at R-101 for the record.

7 A. Yes, I have it.

8 Q. If we look on Bates Number 2099, on the first
9 page there, under "Purpose or Objective," it says:

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 Do you see where I am?

16 A. Yes.

17 Q. Following Macondo, operators in the Gulf had
18 to pay compensation. Are you aware of that?

19 A. Generally through media reports.

20 Q. Yeah, me too.

21 PRESIDENT GREENWOOD: I'm sorry, can I just
22 ask the Witness a question. What was this PowerPoint

1 presentation used for, Mr. Dunphy?

2 THE WITNESS: My recollection is that was
3 part of the presentation that we presented at the
4 2012 HSE Workshop organized by PRNL, whereby all the
5 Operators came together, reviewed the various R&D
6 proposals that we were interested in doing, and
7 discussed, evaluated, and rated various the projects,
8 and those that were accepted were then passed on to
9 PRNL to proceed with conducting the R&D.

10 PRESIDENT GREENWOOD: Thank you very much.

11 BY MS. HOFFMANN:

12 Q. So, you will agree with me that the [REDACTED]
13 [REDACTED] spill was a driver, at least a stated driver,
14 for this R&D?

15 A. It brought to our general attention that--in
16 the event of a very large spill; there was going to
17 be, likely, a great deal of scientific work done.
18 And while we have an Oil Spill EEM, that would cover
19 our obligations as determined by the regulator,
20 undoubtedly, there will be additional research done
21 from various sources in the event of a very large
22 spill.

1 And to address the chance of false positives
2 due to misinterpreting natural variation, it was
3 deemed to be an appropriate R&D Project that we could
4 be qualified under the Guidelines. It was deemed to
5 be an appropriate study to do.

6 Q. Thank you.

7 If we turn back to the R&D Application at
8 Tab 6 of your binder, that's Exhibit C-322 for the
9 record we see here on the first page that HMDC made
10 the application to the Board on June 13, 2012?

11 A. That is correct.

12 Q. So, on Page 3 of the PDF, Bates 5739, we have
13 a Project description which we went to earlier, I
14 think.

15 A. Yes.

16 Q. We discussed the first point already.

17 If we turn to the fourth bullet at the end of
18 that list, it says [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 Do you see that there?

1 A. Yes, I see that.

2 Q. If we turn to the next page, Bates Number

3 5740, at the top there.

4 A. Okay.

5 Q. It says: [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 Do you see where I am with that?

21 A. Yes, I do.

22 Q. So, from these documents we know that one of

1 the recommendations arising out of the [REDACTED]
2 was to develop a better knowledge base of the
3 baseline condition of the marine ecosystem, focusing
4 on a wide range of species; is that right?

5 A. That's correct.

6 Q. Okay. And as you mentioned earlier, the
7 bioindicators model underway in the Gulf is
8 similar--or, sorry--underway in the Grand Banks--

9 COURT REPORTER: Slow down, please.

10 BY MS. HOFFMANN:

11 Q. As you mentioned earlier, the bioindicators
12 model underway in the Grand Banks is similar to that
13 in the [REDACTED] right? You mentioned that you had
14 visited?

15 A. The Bioindicators Study done under the
16 Guidelines was intended to address that
17 recommendation out of the [REDACTED] that they--

18 Q. Okay.

19 A. What we learned from the One Ocean trip there
20 was that data was being collected, and there wasn't a
21 long-term historical baseline database available.
22 And, therefore, natural variation issues were arising

1 and confounding the interpretation of data.

2 Q. Okay. Thank you.

3 Let's turn to Tab 10 of your binder. That's
4 R-102, for the record. This is a [REDACTED] Contribution
5 Agreement between HMDC, [REDACTED] ExxonMobil
6 Canada Properties, and [REDACTED]

7 [REDACTED]

8 A. Mm-hmm.

9 Q. If we turn to Bates Number 2084, about 20
10 pages in--20, 21 pages in.

11 A. Okay, I'm there.

12 Q. There is a project description, which looks
13 similar to the one that we already looked at. It
14 essentially duplicates the first two points that we
15 discussed from the R&D Application; first, about
16 having the--the importance of having a baseline
17 understanding of marine health post-[REDACTED] and to
18 reduce exposure to liabilities. Do you see that?

19 A. Mm-hmm, I do.

20 Q. So, these benefits were part of the reason
21 other industry players participated in the Joint
22 Industry Project?

1 A. I would describe these as the, I guess, the
2 technical objectives of the study.

3 Q. Okay.

4 A. The overall objective, really, and the way
5 the--it was presented to us. Within HMDC, we had a
6 significant challenge ahead of us with the recent
7 interpretation of the spending--the R&D spending
8 requirements. And that was, you know, put out to all
9 employees as an opportunity to recommend and
10 propose--propose R&D Projects.

11 Q. Okay. Thank you.

12 The strategy for oil-spill response includes
13 sharing technology and results; is that right?

14 A. Yes.

15 Q. So, you would agree with me, then, that Mobil
16 Investments Canada, and the industry in general, is
17 essentially being diligent in collecting this data in
18 advance of a spill?

19 A. Yes. We're acting above and beyond what's
20 required. We had an Oil Spill EEM in place that was
21 approved by the regulator, using a proven tool--that
22 being, for this particular discussion, the American

1 plaice.

2 American plaice was selected as the optimum
3 species to utilize for such a study. You know, its
4 utilization of habitat was ideal. It lived on and
5 within sediments, it fed on organisms that lived
6 within sediments. It had some reasonable degree of
7 historical data, and it was the ideal candidate to
8 utilize.

9 Q. Thank you.

10 Now, I would like to discuss the marine
11 dredge disposal JIP, which you discuss at
12 Paragraph 17 and 18 of your First Witness Statement,
13 and paragraphs 7 to 11 of your Second Witness
14 Statement.

15 A. I'm there, yes.

16 Q. Thank you. This is about a [REDACTED]
17 expenditure, which if it's okay if you don't know.

18 A. Okay.

19 Q. And it's a Joint Industry Project, which both
20 Hibernia and Terra Nova are participating in?

21 A. Yes, that's correct.

22 Q. Okay. And Mobil Investments Canada is

1 claiming as damages for its 33.125 percent interest
2 in Hibernia, or in HMDC, and its 19 percent in Terra
3 Nova; does that sound about right?

4 A. It does sound about right.

5 Q. If you'll trust my math, that's about
6 [REDACTED] net for Mobil Investments Canada in this
7 arbitration.

8 Before getting into the expenditure itself,
9 I'd like to discuss some of the statements that you
10 made in your Witness Statement regarding the
11 Fisheries Act, and some background information on
12 dredging.

13 A. Okay.

14 Q. For us non-environmental people.

15 A. Okay.

16 Q. Can you explain briefly what dredging is, in
17 layman's terms, for everyone in the room.

18 A. So, at Hibernia--Hibernia is a gravity-based
19 structure, it's a chunk of concrete upon which we
20 have all of our equipment and personnel.

21 At some point in time it was determined that
22 there was Hibernia South Pool that we could develop,

1 but the only way to develop it was do a subsea
2 development, which means wells are put on the
3 seafloor. And to prevent and mitigate the risk of
4 icebergs hitting those wells, the seafloor is
5 excavated to a required depth--I think it was
6 10 meters; and, therefore, if any icebergs come down
7 through the area and are in touch with the seafloor
8 causing scouring, the wellhead equipment and whatever
9 is in there would be protected from potential damage.

10 Q. Okay.

11 A. So, prior to commencing any type of equipment
12 installation, a very large dredging vessel basically
13 scrapes and sucks up from the seafloor the seabed
14 sediments, and then disposes them, disposes of them
15 at a site where we've obtained a permit or an
16 approval for disposal. And that is what we refer to
17 as a dredge disposal site.

18 Q. Okay. Thank you.

19 You can continue, if you want. That's it?

20 A. I'm good.

21 Q. So, basically, it's scooping out sediments
22 and debris at the bottom of a water body and putting

1 it elsewhere?

2 A. Exactly.

3 Q. So, the Marine Dredge Disposal JIP is a study
4 of biological productivity at those offshore dredge
5 disposal sites where you put the--

6 A. Yeah, at the disposal site where the original
7 seafloor sediments were deposited. The intent was to
8 measure the biological activity immediately after,
9 and for a number of years thereafter at that site.

10 Q. Okay. And Phase I was intended to be a
11 three-year Project, from June 2012 to October 2015?

12 A. I think so, yes.

13 Q. Let's discuss some of the statements you made
14 in your Witness Statement.

15 In your Second Witness Statement at
16 Paragraph 11--you could open it up if you like--you
17 state that because of the 2012 amendments to the
18 Fisheries Act, operators no longer need to compensate
19 for loss of habitat; is that right?

20 A. Could you refer me to the page again, please?

21 Q. It's Paragraph 11 of your Second Witness
22 Statement.

1 A. Okay, I'm there. Go ahead, please.

2 Q. Can you read the bottom, like, starting about
3 halfway down the paragraph, starting from "as a
4 result."

5 A. Okay. "As a result, DFO's focus has shifted
6 away from habitat protection to fisheries protection,
7 and no longer imposes a habitat compensation
8 requirement for dredging associated with the Hibernia
9 subsea development.

10 "In view of this regulatory change, which had
11 nothing to do with the marine dredge disposal JIP, it
12 is even less likely that the Hibernia or Terra Nova
13 operations would ever see a need to fund a study like
14 this." That is correct.

15 Q. Thank you. So, in your view, the focus of
16 Section 35 has shifted from fish habitat to fisheries
17 protection.

18 A. Yes. The Department of Fisheries and Oceans
19 Regional Director, prior to these amendments being
20 made, undertook some consultation with our industry
21 through our Canadian Association of Petroleum
22 Producers, our industry association. Through those

1 discussions--and I think there were two, maybe three
2 meetings on this, and that's the way it was expressed
3 and shared with us long before the texts materialized
4 that they were moving away from habitat quality
5 towards fisheries protection. In fact, the Regional
6 Director described what had happened over the years
7 as "mandate creep"; that they had evolved away from
8 the original purpose and intent within DFO, which was
9 to manage fisheries, and they moved towards, in this
10 particular case, more of a habitat protection, which,
11 in the Federal Government, usually is a function of
12 Environment Canada. They monitor and establish
13 guidelines and standards for environmental quality,
14 whether it be water, sediments, what have you, air.
15 And that's how it was presented to us.

16 Q. Okay. And this formed part of your opinion
17 of why it would not have been funded by Mobil
18 Investments Canada?

19 A. Well, with the--it would not have been
20 funded, after the changes to the Guidelines because
21 we were successful in making an application to DFO to
22 have the original Fisheries Act authorization

1 rescinded. The amendment--the amendments that were
2 made included provision of a review of existing
3 authorizations, so we applied for that, and we were
4 successful in obtaining that removal of the
5 requirement to have an authorization and the
6 associated compensation.

7 Q. Okay. So, your understanding came from a
8 talk with regional representatives, as you mentioned
9 earlier?

10 A. Yes.

11 Q. Okay. Thank you.

12 Let's look at Tab 14 of your binder, which is
13 C-361, for the record.

14 A. Tab 14 of the binder?

15 Q. It should be Tab 14, yeah.

16 And if we look at Section 35, can you please
17 read it out loud for us.

18 A. "Serious harm to fish: No person shall carry
19 on any work, undertaking, or activity that results in
20 serious harm to fish that are part of a commercial,
21 recreational or aboriginal fishery, or to fish that
22 support such a fishery."

1 Q. Thank you.

2 Let's turn to Tab 18 of your binder, that's
3 R-264, for the record.

4 This is a document--this is an excerpt from
5 the Department of Fisheries and Oceans Canada web
6 site, entitled "Fisheries Productivity Investment
7 Policy: A Proponent's Guide to Offsetting."

8 A. Mm-hmm.

9 Q. If we turn to Page 5 of the document--sorry,
10 these ones aren't numbered with Bates numbers, but
11 it's Page 5 of the document.

12 A. Okay.

13 Q. About halfway down the page, under
14 Section 1.1?

15 A. Yes, I'm there, yeah.

16 Q. We have the definition that you just read
17 aloud.

18 And it notes that under--it notes that serious
19 harm to fish is defined in Section 2 of the Fisheries
20 Act as the death of fish, or permanent alteration to
21 or destruction fish habitat."

22 A. That's correct.

1 ARBITRATOR GRIFFITH: Counsel, excuse
2 me--there is an exception, back to the previous Tab
3 14 in Subsection 2. Do any of those exceptions apply
4 here?

5 MS. HOFFMANN: No, they do not.

6 ARBITRATOR GRIFFITH: Okay. Thank you.

7 MS. HOFFMANN: It should be excerpted in
8 full, but we could--

9 ARBITRATOR GRIFFITH: Well, you can take that
10 on notice. Don't divert.

11 BY MS. HOFFMANN:

12 Q. So, you would agree with me, then, that both
13 before and after the 2012-2013 amendments that the
14 Fisheries Act was concerned with fish habitat?

15 A. In both cases, that is correct. In the
16 amendments, there were some significant changes made.
17 First of all, fish were--are really defined as
18 commercial, recreational, aboriginal, and the habitat
19 alteration, the word "permanent" was added, which is
20 a substantial change to what existed previously. The
21 permanent alteration or destruction of fish habitat,
22 those fish being commercial, recreational, or

1 aboriginal, that was a significant change from
2 previously. That was the basis of us being
3 successful.

4 In our application to have our previous
5 authorization reviewed and ultimately decided to be
6 no longer required under the amendments--new
7 amendments.

8 Q. My question, sorry, I will rephrase. Both--

9 MR. O'GORMAN: Mr. President, I'm sorry, just
10 a transcription question, I think you said in both
11 cases I was correct, Mr. Dunphy? At the beginning of
12 your answer? I think it was taken down as that is
13 correct.

14 MS. HOFFMANN: I can rephrase my question.

15 MR. O'GORMAN: Thank you.

16 THE WITNESS: I don't recall exactly what I
17 said.

18 MS. HOFFMANN: Me neither.

19 BY MS. HOFFMANN:

20 Q. So, you would agree with me, then, that both
21 before and after the 2012-2013 amendments the
22 Fisheries Act was concerned with fish habitat.

1 A. There was still some retention and focus on
2 habitat. However, the significant change that was
3 entirely relevant was that a habitat had to be
4 associated with commercial, recreational, aboriginal
5 fisheries and any alteration had to be permanent.

6 So, that, in my interpretation, that was
7 completely aligned with the information we were given
8 by the Regional Director in consultations prior to
9 the amendments that there was a general shift from
10 solely habitat harm toward fisheries. Now the
11 habitat had to be impacted permanently, and that
12 habitat had to be-- habitat for those three
13 fisheries: recreational, commercial, and aboriginal.
14 That was a significant shift from a focus on habitat
15 to fisheries.

16 Q. Okay. So, basically, any water that is
17 fished from is captured under Section 35?

18 A. Could you repeat that, please?

19 Q. Any water that is fished from is captured
20 under Section 35?

21 A. Any water that is fished from--

22 Q. Either commercially, recreationally or from

1 an aboriginal fishery.

2 A. If those fisheries exist in that water, this
3 would apply.

4 Q. Thank you.

5 So, this statement that you made at Paragraph
6 11 of your Second Witness Statement is factually
7 incorrect?

8 A. Could you direct me to the location again,
9 please?

10 Q. Yes. It's Paragraph 11 of your Second
11 Witness Statement.

12 A. And could you direct me to the particular
13 sentence that you're referring to, please?

14 Q. Yes. It's the one we read aloud earlier.

15 A. Okay.

16 Q. Starting with "as a result."

17 A. I cannot agree that it's factually incorrect.

18 I'll read it again: "As a result, DFO's focus has
19 shifted away from habitat protection to fisheries
20 protection and it no longer imposes a habitat
21 compensation requirement for dredging associated to
22 Hibernia subsea development." That is accurate and

1 correct.

2 Q. You agreed with me a moment ago that any
3 water that is fished from for a commercial,
4 recreational or aboriginal fishery that impacts fish
5 habitat is protected.

6 A. Could you repeat that, please?

7 Q. You agreed with me a moment ago that any
8 water that is fished from for a commercial,
9 recreational, or aboriginal fishery is protected.

10 A. This section would apply to it.

11 Q. Yes, okay. Thank you.

12 Let's turn to the compensation requirements
13 under the Fisheries Act.

14 You mentioned this in your Second Witness
15 Statement at Paragraph 10.

16 A. Okay.

17 Q. So, the Department of Fisheries and Oceans,
18 the DFO, requires that dredgers compensate for a
19 possible loss of habitat resulting from dredging
20 activities; is that correct?

21 A. I'm lost. Could you--

22 (Overlapping speakers.)

1 Q. Yes--

2 A. --Second Witness Statement? Paragraph 10?

3 Q. Where is it?

4 A. That's on the same page we were on a moment
5 ago?

6 Q. Yes. I...

7 A. It starts with the Hibernia--

8 Q. I'm sorry, it's Paragraph 9. I apologize.

9 A. Okay. Go ahead, please.

10 Q. About halfway down the paragraph, it says:
11 "DFO had a policy of requiring underwater dredgers to
12 address possible loss of habitat due to dredging
13 activities." It's kind of in the middle.

14 A. It starts with: "DFO had a policy." Is that
15 correct?

16 Q. Yes.

17 A. Okay. I'm still looking for it.

18 Pursuant to this former version of the
19 Fisheries Act--

20 Q. Yes.

21 A. Okay. It became Department of Fisheries and
22 Oceans had a policy requiring Underwater dredgers--

1 PRESIDENT GREENWOOD: Sorry. I think if you
2 are going to read it out, Mr. Dunphy, you'll have to
3 speak up and read it out properly, although I think
4 we've all now read it, so there is probably no need.
5 I think counsel is asking you whether you stand by
6 that statement.

7 THE WITNESS: Just give me a moment; I'll
8 review.

9 BY MS. HOFFMANN:

10 Q. Oh, I'm just asking--I just want to discuss
11 this statement--

12 A. Okay.

13 Q. --discuss the compensation requirements more
14 generally.

15 ARBITRATOR ROWLEY: Why don't you ask your
16 questions. Everybody has read it.

17 MS. HOFFMANN: Okay, thank you.

18 BY MS. HOFFMANN:

19 Q. So, in the DFO's view, there are two areas of
20 lost habitat due to dredging. There is the area from
21 which the dredged material was taken and the area to
22 which dredge material is deposited.

1 A. That is correct.

2 Q. So, under the Fisheries Act, operators must
3 comply with the compensation requirement for both of
4 those areas?

5 A. In the original act, yes.

6 Q. And the effort and costs associated with
7 these compensation requirements are considerable?

8 A. Not "considerable," relative to the overall
9 cost of a subsea development.

10 Q. Okay. In your First Witness Statement, you
11 mentioned that it's costly, and in your second you
12 say it's manageable, so it falls somewhere between
13 costly and manageable?

14 A. Yeah, I guess it's a relative thing.

15 Q. Okay.

16 A. The prevailing opinion within the industry
17 about the application of this policy to the offshore
18 environment is that it was inappropriate application,
19 that the policy really evolved from land-based
20 alterations to habitat, and, you know, the offshore
21 oil-and-gas industry is fairly new. The first one is
22 off the East Coast of Newfoundland, and they rolled

1 that policy and applied it. It was a general--a
2 difficult issue between industry and DFO in the
3 application of that policy. It didn't fit, and it
4 was seen to be exceptionally onerous. The inherent
5 assumption of harm to a dredged disposal site, the
6 inherent assumption was not considered to be valid by
7 industry. However, you know, we didn't have--excuse
8 me.

9 DFO applied the precautionary approach, and
10 they assumed harm where it was not proven otherwise,
11 and we saw that as being overly conservative, and
12 the--from a cost perspective, any costs associated
13 with doing something of that nature when you truly
14 believe that is an inappropriate application of a
15 policy, any cost is painful and considerable. I
16 guess that's the context of that remark.

17 Q. Okay. Thank you.

18 So, you mentioned that it's not--so, sorry,
19 let me rephrase.

20 Mobil, or HMDC as you mentioned, has reason
21 to believe that actually the areas to which dredged
22 material is deposited are even more biologically

1 productive than DFO thinks; right? DFO--my
2 understanding is that DFO thinks it's worse off, but
3 Mobil or HMDC has reason to believe that it's
4 actually more productive.

5 A. I guess that was the theory and hypothesis
6 and the basis of the study.

7 Q. Okay. Thank you.

8 A. And that was based on anecdotal information
9 from fishers who are aware of dredging activities
10 near shore. Many harbors are dredged and materials
11 are disposed of in the near shore. Anecdotally, it's
12 not uncommon to hear of the fishermen who would
13 intentionally focus on that area subsequently because
14 there was more material--more species there, to catch
15 more. They can do--be more successful in their
16 fishing efforts by focusing on those areas.
17 Anecdotally, that was generally known.

18 Q. Okay.

19 ARBITRATOR ROWLEY: Sorry, help me there. Is
20 it focusing on the areas where the disposal had been
21 made or where it's been dredged?

22 THE WITNESS: Where disposals were made.

1 ARBITRATOR ROWLEY: Thank you.

2 BY MS. HOFFMANN:

3 Q. So, the marine dredged disposal expenditure
4 is aimed at testing DFO's assumption that dredge
5 disposal sites are less productive. That's the
6 purpose of this expenditure.

7 A. Yes, yes.

8 Q. Okay. Let's turn to Tab 15 of your binder.

9 A. The--I mean the overall purpose, as mentioned
10 earlier, was to satisfy the spending requirements
11 under R&D Guidelines. I mean that's--none of these
12 projects that I am associated with would ever have
13 materialized or been proposed were it not for the
14 Guidelines that--and the challenge that was put forth
15 by our management team.

16 The technical objectives I would agree
17 from--with your question. It was a technical
18 objective to demonstrate productivity there--

19 Q. Okay. Thank you.

20 A. --above and beyond what DFO had assumed in
21 its policy.

22 Q. Thank you.

1 So, if we turn to Tab 15 of your
2 binder--that's R-188 for the record--this is another
3 PRNL Contribution Agreement for the Marine Dredge
4 Disposal Expenditure.

5 If we turn to Bates Number 3851, that's the
6 Annex B Project description.

7 A. 3851?

8 Q. Yes, I think so.

9 If we look at the end of the second
10 paragraph, it says: "There is a dearth of knowledge
11 about the tolerance of offshore marine life to
12 sediment loading and the rate at which these
13 ecosystems recover from impacts caused by disposal
14 operations. As a result of this knowledge gap, the
15 Canadian Department of Fisheries and Oceans'
16 precautionary approach to fish and fish habitat
17 management may have resulted in an overestimation of
18 the environmental impacts resulting from offshore
19 disposal activities. Correspondingly, the
20 compensation requirements to offset disposal at sea
21 operations conducted by Newfoundland and Labrador's
22 offshore operators may also be excessive."

1 So, this is essentially what you were saying
2 a couple of moments ago that they kind of
3 overestimated and are requiring compensation, but
4 operators are of the view that, and as you mentioned,
5 fisheries are of the view that DFO is overestimating;
6 is that accurate? Is this statement--sorry, let me
7 rephrase.

8 A. Please do.

9 Q. A couple of moments ago, you mentioned an
10 overestimation or that they took a precautionary
11 approach, the DFO.

12 A. They took--they made an assumption--

13 Q. Okay.

14 A. --a scientific assumption.

15 Q. Okay.

16 A. --that the disposal of clean seafloor
17 sediments resulted in a harmful effect that had to be
18 compensated for.

19 Q. And that is--do you agree that this is
20 essentially what this paragraph is saying as well?
21 Does it reflect what you said earlier?

22 A. Resulted in an overestimate--yes.

1 Q. Yes. Okay, thank you.

2 PRESIDENT GREENWOOD: Can I just clarify this
3 because I think we got a little bit lost at one or
4 two points?

5 Your evidence is that the view you held and
6 other people in the offshore oil industry held was
7 that the DFO was being unduly pessimistic about the
8 effect on fish at the disposal of dredge waste.

9 THE WITNESS: That is correct. If not
10 punitive.

11 PRESIDENT GREENWOOD: Right. And that this
12 project was designed to test whether the DFO's
13 assumptions were right or not.

14 THE WITNESS: That is correct.

15 PRESIDENT GREENWOOD: Thank you.

16 So, the benefit that you hoped to get from it
17 was a report which would convince DFO to lay off you.

18 THE WITNESS: That is correct.

19 PRESIDENT GREENWOOD: All right. Would you
20 have--do you think that would have been a worthwhile
21 research project, given the penalties that DFO could
22 levy?

1 THE WITNESS: Definitely not.

2 PRESIDENT GREENWOOD: "Definitely not." Why?

3 THE WITNESS: It's relative to the cost of a
4 subsea development project. I think the cost
5 estimate for--the cost for Hibernia South is
6 [REDACTED]. The potential savings in the reduction
7 in the habitat that you had to install would have
8 been [REDACTED].

9 The other challenging issue for us as
10 operators with environmental personnel was that
11 the--within a time--the tight timeframe of a project,
12 there is very little tolerance by the Project
13 Managers to entertain a regulatory challenge of that
14 nature. The costs are manageable in that scenario.
15 It's not worth pursuing a challenge. It's not worth
16 pursuing research within the timeframe of a project
17 for installation of a subsea development.

18 In addition, the Project is funded by a
19 certain source of funding. The monitoring of the
20 compensation--of the habitat was--would be
21 compensated--would come from the operation budget
22 years down the road because that would have to

1 be--proceed three and five years later. So, there
2 was no driver from cost perspective nor time
3 perspective within the Project--within the schedule
4 and budget of a project to pursue such initiative.

5 It was rather difficult for environmental
6 personnel to have to live with this very conservative
7 assumption by DFO and to perceive this type of work
8 when we certainly felt that it was an overly
9 conservative assumption, an incorrect assumption, but
10 yet we had barriers internally, costs, scheduling,
11 and risk of getting your permit. These barriers just
12 would prevent us from proceeding with this type of
13 study, and that's why it wasn't done.

14 The R&D Guidelines provided an ideal
15 opportunity for us to correct this wrong, and, you
16 know, that is why this project was able to be
17 launched, and that's the only reason why. We were
18 able to do it outside of a project schedule, outside
19 of a project budget. I don't know if the Project
20 Managers knew at all if it was proceeding. It was
21 completely outside of the Project.

22 PRESIDENT GREENWOOD: That's very helpful.

1 Thank you.

2 Ms. Hoffmann, please.

3 BY MS. HOFFMANN:

4 Q. So, back to the intent of the Project at the
5 time it was created, a major expected deliverable of
6 this project is to provide scientific justification
7 to remove compensation requirements for disposal
8 sites.

9 A. The intent was to demonstrate that the
10 assumption by default in their policy of harm was
11 incorrect. And, presumably, if DFO believed the
12 results, if the results were able to get
13 peer-reviewed and published appropriately, DFO
14 believed the results, the intent would be to convince
15 them to change their policy and thereby, you know,
16 presumably reduce the amount of compensation--habitat
17 that would have to be compensated for.

18 Q. Okay. So, a major deliverable is to provide
19 scientific justification.

20 A. That is correct.

21 Q. To remove the compensation requirements.

22 A. To alter the policy--

1 Q. Okay.

2 A. --in place with DFO.

3 Q. And to alter the policy could reduce Mobil
4 Investment Canada's compensation requirements by
5 50 percent?

6 I'm sorry.

7 To change the policy would reduce Mobil
8 Investment Canada's compensation requirements by
9 50 percent?

10 MR. NICHOLS: I'm sorry, I have to interrupt.

11 I think we're conflating again ExxonMobil Canada--

12 MS. HOFFMANN: Sorry.

13 MR. NICHOLS: --and operators--

14 (Overlapping speakers.)

15 MS. HOFFMANN: Let me rephrase the question.

16 BY MS. HOFFMANN:

17 Q. It would reduce HMDC's compensation
18 requirements by 50 percent?

19 A. Not for the--Hibernia has done one subsea
20 project in the 20 years, so it's--so they're rare,
21 and the HSE Project was first, and there was no
22 intention to have the study apply to the compensation

1 required for Hibernia. So, at the time, it just
2 could not happen because the permit to proceed had to
3 be in place first. To do the excavation, to do the
4 disposal; right? So, you can't do the study--you
5 can't get your permit and--you can't do the study in
6 advance of getting your permit to do the work so...

7 And the study was, I think the timeline that
8 you mentioned earlier, three to five years. So, the
9 Project would be long done and the Project Team long
10 gone before that data would be collected and able to
11 be presented to the regulator, to DFO.

12 So, in the short term, the answer is no. The
13 intent was not to apply it to HSE because the timing
14 just was--it was--it was impossible.

15 You know, the intent was to change a wrong,
16 to right a wrong. And, you know, if a subsea--if the
17 data actually proved us correct--first of all, I mean
18 that had to happen first, you know. If it got
19 published and reviewed in a manner--in an appropriate
20 manner, if DFO accepted it and actually revised their
21 policy, because there is still no guarantee that that
22 would happen, and next if there was another subsea

1 developed sometime in the future, I mean there is a
2 lot of ifs that would have to happen for us to avail
3 of that benefit.

4 Q. Sure. But it is possible that the policy
5 would apply to other projects if it was changed.

6 A. It's possible.

7 Q. Thank you. Such as Hebron?

8 A. I can't comment on Hebron.

9 Q. Okay. Thank you.

10 MS. HOFFMANN: No more questions. Thank you.

11 PRESIDENT GREENWOOD: Thank you,
12 Ms. Hoffmann?

13 Mr. Nichols, do you have any questions in
14 redirect?

15 MR. NICHOLS: Yes, if I may.

16 PRESIDENT GREENWOOD: Go ahead, please.

17 REDIRECT EXAMINATION

18 BY MR. NICHOLS:

19 Q. I would like to actually follow up on a
20 question from the President of the Tribunal with
21 respect to the Bioindicators Project. Let's look
22 again at the exhibit that's at Tab A. I believe

1 that's R 101.

2 A. Tab A?

3 Q. Excuse me, 8.

4 If I recall your testimony, Mr. Dunphy, this
5 was a presentation delivered at an HSE Workshop.

6 Just for clarification, what is HSE? What did the
7 letters stand for?

8 A. Health, Safety and Environment. That was the
9 theme of the workshop, the subject matter.

10 Q. Do you remember, sir, if you participated in
11 that workshop?

12 A. Oh, yes, I did.

13 Q. Okay. Do you remember, sir--or do you know
14 what the purpose of organizing that workshop was?

15 A. That workshop was--its entire purpose was to
16 enable the various operators to assemble with their
17 R&D proposals that they wanted to put forward to be
18 eligible and qualify under the R&D Guidelines.

19 Yes, go ahead.

20 Q. Besides this project, sir, were other R&D
21 proposals discussed at that workshop?

22 A. Yes, there were others.

1 Q. Are any of those others discussed in your
2 Witness Statement?

3 A. Yes. The Bioindicators Project, as we see
4 here; the seismic noise effects on shrimp; and the
5 Marine Dredge Disposal Study were all three studies
6 that I was involved with in that workshop.

7 Q. Mr. Dunphy, when I was listening to the
8 examination by Ms. Hoffmann, it seemed like there was
9 a disconnect between you and her with regard to a
10 statement in your Witness Statement regarding the
11 Bioindicators Project. You recall from your
12 statement that you said that, as a result of the
13 change of the amendment to the Fisheries Act, there
14 has been a shift in focus away from habitat
15 protection to fisheries protection; correct?

16 A. That was for the Marine Dredge Project.

17 Q. Oh, I apologize. The Marine Dredge Disposal
18 Project.

19 But you stood by that statement; correct?

20 A. Yes, without a doubt.

21 Q. Can we take a look at Tab 18, again?

22 Can we turn back to that page that

1 Ms. Hoffmann had pointed you to where the definition
2 of "serious harm to fish" appears.

3 A. Yes.

4 Q. Let me know when you're there.

5 A. Yes, I'm there.

6 Q. Okay. Above that is section--it looks like
7 Section 35. Is that Section 35 of the Fisheries Act?

8 A. I would have presumed so, yes; it appears to
9 be.

10 Q. All right. Mr. Dunphy, could you please
11 explain how your Witness Statement with regard to the
12 shift in focus away from habitat protection to
13 fisheries protection, how do you relate that
14 statement in regard to the language that you see
15 there?

16 A. In the previous act, there was no link
17 between habitat and the three fisheries that we see
18 here. So, in the previous act, just harm to the
19 habitat was sufficient to trigger an authorization
20 under the Fisheries Act in order to proceed with that
21 Project. With these amendments, it added to--or it
22 added a requirement that not only would there have to

1 be harm to the habitat, that harm had to be permanent
2 and had to be habitat of the three fisheries we have
3 here.

4 So, in the absence of reference to these
5 three fisheries, we had to have an authorization in
6 place. When these amendments were presented, as you
7 see here, an authorization would be required only if
8 these fisheries were affected with that harm to the
9 habitat.

10 So, that is, clearly in my mind, a shift from
11 sole habitat--solely habitat harm to habitat harm
12 with fisheries' impact. That is a shift towards
13 protection of fisheries. That's very clear in my
14 mind.

15 It's even more clear when you consider the
16 fact that when we applied for the review of our
17 existing authorization in the old act, we were
18 successful in getting it, and the main thrust of that
19 success was we did not have commercial, recreational,
20 or aboriginal fisheries in our area.

21 MR. NICHOLS: No further redirect.

22 PRESIDENT GREENWOOD: Can I just clarify one

1 thing? I'm not sure whether this is for you,
2 Mr. Dunphy, or for counsel, but bear with me.

3 The initials HSE appear to be used in this
4 case in two different contexts; is that right?
5 Hibernia Southern Extension, Health Safety and
6 Environment?

7 MR. NICHOLS: Yes, that's correct. You're
8 very perceptive.

9 PRESIDENT GREENWOOD: Thank you.

10 I would be very grateful if counsel could
11 trawl the Transcript to make sure that it is clear
12 everywhere which context we're talking about.

13 Right. Let's break for 15 minutes.

14 Mr. Dunphy, thank you very much, indeed.
15 You've been very helpful. It's now just coming up to
16 11 o'clock. We'll break until 11:15. And then I
17 think the next witness is Mr. Durdle; is that right?

18 (Witness steps down.)

19 PRESIDENT GREENWOOD: Thank you.

20 (Brief recess.)

21 PAUL DURDLE, CLAIMANT'S WITNESS, CALLED

22 PRESIDENT GREENWOOD: Right. Thank you,

1 Mr. Durdle. Make yourself comfortable and have some
2 water, is the first thing I was going to say. Help
3 yourself.

4 Can I just have an indication, are we likely
5 to get to Mr. Jeff O'Keefe by lunchtime, or are we
6 saving him for the afternoon?

7 MS. SQUIRES: I anticipate this would take
8 half an hour or so, and we could start Mr. O'Keefe
9 after lunch if we wanted, take an early lunch.

10 PRESIDENT GREENWOOD: What do you feel,
11 Mr. Nichols?

12 MR. NICHOLS: Our redirect will depend on
13 what Canada asks; but, otherwise, I don't believe
14 that would be an issue.

15 PRESIDENT GREENWOOD: I think if it's only
16 going to take half an hour or so plus a little bit of
17 time for direct and redirect, then I think we will go
18 straight on to Mr. Jeff O'Keefe.

19 MS. SQUIRES: He is available, so that will
20 be fine.

21 PRESIDENT GREENWOOD: Right.

22 Mr. Durdle, you should have in front of you a

1 declaration which I would be grateful if you would
2 make.

3 THE WITNESS: Okay.

4 I solemnly declare upon my honor and
5 conscience that I shall speak the truth, the whole
6 truth, and nothing but the truth.

7 PRESIDENT GREENWOOD: Thank you.

8 Now, counsel is going to put before you--no
9 need to ask for permission--going to put before you
10 your two Witness Statements and you also have to your
11 right--sorry, to your left, a large, depressingly
12 large lever arch file which contains the documents
13 that counsel will put to you in cross-examination.

14 THE WITNESS: Okay.

15 PRESIDENT GREENWOOD: Can I just make two
16 points before we start.

17 The first is that, sitting behind you is the
18 Court Reporter. He has to be able to hear what you
19 say and transcribe it, so please speak up. You have
20 a good speaking voice, so it shouldn't be difficult.
21 But it's particularly problematic that people tend to
22 look at the counsel who is asking them questions, and

1 therefore, to turn away from the microphone, so try
2 and make sure you speak into the mic and keep your
3 voice up.

4 THE WITNESS: I will do my best.

5 PRESIDENT GREENWOOD: Thank you.

6 And, secondly, don't speak too quickly.

7 We've already had some advice about Newfoundlanders
8 having difficulty slowing down, but it's very
9 important whether you're from Newfoundland or not
10 that you don't speak too fast.

11 THE WITNESS: Understood.

12 PRESIDENT GREENWOOD: Okay. Thank you very
13 much.

14 Mr. Nichols.

15 DIRECT EXAMINATION

16 BY MR. NICHOLS:

17 Q. Good morning. Could you please introduce
18 yourself and your relationship to the Hibernia and
19 Terra Nova Projects.

20 A. Good morning. My name is Paul Durdle, and
21 I've had I would say a significant amount of
22 experience on both the Hibernia--particularly the

1 Hibernia Project and indirect experience on the Terra
2 Nova Projects. I've held a number of different roles
3 ranging from procurement, finance procurement to
4 operations roles, about a four-year assignment
5 offshore as a supervisor, and then most recently or
6 my last two assignments related to Hibernia were as
7 safety manager and an operations support
8 superintendent.

9 Terra Nova, I was part of the--it's a safety
10 Subcommittee that would meet on a regular basis and I
11 participated or represented HMDC interests on that
12 safety committee.

13 Q. For the benefit of this record, are you the
14 same Paul Durdle who testified in the last proceeding
15 between Mobil and Canada?

16 A. I am.

17 Q. And you also provided a Witness Statement in
18 that last proceeding?

19 A. Yes, I did.

20 Q. You have provided two further Witness
21 Statements in this proceeding; isn't that correct?

22 A. I have, yes.

1 Q. Okay. Do you have those in front of you?

2 A. I do.

3 Q. Okay. Your First Witness Statement of March
4 7th, 2016, marked CW-7, that is in front of you, sir?

5 A. Yes, it is.

6 Q. Do you reaffirm the contents of that
7 statement?

8 A. I do.

9 Q. Do you have any corrections you wish to make
10 to that statement?

11 A. No, I do not.

12 Q. Do you also have in front of you your Second
13 Witness Statement of September 14th, 2016?

14 A. Yes.

15 Q. CW-12?

16 A. CW-12, that's correct, yes.

17 Q. Do you reaffirm the contents of that
18 statement, sir?

19 A. And I do.

20 Q. Do you have any corrections you wish to make
21 to that statement?

22 A. No, corrections, no.

1 MR. NICHOLS: Mobil passes the Witness.

2 PRESIDENT GREENWOOD: Thank you.

3 Ms. Amalraj, is it to you?

4 MS. AMALRAJ: Yes.

5 PRESIDENT GREENWOOD: Excellent. Well,
6 please, go ahead.

7 CROSS-EXAMINATION

8 BY MS. AMALRAJ:

9 Q. Good morning, Mr. Durdle. My name is
10 Valantina Amalraj and I'm counsel for the Government
11 of Canada. Before we get started, I would just like
12 to give you a brief idea of how this will work.

13 I will be asking you a few questions to
14 better understand your Witness Statements. Now, it's
15 important that you understand me. So, if anything I
16 say is unclear, do ask me to repeat myself. It's
17 also important that you answer my questions. So, if
18 the answer to something I ask is a yes or a no,
19 please begin your answer that way, and you can
20 provide any clarification you wish to after that.

21 That said, we do have a brief amount of time
22 this morning together, so I would appreciate it if

1 you could be focused and on point.

2 A. Okay.

3 Q. So, let's get started then.

4 You have been employed with ExxonMobil since
5 2003?

6 A. That is correct, yes.

7 Q. And, in 2010, you were assigned to the role
8 of Safety Supervisor for ExxonMobil and seconded to
9 HMDC?

10 A. That's correct.

11 Q. And you were at HMDC in this role until 2014.

12 A. I believe 2014. I would have to verify, but
13 that sounds correct, yes.

14 Q. Okay. You have never been employed by
15 Suncor?

16 A. No, I have never been employed by Suncor.

17 Q. And you filed two Witness Statements in this
18 arbitration?

19 A. I did.

20 Q. And the two statements concern eight
21 safety-related projects that were undertaken by
22 Hibernia or Terra Nova?

1 A. That is correct.

2 Q. Did you speak to anyone at Suncor about
3 Suncor's perspective on any of the Projects you
4 discussed that Terra Nova participated in?

5 A. It would have been some time ago and it would
6 have been in a--just a general passing sense as I
7 attended some of the--some of the EH&S or Safety
8 Committee meetings.

9 Safety is perhaps one area where we--there's
10 really nothing proprietary, so we try to share safety
11 learnings across projects. So, I can't recall a
12 specific Project or a specific incident where I would
13 have spoken to someone, but I know in general terms
14 we would have had casual conversations about safety
15 projects.

16 Q. Now, I would like to start by discussing the
17 safety oversight management system expenditure that
18 you discuss. It's at Paragraph 33 of your First
19 Statement, and at Paragraph 17 of your Second Witness
20 Statement, just for your reference.

21 Now, this Project is an IT Project to develop
22 a software program; right?

1 A. Thirty-three and the Second Witness Statement
2 was--

3 Q. Paragraph 17.

4 A. Seventeen, okay. Okay, I have them here.

5 Q. Now, this Project, it's an IT Project to
6 develop a software program; correct?

7 A. That's correct, yes.

8 Q. And you said in your Witness Statements that
9 the purpose of the software was to create a database
10 for reporting and tracking safety incidents?

11 A. Yes.

12 Q. Now, another focus of this Project, though,
13 was automating and streamlining the Board's work
14 approval process; right?

15 A. That was initially talked about, but the
16 fundamental focus of this Project was really to do
17 with streamlining the Board's mandatory reporting
18 process, and I'm reasonably familiar with this
19 Project because, as Safety Supervisor, when we were
20 asked to brainstorm some of these R&D ideas, this was
21 one that myself and some people in the Department I
22 directly supervised brought forward, and it really

1 arose out of--right now the requirement for reporting
2 to the Board was a paper process, it involved a fax
3 machine, which is old technology, and it involved us
4 trying to reach individuals at the CNLOPB by
5 telephone, which was not always ideal. So, when the
6 opportunity arose, we identified a system where it
7 might make sense to enter them in, and not unlike any
8 databases, enter it in directly, and then the Board
9 would receive that response.

10 They would also enable the Board to do some
11 data analysis because it was not uncommon for us to
12 receive phone calls from the CNLOPB about historic
13 incidents, and this was a way to avoid that and be
14 more efficient. So, that's really where the Project
15 arose from.

16 Q. Okay. Let's look at Tab 2 of your binder.
17 This is Exhibit R-208, and you'll see the first page
18 is a letter from Mr. Sampath, and attached to the
19 letter is the Agreement or the Contract that is
20 signed between Hibernia and the Contractor that was
21 actually hired for this Project.

22 Do you see that?

1 A. I do.

2 Q. Now, the Contractor that was hired to do work
3 on the Project is MWCO or Michael Wager Consulting,
4 Inc., right?

5 A. Correct.

6 Q. And if you turn to Appendix A of the
7 Contract--actually, if we just look on the Contract
8 at Paragraph 2, it references the Appendix A and
9 includes the Appendix A and the Project description
10 in it within the Contract; right? This is at
11 Paragraph Number 2 on the first page of the Contract.

12 A. Paragraph 2 on the first page of the
13 Contract. Page 2 of 9? Is that what you're
14 referencing?

15 Q. So, it's Bates Number 4229.

16 A. Okay. 422--okay, I have it. Sorry.

17 Q. And if you look at Bullet Number 2 on that
18 page, it says: "The contribution," so HMDC's
19 contribution of [REDACTED] to this Project, "will be
20 used to support development of a certification and
21 safety management oversight system as more
22 particularly described in Appendix A."

1 Do you see that?

2 A. I do.

3 Q. Okay. So, let's turn to Appendix A--it's
4 just one page over. If you go to Bates 4232, that's
5 where the appendix is.

6 Now, you will see it's entitled "Research and
7 Development Activity for the Certification and Safety
8 Management Oversight System."

9 Right?

10 A. Yes.

11 Q. And if we go to Page 3 of 9 of this
12 proposal--

13 A. Okay.

14 Q. --at the very last paragraph, the second line
15 says: "The activity has two main focuses, firstly to
16 automate and streamline the current paper based
17 certification and recertification documentation
18 process to expedite approvals through the Board while
19 reducing the amount of administration involved in the
20 process through automation."

21 Do you see that?

22 A. I do.

1 Q. And then it goes on to say: "The second
2 focus is to develop an accident/incident tracking,"
3 what you were talking about?

4 A. That's correct, yes.

5 Q. Okay. So, one of the two focuses of the
6 Project was automating and streamlining the Board's
7 approval process at the time the Contract was signed?

8 A. Based on the vendor's proposal, yes, I would
9 agree with that.

10 Q. Yes. And based on what was attached to the
11 Contract that Hibernia signed also?

12 A. That's correct, yep.

13 Q. And the point from this was to expedite the
14 approval process by moving away from a paper-based
15 system to an on-line system?

16 A. I think that was one of the descriptors or
17 one of the optimistic goals of the program.

18 Q. Okay.

19 A. On paper.

20 Q. That was the goal under which the
21 contribution was made, yes?

22 A. The paper--yeah, I mean, that's fair, yes,

1 that's what was written in the proposal, that was put
2 forward to us. The discussions that we had with the
3 CNLOPB at the time were simply and only focused on
4 the incident database piece.

5 Q. Okay. I would like to--are you aware of the
6 paper-based approval process that the Board uses?

7 A. Reasonably. Individuals I supervised would
8 execute that process.

9 Q. Okay. I would like to talk about that
10 briefly.

11 Now, any time Hibernia wants to do something,
12 say drilling or laying a pipe or anything like that,
13 the Board has to approve it first and issue a work
14 authorization for it; right?

15 A. That's basically correct, yes.

16 Q. And this is the case for any production
17 development activity, well operation, diving
18 operation or geophysical operation? The Board would
19 have to approve--

20 A. Fundamentally, yes, that's correct.

21 Q. So, the Board's authorization and part of the
22 authorization involves a safety assessment, isn't

1 something that Hibernia needed just when it began
2 operations; rather, any time something is changed or
3 renewed, Hibernia has to apply and the Board has to
4 authorize it?

5 A. I'm not sure I follow your question, but in
6 principle, prior to any--fundamentally any activity
7 certainly to start the Hibernia Project, there was a
8 formal process to apply for an Operations
9 Authorization.

10 Q. Okay. And as part of this process, the
11 application certification process, like you were
12 saying, there's paper exchanged back and forth?

13 A. Yes, that's correct, yes.

14 Q. And sometimes boxes and binders of paper will
15 be exchanged, depending on what the activity is?

16 A. That would be fair.

17 Q. Okay. Now, any delay in this process, so a
18 delay in the Board authorizing an activity, would
19 push back the actual activity, if it's an unexpected
20 delay that wasn't built into the system?

21 A. Potentially. Our practice was to--these
22 dates didn't come up as a surprise, so our normal

1 practice was to plan for these events, and typically
2 we would not see delays based on that because we were
3 fairly proactive in applying for those things early
4 on, and certainly we know when they expire.

5 Q. Okay. Let's discuss what the President of
6 Hibernia thought about this software Project, okay?
7 So, let's turn to Tab 4 of your binder. This is
8 Exhibit R-207, and this is an e-mail chain, and you
9 will notice you're cc'd on the final e-mail on the
10 chain, so you have seen this thread before; right?

11 A. Yes, I would have seen this.

12 Q. Now, the subject line of the e-mail is "SOIMS
13 Project," which stands for Safety Oversight
14 Information Management System. That's the Project
15 we're discussing; right?

16 A. That's correct, yes.

17 Q. So, let's just turn to the second page of the
18 e-mail thread for a moment. So, that's Bates Page
19 Number 4252. And around the center of this is an
20 e-mail from Jamie Long; right?

21 A. I see that, yes.

22 Q. And Jamie Long was the President of Hibernia

1 when this e-mail was sent?

2 A. He was.

3 Q. And if you look at the start of the e-mail,
4 it says: "I scheduled a meeting with MWCO a month
5 ago on the assumption that we would have some useful
6 information."

7 Do you see that?

8 A. I do.

9 Q. And at the end of the next paragraph in the
10 e-mail, so the last sentence of this e-mail from
11 Jamie Long, he says: "I do not want to cancel the
12 meeting."

13 Do you see that?

14 A. I do.

15 Q. So, it seems from this that the President of
16 Hibernia is planning to meet with the Contractor that
17 was hired for this Project, MWCO; right?

18 A. That's correct, yes.

19 Q. Okay. Now, let's turn to the first page of
20 this e-mail thread, so the most recent e-mail that
21 you were cc'd on. That's at Bates Page Number 4251.

22 PRESIDENT GREENWOOD: Sorry, Ms. Amalraj,

1 before we do that--Mr. Durdle, could you just tell us
2 who or what are EMIT which appears in the first
3 paragraph of the e-mail we've just been looking at?

4 THE WITNESS: That is--it's an ExxonMobil
5 Management Information Center that supports Hibernia
6 Management Development Company, so Hibernia, on
7 occasion, would seek subject-matter experts in
8 certain areas, and we would rely on some of the Owner
9 companies to provide that, and that's an entity that
10 would have provided information technology support.

11 PRESIDENT GREENWOOD: Right. Thank you very
12 much. Sorry about that, I just wanted to be clear.

13 THE WITNESS: That's okay.

14 BY MS. AMALRAJ:

15 Q. Now, at the center of this e-mail is also
16 Jamie Long, the President of Hibernia; right?

17 A. Yes.

18 Q. And the third paragraph of this e-mail, Jamie
19 Long says: "It was a productive discussion, in
20 addition to tracking the Incident Reporting, Dan
21 (CSO) wants to use the software to streamline the
22 Operations Authorizations process, which would be a

1 significant benefit. A four-day delay in receiving
2 an Operations Authorization for a future MODU would
3 pay for the cost of the Project."

4 Do you see that?

5 A. I do.

6 Q. Okay. So, I just want to take a moment to
7 talk about these two sentences because you said in
8 your Second Witness Statement that you do not
9 understand what the President was saying because
10 there was no connection between this Project and the
11 Operations Authorizations; right?

12 A. Fundamentally, yes.

13 I can clarify that, if you wish.

14 Q. Okay. So, the President of Hibernia is
15 reporting here on his meeting with MWCO about this
16 Project; right?

17 A. Yes.

18 Q. And "Dan (CSO)" refers to Daniel Chicoyne,
19 the Chief Safety Officer of the Board?

20 A. That's right. He was the CSO, yes.

21 Q. And the e-mail refers to an "MODU."

22 A MODU, or a Mobil Offshore Drilling Unit, is

1 something used for drilling or exploration; right?

2 A. That's correct, yes.

3 Q. And using an MODU is one of those things that
4 Hibernia would need the Board's authorization to do?

5 A. Absolutely, that's correct.

6 Q. And it would rely on a paper-based system
7 right now for authorization?

8 A. It would rely on a combination of inspections
9 by the CNLOPB, presentations by HMDC as the Operator,
10 and some paper applications, certainly. It was a
11 combination of more than just submitting paper, but
12 fundamentally you're correct.

13 Q. Yeah. There is a part of the process that
14 happens in paper format?

15 A. There is.

16 Q. And it can take as long as a year to get
17 approval for an MODU; right?

18 A. I would have to verify--my piece of it wasn't
19 involved in the overall, but it can take extensive
20 amounts of time, yes, I'm aware of that.

21 Q. Okay. So, there might be potential to save
22 more than four days in theory by automating a part of

1 the process and allowing for transfer of information
2 to happen in realtime?

3 A. I challenge the idea of save four days. As I
4 identified, this process is typically started well in
5 advance of a rig or a MODU coming into the country.
6 That's not something that would be a last-minute
7 decision, it would be done through a bid process. It
8 would be an extended period of time. So, it's hard
9 to say a day or two savings would have actually been
10 there in real terms. We would have had a targeted
11 date when we wanted to go into operations and would
12 have worked towards that delivery date. To my
13 knowledge, in terms of my role in the OA process for
14 a MODU that we had at one time, we didn't see any
15 delays.

16 I don't know if I answered your question, but
17 I hope I have.

18 Q. So, your position is that Jamie Long's
19 concerns are unfounded? What he's saying in this
20 e-mail is unfounded?

21 A. I believe Jamie misspoke in terms of the
22 e-mail.

1 The process for us at the time we were
2 looking at these R&D Projects was to describe them as
3 optimistically as we could to identify a Project that
4 met the Guidelines and a Project that the Board would
5 approve. This particular project was one of the more
6 frustrating ones for me as a safety professional. I
7 was the supervisor of the safety department. The
8 individual in the e-mail that you referenced here,
9 Ms. Vicki Reid, I was her direct supervisor. We
10 assigned Vicki to work with the Chief Safety Officer.
11 This Project kicked around for many, many weeks with
12 the Board. It lacked any type of focus or any type
13 of real direction. It was a little bit of Mr. Long
14 trying to work in a cooperative manner with the
15 Board. And in many respects, in my opinion, trying
16 to please the Board in this regard. This Project is
17 really unusual. Why would Mr. Long and I identify a
18 Project and pay for it for the regulator to have a
19 database? That, in many respects, Jamie and I felt
20 they should have had all along. The Project started
21 out as a \$ [REDACTED] estimate. It was really, we
22 felt, over the top. We worked diligently with the

1 Board to try and narrow it down, but it was
2 frustrating in many respects to get cooperation from
3 the Board, and certainly I know Dan Chicoyne and
4 Jamie had conversations about how big this could be,
5 how helpful it could be. But in my opinion as a
6 safety person who worked with the Board every day for
7 many years, it was optimistic at best that it could
8 accomplish the things that were identified in the
9 vendors' report.

10 As I identified, the birth place of this idea
11 was simply to streamline the reporting offshore on
12 evenings and weekends and start small there.

13 It was a really frustrating Project for us
14 because even to this day we have not seen a print
15 screen, we have not seen anything on this from this
16 vendor, and I have my personal doubts that we will
17 ever see anything from them. So, it's been, like,
18 four years, and nothing has arisen out of this.

19 So, if it was really of interest to Hibernia
20 and it was really going to save that kind of time, we
21 would have put a whole lot more energy into it. If
22 we really saw that value, we would have been all over

1 this like we are in everything in our business. But
2 this was just something percolating along in the
3 background, and it was really based on conversations
4 we had with the Chief Safety Officer who thought this
5 was a good idea.

6 I was involved in the day to day, and that's
7 really the observations I can give you on it.

8 Q. Okay. So, I wanted to focus here on the
9 President of Hibernia's take on this Project because
10 he is the person that met with the Contractor. And,
11 as you can see in the next paragraph of the e-mail,
12 he says: "MWCO will send us the updated proposal
13 next week, and I suggest we take whatever version
14 they provide, make changes as appropriate, and attach
15 it to our standard funding template for [REDACTED]."

16 Do you see that?

17 A. I do.

18 Q. So, I'm trying to understand the President's
19 perspective on the Project because it was the
20 President that decided to go ahead and do this
21 Project. That's what he's saying in this e-mail
22 that, he wants to go ahead with the Project; right?

1 A. Yeah. He did identify he wanted to go ahead
2 with the Project.

3 Q. And as the President, met with the Contractor
4 to discuss the Project?

5 A. Jamie would have met with him. I believe we
6 had one of our IT individuals meet with him, along
7 with the safety representative, Vicki Reid, so it was
8 a number of meetings that were held. I think Jamie
9 was certainly not at all of them, but he would have
10 met with him on one occasion. And certainly Mr. Long
11 and I spoke a number of times about the Project.

12 Q. Right. So, the President of Hibernia,
13 rightly or wrongly, saw a cost-saving potential of
14 this Project, and he may have also been influenced by
15 a desire to have a good relationship with the
16 Project's regulator, the Board?

17 A. I believe that's factual, yes.

18 Q. Okay. Now, I just want to follow up on
19 another point that you made about Hibernia being the
20 only Operator to pay for this. Now, the Board
21 operates on cost recovery; right? The Board recoups
22 all of its operational costs from the Operators in

1 Newfoundland; is that right?

2 A. I believe it's 75 percent, but in principle I
3 understand the concept and I agree with what you're
4 saying.

5 Q. So, Hibernia would have ended up paying for a
6 portion of the software Project, if the Board went
7 ahead with this through some other mechanism as an
8 Operator in this area?

9 A. That's correct, quite likely, yes.

10 Q. And a benefit of paying for this Project in
11 the front-end, the way Hibernia did, was the
12 President had the opportunity to build a relationship
13 with the Board, and Hibernia, through this contract,
14 was also given a seat at the table as to how this
15 software was designed; right?

16 A. I don't know. I'm not sure I understand your
17 phrase "seat at the table," but certainly through the
18 R&D Guidelines, it was Hibernia that put the
19 submission in and had some dialogue with the Board.
20 To say we had a seat at the table, there was really
21 only cursory meetings with the Board. There was no
22 detailed design.

1 And as I said earlier, to the best of my
2 knowledge, to this point, to today, we have not
3 seen--we were not party to any fundamental testing of
4 software. We were not part of any design of forms,
5 we were not asked to participate in any beta testing.
6 This was some preliminary conversations with the
7 Board, satisfied the Guidelines, Jamie was happy to
8 approve the Project, because it satisfied some of our
9 spend, and really the interface with the CSO would
10 be--on this Project has been nonexistent for years.
11 And, as I said, to this point it's not functioning,
12 we haven't seen any reports. And, as a matter of
13 fact, the Board has never shown us anything in terms
14 of input or asked for any additional input on this
15 Project.

16 So, really, the fundamental motivation there
17 was for Jamie to satisfy the Guidelines, and we were
18 anxious to identify projects. This looked like an
19 easy one, and we proceeded with it. But, if there
20 was real value in this, Jamie would have had myself,
21 as safety supervisor at my department, actively
22 pursuing this. If there was really four days of

1 savings on a MODU, which is significant, we'd have
2 put a significant amount more effort in it.

3 The motivation here, in my opinion, based on
4 my experience, was simply a Project to satisfy the
5 Guidelines.

6 Q. Okay. I would like to talk about helicopter
7 safety now.

8 Now, workers travel primarily by helicopter
9 to the Hibernia and Terra Nova Projects; right?

10 A. Correct, yes.

11 Q. And three Sikorsky S92A helicopters are used
12 for that purpose?

13 A. That's correct, yes.

14 Q. And the helicopters fly over 300 kilometers
15 each way between the shore and the Project, so
16 300 kilometers over water each way?

17 A. That's correct, yes.

18 Q. Now, unfortunately, I have to bring up the
19 2009 helicopter accident that happened in these
20 waters. You discuss the accident at Paragraph 26 of
21 your First Witness Statement.

22 So, there was a helicopter crash that

1 happened in March 2009 in these waters; right?

2 A. That's correct, yes.

3 Q. And just to keep this brief, what happened
4 was one of the three helicopters was on the way to
5 Hibernia, the helicopter crashed into the water, did
6 not stay upright, became submerged underwater and 17
7 people drowned while one survived?

8 A. I clarify the description a little bit in
9 terms of--and I have some unique knowledge of the
10 tragedy of that crash. I participated and
11 represented Hibernia on the Implementation Committee
12 after the inquiry. To say that was a--that really
13 was--we make a distinction in helicopter transit and
14 in training people between a crash and a controlled
15 landing or a controlled ditching. The tragedy of
16 Cougar 491 was simply a crash. We train people
17 offshore for controlled ditchings, and that's where
18 you worry about helicopter stability. Anything to do
19 with helicopter stability is, pardon my phrase, out
20 the window, in terms of a crash and Cougar 491 was
21 definitely, without a doubt, a crash.

22 Q. Okay. I don't think I actually said the word

1 "stability," but I appreciate the clarification
2 nonetheless.

3 Now, prior to the helicopter accident,
4 Hibernia and Terra Nova flew their helicopters at
5 night; right?

6 A. That's correct, yes.

7 Q. And, after the accident, operators were
8 ordered to stop flying at night?

9 A. Correct, yes.

10 Q. And then, in 2012, the Board told Hibernia
11 that if it wanted to fly the helicopters at night
12 again, it had to do a few things, and one of them was
13 to research seabird migratory patterns; right?

14 A. In principle, yes. The seabird survey or
15 study was identified as a group with seven other
16 recommendations. And the recommendations didn't come
17 from the Board, they came from the implementation
18 team that I participated on. So, there was a risk
19 assessment on night flying, they identified eight
20 best practices that were recommended to be done, and
21 the Board took the recommendations from the
22 implementation team and assigned them to the

1 Operators. And basically said, yes, as you
2 described, if they want to return to night flying,
3 these eight things must be satisfied. And then, once
4 they were satisfied, the CNLOPB would consider
5 approving return to night flights.

6 Q. Right. So, because the Board accepted the
7 recommendations of this implementation team, in
8 essence, before the Board would consider a return to
9 nighttime flying, the Operators had to meet
10 conditions, including researching seabird flight
11 patterns?

12 A. That's correct, yes, absolutely.

13 Q. And the Operators told the Board at that
14 time, so in 2012, that they were prepared to meet
15 this condition to fly at night and were developing a
16 plan to meet it; right? In 2012.

17 A. I don't know--I'm not sure of the timing,
18 but, yes, the Operators did say they would look at
19 the conditions for returning to night flight.

20 Q. And that they were developing a plan to meet
21 those conditions?

22 A. Yes, that's fair, yes.

1 Q. So, then the very next year after that, so,
2 in 2013, Hibernia started to research seabird
3 migratory patterns?

4 A. I would have to verify the timing, but in
5 principle, yes. I remember the Project coming up for
6 discussion and it being presented as an R&D Project.
7 But I don't have the exact timing.

8 Q. If it helps, the Project is at Paragraph 31
9 of your First Witness Statement and at Paragraph 24
10 of your Second Witness Statement?

11 A. Okay.

12 Q. It's been labeled the "Seabird Activity and
13 Aviation Operations Study Expenditure" in this
14 arbitration, and you will notice there is a reference
15 to 2013.

16 A. '13, okay, thank you, yeah.

17 Q. Okay. So, the Hibernia started funding this
18 research in 2013.

19 So, when you signed your First Witness
20 Statement in March 2016, you said that this was not
21 an "ordinary course" expenditure because, to your
22 knowledge, Hibernia was not seeking to fly at night

1 at the time?

2 A. That's correct. There was no conscious
3 effort to work the intimate details of the eight
4 recommendations and present it to the CNLOPB at that
5 time.

6 There is a number of things in those
7 recommendations, those eight recommendations, if you
8 went into the details of aviation and the benefits,
9 there's a number of items in those eight
10 recommendations that are simply a best practice
11 regardless of night flying or not, and the Operators,
12 Cougar, on behalf of the Operators in the Basin,
13 presented those to Hibernia, along with the other
14 folks who shared these helicopters and said there's a
15 number of these things that make sense to do. And in
16 terms of working some of those options, that's the
17 premise on which a number of them were worked. So,
18 there's a number of those eight items that just make
19 good sense to do, whether you were intending to night
20 fly or not. And I can tell you certainly in the
21 early years post-Cougar 491, there was no appetite to
22 return to nighttime flying. And really that was the

1 tone from the Board, and the Operators may have been
2 identifying some opportunities to change how they do
3 business, how we did business with Cougar and how we
4 flew, but there was no conscious effort at that time
5 to work a plan to return to nighttime flying.

6 Q. Okay. So, this is what you said in your
7 First Witness Statement in March 2016, but a few
8 months later, when you filed your Second Witness
9 Statement in September 2016, the Operators had met
10 every single one of those eight conditions, including
11 the one that we're talking about to complete seabird
12 migratory pattern research; right?

13 A. That's correct, yeah.

14 Q. And, after that happened, you say in your
15 Witness Statement that Hibernia was or is still--is
16 now considering applying to the Board to fly at night
17 again after all?

18 A. So, I used the word "considering" because at
19 this point, certainly when I made my First Witness
20 Statement, there was no conscious effort, there was
21 no presentations to our management team, there was no
22 cooperative effort with Cougar, the service provider

1 or the other operators in the basin, to return to
2 night flying.

3 And if we were to return to nighttime flying,
4 it would involve a lot more conscious effort and
5 overt actions, besides just these eight activities.
6 It would involve engagement with the workforce, it
7 would have involved a media plan. It was a
8 significant amount of more activity required to
9 return to nighttime flying.

10 When I made my First Witness Statement, none
11 of that had been contemplated, none of that had been
12 planned. As I identified a few minutes ago, there
13 was some activities around those eight
14 recommendations because they presented value for
15 daytime flying, so there was effort to do that, but
16 no conscious effort to return to nighttime flying.

17 Subsequent to my First Witness Statement, the
18 Operators have gotten together and completed those
19 eight activities, they are still considering a return
20 to nighttime flying. There is an awful lot of other
21 factors that have to be considered, and at this
22 point, there's been no proposal presented to the

1 CNLOPB to actively return to night flying.

2 And no certainty that they will, but I think
3 there was reasonable effort put in to satisfying
4 those eight in the event that they want to return to
5 nighttime flying. But at this point, there's no
6 application before the CNLOPB to return to nighttime
7 flying.

8 And in many respects, the feedback we've
9 received from some of the workforce is it's been
10 almost eight years since the tragedy of Cougar 491,
11 we haven't flown at night, and we've gotten our
12 business done. So, there's a balance to be added in
13 terms of the decision to go to nighttime flying.

14 Q. Like I said at the start, we have very
15 limited time together, so I'm going to ask you,
16 again, to try and focus on what I'm asking you and
17 try and keep your answers to the point. I'm happy
18 for you to provide some context, but try to stay
19 within the realm of the question that's being asked
20 if possible. Thank you.

21 A. My apologies.

22 Q. So, needless to say, now that the Operators

1 are considering returning to nighttime flying, within
2 that context, this Project is useful?

3 A. If we were to return to nighttime flying,
4 this Project would have value. At the time we
5 approved the Project, there was no concerted effort
6 and in my opinion, it was incremental.

7 Q. So, over time, an expenditure that seems
8 incremental can turn out to be useful and necessary,
9 depending on future decisions that are made?

10 A. I think in this case, this one may or may
11 not.

12 The criteria for us at the time was not
13 whether it would ever yield value, is would it
14 satisfy the Guidelines. And I mean, we applied that
15 test here, and in many cases the Projects were
16 optimistic at best. This particular one was one that
17 we didn't need to do at the time. It represented
18 compliance with the R&D Guidelines. It was almost an
19 easy one to pick, and that was the thought process we
20 had when I was involved in the conversation--

21 Q. Okay, so my question was, a Project that
22 seems unnecessary when it's undertaken, to you, can

1 over time turn out to be useful and helpful?

2 A. Hypothetically, I guess, yeah. I mean, you
3 can say that about anything, but yeah.

4 Q. Okay. Now, I would like to turn to another
5 issue related to helicopters. We can talk about
6 helicopter stability now, which you alluded to
7 earlier.

8 A. Okay.

9 Q. So, after the March 2009 accident, one of the
10 things the Board did was set up an inquiry on
11 helicopter safety; right?

12 A. That's correct, yes.

13 Q. And the inquiry completed two reports, a
14 Phase I report that was completed in October 2010,
15 and a Phase II report that was completed in
16 July 2011; right?

17 A. Correct, I believe, yeah.

18 Q. So, let's just turn to the Phase I report
19 now. It's at Tab 7 of your binder. This is Exhibit
20 C-213 for the record, and we can go to Page 208.

21 If it helps, it's also Bates Number 3879, so
22 it's just the smaller number on the pages on the

1 bottom right. 3879.

2 A. I have it.

3 Q. Great.

4 So, if you just look at the last paragraph,
5 at the second line, the inquiry notes, "I have
6 already written about the harsh conditions which
7 almost always prevail in our offshore. Suffice it to
8 say that in our sea states, it is most likely the
9 helicopter will overturn because it is top heavy. In
10 calm water that may not happen, but we must assume
11 that in our conditions it will happen and happen very
12 quickly."

13 Do you see that?

14 A. I do.

15 Q. Okay. I'm just going to take you to a couple
16 more references in this report. Actually, before I
17 do that, the Sikorsky helicopters have floats at the
18 bottom of the helicopter; right?

19 A. That's correct. All helicopters only have
20 flotation at the bottom of them--

21 Q. Okay. The idea is that if the helicopter is
22 in water for some reason, it can float.

1 A. In principle, yes.

2 Q. Now, if a helicopter starts to invert, which
3 is what this paragraph is alluding may happen, the
4 floats would end up at the surface of the water, and
5 the cabin and everyone in it would be submerged under
6 water. Okay.

7 So, let's just turn to another paragraph in
8 this report now. I would like you to go to Bates
9 Page Number 3895.

10 A. Okay.

11 Q. Now, at the second full paragraph on this
12 report--sorry, on this page, the inquiry states:
13 "All of my readings and consultations with experts
14 lead me to believe that in ditching, there is at
15 least a 75 percent chance that the helicopter will
16 capsize and its occupants will very quickly find
17 themselves upside down in a machine which has filled
18 with frigid water."

19 Do you see that?

20 A. I do.

21 Q. And I think you mentioned this earlier, but
22 ditching refers to any emergency landing on water,

1 whether controlled or in the form of a crash; right?

2 A. That's fair, yes.

3 Q. Okay. Now, we will just turn to one last
4 reference in this report.

5 Can you please turn to Page 264, Bates
6 Number 3935.

7 A. Okay. I have it.

8 Q. Okay. Now, at the very last paragraph of the
9 third line, it says: "An example of research which I
10 think is important is the concept of the
11 side-floating helicopter. Its advantage would be to
12 avoid the disorientation which is bound to affect
13 some or all of those in the helicopter, should it
14 capsize and invert. Escape from an upside-down
15 helicopter is obviously more difficult than it would
16 be from a side-floating helicopter."

17 Do you see that?

18 A. I do.

19 Q. Now, just for clarification, a side-floating
20 helicopter is something that--is a helicopter that
21 could have floats at the top and the bottom of the
22 helicopter?

1 A. In principle, yes, that's the theory.

2 Q. That's the idea behind a side-floating
3 helicopter?

4 A. That's the theory.

5 Q. And the theory is that if there are floats at
6 the top and at the bottom of the helicopter, the two
7 floats can float the helicopter sideways if the
8 helicopter starts to invert?

9 A. That's the theory, absolutely, yes.

10 Q. And it would basically ensure that the cabin
11 is not submerged under water?

12 A. Correct.

13 Q. Now, after this report was released by the
14 inquiry, the Board became interested in the issue of
15 helicopter stability upon ditching; right?

16 A. That's correct.

17 Q. And, in fact, the Board started actively
18 researching helicopter stability and the benefit of
19 side-floating helicopters in 2012?

20 A. I'm not aware of the Board itself actively
21 researching. I do know from my time with the
22 helicopter inquiry and dealing with, at that time,

1 the Chief Executive Officer of the Board, he had
2 great interest in this and had participated in a
3 number of certainly seminars and conferences in the
4 U.K. sector where they were doing some research on
5 side flotation.

6 Q. Okay. So, the Board is the regulator that
7 deals with whether operations are operating safely,
8 and they have been interested in this issue to some
9 degree?

10 A. Absolutely, that's a fair statement.

11 Q. Okay. So, let's now discuss the "Improving
12 Stability of Helicopters Following Ditching"
13 expenditure that is at issue in this arbitration. It
14 was started by the Operators in 2013. And for
15 reference, it's at Paragraph 26 of your First Witness
16 Statement, and at Paragraph 14 of your Second Witness
17 Statement.

18 A. Okay.

19 Q. Let's turn to Tab 9 of your binder now,
20 Exhibit C-215.

21 A. Okay.

22 Q. Okay. So, this is Hibernia's application to

1 the Board for approval of this project. And attached
2 with this is a document prepared by Oceanic. It's
3 just two pages in, and it's entitled "Manners of
4 Improving Helicopter Stability in Waves Following
5 Ditching in Order to Prevent Inversion."

6 Do you see that?

7 A. Yes, I do.

8 Q. And Oceanic is the Contractor that was hired
9 to do this research?

10 A. I believe they were, yes.

11 Q. Okay. And the goal of this project,
12 ultimately, was to show that, or to study whether
13 side-floating attitude can be achieved for the S92A
14 in the wave environment that's found in the Grand
15 Banks of Newfoundland; right?

16 A. That's correct.

17 Q. And you might recall you said in your Witness
18 Statement that it's not economical for Hibernia to
19 redesign Sikorsky helicopters because Hibernia only
20 uses three of these helicopters; correct.

21 A. That's correct.

22 Q. Now, I just want to confirm: So, this

1 research is specific to the wave conditions that are
2 prevalent on the Newfoundland offshore where, as the
3 Commission, or the inquiry, found there was a
4 75 percent risk of the helicopter flipping; right?
5 This study is focused on the specific waves in the
6 Newfoundland Banks?

7 A. It did specify that, yes.

8 Q. And the reason this research focuses on the
9 specific waves in Newfoundland is because, whether or
10 not a helicopter capsizes, and how that happens, is
11 very sensitive to the precise details of the waves
12 involved; right?

13 A. That's a fair statement, but it was really
14 generated around the percentage of time that we see
15 those sea heights or wave heights that exceed the
16 existing certification and flotation. The
17 Newfoundland region has no monopoly on waves; or the
18 waves that we would see offshore in Newfoundland are
19 not untypical to what we would see off the--in the
20 North Sea, Norwegian or U.K. sectors in the North
21 Sea.

22 In principle, waves on the ocean are waves on

1 the ocean. And the percentages you referenced of
2 75 percent, they're roughly correct. But they would
3 be the same applicable percentages to a helicopter
4 landing on water in the Norwegian sectors or the U.K.
5 sectors of the North Sea.

6 If you have wave heights that exceed the
7 certification of the flotation, it's quite likely
8 that helicopter is going to tip over.

9 So, while it was identified to be specific to
10 Newfoundland, in principle, waves are waves wherever
11 a helicopter flies.

12 And I didn't mean to sound curt, I apologize,
13 but I just wanted to clarify that.

14 Q. I appreciate that.

15 So, do you recall that one of the first steps
16 that this project was meant to do was to actually
17 figure out how to model the specific waves in
18 Newfoundland, and move away from using general sort
19 of wave heights and that sort of thing, as you're
20 describing?

21 A. It talked about that, yes.

22 Q. So, it was meant to be quite specific to the

1 waves of Newfoundland. Okay.

2 And now, I just want to clarify: This
3 research does not contemplate a general redesign of
4 the Sikorsky helicopter; right? It was designed just
5 to test whether side-floating is feasible in these
6 waters, and the Project was specifically designed so
7 that, if it went well, the results would be passed to
8 the helicopter's manufacturer to actually do the
9 redesign work; is that right?

10 A. I believe that's correct. In any event,
11 that's what would have had to have happened anyway.
12 Sikorsky would have had to redesign. And it's almost
13 a certainty that they would have had to have
14 redesigned the aircraft.

15 Q. Now, this research project was a Joint
16 Industry Project; right?

17 A. I believe it was, yes.

18 Q. And HMDC, [REDACTED] and [REDACTED] also contributed
19 to this project.

20 A. I would have to verify, but I think that's
21 correct, yes.

22 Q. If you go to Tab 5 on your binder, you will

1 see the Agreement that the Operators entered into
2 with PRNL to do this research project. And you will
3 see all of the Operators--HMDC, [REDACTED] and
4 [REDACTED]-are mentioned there?

5 A. I do see that, yes.

6 Q. Okay. Now, are you aware that this
7 expenditure is an "ordinary course" expenditure, as
8 far as the Terra Nova Project is concerned?

9 A. I am not aware of that.

10 Q. Okay. I would like to talk to you about one
11 last topic: personal locator beacons.

12 Now, a personal locator beacon is worn by
13 workers and used to send out distress signals; right?

14 A. That's correct.

15 Q. And the idea is that it speeds up rescue by
16 making it easier to locate people during an
17 emergency?

18 A. Yeah, that's fair. Yeah.

19 Q. And because the waters of Newfoundland are
20 quite cold, speed of rescue can be critical there?

21 A. That's a fair statement, yeah.

22 Q. Now, the personal locator beacons that were

1 used during the helicopter accident that we discussed
2 a little while ago were ineffective; right?

3 A. In principle, it was identified during the
4 Transport Canada investigation that they did not
5 work. The indications from the investigation were
6 they did not work because it was a crash, not a
7 controlled ditching, and because the helicopter sank
8 very quickly and exceeded the limitations of that
9 particular unit.

10 I don't think it's fair to say they were
11 ineffective. They certainly didn't work because they
12 weren't designed to work under those circumstances,
13 where a helicopter crashed so severely and sank
14 immediately.

15 So, it was the depth of the water that
16 stopped them from working.

17 Q. So, the beacons did not work; no signals were
18 received during that accident.

19 A. To my knowledge, no beacons were received,
20 no--because of the depth of the water.

21 Q. Right. And do you recall that the Union of
22 Hibernia workers, Local 212, was frustrated by the

1 personal locator beacons that were in use, and how
2 they worked during the accident?

3 A. I don't have any direct recollection or
4 direct involvement or interface with the Union to say
5 they were frustrated. They were frustrated with the
6 crash in general; we all were.

7 Q. Now, after the helicopter crash, the
8 Operators told the inquiry that they would do work to
9 continuously review improvement opportunities for
10 beacons; right? Do you recall that?

11 A. I don't recall it directly, but I believe
12 that was a general intent that, coming out of the
13 crash of 491, you know, operators would look at ways
14 to make improvements. Yeah, you can always learn,
15 and I think that was a fair statement, yes.

16 Q. Okay. Now, let's discuss the Personal
17 Locator Expenditure at issue in this arbitration.
18 You discuss it at Paragraph 35 of your First Witness
19 Statement, and at paragraph 21 of your Second Witness
20 Statement.

21 And you will find the expenditure application
22 to the Board for this project at Tab 13 in your

1 binder, and it's Exhibit C-220.

2 So, this is actually an R&D application for
3 this project and a few others, as well. So, we'll
4 have to go to Bates Number 4321 to find the
5 application for the Beacon Project; so, Tab 13, Bates
6 Number 4321.

7 A. Okay.

8 Q. Now, the purpose the Project was to create a
9 better personal locator beacon; right?

10 A. In principle, yeah, that's correct.

11 Q. And one advantage it was meant to offer was
12 being more reliable in environments with high-impact
13 force, water pressure, high humidity or salt--some of
14 the things that would come into play with a
15 helicopter crash in water; right?

16 A. That's correct.

17 Q. And you state in your Witness Statement that,
18 if a better beacon was necessary, it would have been
19 obtained off-the-shelf from the market. That's what
20 you said in your First Witness Statement, I believe?

21 A. That would be normal practice for HMDC. I
22 mean, in our business, we wouldn't take on a design

1 of anything in particular. We want--our typical
2 approach would be to identify a specification or a
3 spec for the product we wanted, and it's very typical
4 for us to go to the market and put a formal bid, and
5 evaluate the bids from a cost-benefit perspective.

6 Q. Okay. So, let's look at that application to
7 the Board now. I believe you're at it. So, attached
8 to the cover page of the application is the write-up
9 that was completed by Canatec. Canatec is the
10 contractor that was hired to do this research; right?

11 A. That's correct.

12 Q. And you will see on the first page of this
13 document, the first paragraph, at the end of the
14 first line, it says: "Timely, reliable and exact
15 location of personnel in emergency rescue situations
16 is limited by the performance and reliability of
17 personal locator beacons now on the market. Better
18 technology is available to reduce the loss of human
19 life, and the financial impact on operations."

20 And in the next paragraph, in the second line
21 it says: "This technology can be quickly adapted for
22 a personal locator beacon application, and offers

1 significant advantages over existing products on the
2 market."

3 Do you see that?

4 A. I do.

5 Q. So, the type of beacon that was being
6 envisioned here could not have been bought directly
7 from the market?

8 A. The ideal PLB that was being described here
9 was not available in the market, not at that time.

10 Q. Okay. And just to confirm, your position
11 remains that this research was done not to increase
12 the safety of the Projects but just to meet the
13 Guidelines, just like all the other projects we've
14 discussed today?

15 A. Canatec was competing for R&D dollars. The
16 descriptions we used in a lot of these Projects were
17 designed--

18 Q. I think that was a yes-or-no question.

19 A. If you'll repeat the question for me, then.

20 Q. So, your position remains that this research
21 was done not to improve the safety of the Projects,
22 but simply to meet the 2004 Guidelines?

1 happening offshore in terms of efficiencies, this was
2 brought forward as an idea that might represent some
3 value, but certainly would satisfy the R&D
4 Guidelines. So, it came through a brainstorming
5 session on the R&D Guidelines that we were asked to
6 participate in as a safety group.

7 Q. Ms. Amalraj brought up that part of the
8 Board's costs are covered by the Operators. Do you
9 remember that part?

10 A. I do.

11 Q. Do you know whether the Board would have
12 funded this particular project if HMDC did not?

13 A. I don't believe they would have funded it.
14 Certainly, they didn't demonstrate any interest or
15 willingness to do this type of activity prior to us
16 presenting it under the R&D Guidelines.

17 Q. Do you know who selected the vendor for this
18 project?

19 A. CNLOPB's chief Safety Officer brought the
20 vendor to us. It was not done through any
21 full-and-fair competitive bid process.

22 Q. Do you know why the CNLOPB selected that

1 particular vendor?

2 A. I believe he was known to--the vendor was
3 known to the Chief Safety Officer, either in a
4 previous career or personally--but I couldn't speak
5 specifically to it. But, certainly, he was known to
6 the Chief Safety--the vendor was known to the Chief
7 Safety Officer, and that's how he presented the name
8 to us.

9 Q. You also testified, as I recall, that you
10 have personal doubts about whether you will ever see
11 the results from this vendor. Could you please
12 explain why you have those doubts.

13 A. The project was identified a significant
14 period of time ago, many years ago. In many
15 respects, aspects of the Project should have been
16 fairly simple to bring forward. But, to this point,
17 and to the best of my knowledge, we have not seen, as
18 I said earlier, a simple electronic form; we have not
19 been asked to participate in trial runs; we have not
20 seen a scoping document with any degree of detail.
21 And the safety people that presently occupy, or all
22 occupied previously at Hibernia, have had no

1 engagement with the CNLOPB about it. And, in fact,
2 when they've inquired about it, received very little
3 in terms of a formal response.

4 Q. Do you know whether the value, potential
5 value, described in Jamie Long's e-mail that Ms.
6 Amalraj referred to, has been realized?

7 A. To the best of my knowledge, we've
8 seen--well, certainly, we've seen no reports, or no
9 active use of this database; so, certainly, no dollar
10 values or values to Hibernia have accrued out of this
11 Project. And I doubt we'll see any out of it.

12 Q. Do you know whether HMDC will ever derive
13 value from this particular expenditure?

14 A. Based on the progress that I've seen so far,
15 again, I'm doubtful we will see any value coming out
16 of a database such as this--if, indeed, we see the
17 database active at all.

18 Q. Mr. Durdle, let's go back to the Seabird
19 Activity Study that was covered in your Witness
20 Statement and also examined by Ms. Amalraj.

21 Why, Mr. Durdle--or do you know why,
22 Mr. Durdle--I will rephrase.

1 At the time that this particular expenditure
2 was made, do you know whether the Operators intended
3 to return to nighttime flying?

4 A. At the time we evaluated this particular
5 project, there was definitely no concerted effort to
6 return to night flying.

7 Q. Do you know when the Operators began
8 considering returning to nighttime flying?

9 A. I know--I couldn't speak specifically to when
10 the work started. I can tell you when I became
11 reasonably aware, and it was just--it was post my
12 First Witness Statement.

13 Q. With regard to the Helicopter Stability
14 Project that Ms. Amalraj also covered, in the
15 ordinary course of business, does HMDC undertake
16 studies into design changes to helicopters?

17 A. Absolutely not. It's all foreign to our core
18 business. Our base business is production; safe,
19 efficient production of oil. And the redesign of
20 helicopters that are certified in the U.S., and are
21 used worldwide, would certainly not be anywhere near
22 the mandate for HMDC.

1 It would be really unusual for me as a
2 supervisor, or as a leader in the Hibernia
3 organization, to bring that to my management and say,
4 "This is a quality Project that represents value to
5 Hibernia, its core business. Let's do this project."
6 It would just never pass the test of our business
7 model. It would be so foreign for us to do something
8 like that, particularly, with helicopters
9 particularly, in an industry so specific and targeted
10 as aviation.

11 Q. Turning to the PLB study, do you know whether
12 HMDC would fund that particular study in the ordinary
13 course?

14 A. Again, not unlike the helicopter stability,
15 for one company, HMDC, we perhaps used, you know, at
16 most 50 PLBs in terms of our base business. It's not
17 core business. We would typically go to the market,
18 identify a need or a gap in the technology; and ask
19 the market to provide that.

20 But for HMDC, in and of itself, to fund very
21 specific technical research with that much
22 uncertainty, and not have any proprietary rights to

1 the product--and even if the PLB research yielded a
2 product which, to this point, it hasn't, and it's
3 probably very uncertain that we will see a PLB come
4 out of that research that's able to be certified and
5 used in America. But even if it did, we would still
6 have to go to the market and ask a vendor, whoever
7 built that, to sell it to us, and buy it. And we
8 would be just in the queue like everybody else.

9 That's just so foreign to our business model
10 that we would not do that, but for these Guidelines.

11 MR. NICHOLS: No further redirect.

12 PRESIDENT GREENWOOD: Mr. Durdle, thank you
13 very much.

14 You were working for HMDC when that
15 helicopter crash took place, were you?

16 THE WITNESS: I was actually on a rotation
17 offshore, so I was one of the first individuals to--

18 PRESIDENT GREENWOOD: So, they were
19 colleagues of yours.

20 THE WITNESS: Yes.

21 PRESIDENT GREENWOOD: Well, I'm sorry that
22 you've had to relive it in the context of this

1 Hearing. And thank you very much for coming to see
2 us.

3 I suggest we take a five-minute break while
4 we change witnesses over, and then we'll make some
5 progress with Mr. Jeff O'Keefe.

6 (Witness steps down.)

7 PRESIDENT GREENWOOD: Sorry--could you hold
8 on for just a minute.

9 Mr. Durdle, you're free to leave.

10 (Tribunal conferring.)

11 JEFF O'KEEFE, RESPONDENT'S WITNESS, CALLED

12 PRESIDENT GREENWOOD: Mr. O'Keefe, welcome.
13 Thank you for coming to talk to us.

14 Yes, you need to put your microphone on.

15 THE WITNESS: Is that on now? Okay.

16 PRESIDENT GREENWOOD: There we are.

17 Would you make the Declaration from the
18 laminated sheet of paper in front of you, please.

19 THE WITNESS: Sure. I solemnly declare upon
20 my honor and conscience that I shall speak the truth,
21 the whole truth, and nothing but the truth.

22 PRESIDENT GREENWOOD: Thank you very much.

1 Now, just a couple of housekeeping matters.
2 The first one is not going to be a problem since you
3 seem to have a good, clear voice. It's very
4 important that you speak up, but remember, if you're
5 looking at the counsel who is asking you questions,
6 don't take your mouth away too far from the
7 microphone so that the Court Reporter, in particular,
8 can pick up what you're saying.

9 And the second thing is don't speak too
10 quickly, and don't speak when counsel is speaking.
11 It's all too easy with cross-examination for both of
12 you to speak at once, but it plays havoc with our
13 attempt to keep a transcript.

14 THE WITNESS: I understand.

15 PRESIDENT GREENWOOD: Right.

16 Who is doing the direct examination?

17 MS. SQUIRES: I am.

18 DIRECT EXAMINATION

19 BY MS. SQUIRES:

20 Q. Hi, Mr. O'Keefe, you will see in front of you
21 there you have a copy of your Witness Statement.

22 Do you have any corrections to make to that

1 statement?

2 A. Yes. I have one correction, and that is on
3 Page 9, in Paragraph 23, the line that says, "While
4 the results of the WAG Pilot will not be known until
5 the pilot is run, based on the documents provided to
6 the Board by HMDC, I see no reason not to believe
7 field-wide EOR is not possible."

8 There's three "nots" in there. There should
9 only be two.

10 My statement is that I believe that it is
11 possible.

12 PRESIDENT GREENWOOD: I think that's how I,
13 for one, had read it, but it should read, therefore,
14 "I see no reason to believe field-wide EOR is not
15 possible." I think that's what you meant to say.

16 THE WITNESS: Correct.

17 PRESIDENT GREENWOOD: Thank you.

18 BY MS. SQUIRES:

19 Q. No other questions from me.

20 PRESIDENT GREENWOOD: Thank you very much.

21 I'm sorry, I can't see who it is who's asking
22 the questions.

1 Mr. Neufeld.

2 MR. NEUFELD: Mr. President.

3 PRESIDENT GREENWOOD: Very good. Please go
4 ahead.

5 Do you have a cross-examination bundle?

6 MR. NEUFELD: I do, indeed.

7 PRESIDENT GREENWOOD: I think we will just
8 pause for a minute while you distribute it or while
9 your colleague distributes it.

10 While those are being handed around,
11 Mr. Neufeld, through no fault of anyone, we have
12 clearly followed the practice in this Hearing that no
13 piece of paper should be produced which doesn't bear
14 at least two, and sometimes three different page
15 numbers, but we were getting a little bit confused on
16 one or two occasions, so please try to be consistent
17 about which page you refer the Witness to.

18 MR. NEUFELD: Thank you, sir. I will.

19 CROSS-EXAMINATION

20 BY MR. NEUFELD:

21 Q. Good afternoon, Mr. O'Keefe.

22 A. Good afternoon.

1 Q. I would like to take you to your statement
2 and ask you a few questions about what's contained
3 therein.

4 First, I would like to ask you how long--

5 PRESIDENT GREENWOOD: Mr. Neufeld, I'm sorry,
6 we're losing you. You'll have to speak up and make
7 sure the microphone is right by your mouth.

8 MR. NEUFELD: Thanks, Mr. President.

9 BY MR. NEUFELD:

10 Q. Mr. O'Keefe, I would like to ask you how long
11 you've served as Director of Resource Management and
12 Chief Conservation Officer at the Board?

13 A. I was appointed Director of Resource
14 Management in March of 2012, and I became the Chief
15 Conservation Officer, I think it was, in July or
16 August of 2012.

17 Q. And what was your position prior to joining
18 the Board?

19 A. I came to the Board in July of 2004 as a
20 Reservoir Engineer and moved through the ranks,
21 becoming a Conservation Officer in 2008.

22 Q. And, prior to that, did you work in the

1 private sector?

2 A. Yes.

3 Q. And what were your positions in the private
4 sector?

5 A. Should I list all of them or the relevant
6 ones?

7 Q. You can list the relevant ones.

8 A. Okay. I graduated from Memorial University
9 in '93 with a Bachelor's in geology and worked for
10 two years as a well-site geologist for a company out
11 of Calgary called "Sperry-Sun."

12 I then went back to school, graduated from
13 the University of Alberta with a petroleum
14 engineering degree where I was--then went to work for
15 Marathon Oil company out of Houston, Texas, in their
16 international production department.

17 I spent close to four years there before
18 returning to St. John's, Newfoundland, where I worked
19 for a year-and-a-half on the sanctioning of the White
20 Rose Project for Petro-Canada.

21 Q. Thank you.

22 And what year did you graduate from the

1 University of Alberta, was it?

2 A. 1998.

3 Q. Okay. That's my alma mater, as well.

4 A. Okay.

5 Q. Now, you note that you're responsible for
6 reviewing and approving development plans, production
7 operations and so forth; is that right?

8 A. Correct, as the Director of Resource
9 Management.

10 Q. And what activities and projects in the
11 Offshore Area are within your responsibility?

12 A. All the active--all the production--all the
13 exploration in terms of data acquisition and all the
14 development and production activity in the
15 Newfoundland and Labrador offshore.

16 Q. Thank you.

17 And which projects specifically, if you could
18 name them in the Offshore Area that you were
19 responsible for?

20 A. I worked for--in terms of production
21 projects, the Hibernia Project, on the Terra Nova,
22 White Rose, and most recently the Hebron Project.

1 Q. Thank you.

2 Now, you've submitted your statement in these
3 proceedings, as you say in Paragraph 2, to address
4 what you call the Gas Utilization Study or WAG Pilot;
5 is that correct?

6 A. That's correct.

7 Q. You say "the" WAG Pilot. How many WAG Pilots
8 are there currently in the Offshore Area in which you
9 are responsible?

10 A. Currently, there is none.

11 Q. Okay. So, you're referring to the WAG Pilot
12 specifically at Hibernia; is that right?

13 A. Yes.

14 Q. And, of the other projects you named, some of
15 those are older in life of field than Hibernia's; is
16 that right?

17 A. No, Hibernia is the oldest one. It's been in
18 production since 1997 and it's in its 20th year.
19 Terra Nova started in 2002, so it would begin its
20 15th year, and White Rose started in 2005, so its
21 12th year.

22 Q. Yes. And the end of life for Production

1 Phase for those projects, however, it's Terra Nova, I
2 believe, that is closest or one of the closest to
3 coming to an end?

4 A. No. Currently, Terra Nova is--started an
5 asset review of the facility to extend its life by
6 another 10 years. It comes up for renew in 2022.
7 That review possibly could extend it beyond that.

8 White Rose, obviously, with the sanctioning
9 of the wellhead project is a continuation, and that's
10 supposed to extend it out for another 10 years,
11 around the same time. It could be White Rose, it
12 could be Terra Nova.

13 Q. And the life of field expected for Hibernia
14 at this stage is over 20-40.

15 A. Another 30 years, yes.

16 Q. Now, in your statement, you refer to a number
17 of provisions. One is in a decision, Decision 86.01,
18 and that's at C-37, but it's also quoted in your
19 statement at Paragraph 3. This is the Hibernia
20 Benefits Plan, and it's an application for approval,
21 and there is a decision on this matter.

22 Is the Hibernia Development Plan referred to

1 in this document, this Development Plan was presented
2 prior to any drilling taking place at Hibernia; is
3 that right?

4 A. Well, there was exploration drilling, the
5 discovery well, and then there was delineation
6 drilling, and then the Project--the Operator submits
7 the proposal based on the information from the
8 exploration and delineation wells.

9 Q. And the initial development drilling did not
10 take place until when? Nineteen-ninety--

11 A. 1990--November 1997.

12 Q. 1997, thank you.

13 Now, the purpose of this document, the
14 Decision 86.01, is to record the Board's decision on
15 the Proponent--in this case, I take it that's HMDC?

16 A. Correct.

17 Q. --and then HMDC's Application for Approval of
18 the Hibernia Development Plan; correct?

19 A. Correct.

20 Q. And, as part of the approval of the Hibernia
21 Development Plan, there was a condition, you say, a
22 Condition 1(2) of Decision 86.01; is that right?

1 A. Correct.

2 Q. Okay. Let's take a look at that provision.

3 You cited at the top of Page 2 of your Witness
4 Statement, which is Paragraph 3. Could you just read
5 that out for us?

6 A. Okay. It's on the screen there.

7 It's the next page, whoever is controlling
8 the screen. Okay.

9 "It is the condition of the approval of the
10 Hibernia Development Plan that the Proponent
11 undertake studies concurrent with the initial
12 development drilling to establish the feasibility of
13 a miscible flood for the Hibernia Reservoir."

14 Q. Thank you.

15 Now, let's look specifically, before we get
16 into the details, at what exactly this quote is
17 referring to. It is the feasibility of a miscible
18 flood.

19 A. Correct.

20 Q. And there are a number of different types of
21 miscible flooding; is that right?

22 A. Correct.

1 Q. For example, CO2 injection, polymer
2 injection. Would those be two examples?

3 A. Correct.

4 Q. Another example is a form of miscible
5 flooding called "double displacement"; is that right?

6 A. Correct.

7 Q. And would you agree that double displacement,
8 in particular, is a process of injecting water
9 throughout a reservoir followed by injecting gas
10 throughout the same reservoir?

11 A. Correct. That you would have--initially
12 start with a waterflood, and then after it
13 watered-out, you follow it up with a gas flood.

14 Q. And, as I understand it, a
15 double-displacement study was actually done in 2008
16 to assess the potential for EOR.

17 A. Correct.

18 Q. And "EOR" refers to energy...

19 A. Enhanced oil recovery.

20 Q. Thank you.

21 Now, you also refer, I think, to a definition
22 of "miscible flooding," and that's found in C-37, as

1 well on Page 101, which--

2 MR. NEUFELD: Excuse me, Mr. President, I'm
3 going to give you the number of the Bates page, which
4 is 1051.

5 PRESIDENT GREENWOOD: Mr. O'Keefe, each
6 document is likely to have two page numbers. The one
7 that is usually the best one for identifying things
8 is what's called a Bates number, which is the
9 hieroglyphic down in the bottom right-hand corner,
10 MOB 0001051.

11 THE WITNESS: Okay.

12 BY MR. NEUFELD:

13 Q. Now, sir, do you have the definition in front
14 of you?

15 A. It's currently on P. It has to go back up to
16 "miscible," I guess.

17 Q. Okay. Could you read that out for us if it's
18 in front of you?

19 A. It's not in front of me yet.

20 Q. Okay. Yeah, Mr. O'Keefe, you can also find
21 it--

22 PRESIDENT GREENWOOD: Yes. Mr. O'Keefe, I

1 think you will find it more useful to use the bundle
2 that trying to read it off the screen. It's quite a
3 challenge to read it off the screen.

4 THE WITNESS: The number again, please?

5 PRESIDENT GREENWOOD: 1050. It's in the
6 bottom right-hand corner.

7 THE WITNESS: I have it.

8 BY MR. NEUFELD:

9 Q. Could you read that out for us.

10 A. Sir, certainly.

11 "Miscible flood, a secondary or tertiary
12 oil-recovery method where two or more injection
13 fluids are used, one behind the other, for example,
14 gas or water, to mix with the oil and enhance flow
15 characteristics."

16 Q. Now, we were just discussing double
17 displacement, and I take that it double displacement
18 would be a form of miscible flood based on the
19 definition we had.

20 A. Correct.

21 Q. And the topic that you are discussing in your
22 statement, as you say, in Paragraph 2 is the WAG form

1 of EOR.

2 A. Correct.

3 Q. And what does WAG stand for?

4 A. Water-Alternating-Gas.

5 Q. Okay. So, by its very name, it suggests that
6 it's a form of miscible flooding.

7 A. Correct.

8 Q. Can you describe the process, briefly?

9 A. So, basically, you would initiate a WAG study
10 where you would, for a period of time, inject water,
11 then stop and inject gas, and then alternate back to
12 water then gas. So, it would depend on cycles in
13 terms of how long--depending on the reservoir and the
14 fluid characteristics, how long you would have those
15 cycles going on for.

16 Q. WAG itself is the displacement of water and
17 gas alternating in form?

18 A. Correct.

19 Q. Is that right?

20 A. Correct.

21 Q. Okay. And double displacement and WAG, as
22 that--as defined just now, are forms of miscible

1 flooding, according to the definition of 86.01.

2 A. Correct.

3 Q. Okay. So, WAG is a form of EOR; is that
4 right?

5 A. Correct.

6 Q. Okay. Though it's not quite right, I guess,
7 to say, in Paragraph 4, as you do, that WAG is--that
8 EOR is a form of WAG. It's really the other way
9 around. There are multiple types of miscible
10 flooding.

11 A. Correct. EOR is sort of the umbrella that
12 captures the different types between miscible,
13 chemical, in situ. There is a variety of different
14 types.

15 Q. Now, the expenditure that we are discussing
16 in this particular matter is the WAG Pilot. You're
17 familiar with this project; right?

18 A. Correct.

19 Q. Okay. And earlier, we were reading out from
20 the Condition 2(1) or rather 1(2) in Paragraph 3 of
21 your statement.

22 There, there is no reference, is there, to

1 the WAG Pilot or a pilot of any kind?

2 A. No, there isn't.

3 Q. All right. But you have cited this
4 provision, I take it, as a demonstration of the
5 requirement to take the WAG Pilot.

6 A. You have to go back to the premise of where
7 the condition was put into the Decision. That would
8 be--

9 Q. Sir, if I could--

10 A. Page MOB0000999.

11 PRESIDENT GREENWOOD: You said Page 999?

12 THE WITNESS: Yes.

13 So, the Board, in its analysis, describes
14 what led to the Condition Number 1. It's realized
15 that there was technical difficulties in looking at
16 miscible flood, and required that more field and
17 laboratory data needed to be done to look at the
18 feasibility of a miscible flood. So, the requirement
19 was that during the initial drilling phases, that
20 more field data as well as lab data be required to go
21 forward, and they even suggest the block area that
22 the study should be done.

1 BY MR. NEUFELD:

2 Q. Yes.

3 A. So, they could best assess miscible flooding.

4 Q. And the third paragraph on 999 states that:

5 "The Board recognizes a technical difficulty
6 associated with the feasible study of a miscible
7 flood at this time"--

8 A. Mm-hmm.

9 Q. --"and with the possible implementation of a
10 miscible flood in a geologically complex reservoir
11 such as the Hibernia sandstones."

12 So, the reference here is to studies,
13 feasibility studies, which is what's referred in your
14 statement--

15 A. Correct.

16 Q. Now, studies, as we have just been
17 discussing, include, for example, the
18 double-displacement study that was done in 2008.

19 A. Correct.

20 Q. That study did not include a pilot, in-field
21 pilot, did it?

22 A. No. It was more based on the laboratory.

1 Q. Right.

2 And the studies that are referred to in, for
3 example, the staff commentary on that study assumed
4 that the study takes place before anything else is
5 done. It's a study about feasibility; is that right?

6 A. Correct.

7 So, that's in keeping with the legislation.

8 Q. Right.

9 So, a study as such is not an in-field pilot.

10 A. I mean, the study is to--whether--a pilot's
11 definition, if you go to that, is a scheme to look at
12 evaluation of experimental data to see if it can be
13 used on a full field. So, I would say that a pilot
14 is a study because you're not doing a full field.
15 You're testing out a hypothesis that you want to
16 bring to the field in a small area, and thus it's a
17 study, bringing the--because the lab data doesn't
18 always work in the field, and thus you're testing
19 your hypotheses that you've seen in the lab going
20 forward. So, I would say no. It is a study.

21 Q. So, sir, it's your testimony that there is no
22 difference between a study in the form, for example,

1 of a double displacement paper that was submitted and
2 commented on in regards to its feasibility and an in-
3 field pilot, an actual production--

4 A. Well, it depends. The definition of the
5 "pilot" in the regulations state that it's taking
6 experimental data and trying it out in the field, not
7 on a full field, or that--but it's for a period of
8 time. There's objectives in the pilot to test it
9 out.

10 Q. Now in--

11 PRESIDENT GREENWOOD: You say "in the
12 regulations," the definition in the regulations?

13 THE WITNESS: Correct.

14 PRESIDENT GREENWOOD: Is that in the bundle
15 in front of you? Could you just show us where it is?

16 THE WITNESS: You would need to pull up the
17 Drilling and Production Regulations, whatever--

18 PRESIDENT GREENWOOD: Drilling and Production
19 Regulations, thank you.

20 Could somebody do that?

21 MR. NEUFELD: Yes. It's R 249.

22 PRESIDENT GREENWOOD: R 249. Thank you.

1 Is that--right. That's later in this bundle.

2 MR. NEUFELD: Yes, it's Page 39 of...

3 PRESIDENT GREENWOOD: Mr. O'Keefe, would you
4 perhaps direct us to the particular definition you
5 were referring to a moment ago?

6 THE WITNESS: Sure.

7 It's under "pilot scheme" Number 831. For
8 the purposes of this section "pilot scheme" means a
9 scheme that applies, existing or experimental
10 technology, over a limited portion of a pool to
11 obtain information or reservoir or production
12 performance for the purpose of optimizing field
13 development or improving reservoir or production
14 performance."

15 And the last, number three says: "Completing
16 the pilot, tell the results of the scheme and
17 supporting data as well as conclusions to the
18 potential of the scheme for application for full
19 scale production."

20 BY MR. NEUFELD:

21 Q. Thank, Mr. O'Keefe. That's quite helpful.

22 Now, the definition of "pilot," as you say,

1 is provided in the regulations and it's defined as
2 such just as you've read it; correct?

3 A. Yes. Correct.

4 Q. And had Decision 86.01 wished to use that
5 term as it's defined, presumably it would have
6 included it in the Decision. Would you not agree?

7 A. No. I mean, it's--you do the studies first
8 in the lab to see--if the results in the lab are
9 encouraging, you're moving next to the pilot. So, to
10 define that--

11 Q. Excuse me, sir. So, in that case, studies
12 are done, and they're different from the pilot; is
13 that correct?

14 A. I think you're saying there is a diff--you're
15 trying to say there is a difference between--

16 Q. I am indeed saying there is a difference.

17 A. Difference.

18 Q. We've just looked to the definition, as you
19 pointed us to--

20 A. Correct.

21 Q. Of "pilot"; correct?

22 A. Correct.

1 Q. It's in the regulations.

2 A. Correct.

3 PRESIDENT GREENWOOD: Please, gentlemen,
4 don't both talk at the same time. It makes it
5 impossible for the Court Reporter.

6 Mr. Neufeld, you must let your witness answer
7 the questions that are put to him.

8 MR. NEUFELD: Thank you, sir. I will.

9 BY MR. NEUFELD:

10 Q. So, the definition of "pilot" that you drew
11 us to--

12 A. Correct.

13 Q. --that word, that's a defined term as you
14 noted, is not the term that's included in Decision
15 86.01; correct?

16 A. Correct.

17 Q. And, as you say, studies are done before in-
18 field pilots as a matter of course; is that your
19 testimony?

20 A. Correct.

21 Q. So, there is a difference between a study and
22 a pilot in that case.

1 A. No, I don't think there is a difference
2 because I think the results from the study lead you
3 to do more work, which is a study and which includes
4 a pilot.

5 Q. So, you would agree that a defined term in
6 the regulations, namely "pilot," is not in this
7 provision; is that correct?

8 A. I think you're--the definition is the scheme
9 a study.

10 Q. I think we need to get this very baseline at
11 least set. The word "pilot scheme" does not appear
12 in Condition--

13 A. 86.01, correct.

14 Q. 86.1.

15 And it is a defined term in the regulations,
16 "pilot" is.

17 A. Correct.

18 Q. And it was not chosen to be used in this
19 provision.

20 A. Correct.

21 Q. And "pilot" and "study" are two different
22 things, therefore; would you agree?

1 A. No, I would not agree.

2 Q. Thank you. Let's move on.

3 PRESIDENT GREENWOOD: Mr. O'Keefe, is there a
4 separate definition of "study" in the regulations?

5 THE WITNESS: No, there is not.

6 PRESIDENT GREENWOOD: Just a pilot scheme?

7 THE WITNESS: Mm-hmm.

8 PRESIDENT GREENWOOD: Thank you.

9 BY MR. NEUFELD:

10 Q. Now, in Paragraph 5 of your statement, you
11 say in the first line that there is a requirement
12 under the Decision 86.01 to implement EOR techniques.
13 That's not quite right, is it?

14 A. The section you're referring to in 65 says
15 that, if--65(c).

16 Q. Pardon me. I was referring to
17 Decision 86.01, so the condition we were just
18 speaking of.

19 A. Correct. The Decision 86.01 doesn't refer to
20 implementing an EOR.

21 Q. Right.

22 Let's move, then, on to the point that you

1 were referring to, which is Drilling and Production
2 Regulations. This is Section 65, which you were just
3 referring to. And if we take a look at that
4 provision, it refers to EOR in Subsection (c), and
5 this is found in the bundle, which we were just
6 looking at, at R-249, and I believe it is Page 31.

7 (Comment off microphone.)

8 Q. Yes, page 31 in the bottom left corner,
9 Section 65. It's also reproduced, Mr. O'Keefe, of
10 course, in your statement at Paragraph 5.

11 Could you read out for us Subsection (c) of 65?

12 A. Sure.

13 "The Operator shall ensure that (c) if there
14 is reason to believe that infill drilling or
15 implementation of an enhanced recovery scheme may
16 result in increased recovery from a pool or a field,
17 studies on this method are to be carried out and
18 submitted to the Board."

19 Q. So, again, the word "studies" appears in this
20 provision, as before; correct?

21 A. Correct.

22 Q. And an in-field pilot study does not--pardon

1 me, an in-field pilot project does not appear
2 anywhere in this provision.

3 A. That's correct.

4 PRESIDENT GREENWOOD: Mr. Neufeld, I think
5 that might be a convenient moment for us to break for
6 lunch, unless you have perhaps just one further
7 question on this point.

8 MR. NEUFELD: That's quite all right,
9 Mr. President.

10 PRESIDENT GREENWOOD: Thank you.

11 Right. We'll resume at 2:00. Thank you all
12 very much.

13 Mr. O'Keefe, I'm afraid you must sequester
14 yourself during the lunch break and not talk to
15 anyone from either team that you see in the
16 room--probably not to talk to anyone at all.

17 THE WITNESS: Correct.

18 PRESIDENT GREENWOOD: Thank you very much.

19 THE WITNESS: Not a problem.

20 PRESIDENT GREENWOOD: Mr. Neufeld, when we
21 come back, I think we've all--the Members of the
22 Tribunal have all looked as these legislative

1 provisions. Of course, you should put them to the
2 Witness, but I don't think it's necessary that either
3 you or the Witness read them out unless you want to
4 make some particularly significant point about the
5 exact wording.

6 MR. NEUFELD: Thank you, Mr. President.
7 Understood.

8 PRESIDENT GREENWOOD: You can assume that
9 we're familiar with them by now.

10 MR. NEUFELD: Thank you.

11 (Whereupon, at 12:56 p.m., the Hearing was
12 adjourned until 2:00 p.m., the same day.)

1 How many applications for abandoning a well
2 have been denied because HMDC did not implement EOR
3 in the field?

4 A. None have been denied because EORs are not
5 ready.

6 Q. I also want to ask you--

7 PRESIDENT GREENWOOD: Sorry, I need to make
8 sure we've got that answer right. Did you say EORs
9 are not ready or EORs are not relevant?

10 THE WITNESS: EORs are not ready.

11 PRESIDENT GREENWOOD: Ready, thank you.

12 Ready in what sense?

13 THE WITNESS: That the studies that were
14 undertaken to see if EOR could be done are still
15 ongoing.

16 PRESIDENT GREENWOOD: Thank you.

17 BY MR. NEUFELD:

18 Q. Mr. O'Keefe, there is a presentation that you
19 have attached to your Witness Statement that I would
20 like to ask you about. It is R-259, and it appears
21 at Paragraph 18 of your statement.

22 It's noted in a footnote.

1 A. What's--

2 Q. Paragraph 18 of your statement.

3 A. Oh, Paragraph 18.

4 Q. The first sentence has a footnote,

5 Footnote 16, and there you refer to Exhibit R-259--

6 A. Yes.

7 Q. --which appears to be a PowerPoint

8 presentation; is that right?

9 A. Correct.

10 Q. And you also refer to a similar presentation

11 at Paragraph 13, and that exhibit is 257, also a set

12 of PowerPoint slides apparently from the same date.

13 Are you able to tell me whether or not

14 those--

15 A. I don't have the 257.

16 Q. Ah, okay. Well, let's just talk about 259.

17 A. Okay.

18 Slide 4?

19 Q. You recognize this presentation?

20 A. Yes, I do.

21 Q. And can you tell me who created this

22 presentation?

1 A. My lead engineer, John Manning.

2 Q. Okay. And was it ever presented?

3 A. Yes, it was presented to the CNLOPB Board.

4 Q. I see.

5 And did you present the slides?

6 A. John presented the slides, but I was in the
7 room, being his supervisor.

8 Q. And was this presentation that you made to
9 your Board, I guess it would be called--

10 A. Yes, that's correct.

11 Q. --before you completed your Witness
12 Statement?

13 A. Yes.

14 So, the Board has a policy in which you
15 submit documents a week before the Board--actually,
16 they're sent out to Board members so they can review
17 them and have relevance rather than bring them
18 straight to the Board itself.

19 Q. I see. So, you prepared it before you did
20 the presentation, so the presentation occurred on
21 December 19, 2016?

22 A. That's correct, yes. And it was prepared a

1 week before.

2 Q. Thank you. I was wondering about that
3 discrepancy.

4 A. Sure.

5 MR. NEUFELD: Mr. President, no further
6 questions.

7 PRESIDENT GREENWOOD: Thank you very much.
8 Redirect, Ms. Squires?

9 MS. SQUIRES: We have no further questions
10 for Mr. O'Keefe.

11 PRESIDENT GREENWOOD: Thank you. Can I just
12 ask whether either of my colleagues have any
13 questions they would like to put to Mr. O'Keefe.

14 In that case, Mr. O'Keefe, you are free. And
15 I'm sorry, had I known it was going to finish quite
16 so soon, I might not have made you sit in splendid
17 isolation over lunch. I hope you were given some
18 food.

19 THE WITNESS: Yes, I was fine.

20 PRESIDENT GREENWOOD: Well, thank you very
21 much. You're discharged.

22 (Witness steps down.)

1 PRESIDENT GREENWOOD: Now, I think we might
2 as well proceed straight to the Expert Report of
3 Mr. Walck.

4 RICHARD E. WALCK, RESPONDENT'S WITNESS, CALLED

5 PRESIDENT GREENWOOD: Mr. Neufeld, if you
6 have a cross-examination Core Bundle, perhaps you
7 would like to give it out to everyone except counsel
8 for Canada at this stage then we won't be as heavily
9 disrupted.

10 Your loyal colleague who carries this vast
11 number of ring binders around...

12 (Laughter.)

13 PRESIDENT GREENWOOD: Ladies and gentlemen,
14 before we move to the cross-examination of Mr. Walck,
15 can I just take stock of where we stand? How long is
16 this likely to take? Do we know?

17 MR. O'GORMAN: Mr. President, we do not
18 expect that this will take a substantial amount of
19 time, but may we lodge with you the very humble
20 request to stick with Closing Arguments on Friday
21 morning. We would be eternally grateful to you if
22 you would allow us to do that.

1 BY MR. DOUGLAS:

2 Q. Good afternoon, Mr. Walck.

3 A. Good afternoon.

4 Q. Mr. Walck, how long have you been a damages
5 expert?

6 A. Since 1977.

7 Q. And on how many projects have you provided
8 expert advice?

9 A. I've consulted on several hundred and
10 provided expert testimony in probably 70 to 75 of
11 them.

12 Q. And did you provide Expert--

13 MR. O'GORMAN: Mr. President?

14 PRESIDENT GREENWOOD: Yes, Mr. O'Gorman?

15 MR. O'GORMAN: May I just humbly request, I
16 don't believe that there was an anticipated direct
17 examination in Procedural Order Number 8, and it
18 appears that we are heading in that direction. I
19 just want to ask on what basis that's about to be
20 undertaken.

21 PRESIDENT GREENWOOD: Well, I think so far
22 the questions I have heard are no different from the

1 questions that have been put to Mobil's various
2 witnesses, asking them to establish who they were and
3 what their area of expertise was.

4 But the rules are quite clear. You're
5 entitled to do that. You're entitled to invite
6 Mr. Walck to make any corrections that he has to make
7 to his statement and to put to him any facts that
8 were not previously before him.

9 I think you're also entitled, given the way
10 in which Mr. Phelan's evidence was dealt with, to put
11 any issues that arose in the examination and
12 cross-examination of Mr. Phelan. But, otherwise, not
13 a direct examination.

14 MR. DOUGLAS: That is our understanding as
15 well. And this won't be long.

16 BY MR. DOUGLAS:

17 Q. You provided five Expert Reports in the Mobil
18 and Murphy Arbitration?

19 A. Yes, I did.

20 Q. And did you testify in that arbitration?

21 A. Yes, I testified at the Merits Hearing and at
22 the subsequent Damages Hearing.

1 Q. And you provided two expert reports in this
2 arbitration?

3 A. Yes.

4 Q. Do you have any corrections to those expert
5 reports?

6 A. No, I do not.

7 Q. Mr. Walck, have you learned anything this
8 week that is of relevance to your testimony?

9 A. Yes, I have. I've learned a few things from
10 Mr. Phelan's testimony.

11 First of all, that the Mobil share of the
12 Hibernia South Extension is different from its share
13 of Hibernia General. I have not had the chance to
14 evaluate whether that would have any material impact
15 on my conclusions; but, if it is necessary, if the
16 Tribunal gets there, then certainly I will take a
17 look at that.

18 In addition, as I set out in my expert
19 reports, one of my concerns with Mobil's damages
20 presentation in the Mobil/Murphy Arbitration was the
21 lack of any alternative methods for corroborating the
22 DCF calculation of Present Value of future losses,

1 and I heard some things from Mr. Phelan that very
2 strongly suggested to me that such other methods may
3 well have been available.

4 I heard Mr. Phelan, for example, testify that
5 there were, in fact, transactional data involving the
6 purchase and sale of working interests.

7 I heard him say that Mobil had run various
8 scenarios on its damages.

9 I heard Mr. Phelan testify that there was a
10 formula in connection with the Terra Nova
11 redetermination that involved both capital
12 expenditures and operating expenditures, the former
13 of those being part of what would be called the "cost
14 methods" of valuation, the latter the operational
15 expenses being part of an "income" method.

16 And maybe it's helpful to just back up for
17 just one second.

18 There are three broad measures or broad
19 methods of valuation that are commonly used by
20 valuation professionals. I'm accredited in business
21 valuation. Mr. Rosen has the comparable
22 certification in Canada.

1 The first of those is cost or asset-based
2 methods. That's valuing something based on what it
3 cost or based on what replacement assets would cost.

4 The second is market or transactional
5 methods. That's valuing something based on what it
6 costs in the marketplace.

7 And, third are income-based methods, the most
8 frequently encountered of which is the Discounted
9 Cash Flow Method that looks to future income in
10 attempts to discount it back.

11 So, what I take from Mr. Phelan's testimony
12 is that it is highly probable that there were other
13 sources of data that could have been used as a sanity
14 check, as corroboration of Mr. Rosen's DCF
15 calculations, but that we never saw.

16 MR. DOUGLAS: I have no further questions.

17 PRESIDENT GREENWOOD: Thank you.

18 Mr. Neufeld.

19 MR. NEUFELD: Thank you, Mr. President.

20 CROSS-EXAMINATION

21 BY MR. NEUFELD:

22 Q. Good afternoon, Mr. Walck.

1 A. Good afternoon, Mr. Neufeld.

2 Q. Since you have raised the topic of Mobil I,
3 maybe we can begin there and take you back to your
4 Report dated December 1st, 2009, which is in the
5 bundle in front of you labeled 231, R-231.

6 A. Yes, I have it.

7 Q. I just want to very briefly focus on the
8 conclusion in this report, which is at Paragraph 154,
9 only because it includes some comment on factors that
10 are part of the Guidelines formula for calculating
11 Incremental Expenditure.

12 PRESIDENT GREENWOOD: Gentlemen, could I ask
13 you to both keep your voices up. I couldn't hear
14 that last exchange. I don't think it matters because
15 it was purely procedural, but it's very important
16 that we can hear you and that the Court Reporter has
17 an accurate record of what's being said.

18 MR. NEUFELD: Thank you, Mr. President. We
19 will be.

20 BY MR. NEUFELD:

21 Q. So, in Paragraph 154, Mr. Walck, you discuss
22 a number of factors that are involved in calculating

1 expenditure requirements, including oil prices and
2 the StatsCan factor; correct?

3 A. Yes.

4 Q. And among other things, you focus on some
5 issues of uncertainty and volatility in respect to
6 those factors; correct?

7 A. That's correct.

8 Q. For example, you say that production had--oil
9 production had been shown to "very considerably" from
10 projections.

11 Is that still true today?

12 A. I haven't done a recent comparison of the
13 actual production to the forecasted production, so I
14 can't answer the question.

15 Q. And, in respect of oil prices, you say those
16 are quite volatile; correct?

17 A. Yes.

18 Q. And in respect of converting prices to
19 Canadian dollars, also "not historically stable," I
20 believe are your words; is that right?

21 A. That's correct.

22 Q. And so, all the uncertainty surrounding these

1 factors, you say, impacts the projections that have
2 been made by Mr. Rosen in Mobil I; is that right?

3 A. They do.

4 Q. And, in particular, in calculating or
5 attempting to calculate life-of-field damages--now,
6 let me take you away from this report and take you to
7 just one more place in the Transcript from Mobil I on
8 Day 3, which is 285. It's all included in here, but
9 I really only want to take you to the last--to the
10 Page 279.

11 A. Yes.

12 Q. And there you note, I think it is at Line 21
13 that you provided a sort of rough sizing of potential
14 damages; is that right?

15 A. I assume you're talking about Line 21 on the
16 top of the page and not the Line 21 on the bottom of
17 the page?

18 Q. Correct.

19 A. Yes.

20 (Comment off microphone.)

21 Q. And there you say that--a little bit lower
22 down at Line 5--that you did not have the sufficient

1 data to give a figure that you could say was your
2 opinion of damage; is that right?

3 A. That is correct.

4 Q. Okay. And, in fact, you also note that you
5 were actually requested to give an estimate but would
6 preferred to have not done that?

7 A. That is also correct.

8 Q. If we could now turn away from the Transcript
9 in the Mobil I and your report, I'd like to ask you a
10 few questions about the market-based valuation that
11 you raised earlier, actually in your direct.

12 Now, in this arbitration, you have introduced
13 a market-based analysis to determine, or at least are
14 proposing it hypothetically, to determine loss in
15 value incurred by Mobil in respect of Hibernia and
16 Terra Nova over the life of the field; correct?

17 A. I have suggested that there should be market
18 or transactional data that could have been used as a
19 crosscheck on the calculation Mr. Rosen did.

20 Q. And--but you have not performed that market
21 valuation in this arbitration; correct?

22 A. No, I have not.

1 Q. And you did not perform it in Mobil I,
2 either; is that right?

3 A. No. I didn't have the data to do it with.

4 Q. And in Paragraph 30 of your First Report in
5 this arbitration, which is RE-1, at Paragraph 30 you
6 introduce this notion of a market-based valuation.
7 It's actually Paragraph 30.

8 And there you say that Mobil and Murphy could
9 have calculated their claims as the difference in
10 value of their investments in Hibernia and Terra Nova
11 (a) without the 2004 Guidelines and (b) with the 2004
12 Guidelines, and that the measure of the impact of the
13 2004 Guidelines on Mobil's and Murphy's investments
14 would be the damage occurred, assuming sufficient
15 support for the calculations.

16 Is that the correct location for your
17 market-based suggestion?

18 A. Yes.

19 Q. Okay. And this model would, nevertheless,
20 consider future cash flows and also the impact of the
21 Guidelines on those cash flows; is that right?

22 A. Yes, it would.

1 Q. And, in addition to that, you say uncertainty
2 would be addressed if it was a concern by both the
3 transactional or other data or market comparables; is
4 that right?

5 A. Yes, I've suggested that you could use
6 transactional data from other areas to crosscheck
7 your result.

8 Q. And the delta between the value of the
9 investments with and without the Guidelines would be
10 the standard of damages you're suggesting; is that
11 right?

12 A. It would be one measure.

13 Q. The delta--

14 A. Of the potential damages.

15 Q. The delta being the impact of the variables,
16 in this case the Guidelines formula?

17 A. It would be the impact of the imposition of
18 the Guidelines. You would have the other variables
19 in any event.

20 Q. And I take it that the Market Value Approach
21 so described depends on the market being able to
22 measure the impact of the required expenditures or

1 the Incremental Expenditures as projected on value;
2 is that right?

3 A. Could you repeat that for me, please?

4 Q. That the--is it correct to say that the
5 Market Value Approach depends on the marketplace
6 being able to determine the impact of the expenses
7 caused by the expenditures made in pursuant to the
8 guidelines on the value of the investment?

9 A. Yes, that would factor into it. You would be
10 looking at the difference in the cash flows.

11 Q. Now, in addition to considering cash flows
12 for Hibernia and Terra Nova, the market would also
13 need to estimate the required expenditures over the
14 life of field; is that right?

15 A. You would need to be able to estimate
16 required expenditures, yes.

17 Q. And you would also need to determine that the
18 impact of the Guidelines as such was the cause
19 or--the cause of the permanent decrease in the value
20 of the Projects to Mobil?

21 A. Well, I think you have to link things to
22 causation, yes.

1 Q. In fact, it has to be the sole cause of
2 decreased value; isn't that right?

3 A. Well, I think that calls for a legal
4 conclusion. If there are situations in which you
5 have multiple causes, I don't know how you would deal
6 with that.

7 Q. Surely, you would agree that there are more
8 than one factor that would impact the value of an
9 investment besides a sole consideration of
10 expenditures or expenses or costs?

11 A. Yes, and that's why you would set up your
12 model to look at it with and without the Guidelines.

13 Q. And, in that regard, when looking for
14 comparables, the Guidelines are also not the only
15 factors that may impact the value of the investments
16 as compared to other assets; isn't that true?

17 A. Could you repeat that one for me, please?

18 Q. So, when looking for comparables for
19 evaluating the investments, the Guidelines aren't the
20 only factor that would impact the value of the
21 investments as compared to other assets; is that
22 accurate?

1 A. If I understand your question correctly, I
2 think what you would be doing is looking for other
3 transactions and seeing how the interplay of the
4 common variables was handled by the market in other
5 areas, and then--

6 Q. Well, actually, I'm asking, I think or
7 pointing to something a little more mundane than
8 that. For example, other assets that might be
9 comparable to the investments are going to, for
10 example, face different regulatory environments, for
11 example; isn't that true?

12 A. Oh, certainly.

13 Q. Different legal regimes, different R&D
14 requirements, et cetera; isn't that right?

15 A. Correct.

16 Q. And other assets may also have different
17 geographic challenges to their production.

18 A. They may.

19 Q. North Atlantic versus Offshore versus Gulf of
20 Mexico versus North Sea. These are all different
21 geographic locations, for example, that might impact
22 that assessment?

1 A. I think you would find there would be
2 differences and there would be commonalities.

3 Q. Now, you also note that in Mobil I, Mobil and
4 Murphy sought to claim as damages a pro rata share of
5 Incremental Expenditures for the life of field. I'm
6 not going to take you to a document on this, but I
7 think you went through enough of Mobil I probably to
8 know the answer offhand, but isn't it true that what
9 you're characterizing--the way you characterize the
10 damages model is a claim for a pro rata share of
11 Incremental Expenditures?

12 I think, in fact, maybe the easiest way is to
13 take you to the statement because, in Paragraph 30,
14 of your Damages Report, which is RE-1 in this case,
15 you note at the bottom of Page 9, which is
16 Paragraph 30, you state: "Mobil and Murphy elected
17 to frame their claim as one for their pro rata Shares
18 of increased costs--"

19 A. Can you tell me where you are?

20 Q. I'm sorry. Paragraph 30.

21 A. Yes.

22 Q. In RE-1, in your Cross-Examination Bundle.

1 A. I've got it now.

2 Q. The last sentence of Paragraph 30, where
3 you're just characterizing the damages model in Mobil
4 I, and you say Mobil and Murphy elected to frame
5 their claim as one for their pro rata Shares of
6 increased costs incurred by the Project. That's what
7 you're describing there; is that right? The damages
8 model that was presented?

9 A. That is my understanding of Mr. Rosen's
10 damages model, yes.

11 Q. Okay. And that is the same projection that
12 you stated that you did not have sufficient data to
13 form an opinion on damage in regards to; is that
14 right?

15 A. It is the same kind of a model that I was
16 asked to do and had difficulty doing because of the
17 variability of the variables, and the lack of any
18 other corroborating evidence that would help me test
19 that result.

20 Q. Right. And we discussed some of those
21 variables at the outset of the examination.

22 A. Yes.

1 Q. Now, you also note in this arbitration in
2 respect of such projections of expenditures over the
3 life of field that there is an issue about
4 corroborating those projections and having a safety
5 check; is that right?

6 A. I don't recall safety checks. I think I used
7 the word "sanity check."

8 Q. Okay. Well, let's take a look at
9 Paragraph 32. That may well be right. This is in
10 RE-1. Let me just see if you just comment on it
11 there.

12 Well, I think the point is actually better
13 made in Paragraph 30, where--which we were just
14 looking at, where you say--and this is sort of the
15 middle of the paragraph, Paragraph 30 in RE-1, your
16 First Damages Report, where you say the valuation
17 could have been supported with transactional or other
18 data on market comparables.

19 Is that what you're referring to as a sanity
20 check?

21 A. That would be one form of sanity check, yes.

22 Q. And that's a sanity check on the projection

1 of cash flows over the life of field?

2 A. That's a sanity check on the way of setting
3 up the model. If you can test that model for
4 Hibernia and Terra Nova against transactional
5 information from other fields that also includes
6 projections on oil prices, projections on exchange
7 rates and so forth, and see whether they have been
8 handled reasonably consistently.

9 Q. That point aside, in a Market Valuation
10 Approach, one must still consider, at least in this
11 instance, whether the impact caused by the
12 Guidelines, one has to measure that impact; is that
13 right?

14 When you say, for example, you need to look
15 at the value of the investments with or without the
16 Guidelines, a prerequisite of that is to measure the
17 impact of the Guidelines with or without; is that
18 right?

19 A. Well, that's what you're ultimately trying to
20 do, is to get a measure of what the value of the
21 impact is.

22 Q. Okay. And some of the comparables that we

1 were talking about earlier included, for example,
2 geographic location, legal regimes, those kind of
3 differences that might impact your valuation of
4 causation. The Guidelines, of course, are not
5 enforced outside of Newfoundland on projects. That's
6 an important difference.

7 But, you also--I mean, would you agree with
8 that? I think that's factually correct and you
9 would--

10 A. To the best of my knowledge, the Guidelines
11 are not enforced outside of Newfoundland and
12 Labrador.

13 Q. Now, the transactional data and market
14 comparables you do refer to include, among other
15 things, the sale of participation interests as one
16 example; is that right?

17 A. Yes.

18 Q. And Financial Statements? Is that another
19 example?

20 A. A Financial Statement in and of itself is not
21 an example of a comparable. What the Financial
22 Statement would do is it would give you a sense of

1 how the impact of the Guidelines was treated for
2 financial-reporting purposes. And that may need a
3 little bit of explanation.

4 When you are looking at the impact of an
5 event--

6 Q. So, you did not refer to Financial
7 Statements? Is that your point? This is an
8 additional point?

9 A. I'm not sure I followed the question.

10 Q. Well, what about impairment analysis? Is
11 that another element that you refer to as a
12 comparable?

13 A. Impairment analysis would not be a
14 comparable. Impairment analysis would be directed
15 toward this specific investment, and you would be
16 testing that investment because of a trigger event,
17 as Mr. Phelan testified.

18 So, if the imposition of the Guidelines is
19 your trigger event, from a financial reporting
20 standpoint, you have a two-prong test:

21 The first prong, if I may--

22 Q. Mr. Walck, I would like to--

1 (Comments off microphone.)

2 Q. I'm not sure where the theory is going, but
3 I'd like to stick to my questions if I may.

4 PRESIDENT GREENWOOD: Before you take us any
5 further, two things: First, is that in Line 16, the
6 answer is given as I'm sure I followed the question,
7 and it was actually I'm not sure I followed the
8 question, just need to correct that so that when
9 we're going back to it later this evening there is no
10 problem.

11 The second thing is, you have to be able to
12 ask the question, but at the same time Mr. Walck has
13 to be given the time to answer it. It's not like
14 cross-examination of a fact witness on a relatively
15 simple matter. An Expert has got to be allowed to
16 set out the nature of their answer, so please allow
17 the Expert to do that.

18 MR. NEUFELD: Thank you, Mr. President.

19 THE WITNESS: So, you were asking about
20 impairment testing, and that's a two-prong test, the
21 first of which is, is it probable that an impairment
22 or an obligation has occurred? That would basically

1 be the fact of damage.

2 The second prong is can you reasonably
3 estimate the impact of that. If the answer to both
4 of those is yes, then you book a provision, you
5 reflect it in the Financial Statements, assuming it's
6 material, and you disclose it. If the answer is
7 "yes" to the first one, "no" to the second one, you
8 disclose it. If you have some range of values you
9 think that the impairment would fall within, you
10 would be likely to disclose that as well. But you
11 don't book a provision for it until you have better
12 information.

13 And I think this actually is responsive to
14 one of the questions that I heard the Tribunal ask
15 during the Opening Arguments about what do you do if
16 you have an appeal going on? Do you have a loss?
17 And obviously, from a legal standpoint, I have no
18 idea. But from a financial accounting standpoint,
19 you would treat it that way. You would say is it
20 probable that a loss or an obligation has occurred;
21 and, if so, can I reasonably estimate it.

22 And so, the impairment testing that might be

1 reflected in the Financial Statements would be a
2 relevant thing to look to for ascertaining how the
3 amount of damage was treated for that purpose.

4 BY MR. NEUFELD:

5 Q. Thank you, Mr. Walck. I appreciate that
6 answer. Where I was about to go is to just very
7 briefly note the testimony that we had heard earlier
8 this week, and you noted at the outset, which is that
9 Mr. Phelan's testimony in this instance, none of the
10 working interests at Hibernia or Terra Nova have been
11 sold since the 2004 Guidelines have been introduced,
12 which was one point. I think you were here, and you
13 understood that point as well; correct?

14 A. Yes.

15 Q. And a second point, that there are no
16 internal or external asset valuations of the Hibernia
17 and Terra Nova assets that could show the specific
18 impact of the Guidelines in Mr. Phelan's testimony?

19 A. Yes, I heard him say that.

20 Q. And his testimony that no impairment
21 accounting analysis had been performed with respect
22 to Hibernia or Terra Nova?

1 A. Yes, I heard him say that.

2 Q. Now, where this information is not available,
3 the Market Value Approach is not appropriate; would
4 you agree with that?

5 A. Obviously, if you have no data to work with,
6 you can't do much with it.

7 Q. Now, we already went to Mobil I in your
8 Report where you had noted that you could not arrive
9 at a damages calculation that you would stand by. I
10 think there is another point on that very same page,
11 going back to R-231, and I'm only going to take you
12 to the very same page. It's the conclusion of the
13 Report from 2009, and it's Paragraph 153. And there
14 you say: "There are no damages that have been
15 incurred at this point."

16 Now, isn't it true that if no damages had
17 been incurred at all, that there is no basis for
18 doing a Market Value Approach because you're not
19 measuring an impact in value? There is no damage?

20 A. If I recall correctly, there were some
21 significant questions that were open as to the
22 eligibility of some very large expenditures, so it

1 wasn't clear whether the "ordinary course"
2 expenditures would dwarf the required expenditure,
3 which is why, if you think back to that two-prong
4 test, I couldn't conclude that it was probable that a
5 loss had occurred, which then leads me to the
6 conclusion no damages have been incurred at this
7 point.

8 Now, that doesn't mean that if you're looking
9 at a calculation such as Mr. Rosen's with a
10 multiple-year future projection discounted back, that
11 you couldn't look at some market information to try
12 to test that calculation. Those two are separate
13 things.

14 Q. Now, the point about testing the
15 calculation--let's return to that just for a moment
16 because the variables that are so volatile in your
17 view in respect of projecting life-of-field costs
18 arriving from the expenditures, that projection still
19 has to be made on the market comparison approach
20 you're suggesting; isn't that right?

21 A. Yes.

22 And oil companies do that in their everyday

1 business, which is precisely why I was interested in
2 getting that kind of information.

3 Q. Right. But you also noted that you couldn't,
4 as an expert, evaluate it to any certainty, any
5 reasonable certainty or indeed at all.

6 A. I couldn't do it in a vacuum. Had I had
7 other market-based information about how oil
8 companies contemporaneously have been valuing assets,
9 then perhaps I could.

10 Q. Right.

11 But the StatsCan factor and oil prices and
12 all of that you very succinctly identified as highly
13 volatile; isn't that right?

14 A. Yes.

15 Q. Okay. Now, even if there were comparables of
16 the sort that you are suggesting--which Mr. Phelan
17 has testified in this case there are not, but let's
18 assume there were--we still have the issue, do we
19 not, of determining that the Guidelines are the sole
20 cause of whatever supposed difference in value has
21 taken place? Isn't that right?

22 A. Well, if you've set up your model to measure

1 values with and without the Guidelines, then you
2 would have the Guidelines as the sole cause of the
3 delta.

4 Q. But, regardless of what the delta is, isn't
5 it still true that the costs are being incurred by
6 Mobil for Incremental Expenditures made pursuant to
7 the Guidelines and that that's a cost and expense and
8 the damage incurred?

9 A. If they have been incurred. See--

10 Q. The--

11 A. --I think there may be some semantics here.
12 If you have an event that occurs--let's take a
13 post-sale dispute. You sell a company, and the buyer
14 comes in and says, well, four of the major customers
15 that you represent would be here aren't here. That
16 impact is going to occur down the road, but it also
17 has an impact on the value at which the company
18 changed hands. And so, you can look at what is the
19 future loss of sales, loss of profits, discount that
20 back and get a number today. But you can also look
21 at it from a standpoint of how were the deal metrics
22 put together, and if I take those customers out of

1 the deal metrics--maybe it's a multiple of sales, a
2 multiple of profits, whatever it is--I may get a
3 different number, and does that number tend to
4 corroborate the Discounted Cash Flow? That's the
5 point that I'm trying to suggest could have been
6 done.

7 Q. I appreciate the point.

8 Regardless of the comparables, the
9 projections, the uncertainty, which, in fact, I think
10 the market-based value model which you've just
11 described, isn't it still true, and in the case
12 today, that the damages that are incurred as a result
13 of enforcing the Guidelines and Mobil making
14 expenditures that they would not make in the ordinary
15 course of business, that those damages, unlike
16 everything else we've been talking to--about are
17 discrete and quantifiable and measurable? Would you
18 agree with that?

19 A. Are we talking about damages that have
20 already occurred or are we talking about damages that
21 lie in the future?

22 Q. That, on an ongoing basis, damages are

1 incurred.

2 A. If I understand you correctly, I think the
3 answer to your question is that, as those monies are
4 spent as the determinations are made as to what
5 required spending is and you know specifically how
6 the money was spent, you're in a position to make
7 those determinations.

8 If you're talking about an ex ante situation
9 where you're trying to make the decision, say, in
10 2009 to go out for the life of field, it's much more
11 difficult to specify precisely what those impacts
12 will be, which is why, in bringing it down to
13 something that you can assess on a market-value
14 basis, you may have a better ability to ensure that
15 you've got some reasonableness in your calculations.

16 Q. Well, on that point, and this is one of my
17 last questions to you, but if we just turn very
18 briefly to Paragraph 28 of RE-1, where I think you
19 refer to the Decision on Liability and Principles of
20 Quantum in Mobil I, there's a small quote at
21 Paragraph 28, and there you describe damages for
22 Mobil I.

1 I just want to take you briefly to C-1,
2 Paragraph 440. 440, where the Tribunal and the
3 Majority says they will consider any loss which is
4 incurred which is actual as the date of the Award, in
5 the Majority's view, actual damages occur when there
6 is a firm obligation to make a payment and there is a
7 call for payment or expenditure, or the occurrence or
8 payment of expenditure has transpired.

9 You would agree that the Decision in this
10 case is that the occurrence of a payment or
11 expenditure is a damage, would you not?

12 A. I would agree with what you read as being
13 what the Majority in the Mobil/Murphy Tribunal set
14 out in Paragraph 440.

15 Q. Thank you very much, Mr. Walck. I appreciate
16 your time.

17 MR. NEUFELD: No further questions.

18 PRESIDENT GREENWOOD: Thank you, Mr. Neufeld.

19 Mr. Douglas?

20 Mr. Neufeld, would you turn your microphone
21 off, please.

22 MR. DOUGLAS: Yes, just a few questions on

1 redirect.

2 PRESIDENT GREENWOOD: Please go ahead.

3 REDIRECT EXAMINATION

4 BY MR. DOUGLAS:

5 Q. Mr. Walck, how many models were used by
6 Mr. Rosen in the Mobil/Murphy Arbitration?

7 A. I don't know how many he used. I know how
8 many he put in his Report, which was one.

9 Q. In your view, is it common practice to
10 provide alternative damages models?

11 A. Yes.

12 Q. In your view, is it good practice to provide
13 alternative damages models?

14 A. Yes. It's generally set out in pretty much
15 every valuation guidelines that I've ever read.

16 Q. Counsel took you to Paragraph 30 of your
17 First Expert Report in this arbitration. I think
18 there was a lot of discussion, so I don't want to
19 revisit it, but that diminution of value model you
20 are suggesting Mr. Rosen could have undertaken?

21 A. I was suggesting that was one method he could
22 have used, yes.

1 Q. And counsel asked you whether such an
2 approach would create any further certainty in the
3 quantification of damages. Would it?

4 A. Potentially. It's something where you never
5 know until you do it.

6 You approach the question of value from as
7 many different perspectives as you have data for, and
8 then you reconcile the results of those.

9 So, if you've got three different approaches,
10 let's say, a cost of market method and an income
11 method and they're all converging around the same
12 general number, you get much better comfort than you
13 do if you've got one that's ten times the other.

14 PRESIDENT GREENWOOD: Sorry, forgive me for
15 interrupting, I would like to put a question to the
16 Witness myself.

17 THE WITNESS: Yes, sir.

18 PRESIDENT GREENWOOD: What's puzzling me a
19 little bit is that I fear we appear to be refighting
20 Mobil I rather than looking at the issues in Mobil II
21 in this line of questions. This claim, the present
22 one, is a claim for damages incurred over a period of

1 years.

2 Is there any reason to suggest that there
3 should have been an alternative model for damages in
4 this case as opposed to Mobil I?

5 THE WITNESS: I think, in this case, the
6 challenge that I have with the damages model that was
7 used was that it no longer drives off the expenditure
8 requirement. If you think back to that two-step test
9 that a financial accountant uses, is it probable
10 there has been a loss or obligation created? I don't
11 know whether there is with respect to the surplus
12 spending, and that's where I have difficulty with
13 this particular damage model.

14 PRESIDENT GREENWOOD: When you say "the
15 surplus spending," you're talking about--there was a
16 very helpful chart in one of your Reports, as I
17 recall, but you were talking about the expenditure
18 during the years for which a claim has been made.

19 THE WITNESS: Correct.

20 PRESIDENT GREENWOOD: Which is in excess of
21 what was required under the Guidelines.

22 THE WITNESS: Yes.

1 PRESIDENT GREENWOOD: Right. So, you're not
2 questioning the valuation of the damages otherwise;
3 is that right?

4 THE WITNESS: That's correct.

5 PRESIDENT GREENWOOD: Thank you.

6 Yes, Mr. Douglas, please continue.

7 MR. DOUGLAS: We have no more questions,
8 thank you.

9 PRESIDENT GREENWOOD: So, I will ask if my
10 two colleagues have any questions.

11 Mr. Rowley?

12 QUESTIONS FROM THE TRIBUNAL

13 ARBITRATOR ROWLEY: The claim here is for
14 damages incurred as a result of spending required by
15 the Guidelines; yes?

16 THE WITNESS: That's my understanding, yes,
17 sir.

18 ARBITRATOR ROWLEY: And the chart the
19 Chairman was referring to was the one where you had
20 at least two colors. One was a color indicating an
21 amount required by the Guidelines, and then there was
22 another color for an amount above that; yes?

1 THE WITNESS: Yes.

2 ARBITRATOR ROWLEY: And that's the surplus
3 that the Chairman just referred to.

4 THE WITNESS: Yes, it is.

5 ARBITRATOR ROWLEY: And your concern with
6 that, if I understand what you're saying, is that you
7 don't know whether that surplus spend was required by
8 the Guidelines; is that it?

9 THE WITNESS: Either was--well, we know it
10 wasn't historically. The question is will it be some
11 time in the future, and that I don't know.

12 We saw, from Mr. Phelan's testimony,
13 "ordinary course" expenditures are increasing. We
14 know that as the fields age and production drops, the
15 required spending will drop in proportion to
16 production. Mr. Rosen had predicted that, by 2024,
17 the two would cross, and "ordinary course" spending
18 would exceed required spending.

19 So, I don't know whether that surplus
20 spending now is something that will ultimately be
21 used to meet a requirement or if it will just always
22 stay surplus spending. That's my quandary.

1 ARBITRATOR ROWLEY: And the amount of time
2 spent on cross-examination and re-examination on
3 comparables really has nothing to do with that, does
4 it?

5 THE WITNESS: No, it doesn't.

6 ARBITRATOR ROWLEY: Thank you.

7 PRESIDENT GREENWOOD: Thank you.

8 Dr. Griffith?

9 ARBITRATOR GRIFFITH: No.

10 PRESIDENT GREENWOOD: Right. In that case,
11 Mr. Walck, we thank you for your testimony, and you
12 can stand down.

13 THE WITNESS: Thank you, Mr. President.

14 PRESIDENT GREENWOOD: And then we'll just
15 take stock of where we are, counsel.

16 (Witness steps down.)

17 PRESIDENT GREENWOOD: We have time to have
18 closing submissions this afternoon, I would have
19 thought.

20 (Laughter.)

21 (Discussion off the record.)

22 PRESIDENT GREENWOOD: I think, judging by the

1 reaction to, we say, the implied suggestion that you
2 might want to get away earlier, the answer to that
3 appears to be no, so it looks as though we finish
4 now. We have a day clear tomorrow--it's a day off
5 since everyone will be working very hard--and then we
6 have Closing Submissions on Friday.

7 Is that agreeable to everybody?

8 MR. O'GORMAN: Thank you very much,
9 Mr. President. That's certainly agreeable from the
10 Claimants.

11 PRESIDENT GREENWOOD: Right.

12 And can I please remind you, first of all, to
13 go through the Transcript of Day 1 and just pick up
14 the various questions that were put to you by Members
15 of the Tribunal. Just off the top of my head, I can
16 remember asking for submissions from you both on the
17 effect of the Nicaragua and Colombia 2016 judgment.
18 And, on reflecting about that, I think you might also
19 want to have a look at what was said in the 2012
20 judgment of the International Court, which was what
21 was said to create the res judicata.

22 MR. LUZ: Mr. President, on that point, the

1 Secretary of the Tribunal distributed the Judgment.
2 We think it would be helpful to have the entire--with
3 the Dissenting Opinion and the Concurring Opinions as
4 well in the attachment with the main Judgment?

5 PRESIDENT GREENWOOD: Yes. I think this is
6 all available on the Court's Web site, actually, if
7 you go to "www.ICJ-CIJ.org." It's a new Web site.
8 It's much easier to use than the old one.

9 MR. LUZ: It is.

10 PRESIDENT GREENWOOD: And you can pull them
11 all off there.

12 Keep in mind that there are three separate
13 Nicaragua and Colombia Judgments--there's four,
14 actually. You can forget about the 2007 one. 2012
15 is the section on the Extended Continental Shelf
16 Claim. You don't need to read anything else. The
17 2016 Judgment, there were two given on the same day.
18 It's the Extended Continental Shelf Claim, "NICCOLB"
19 as it's sometimes called, and not the claim for
20 noncompliance that you need to look at.

21 I also asked about whether there was anything
22 in the res judicata article in the Max Planck

1 Encyclopedia and to what extent international law on
2 res judicata reflected concepts, of course, of action
3 estoppel, issue estoppel and the like.

4 But those are just the questions that
5 immediately--that I recall from what was a very
6 interesting dialogue on res judicata. There were
7 also quite a number of questions about effective
8 subsequent practice, for example, and 1116(2),
9 1117(2). You need to have a look at those--and 1106,
10 yes. And that is what exactly Mr. Rowley quite
11 rightly reminds me of his question about 1106,
12 referring to maintenance and enforcement of measures,
13 not just adoption.

14 So, we look forward to hearing your
15 submissions on those points.

16 (Tribunal conferring.)

17 PRESIDENT GREENWOOD: Yes, Mr. Rowley.

18 ARBITRATOR ROWLEY: The President referred at
19 one stage, perhaps on the first day, about the
20 obligation under international law of a State that
21 imposes an illegal measure, once it's been found to
22 be illegal, to revoke that measure, and we want to

1 hear what we can on that.

2 PRESIDENT GREENWOOD: The damages issues need
3 not be dealt with in the closing submissions.

4 Now, please let me reiterate what I said at
5 close of play yesterday. You should not read into
6 that that we have made up our minds about the issues
7 we have just been putting to you. But we think, for
8 reasons of procedural economy, the way forward is to
9 deal with--for us to make whatever determination we
10 consider right and necessary about the temporal
11 jurisdiction argument and about Canada's res judicata
12 argument. And then, if we find for Canada on either
13 of those points, that is, of course, the end of the
14 case, so no submissions on damages will be necessary.
15 If we find in favor of Mobil on both of those points,
16 then we would proceed to requesting post-hearing
17 briefing from you on various damages issues.

18 Is everybody clear about that?

19 MR. O'GORMAN: Yes, Mr. President.

20 PRESIDENT GREENWOOD: Good.

21 Any questions of any kind?

22 In that case, thank you all very much.

1 Yes, Mr. O'Gorman?

2 MR. O'GORMAN: Would you still like to begin
3 at 9:00 on Friday, in keeping with the original
4 schedule?

5 PRESIDENT GREENWOOD: I think it would be
6 better that we begin at 9:00 because, for practical
7 reasons, we cannot conveniently go on beyond 4:00,
8 and I want to make sure you have plenty of time to
9 develop your submissions. We will doubtless have
10 questions for you, so I trust you will build that
11 into your allocation of time.

12 MR. O'GORMAN: Very good.

13 PRESIDENT GREENWOOD: Mr. Douglas?

14 MR. DOUGLAS: Great, thank you very much,
15 Mr. President.

16 PRESIDENT GREENWOOD: All right. Thank you
17 very much.

18 So, tomorrow is a preparation day and reading
19 day for the Tribunal, and we will see you all at
20 9 a.m. on Friday morning. Thank you.

21 (Whereupon, at 2:59 p.m., the Hearing was
22 adjourned until 9:00 a.m., Friday, July 28, 2017.)

CERTIFICATE OF REPORTER

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

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



DAVID A. KASDAN