

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

- - - - -x

In the Matter of Arbitration :
Between: :
MOBIL INVESTMENTS CANADA, INC., :
and MURPHY OIL CORPORATION, :
Claimants, :
and : ICSID Case No.
GOVERNMENT OF CANADA, : ARB(AF)/07/4
Respondent. :
- - - - -x Volume 3

HEARING ON THE MERITS

Thursday, October 21, 2010

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

The hearing in the above-entitled matter came
on, pursuant to notice, at 9:40 a.m. before:

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

Also Present:

MS. MARTINA POLASEK,
Secretary to the Tribunal

Court Reporter:

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P R O C E E D I N G S

1
2 PRESIDENT van HOUTTE: Good morning, ladies
3 and gentlemen. We are at the third day of our hearing
4 today.

5 We will start with the examination of
6 Mr. Way; is that it?

7 MR. RIVKIN: I think The Parties agreed we
8 would start with Mr. Davies, so that the two pricing
9 Experts would be back-to-back in that manner, and then
10 we'll go to Mr. Way.

11 PRESIDENT van HOUTTE: All right. Then,
12 Mr. Davies before us. Thank you, good.

13 THE SECRETARY: We are open session now?

14 MR. RIVKIN: No.

15 THE SECRETARY: Please remain closed.

16 PETER A. DAVIES, RESPONDENT'S WITNESS, CALLED

17 PRESIDENT van HOUTTE: Mr. Davies, can you
18 repeat, I hereby declare upon my conscience and honor.

19 THE WITNESS: I hereby declare upon my
20 conscience and honor.

21 PRESIDENT van HOUTTE: That I will make my
22 statements to the best of my knowledge.

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09:40:57 1 THE WITNESS: That I will make my statements
2 to the best of my knowledge.

3 PRESIDENT van HOUTTE: Thank you very much.
4 Then the floor goes to Mr. Luz.

5 MR. RIVKIN: Can Martina confirm it's now
6 closed?

7 THE SECRETARY: I confirm it's now closed.

8 (End of open session. Confidential business
9 information redacted.)

09:41:38 1 CONFIDENTIAL SESSION
 2 DIRECT EXAMINATION
 3 BY MR. LUZ:
 4 Q. Good morning, Mr. Davies.
 5 A. Good morning.
 6 Q. Mr. Davies, do you have copies of the three
 7 Expert Reports you have submitted in this arbitration
 8 in front of you?
 9 A. I believe they're here.
 10 Q. And do you reaffirm what you wrote in those
 11 reports?
 12 A. I do.
 13 Q. Mr. Davies, can you describe for the Tribunal
 14 your background as an energy economist?
 15 A. I'm an international energy economist. I
 16 have been a professional economist for almost 40
 17 years.
 18 I worked for BP for over 20 years, including
 19 17 years as chief economist.
 20 I have been an international economist. I
 21 worked in this building in the World Bank in the
 22 1970s. I've worked for banks, and now, following my

09:43:32 1 price forecasts have tended to follow recent price
 2 changes, and there is a bit more in the middle, and
 3 the final sentence says, "future forecasts are likely
 4 to reflect the prices that currently prevail."
 5 Can you explain what you meant by that and
 6 why it's important.
 7 A. Yes. I think very briefly that, as oil
 8 prices rise, forecasts tend to rise. As prices fall,
 9 forecasts tend to fall. And I have evidence that in
 10 the two graphs, Graph 1 and Graph 2, which show how
 11 forecasts have evolved over time. So, I think,
 12 whenever you look at any forecasts, you have to look
 13 at context in which it's made. If it's made in a high
 14 oil price time, it's probably going to be high and
 15 vice versa.
 16 Q. You referred to Graph 1 and Graph 2.
 17 A. Yes.
 18 Q. Just so that we don't skip over. Can we look
 19 at Graph 2 on Page 15.
 20 A. Yes. Graph 2 is based on some work done out
 21 of the California Energy Commission, and it shows you,
 22 for example, in 1981 when oil prices had just given to

09:42:19 1 retirement from BP, I'm an independent economic
 2 advisor, advising on international economics and
 3 energy.
 4 Q. Mr. Davies, while you worked at BP, did you
 5 purchase oil price forecasts?
 6 A. I did.
 7 Q. Can you explain why you purchased them and
 8 how you used them.
 9 A. I was required to have access to the best
 10 knowledge and best analysis of all energy markets in
 11 the world; and therefore, I regularly purchased a
 12 range of forecasts and studies in order to access that
 13 information and analysis.
 14 However, at no time did I believe the price
 15 forecasts particularly were very valuable. I was
 16 concerned about the detail of the analysis to make
 17 sure it informed our company's analysis of those
 18 markets.
 19 Q. Okay. Can we take a look at your First
 20 Expert Report at Paragraph 40 on Page 13.
 21 Will you flip to the next page, actually.
 22 And the first bullet point says that oil

09:44:40 1 record levels price forecasts then were expecting it
 2 to rise ever higher and ever higher. As the oil price
 3 fell, you could see that the forecast also fell, and
 4 that's a general tendency for forecasts to follow what
 5 is going on in the short term.
 6 Q. So, this graph shows that oil price
 7 forecasters sometimes do overestimate the price of
 8 oil?
 9 A. Sometimes they overestimate, sometimes they
 10 underestimate.
 11 Q. Thank you. I don't have any other e
 12 questions. I turn over the witness.
 13 CROSS-EXAMINATION
 14 BY MR. RIVKIN:
 15 Q. Mr. Davies, you just said purchased forecasts
 16 because you wanted access to the best knowledge
 17 available; correct?
 18 A. Correct. That's correct.
 19 Q. And one of those forecasts that your
 20 purchased was ESAI's forecasts; isn't that right?
 21 A. That's correct.
 22 Q. And you purchased that for their analysis;

09:45:30 1 isn't that right?

2 A. That's right.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

8 Q. And in all forecasts, including the ones you
9 were just pointing to in the graphs, are based on the
10 best available knowledge at the time; isn't that
11 right?

12 A. I assume that's correct, yes.

13 Q. And when people need to make business
14 decisions, they make business decisions based on the
15 best available knowledge at the time; isn't that
16 right?

17 A. Absolutely. Of course.

18 Q. And often in the energy markets, one needs to
19 determine whether a product--whether an investment is
20 going to be worthwhile or to compare investments when
21 those investments are not even going to begin to
22 produce any revenue four, five, seven, ten years out;

09:47:31 1 likely outcome, and I include in that the EIA, the
2 IEA; they generate scenario. They are not--And they
3 explicitly say in the documentation they do not
4 attempt to predict the most likely outcome for prices.
5 They use price assumptions in order to generate supply
6 and demand outlooks and to paint a picture of the
7 energy world against which energy policies can be
8 considered and measured. So, I think you have to look
9 at those and compare price forecasts against price
10 forecasts.

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

16 [REDACTED] one that
18 you referred to, the IEA's 450 Scenario. That is a
19 scenario of--that projects oil prices for a low carbon
20 energy future; is that right?

21 A. No, it does not project oil prices. It is a
22 scenario which attempts to outline the conditions

09:46:31 1 isn't that right?

2 A. Absolutely. In the energy business you make
3 decisions in face of uncertainty and over very long
4 periods of time.

5 Q. So, it is important to make decisions in
6 light of--in light of uncertainty?

7 A. Absolutely.

8 Q. And so, what you do is you make those
9 decisions based on the best available knowledge at the
10 time?

11 A. Correct.

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

18 A. Well, first of all, I think we should say the
19 term forecast seems to be used for two different
20 things. There are sets of price assumptions made in
21 scenario analysis, which are not forecasts, in the
22 sense that they do not attempt to project the most

09:48:42 1 under which a sustainable climate outcome may be
2 obtained under the long term, whereas part of that
3 makes some assumptions about the levels oil prices
4 consistent with that world they're predicting. It is
5 not a forecast of the level of oil prices in that--in
6 a sustainable climate world. They were very explicit
7 about it.

8 Q. The--let me see if I can use your words.

9 The assumptions are based upon a low carbon
10 energy future--isn't that right?--in that particular
11 forecast.

12 A. They are saying we are more likely to get to
13 a level of sustainable carbon emissions with high
14 energy prices and high oil prices than with low, and,
15 therefore, their scenario--they have chosen to put in
16 oil prices, which are moderately high. They do not
17 consider the impact of the supply and demand outcomes
18 over the long term on energy prices, which I suspect
19 will, in fact, be substantial.

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

09:49:56

3 I would maintain that even if you have perfect
4 forecasts of supply and demand forecast, that does not
5 give you strong ability to predict prices. In fact,
6 many people have made good supply and demand forecasts
7 but have made very bad price forecasts from those
8 supply and demand numbers.

9 Q. And you would agree with me, wouldn't you,
10 that, that given uncertain the necessary the world
11 there is a certain risk premium built into oil prices?

12 A. There has been a risk premium in oil prices
13 for a very long time. I suspect that would mean
14 prices are higher today than they otherwise would be.
15 That premium fluctuates over time as global political
16 conditions change.

17 Q. In 2008, you said that certain recent events
18 have only accentuated the issue and increased what
19 some called the risk premium.

20 A. I think that would be one reason why oil
21 prices rose to a record level at that time.

22 Q. You would agree with me also, wouldn't you,

09:52:04 1 technologies have been developed and forecasts in a
2 very short period of time are very inaccurate. Five
3 years ago the forecasts were for U.S. natural gas to
4 be declining. For the last few years we have seen
5 significant growth in natural gas because of
6 technological developments which had emerged over the
7 last decade.

8 Q. And people in business need to make decisions
9 based on their best knowledge?

10 A. Absolutely.

11 Q. Including their best assessment of how those
12 technological innovations may develop and over what
13 time period, isn't that right?

14 A. Absolutely.

15 Q. And they make decisions today on
16 multi-billion dollar investments on the basis of that
17 information.

18 A. Correct, correct.

19 MR. RIVKIN: I have no further questions.

20 PRESIDENT van HOUTTE: Mr. Luz?

21 MR. LUZ: I may have just a couple of

22 questions. Can I confer for just a moment with my

09:50:59 1 that it would be really difficult for any
2 technological innovations to have significant impact
3 on energy prices over the next five to seven years?

4 A. No, I believe that technological innovations
5 which are in the pipeline could well have impact on
6 oil prices.

7 Q. Over the next five years?

8 A. Yes.

9 What the experience has been that often the
10 technological innovations which emerge have not always
11 been accounted for correctly.

12 And if I may give you an example, in the
13 Eighties and early 90, horizontal drilling which is
14 now a commonplace technology, was known about as a
15 technology and has been developed. Its impact upon
16 oil and gas production was not accurately predicted,
17 so it is possible that forecasters have not foreseen
18 the impact of the technologies which are emerging
19 today.

20 And again, another good example is
21 development of natural gas over the last few years
22 with the development of unconventional gas. The

09:53:08 1 colleagues?

2 PRESIDENT van HOUTTE: Sure.

3 (Pause.)

4 (Pause.)

5 MR. LUZ: Thank you.

6 REDIRECT EXAMINATION

7 BY MR. LUZ:

8 Q. Mr. Davies, there are two things that you
9 mentioned in your testimony that I wanted you to
10 elaborate a little more.

11 You mentioned that prices are higher today
12 than they have been in recent history. Can you
13 explain a little bit more about that to give some
14 context and why that's important.

15 A. Yes. I think, first of all, I think
16 historical context is important. History does matter
17 to allow us calibrate and understand where we are
18 within the energy cycle.

19 We heard yesterday that the average oil price
20 this year is likely to be somewhere between \$77 and
21 \$80 a barrel. If we look at 150 years of oil prices
22 which we have experienced, that would make it the--I

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09:54:23 1 think the seventh highest year in history. So, in
2 other words, there would be 143 years out of 150 will
3 have been lower than the price we've seen today.

4 Equally, if we look over the last 10 years,
5 the average price has been about between \$50 to \$55.
6 The last 20 year, which is the life of most projects,
7 it's been around \$40.

8 And if we like since 1973 when OPEC really
9 came on the scene, the average price has been \$45.

10 So, just in terms of some context, today's
11 price is relatively high, and I think whenever one
12 takes decision about the future, one has to look at
13 some of that context and to test your investments
14 relative to the recent and longer-term experience in
15 the markets you operate in.

16 Q. So, what does that mean with respect to
17 Ms. Emerson's forecast as compared to recent history?

18 A. Well, I think it says that we are still
19 within the high period of high oil prices
20 historically, and experiences that prices go and up
21 and down, so there will be times price will come down.

22 I think, also, if you're making decisions,

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09:56:43 1 order to make sound investments that we would not
2 regret.

3 Q. So, you don't believe that oil price
4 forecasts are reason--reasonable predictors of the
5 future--

6 MR. RIVKIN: It's a leading question.

7 MR. LUZ: I will withdraw the question.

8 I have no further questions.

9 PRESIDENT van HOUTTE: Probably my colleagues
10 also have some questions.

11 QUESTIONS FROM THE TRIBUNAL

12 PRESIDENT van HOUTTE: Mr. Davies, may I just
13 ask you for your comments on something which you can
14 read in some newspapers, and I'm really not saying
15 that's a very scientific statement, but nevertheless,
16 in some corners, it is said oil price cannot increase
17 because have you those new countries which consume
18 more and more oil and gas and so on. You have
19 countries that become richer and richer; China and so
20 on; on the other hand, oil is becoming more scarce.

21 What can you say against this very
22 unscientific popular belief?

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09:55:33 1 you would want to say, can I test my projects against
2 what the prices have been in the last 20 year, and you
3 would be looking at the viability of your investments
4 against historical experience.

5 I think today's prices are high in any of
6 those contexts.

7 Q. Just one final question on that point. You
8 said that when business people such as yourself at BP
9 looked at price forecasts as part of their
10 decision-making process, did that decision-making
11 process ever assume that oil price forecasts were
12 reasonably certain?

13 A. Absolutely never. I was never requested to
14 make an oil price forecast. The company adopted
15 various assumptions in order to assist with
16 decision-making, but never explicitly made a forecast,
17 whenever we were asked in public or otherwise, always
18 stated, no, we do not forecast, we cannot forecast, we
19 do not believe we can forecast, but we need to
20 understand the markets we operate in, and the range of
21 risks and uncertainties in order that we can test our
22 investments against those ranges of uncertainties in

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09:57:49 1 THE WITNESS: I could confirm it's a popular
2 belief, and it's been a popular belief for 150 years,
3 but so far it's been wrong in sense that there has
4 always been enough oil to meet demands of the world.

5 I believe the immediate future consumption of
6 oil will continue to rise because of growth in Asia
7 and China and elsewhere, but that doesn't necessarily
8 mean there is going to be a shortage of oil.

9 The world's available and proven economic
10 resource base continues to rise. Basically,
11 technology and exploration/discovery has kept pace
12 with the amount of natural depletion through
13 production. And so, the reserves to production ratio,
14 the world still has more than 40 years of proven oil
15 under the ground, which could be developed
16 economically. And that level has increased over time
17 and not decreased.

18 So, I think, while there is a common school
19 of thought that says it's all running out and it's
20 going to happen tomorrow, I think I quoted in one of
21 my papers, in fact, this has been wrong for a very
22 long period of time and we are not short of oil today.

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10:04:04 1 one is closer in time to the target date?
 2 For example, I think your own work, if I'm
 3 correct, had certain assumptions about 2009 prices
 4 that were made in 2006. Is there a greater likelihood
 5 in 1006 with respect to 2009 than 2005 with respect to
 6 2009? What is the temporal dimension you consider
 7 relevant for?

8 THE WITNESS: I think the energy world is
 9 extremely uncertainty in the short, medium, and long
 10 term. Working the geopolitics of, will Iraq bring
 11 more oil on-stream; will there be Iranian political
 12 change; what's going to happen to the world economy in
 13 the rate of economic growth; the future of the banks?
 14 I think we are at a particularly uncertain time at the
 15 moment, so I don't think the short term is any less
 16 uncertain than the long term.

17 And short-term forecasts, I don't think, have
 18 been any more accurate than long-term forecasts. In
 19 fact, sometimes you can get the long term right, but
 20 the world in between has been very wrong, so I don't
 21 think the certainty factor is there.

22 We have been through periods of time when the

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10:06:24 1 particularly very valuable. I was concerned about the
 2 detailed analysis to make sure to inform company's
 3 analysis of those markets." I'm not sure that you
 4 said the word "particularly," actually, as I wrote
 5 down, but it's neither here nor there.

6 I'm interested to know, then, precisely why
 7 you would have purchased price forecasts. Having made
 8 that statement, I assume from your answer you did
 9 purchase them and you probably purchased them at a
 10 considerable price. So, they must have had some
 11 value. What was the value of those price forecasts?

12 THE WITNESS: My role was to understand how
 13 energy markets worked and were going to work in the
 14 future; and, therefore, we were always testing what
 15 other people were saying and trying to understand if
 16 there are forces which were emerging which were not
 17 the way we saw them. So, any forecast, we would
 18 always check through and say, well, where is our view
 19 different from somebody else's. So, we were looking
 20 at the detail of oil demand growth in China or parts
 21 of Africa or oil production out of Angola and try to
 22 see if the numbers that we were using were different

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10:05:18 1 volatility has been lower. Actually, the last 12
 2 months oil prices have been relatively stable. Oil
 3 traders have not been doing very well. There was a
 4 time in the Nineties when the range of oil prices was
 5 fairly narrow, and the Sixties as well, but you go
 6 through periods, but I don't think you can predict
 7 when that's going to happen, unfortunately. The oil
 8 business is one of a lot of risks and uncertainty, and
 9 oil markets and oil prices are more uncertain than the
 10 prices of other goods and commodities.

11 ARBITRATOR JANOW: Thanks very much. Those
 12 are my questions.

13 ARBITRATOR SANDS: Just really quickly,
 14 LiveNote, Page 15, Line 2, quotes--you won't have it
 15 in front of you. It's what you said--

16 MR. RIVKIN: Sorry, our LiveNote is showing
 17 pages in the 650s.

18 ARBITRATOR SANDS: Oh. Well, I'm on Day 3.

19 MR. RIVKIN: So are we.

20 Anyway, why don't you give us the quote.

21 ARBITRATOR SANDS: The quote is, "However, at
 22 no time did I believe the price forecasts were

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10:07:43 1 than somebody else's and identify the source of
 2 difference, trying to understand how we might find one
 3 forecast at a different number of Angola, but don't
 4 worry, we operate the field and we know what's going
 5 on, or maybe they had sources of information which is
 6 better--always looking for the best source of
 7 information. So, always going to forecasts, picking
 8 up where there were particular difference, different
 9 views, and understanding those views.

10 So, price forecasts, you hope, were based on
 11 sound analysis of supply and demand trends, so you
 12 were always looking for those.

13 I was also interested in what price they were
 14 assuming because the price the forecasters do affect
 15 people's assumptions in the way markets work. So, it
 16 was more interest. It was not going to affect the
 17 decision-making of a company such as BP, but it is
 18 also--we would like to inform the senior management
 19 this is what people are saying, this is what the
 20 market is saying, so you should know what's going on
 21 out there because expectations affect reality as much
 22 as some of the physical forces.

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10:08:44 1 ARBITRATOR SANDS: So, would I be right in
2 thinking that the value for you or for your company
3 was the underlying analysis rather than the
4 conclusions?
5 THE WITNESS: Absolutely.
6 ARBITRATOR SANDS: Would you have identified
7 criteria to determine circumstances in which the
8 underlying analysis was or was not reliable?
9 THE WITNESS: Well, we would go through it
10 and we would have a whole series of forecast, say, of
11 oil demand in China, and we would compare them. We
12 would try to look at the rationale behind them, try to
13 look at the assumptions they were making, was it just
14 simply different economic growth assumptions
15 who--sometimes they were random, sometimes they were
16 sometimes well-informed, trying to work out who was
17 well-informed, and we would tend to find out who knew
18 most about what. And we would tend to rely on those
19 who are best informed about certain things in order to
20 inform our own opinion. And sometimes we would see
21 forecasts and say, well, that doesn't seem to be
22 well-informed; they've got their history wrong, never

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10:10:48 1 could understand when the forecast comes out. How do
2 we understand the provenance of this number that we
3 are looking at when we have purchased? And that's
4 always important, to understand the provenance and the
5 rationale behind it.
6 ARBITRATOR SANDS: So, you would have a
7 number of these forecasts and a number of sets of
8 underlying assumption, and, over time, you described
9 you spent an extended period of time, for example,
10 with BP. Would some of the players producing
11 forecasts and their underlying analysis seem to be a
12 finite group to a certain extent? Over that period of
13 time would some of the underlying analyses emerge as
14 ones to which you would pay particular attention
15 because they were more reliable than others?
16 THE WITNESS: Yes.
17 ARBITRATOR SANDS: Was the consequence of
18 that, then, that you would also tend to rely more on
19 the forecasts of those who had provided more reliable
20 underlying assumptions?
21 THE WITNESS: Sometimes, you did find some
22 consultants who were very good at analyzing the

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10:09:50 1 mind the future, and things like that. So, we find we
2 would go through and try to find the best source and
3 best understanding, who has done the most detailed
4 analysis, who has got the best model, whose model fits
5 the past, for example, would be very important.
6 ARBITRATOR SANDS: So, could you then form a
7 view applying those criteria and that assessment to
8 the reliability of certain underlying analyses? Were
9 some treated as reliable and some treated as
10 unreliable?
11 THE WITNESS: Yes. Yes.
12 ARBITRATOR SANDS: And over time, to the best
13 of your recollection, would there be consistency,
14 whether some people who engaged or entities that
15 engaged in the underlying assessments that you tended,
16 then, to rely?
17 THE WITNESS: You would always find some
18 forecasters that would always have high numbers for
19 demand and then revise them down, other forecasters
20 would be other way, and we tended to try to identify
21 the biases to understand where they were. We compared
22 the, actual against the forecast over time, so we

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10:11:54 1 current situation and the past but their forecasts
2 were not very good, and sometimes vice versa, which
3 you would hope didn't happen, but in reality it did.
4 So, sometimes you found those that had the best
5 current information, then made wild forecasts.
6 ARBITRATOR SANDS: So, the question I'm
7 really getting at is: Is there any relationship--is
8 there any consistent relationship between the
9 reliability of underlying assumptions and the e
10 reliability of a forecast?
11 THE WITNESS: I think if you're going to put
12 one word, the answer is no.
13 But sometimes you found, for example, the
14 International Energy Agency, when they changed their
15 analyst, their forecasts changed, and we used to
16 plot--we knew when the analysts had changed, and we
17 could plot how they changed their forecast, and
18 sometimes they would have a forecaster who would
19 overestimate on supply, and they then were replaced
20 with somebody else who would underestimate.
21 So, it doesn't necessarily mean by entity
22 there is a constant bias on performance, and it does

10:21:03 1 take a break or we can proceed now with Mr. Way.
 2 We're in your hands.
 3 PRESIDENT van HOUTTE: Five minutes' break?
 4 Thank you.
 5 (Brief recess.)
 6 FREDERICK WAY, RESPONDENT'S WITNESS, CALLED
 7 PRESIDENT van HOUTTE: May we resume now with
 8 the examination of factual witness. Mr. Frederick Way
 9 is before us.
 10 You are Mr. Frederick Way?
 11 THE WITNESS: Yes, sir.
 12 PRESIDENT van HOUTTE: Can you repeat: I
 13 hereby confirm upon my conscience and honor...
 14 THE WITNESS: I hereby confirm upon my
 15 conscience and honor...
 16 PRESIDENT van HOUTTE: ...that I will tell
 17 the truth and nothing but the truth.
 18 THE WITNESS: ...that I will tell the truth
 19 and nothing but the truth.
 20 PRESIDENT van HOUTTE: Thank you.
 21 MR. GALLUS: Thank you.
 22 DIRECT EXAMINATION

10:33:17 1 Benefits Plan an agreement?
 2 A. No, it isn't.
 3 Q. And is the Benefits Plan a result of a
 4 negotiation?
 5 A. No.
 6 Q. How would you describe a Benefits Plan?
 7 A. A Benefits Plan is one of two documents that
 8 is to be submitted by an oil-and-gas operator for
 9 approval by the Board. The Plan is submitted, it is
 10 reviewed by the Board for completeness and relevance
 11 and appropriateness. If it isn't acceptable on--as
 12 being in accordance with the legislation and the
 13 Guidelines, it is returned to the Operator with
 14 reasons, and the Operator will then reformulate the
 15 Plan and resubmit it.
 16 Q. And under what circumstances will the Board
 17 accept a Benefits Plan?
 18 A. The Board would accept a Benefits Plan if it
 19 reviews the Plan and it's in accordance with the
 20 Guidelines, in accordance with the legislation.
 21 Q. Just that you mentioned Guidelines, and I
 22 want you to put aside the Research and Development

10:32:27 1 BY MR. GALLUS:
 2 Q. Mr. Way, you're currently the Vice-Chairman
 3 of the Board?
 4 A. That's correct.
 5 Q. And at the time that the Guidelines were
 6 issued, you were the Acting Chairman of the Board?
 7 A. Yes.
 8 Q. Mr. Way, were you at this hearing earlier in
 9 the week?
 10 A. No.
 11 Q. You flew into Washington last night; is that
 12 right?
 13 A. Yes.
 14 Q. Earlier in the week, there has been some
 15 uncertainty about how the Regulatory Framework works
 16 and how the Guidelines actually operate. I thought it
 17 might be helpful jut briefly to walk the Tribunal
 18 through those two issues, starting first with the
 19 Regulatory Framework.
 20 Starting with the Benefits Plan, there was
 21 some discussion earlier in the week as to whether a
 22 Benefits Plan is an agreement. In your view, is a

10:34:28 1 Guidelines for a moment, and we will come back to
 2 them. But just talking about Guidelines generally,
 3 could you explain to the Tribunal the role of
 4 Guidelines in the work of the Tribunal--the work of
 5 the Board?
 6 A. Well, the legislative body--or the statutory
 7 body for the Board consists of the legislation and the
 8 regulations which are passed pursuant to the
 9 legislation. In the legislation, it references areas
 10 where the Board may issue Guidelines to provide
 11 further clarity as to the intent and requirements of
 12 the legislation and the regulations.
 13 Q. And does the Board often rely on such
 14 Guidelines?
 15 A. Yes, the Board has a number of Guidelines.
 16 Q. Let's move on to the specific Guidelines at
 17 issue in this arbitration. Could you explain to the
 18 Tribunal, when was the first public statement of the
 19 Board that the Board would issue these Research and
 20 Development Guidelines?
 21 A. To the best of my recollection, the first
 22 public reference of the Board to the necessity for

10:35:45 1 Research and Development Guidelines was when it issued
2 the decision approving the White Rose Project in the
3 late fall of 2001.

4 THE SECRETARY: I apologize to interrupt, but
5 I forgot to ask if you want to open the session.

6 MR. GALLUS: This can be open.

7 THE SECRETARY: Yes. Please open the
8 session.

9 (End of confidential session.)

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10:37:20 1 questions. To say that the Board was advised, at any
2 point, whether it was in 1985 or in 2004 or any other
3 time by lawyers, it has absolutely no probative value
4 for the case unless we know what that advice was. And
5 if they're willing to waive all of their
6 attorney-client privilege, then that's fine; but
7 otherwise, we don't know whether their actions were
8 consistent with or different from their advice.

9 PRESIDENT van HOUTTE: The Tribunal agrees.

10 MR. GALLUS: I was simply trying to
11 perhaps--I was just raising the question in response
12 to--

13 (Tribunal conferring.)

14 PRESIDENT van HOUTTE: This is a very
15 important issue.

16 MR. GALLUS: We are happy to move on. We
17 certainly have no more questions on this. We are
18 happy to move on.

19 PRESIDENT van HOUTTE: By absence of subject
20 matter, we agree.

21 BY MR. GALLUS:

22 Q. Let's move on to the--well, let me just ask:

10:36:06 1 OPEN SESSION

2 BY MR. GALLUS:

3 Q. So, you're saying, Mr. Way, that the Board
4 issued its first public statement that it would issue
5 the Guidelines in late 2001. And at that stage was
6 the Board aware of the decline in expenditures on the
7 Hibernia and Terra Nova Projects?

8 A. Yes. The Board, in my experience, first
9 became aware of the sort of declining expenditures in
10 the spring of 2001 when the Annual Reports were
11 submitted by Operators for their--essentially their
12 R&D reports in respect to the Year 2000 which were
13 submitted in the spring of 2001.

14 Q. Okay. There was an issue that arose earlier
15 in the week regarding legal advice that the Board
16 obtained concerning the Guidelines, and I want you to
17 be careful here obviously not to disclose any of the
18 content of that legal advice. But did the Board
19 obtain legal advice when developing the Guidelines?

20 MR. RIVKIN: Mr. President, I didn't want to
21 object when these questions were being raised by an
22 arbitrator, but I do have an objection to this line of

10:39:29 1 Mr. Way, did the Board consult with the Operators with
2 regard to development of the Guidelines?

3 A. The Board did begin the process of
4 consultation with the Operators, which, as I recall,
5 evolved into the Operators being represented by the
6 Canadian Association of Petroleum Producers, and
7 essentially it was the East Coast committee of CAPP,
8 which, in essence involved the Operators from
9 Newfoundland.

10 Q. So, you met with these Industry
11 Representatives?

12 A. We met with them, and I think there may
13 have been some exchange of correspondence as well.

14 Q. And did you talk with them about
15 possibilities to propose alternatives to the
16 Guidelines?

17 A. The Operators, I think, probably raised with
18 us first the question of whether or not they could
19 come forward with some alternative to the Guideline,
20 to which we agreed, and then they asked for some time
21 to formulate an alternative.

22 Q. Did they come up with an alternative?

10:40:48 1 A. They did not. They came to us as the
2 deadline which they had set approached and said they
3 hadn't reach a consensus and could they have more time
4 and we said of course.
5 And then before that time expired, they came
6 back to us and said we can't reach a consensus.
7 Q. And are they able to come up with an
8 alternative now?
9 A. Yes, there is a provision in the Guideline
10 that still affords the Operators that opportunity.
11 Q. During the discussions with the Operators at
12 this time, did the Operators ever challenge the
13 benchmark in the proposed Guidelines?
14 A. Not that I recall.
15 Q. Did they ever argue that the benchmark was
16 unfair?
17 A. Not that I recall.
18 Q. And do you think the benchmark is unfair?
19 A. No.
20 Q. And why is that?
21 A. Well, I think the benchmark, if you look at
22 the definition and where it comes from in the

10:42:57 1 should say, if they spent \$20 million on a new
2 building which would house a research and development
3 facility.
4 A. Yes. It was for research and development,
5 yes. The bricks-and-mortar part of it would be
6 eligible under our Guideline.
7 Q. But would those expenditures go towards
8 setting this benchmark under the Statistics Canada
9 question?
10 A. No.
11 Q. And finally, if the Operators gave money to a
12 subcontractor, a company like Halliburton, to say, if
13 they give \$20 million to Halliburton to conduct
14 research and development, would that expenditure
15 qualify under the Guidelines?
16 A. If the research and development was conducted
17 in the Province as required by the legislation, then
18 yes, it would be.
19 Q. And would that expenditure qualify or go
20 towards the benchmark under the Statistics Canada
21 formulation?
22 A. I don't think so because of the requirement

10:41:40 1 Statistics Canada--from Statistics Canada material,
2 it's based on expenditures by upstream oil-and-gas
3 extraction companies in Canada, and the definition of
4 R&D was fairly rigid. Our Guideline, by contrast,
5 accepts that definition and then adds to it other
6 areas, most notably expenditures on education and
7 training and some other areas, expenditures by
8 subcontractors and so on. It's much broader than the
9 definition that's in the benchmark.
10 Q. And is one of those differences expenditures
11 on buildings?
12 A. It could be. It could be.
13 Q. So, let's run through a couple of specific
14 examples. If the Operators spend \$5 million on a
15 scholarship, does that qualify under the Guidelines?
16 A. Yes.
17 Q. And would that, however, go towards the
18 benchmark?
19 A. No.
20 Q. And if the Operators spent \$20 million on a
21 new building, would that sort of spending on the
22 bricks and mortar qualify under the Guidelines? I

10:43:53 1 is the Statistics Canada definition, it would be
2 in-house expenditures--
3 Q. Okay.
4 A. --to get into that benchmark.
5 Q. I have one last question for you, Mr. Way,
6 and I'm going to try to put to you a question that was
7 put yesterday by the President of the Tribunal.
8 MR. GALLUS: I apologize, Professor van
9 Houtte, if I get this question wrong.
10 BY MR. GALLUS:
11 Q. But Professor van Houtte yesterday was
12 talking about a situation where there are 10 companies
13 all trying to find oil, and he talked about the
14 situation--and again I apologize if I get this
15 wrong--but a situation where only one of those
16 companies actually finds oil and actually produces any
17 oil and the other nine companies just continue to
18 explore for oil. In that situation, the nine
19 companies that are exploring for oil, are they obliged
20 under the Guidelines to expend on research and
21 development?
22 A. No.

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10:44:49 1 Q. And this one company that moves into a
2 Development Phase, while it's in the Development
3 Phase, is it obliged to expend on research and
4 development?
5 A. We give them a Guideline, which suggests half
6 of 1 percent of capital should be spent on research
7 and development, education and training during the
8 Development Phase, but it's not necessary to spend it
9 in the Development Phase because the quantum of the
10 requirement is determined by production in the
11 Production Phase.
12 However, if they do spend money in the
13 Development Phase, and it could be half of 1 percent
14 of capital or it could be less or it could be more,
15 then that will be credited against the requirement in
16 the Production Phase when they entered a Production
17 Phase. But if there is no oil produced, there is no
18 requirement because the quantum is totally defined by
19 production.
20 PRESIDENT van HOUTTE: And just for the
21 record, my question was a little different. Because,
22 as a matter of fact, companies do research and

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10:47:07 1 money on research and development but never entered in
2 the Production Phase. Now, their research and
3 development is included in the statistics, and it is
4 based on those statistics that the only one who
5 produces oil then has to spend money for research and
6 development.
7 And then my question was whether under this
8 scenario, as a matter of fact, the benchmark
9 is--whether it is relevant because the benchmark
10 obliges the tenth player to do a lot of research
11 development on the basis of the research and
12 development which effectively already has been carried
13 out by the nine previous players which were
14 unsuccessful. It is not whether the nine unsuccessful
15 players are obliged or not. The fact of my position
16 was that they indeed did a lot of research and
17 development, which that is included into the
18 statistics, and those statistics are then the basis
19 for the tenth player to reach the threshold in the
20 Production Phase.
21 THE WITNESS: I guess I would say in my
22 experience, there is very little research and

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10:45:56 1 development because they think it's necessary. I
2 guess that's the first reason and motive why they do
3 research and development, not because there is a
4 statute which obliges them to do research and
5 development.
6 Now, it was said that research and
7 development in the first stages is more important or
8 is more substantial than in the later phases. Now,
9 the question was not whether in the Exploration and
10 Development Phase companies are required to do
11 research and development. My question was that they
12 did, in fact, do research and development, and that
13 the amounts spent for research and development then
14 were included in the statistics, and it is on the
15 basis of the statistics that during the Production
16 Phase, one has to reach the threshold imposed by the
17 Guidelines.
18 Now, I fully understand that whatever you did
19 in the Exploration and Development Phase can be
20 deducted from the research and development amounts you
21 have to do in the Production Phase, but in my
22 hypothesis, there were nine players who spent a lot of

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10:48:17 1 development expenditure in the Exploration Phase. It
2 hasn't been our experience that Operators spend very
3 much money on research and development in the
4 Exploration Phase. There is no requirement for them
5 to spend any, but there is a voluntary date, they can.
6 That's not contained in the Guideline, but it's
7 contained in another part of the Board's documentation
8 in their terms and conditions under which lands are
9 awarded. But in my experience there has been very
10 little expenditure by companies during the Exploration
11 Phase.
12 BY MR. GALLUS:
13 Q. I just have one follow-up question on that:
14 In your experience, do companies expend on research
15 and development in the Development Phase?
16 A. They tend to spend money on education and
17 training during the Development Phase, getting ready
18 for production; and when we used the 0.5 percent of
19 capital, we chose as a guide for spending during the
20 Development Phase, we took that based on experience in
21 the projects up to that point on the East Coast of
22 Canada. So, that 0.5 percent was based on experience.

10:49:47 1 Q. And my final question is: Do companies which
2 enter a Development Phase, do they then go on to
3 produce oil? Do they then go on to a Production
4 Phase?

5 A. Yes.

6 MR. GALLUS: Thank you. I have no more
7 questions.

8 PRESIDENT van HOUTTE: Thank you.
9 From Claimants' side?

10 MR. RIVKIN: It will be me, Mr. President.
11 Thank you.

12 CROSS-EXAMINATION

13 BY MR. RIVKIN:

14 Q. Mr. Way, you were asked about a company
15 spending \$20 million to build an in-house research and
16 development facility in Newfoundland. Do you recall
17 that question from Mr. Gallus?

18 A. I don't think it was an in-house. It was
19 just to build a facility.

20 Q. Okay.

21 A. It wouldn't have to be in-house.

22 Q. Assume it was an in-house facility built by

10:51:27 1 to time issued Guidelines in order to provide clarity
2 about what it--about how it applies the statutory
3 requirements for Benefits Plans and others; is that
4 right?

5 A. Yes, many aspects of the Accord legislation.

6 Q. And it's fair to say, isn't it, Mr. Way, that
7 in every circumstance other than the 2004 Research and
8 Development Guidelines the Guidelines issued by the
9 Board were forward-looking? They were provided
10 guidance as to what Parties should include in their
11 Benefits Plans in the future.

12 A. I would have to look at the list of
13 Guidelines, but--

14 Q. Well, let me show you some.

15 MR. RIVKIN: Greg, if you could put the Core
16 Bundle, the witness bundle in front of Mr. Way,
17 particularly the first volume of the exhibits.

18 And, Members of the Tribunal, I will refer
19 you to our first Exhibit Core Bundle, starting with
20 Claimants' Exhibit 32.

21 BY MR. RIVKIN:

22 Q. Section 1.0, these are the 1986 Guidelines

10:50:30 1 the Hibernia owners.

2 A. Um-hmm.

3 Q. You said that \$20 million would receive
4 credit against the Guidelines as a benchmark; is that
5 right?

6 A. If it was built for research and development,
7 yes, it would qualify under our Guideline.

8 Q. In order to build that in-house research and
9 development facility, of course, the Hibernia owners
10 would have to buy local goods in order to build the
11 facility; right?

12 A. I presume some local goods.

13 Q. And they would have to buy local services
14 because those are the people who are going to build
15 the facility; right?

16 A. Yes.

17 Q. And once that facility was up and running,
18 the services would be--the R&D in-house facility would
19 be providing research services in the Province of
20 Newfoundland; correct?

21 A. Yes.

22 Q. Now, you mentioned that the Board from time

10:53:05 1 for Benefits Plans approval; is that right? And these
2 are Exploration Phase Guidelines?

3 A. What was the number again?

4 Q. Claimants' Exhibit 32.

5 A. Yes.

6 Q. Section 1.0.

7 It states there that: "This document is
8 designed to provide Operators with Guidelines for
9 Benefits Plan approval and reporting requirements for
10 exploration activities in offshore Newfoundland."

11 Do you see that?

12 A. Yes.

13 Q. So, this was designed to tell Operators what
14 they needed to put into their Benefits Plans for
15 Exploration Phase activities; correct?

16 A. I have very little familiarity with this
17 document. This document not only precedes my time by
18 many years, it also precedes the legislation under
19 which we're operating now.

20 Q. It followed the Accord Acts; isn't that
21 right?

22 A. I think the Accord Act, Federal Accord Act,

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10:54:20 1 was proclaimed in 1987.
 2 Q. It was 1985, actually.
 3 A. Well, the Atlantic Accord was 1985.
 4 Q. Do you know when the--do you know when the
 5 provision allowing the Board to issue Guidelines with
 6 respect to Section 45 was implemented?
 7 A. I've always operated using the Federal Act,
 8 which was proclaimed in, I think, 1987.
 9 Q. And do you know if Section 151 of the 1987
 10 Act include the ability to issue Guidelines?
 11 A. It did. It does.
 12 Q. All right. Well, we can come back to that.
 13 All right. So, you don't--the 1986 and 1987
 14 and 1988 Guidelines were all before your time?
 15 A. Very much so.
 16 Q. If I told you it had similar language--they
 17 had similar language to this, would that surprise you?
 18 A. Maybe, maybe not. I don't know. I don't
 19 have a view.
 20 Q. Would you agree with me that this language is
 21 forward-looking, it's designed to provide guidance for
 22 future Benefits Plans?

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10:56:40 1 Guidelines in the context of the White Rose Project;
 2 is that right?
 3 A. Yes.
 4 Q. And, in fact, the Board--and White Rose is a
 5 separate project from Hibernia and Terra Nova;
 6 correct?
 7 A. That's correct.
 8 Q. It has different owners?
 9 A. Some of the owners are different.
 10 Q. Some are the same, but all in different
 11 ownership percentages; correct?
 12 A. Yes.
 13 Q. It's a different Consortium. It operates a
 14 different project.
 15 A. That's correct.
 16 Q. Just as the Hebron Project, again different
 17 owners, different Consortium?
 18 A. Some are the same.
 19 Q. Different ownership interests, operates as a
 20 separate project.
 21 A. Yes.
 22 Q. And the Board issued its decision approving

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10:55:26 1 A. On the surface, that's what that first
 2 paragraph says.
 3 Q. Okay. Let's take a look at the 2006
 4 Exploration Benefits Plan Guidelines. That's
 5 Claimants' Exhibit 34, which may be--hopefully be in
 6 your binder.
 7 A. Um-hmm.
 8 Q. And look at Section 1.2. First paragraph.
 9 Again, Section 1.2 of the two thousand--these
 10 Guidelines were written while you were Vice-Chairman
 11 of the Board; is that right?
 12 A. Yes.
 13 Q. And they state that "these Guidelines are
 14 presented to assist Operators in the preparation of a
 15 Benefits Plan." Do you see that?
 16 A. Yes.
 17 Q. And again that is meant to provide forward
 18 looking guidance for future Benefits Plans; isn't that
 19 right?
 20 A. Yes.
 21 Q. Okay. You mentioned that the Board began to
 22 consider promulgating Research and Development

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10:57:22 1 the White Rose Benefits Plan in November 2001; is that
 2 right?
 3 A. I'm sorry?
 4 Q. The Board issued its decision approving the
 5 White Rose Benefits Plan in November 2001; is that
 6 correct?
 7 A. That's correct.
 8 Q. And in that decision, the Board indicated
 9 that the Operator of that project would eventually be
 10 subject to a new R&D expenditure target to be
 11 established by the Board at a later date; isn't that
 12 right?
 13 A. Yes.
 14 Q. And if you could look at Claimants'
 15 Exhibit 35, again, in your bundle.
 16 This is the White Rose Decision; is that
 17 right?
 18 A. That's correct.
 19 Q. And if you take a look at Page EMM-422, down
 20 at the bottom.
 21 This is the Board's discussion of the
 22 research and development and education and training

10:58:39 1 requirements for the White Rose Project; is that
2 right?
3 A. Yes.
4 Q. And in that section, the Board says at the
5 end of the first paragraph that "the Board believes
6 that establishing quantifiable expenditure
7 requirements in this regard is appropriate."
8 Do you see that?
9 A. Yes.
10 Q. And then it goes on to say in the next
11 paragraph that "the Board will issue Guidelines to
12 require a minimum level of expenditures"?
13 A. What was your question again in respect to
14 that paragraph?
15 Q. The Board states that it will be issuing
16 Guidelines with respect to the target amount of
17 research and development expenditures that it will
18 require for the White Rose Project; correct?
19 A. You said the Board says it will be issuing a
20 target here?
21 Q. Yes.
22 Take a look at the first paragraph, the third

11:01:21 1 A. I don't have intimate detail or detailed
2 knowledge or recollection of the Hibernia and Terra
3 Nova Benefits Plans. There was an expectation that
4 there would be research and development expenditures.
5 And part of the thinking, which the Board was
6 reflecting here, was the reports it had received from
7 Hibernia and Terra Nova in the spring of 2001, which
8 indicated significantly declining expenditures and
9 forecasting further declines in expenditures.
10 Q. Mr. Way, with respect, that was not my
11 question. The question is: In the Board's Decisions
12 approving the Hibernia and Terra Nova Development
13 Plans, did the Board ever inform those project owners
14 that it would be establishing a target level of
15 research and development expenditures as it did in the
16 White Rose Decision?
17 A. I don't have sufficient knowledge of those
18 Benefits Plans which were--preceded me by 10 years or
19 so to make a definitive statement.
20 Q. Well, now, let's--let me test that a little
21 bit.
22 You're Vice-Chairman of the Board; correct?

11:00:17 1 sentence: "Accordingly, the Board will issue such
2 parameters and criteria and a target level of
3 expenditures."
4 Do you see that?
5 A. Yes.
6 Q. So the Board is informing the White Rose
7 Proponents at the beginning of their project, before
8 they move forward, that the Board will be establishing
9 a target level of expenditures; isn't that right?
10 A. Yes.
11 Q. And, indeed, in Condition 3 down at the
12 bottom, the Board says that "it anticipates for this
13 White Rose Project the target will be not less than
14 \$12 million during the pre-production stage."
15 A. Yes.
16 Q. Do you see that?
17 A. Yes.
18 Q. And so it informs--now, you would agree with
19 me, wouldn't you, that there is no similar indication
20 that the Board will indicate--will create a target
21 level of expenditures in either the Hibernia or the
22 Terra Nova Benefits Plans? Correct?

11:02:29 1 A. Yes.
2 Q. You were Vice-Chairman of the Board in 2004;
3 correct?
4 A. Yes.
5 Q. And in 2004 the Board adopted Guidelines that
6 it imposed on the Hibernia and Terra Nova Projects;
7 correct?
8 A. In 2004?
9 Q. The Board adopted the 2004 Research and
10 Development Expenditure Guidelines; correct?
11 A. Yes.
12 Q. And the Board informed the Hibernia and Terra
13 Nova Project owners that those Guidelines would apply
14 to them; isn't that right?
15 A. Yes, to provide them with parameters or
16 guidance in respect to their obligations for research
17 and development.
18 Q. Not parameters or guidance. The Board told
19 them that they had to meet the Guidelines' targets--
20 A. Yes.
21 Q. --under the benchmarks created under the
22 Guidelines; correct?

11:07:41 1 Q. And you knew that in 2004.
2 (Simultaneous conversation.)
3 Q. I think you said--correct me if I'm wrong,
4 Mr. Way. According to the advice I received, they did
5 not include such a target level.
6 A. Yes.
7 Q. Did you look at the--
8 MR. GALLUS: Sorry, could we confer for just
9 one second? I'm sorry.
10 (Pause.)
11 MR. GALLUS: I'm sorry for interrupting.
12 Please continue.
13 BY MR. RIVKIN:
14 Q. Did you personally review the Benefits Plans
15 and the Board's decisions as--
16 A. The--
17 Q. --Terra Nova and Hibernia?
18 A. No.
19 Q. The question of whether or not the 2004
20 Guidelines could be applied retroactively to the
21 Hibernia and Terra Nova Projects was an important
22 issue for the Board, was it not?

11:09:43 1 views.
2 MR. RIVKIN: And whether the Board discussed
3 it in the discussions among Board members which are
4 certainly not privileged.
5 MR. GALLUS: Perhaps we could just warn
6 Mr. Way not to disclose any of the advice that you
7 received.
8 BY MR. RIVKIN:
9 Q. Do you want me restate the question, Mr. Way?
10 A. Please.
11 Q. Did the Board understand in 2004 that because
12 the Hibernia and Terra Nova Benefits Plans and the
13 decisions adopting them did not include a target level
14 of expenditure, that it put those projects in a
15 different legal position from the White Rose
16 Proponents?
17 A. No, I don't think they did think it put them
18 in a different legal position.
19 PRESIDENT van HOUTTE: It's not the question
20 whether they did. It's the question of how you saw
21 it, and I would prefer--would it be possible to delete
22 the word "legal"?

11:08:40 1 A. No, it was not an issue that received a lot
2 of consideration internally because the Board felt it
3 was simply articulating a practice and an expectation.
4 Q. The Board understood--did the Board
5 understand that because the Hibernia and Terra Nova
6 Benefits Plans and the decisions adopting them did not
7 include a target level of expenditure, that it put
8 them in a different legal position from the White Rose
9 Proponents?
10 MR. GALLUS: Perhaps if we could interrupt at
11 this point. I think if you're asking Mr. Way to talk
12 about the legal position the Board thought it was in,
13 that maybe this touches on areas that might be
14 privileged.
15 MR. RIVKIN: I'm asking him for his
16 understanding as Vice-Chairman of the Board. I think
17 that's a fair question.
18 PRESIDENT van HOUTTE: That's how I
19 understood it also.
20 MR. GALLUS: I'm just ensuring we don't waive
21 any privilege here.
22 PRESIDENT van HOUTTE: It's your personal

11:10:38 1 MR. RIVKIN: Yes.
2 PRESIDENT van HOUTTE: Put in a different
3 position, without any legal questions--
4 BY MR. RIVKIN:
5 Q. Let me ask the question simply: Were the
6 Hibernia and Terra Nova Project owners in a different
7 position than the White Rose Project owners with
8 respect to the Guidelines when they were adopted in
9 2004?
10 A. We didn't think so. We thought we were being
11 helpful to these Operators by putting forward the
12 Guideline that would give them some guidance to avoid
13 the situation that had emerged from the reports in the
14 spring of 2001.
15 Q. Let's turn to Claimants' Exhibit 134.
16 Okay. Mr. Way, you're looking at Claimants'
17 Exhibit 134, which again is in the Claimants' exhibit
18 bundle?
19 A. Um-hmm.
20 Q. Okay. And this is a memo that you drafted
21 about a Board meeting that took place on December 12,
22 2003; is that right?

11:12:22 1 A. Um-hmm, yes.
 2 Q. And this Board meeting was devoted to
 3 considering how to proceed with the R&D Guidelines; is
 4 that right?
 5 A. Sorry, your question again?
 6 Q. The December 12, 2003, meeting of the Board,
 7 which your memorandum describes, was devoted to
 8 consideration of the R&D Guidelines; correct?
 9 A. Yes, as to how we should proceed.
 10 Q. Yes.
 11 And after describing consultations with the
 12 Federal and Provincial Governments on Page 2, you
 13 described the approach the Board discussed to the
 14 different projects; is that right? If you look
 15 underneath the redacted portion.
 16 A. Um-hmm.
 17 Q. You state there that "Given this
 18 clarification, our approach to each of the projects
 19 could be as follows."
 20 Do you see that?
 21 A. Yes.
 22 Q. In fact, then, in the subsequent discussion,

11:15:56 1 conversation was that in order to apply the Guidelines
 2 to the Hibernia and Terra Nova Projects, the Board
 3 would have to use the POA process to impose the
 4 Guidelines; correct?
 5 A. Yes.
 6 Q. And that was because the Hibernia and the
 7 Terra Nova Projects did not have any requirements in
 8 the decisions adopting their Benefits Plans that a
 9 target level of expenditures be reached; correct?
 10 MR. GALLUS: Sorry to interrupt again. I
 11 just want to warn Mr. Way to be very careful not to
 12 discuss any of the legal advice that he received in
 13 anything that might be within whatever is obviously
 14 privileged here.
 15 MR. RIVKIN: But he can discuss the Board's
 16 rationale, which is what I'm asking him.
 17 MR. GALLUS: He can certainly discuss the
 18 Board's rationale. As long as he doesn't discuss
 19 anything that he was given in terms of legal advice,
 20 anything that could be in that privileged part of the
 21 document.
 22 PRESIDENT van HOUTTE: We understand that,

11:14:03 1 as you describe it, is it fair to say that you
 2 differentiated about the positions of the different
 3 projects with respect to imposing the Guidelines on
 4 them?
 5 A. Yes.
 6 Q. And with respect to Hebron, because that was
 7 a new project, the Board felt comfortable applying the
 8 Guideline throughout the life of the project; correct?
 9 That's Subparagraph (i).
 10 A. Um-hmm. Yes.
 11 Q. And in the case of White Rose, the Board felt
 12 comfortable approving the Guideline because it
 13 specifically stated in the section that we were just
 14 looking at of its decision approving its Benefits
 15 Plan, that the Board would establish a target level of
 16 expenditures; correct?
 17 A. Yes.
 18 Q. And then Subparagraph 3 deals with the Terra
 19 Nova and the Hibernia Projects; correct?
 20 A. Yes, it deals with these two projects.
 21 Q. And the Board received some legal advice
 22 which we don't see, but the net of the--the net of the

11:17:00 1 and whatever legal assumptions are made will be
 2 irrelevant.
 3 THE WITNESS: This is a discussion of
 4 applying the Guideline, the requirement to the Terra
 5 Nova Project and the Hibernia Project on a go-forward
 6 basis.
 7 BY MR. RIVKIN:
 8 Q. And the basis of applying the Guidelines to
 9 those two projects on a going-forward basis was going
 10 to be their POA renewal process; correct?
 11 A. The Production Operation Authorization.
 12 Q. Is that correct? Was my statement correct?
 13 A. Yes.
 14 Q. And without the POAs, the Hibernia and Terra
 15 Nova Projects could not produce any further oil;
 16 correct?
 17 A. That's correct.
 18 Q. And the Board had to--and is it fair to say
 19 that the Board had to use the POA process to impose
 20 the Guidelines on those two projects because their
 21 Benefits Plans and decisions approving those Benefits
 22 Plans did not include a requirement of a target level

11:18:33 1 of expenditures?
 2 A. No. The POA is also used to apply the
 3 Guideline to the White Rose Project, and to Production
 4 Operations Authorization is really the only effective
 5 tool which the Board has to require conformance with
 6 any aspect of a Benefits Plan for any project, and
 7 that will be the case for the Hebron Project as well.
 8 Q. But the Hebron Project was a new project;
 9 correct?
 10 A. Well, it's not a project yet.
 11 Q. Right. But at the time of its application,
 12 the Board required the Hebron owners to agree that
 13 they would apply the Guidelines going forward.
 14 A. The Board hasn't received an application from
 15 the Hebron Project yet.
 16 Q. Okay. But--well, in this memo the Board
 17 states that if you receive an application--
 18 A. Yes.
 19 Q. --the Board will insist on acceptance of the
 20 Guidelines; correct?
 21 A. The Guideline will apply.
 22 Q. Yes.

11:22:15 1 includes a condition requiring compliance with the
 2 applicable Benefits Plan; isn't that right?
 3 A. Yes.
 4 Q. And when the Board issued a POA, it--well,
 5 strike that.
 6 In order to issue a POA, the Board had to be
 7 comfortable that the Proponent was in compliance with
 8 all applicable legislative and regulatory requirements
 9 and their own Benefits Plan; correct?
 10 A. Yes.
 11 Q. And in 2000, the Vice-Chairman--when you were
 12 Vice-Chairman of the Board, the Board approved the POA
 13 for the Hibernia Project; correct?
 14 A. I assume. I can't recall the exact dates of
 15 the issuance of POAs; but if there was a POA issued in
 16 that period at that time, that would have been the
 17 case.
 18 Q. And when the Board approved the POA in 2000,
 19 it did not apply any target expenditure level to the
 20 Hibernia Project, did it?
 21 A. It did not.
 22 Q. The Terra Nova POA was the first one to come

11:19:50 1 And you have informed the Hebron owners that
 2 you will not proceed without an explicit recognition
 3 by them that the Guidelines will apply; correct?
 4 A. I don't recall that we've done that.
 5 Q. You don't recall that the Board has made that
 6 statement to the Board--to Hibernia--to the Hebron
 7 owners?
 8 A. No, I don't recall that we had done that.
 9 Q. Okay. Do you know if the Province required
 10 that agreement by the Hebron owners?
 11 A. I don't know what the Province has required.
 12 Q. And on the last page of this document, you
 13 told the Board--you advised the Board that we should
 14 be prepared to move application of the Guideline to
 15 the POA go-forward dates for Hibernia and Terra Nova;
 16 correct?
 17 A. I'm sorry, where is this?
 18 Q. On the very last page of the document,
 19 Page--either 222 or EMM-2248.
 20 A. Yes.
 21 Q. Okay. Now, we were talking about the POA
 22 process. In every POA that it issues, the Board

11:24:11 1 up for renewal after the Guidelines were in place; is
 2 that right?
 3 A. Again, I don't recall the exact schedule, but
 4 that was probably the case.
 5 Q. Okay. Well, let me refer you to Claimants'
 6 Exhibit 107, again which should be in front of you,
 7 and which is--and which is in Claimants' Core Bundle.
 8 This is a Production Operations Authorization
 9 application; is that correct, Mr. Way?
 10 A. Yes.
 11 Q. And when the Board granted its approval in
 12 January 2005, which is on the third page of this
 13 document, the Board appended some conditions to the
 14 continued operation of the Terra Nova Project; is that
 15 right?
 16 A. Yes.
 17 Q. And that was in addition to the standard
 18 condition that we discussed a moment ago, that the
 19 owners be in compliance with their Benefits Plan as
 20 approved by the decision, and that's Condition 11 on
 21 the prior page; is that right?
 22 A. Which one on this page were you looking at?

11:26:22 1 Q. Page--Condition 11 on Page 2.
 2 A. Yes, I see Condition 11.
 3 Yes.
 4 Q. And the Board included 15, Condition 15, with
 5 respect to the Guidelines because that condition was
 6 not contained within Condition 11; in other words,
 7 these two conditions were not redundant, were they?
 8 A. I'm sorry?
 9 Q. Did each of these conditions have an
 10 independent meaning and basis?
 11 A. I think the purpose in Condition 15 was one
 12 of greater certainty.
 13 Q. The Guidelines were not part of the Benefits
 14 Plan as--or Development Plan as approved by the Board
 15 under Board Decision 9702, were they?
 16 A. These Guidelines?
 17 Q. Yes.
 18 A. They weren't written then.
 19 Q. Right.
 20 And if the Operator had refused to accept
 21 Condition 15 or any of the other conditions, it could
 22 not have continued to operate the Terra Nova Project;

11:29:24 1 particular project that on a cost-benefit basis is
 2 beneficial to that particular project?
 3 A. I believe that they will do what makes sense
 4 for them to do.
 5 Q. And they would do so on a cost-benefit basis;
 6 correct?
 7 A. I presume.
 8 Q. And is it your understanding that the Federal
 9 Accord Act requires that services--that a Benefits
 10 Plan provide that services be accorded first
 11 consideration to suppliers in Newfoundland?
 12 A. Yes.
 13 Q. And research and development are services;
 14 correct?
 15 A. Sometimes it's a service, sometimes it's not.
 16 A service is something you buy, I presume.
 17 Q. It's something that you undertake, isn't it?
 18 A. I regard a service as something I purchase.
 19 Q. Okay. Something that you pay for, one way or
 20 the other?
 21 A. By "purchase a service," if I purchase a
 22 legal service.

11:27:53 1 correct?
 2 A. They could not produce without a Production
 3 Operations Authorization.
 4 Q. Okay. And do you recall that when the
 5 Hibernia owners' POA came up for renewal and they
 6 refused the condition with respect to compliance with
 7 the Guidelines, the Board said it would not approve
 8 the POA?
 9 A. I don't recall it specifically.
 10 Q. Okay. Do you recall that the Hibernia
 11 Proponents noted their objection to the condition in a
 12 cover letter and the Board said that it would not even
 13 accept the objection in the cover letter?
 14 A. I personally don't recall it.
 15 Q. Okay.
 16 MR. RIVKIN: I'll just--to save a little
 17 time, Members of the Tribunal, I will just refer you
 18 to Claimant Exhibits 101, 102, and 103 which sets out
 19 that history.
 20 BY MR. RIVKIN:
 21 Q. Mr. Way, do you believe that oil companies
 22 would fail to do research and development for a

11:31:14 1 Q. You can't--it doesn't have to be paying to a
 2 third party; right? You could be paying it to
 3 somebody internal; that's still a service. They're
 4 still providing a service?
 5 A. In my definition, a service is something you
 6 purchase, not something you would undertake yourself.
 7 Q. Okay.
 8 A. And I think in the Accord legislation, it
 9 talks about the procurement of services.
 10 Q. And when--and what the Accord Act says is
 11 that when an Operator is procuring services, it shall
 12 give first consideration to local suppliers; correct?
 13 A. Yes, based on price, quality, and delivery.
 14 Q. Exactly.
 15 And if--and under the Accord Act, if the
 16 owner feels that the local suppliers cannot compete on
 17 the basis of price, quality, and delivery, they're
 18 entitled to procure those services elsewhere; correct?
 19 A. Yes.
 20 Q. And what the Guidelines do is require the
 21 owners of the projects to procure a certain level of
 22 research and development services or to pay for a

11:32:40 1 certain amount of education and training in the
 2 Province regardless of price, quality, and delivery;
 3 isn't that so?
 4 A. It says clearly in the legislation "in the
 5 Province."
 6 Q. When you say "in the legislation," you're
 7 referring to the Guideline?
 8 A. No, I'm referring to the legislation.
 9 Q. Right. So--
 10 A. The Act.
 11 Q. Okay. And the threshold created in the
 12 Guidelines that owners must meet and that you make a
 13 condition of their POAs, is that they spend a certain
 14 level, a target level of expenditures on R&D; isn't
 15 that correct?
 16 A. Yes.
 17 Q. And they must meet that level, regardless of
 18 whether or not suppliers in--suppliers of R&D in the
 19 Province can compete on the basis of price, quality,
 20 and delivery for those same services; isn't that
 21 right?
 22 A. The Board, in formulating the Guideline that

11:35:17 1 and development?
 2 PRESIDENT van HOUTTE: I don't think we
 3 should go too much into legal considerations.
 4 MR. RIVKIN: Okay.
 5 PRESIDENT van HOUTTE: I don't know what
 6 counsel for Respondent thinks.
 7 MR. RIVKIN: I was asking for his view, but
 8 I'm happy to withdraw the question. That's something
 9 we can argue.
 10 PRESIDENT van HOUTTE: There are too many
 11 legal arguments here.
 12 MR. RIVKIN: Okay, that's fine.
 13 BY MR. RIVKIN:
 14 Q. Mr. Way, in adopting the Guidelines, did the
 15 Board consider the problems that can occur when
 16 project owners have to conduct research that is not
 17 directly applicable to their project and the fact that
 18 they will pay for that work to be done in their
 19 different ownership percentages but then all have
 20 access to whatever research results?
 21 A. No.
 22 Q. And you are aware, for example, that the

11:33:47 1 we're discussing, looks specifically at the research
 2 and development/education and training provision in
 3 the act of Parliament in which was the phrase "in the
 4 Province." It was different than the other area of
 5 the legislation we were talking about procurement of
 6 services.
 7 Q. But you just agreed with me that research and
 8 development is in many cases the procurement of a
 9 service; right?
 10 A. I don't think I did.
 11 Q. Let me ask the question a different way.
 12 If the project owners believe that for their
 13 project, for the particular research which is
 14 necessary, the service--the research and development
 15 is better undertaken elsewhere on the basis of price,
 16 quality, and delivery of service, do they--are they
 17 allowed to reduce their threshold requirement under
 18 the Guidelines?
 19 A. No. The law of Canada doesn't permit it.
 20 Q. It's your testimony that Section 45(3) (d),
 21 which says that services are to be provided on a
 22 first-consideration basis, does not apply to research

11:36:38 1 Hibernia and the Hibernia South owners have different
 2 working interests; is that right?
 3 A. Yes.
 4 Q. And, for example, the Province of
 5 Newfoundland--sorry.
 6 The Province of Newfoundland is a partial
 7 owner of Hibernia South; is that right? Through
 8 Alcor?
 9 A. I understand that to be the case, yes.
 10 Q. And are you also aware that, to the extent
 11 some of the research being conducted--sorry. Let me
 12 ask the question more clearly.
 13 Have you reviewed any of the Work Plans that
 14 have been submitted to the Board by the Hibernia
 15 Project owners in order to meet the shortfall in the
 16 Research and Development Guidelines?
 17 A. I am aware of some of them, yes.
 18 Q. And are you aware that some of the work to be
 19 undertaken under those Work Plans, even if successful,
 20 would not have any application to the Hibernia Project
 21 but could potentially have application to the Hibernia
 22 South Extension?

11:38:18 1 A. I don't recall that detail.
 2 Q. Okay. If that were so, would you agree with
 3 me that the costs of the research and the benefits
 4 being received would not be equal because the working
 5 interests in the two projects are not equivalent?
 6 A. That is not something I would concern myself
 7 with.
 8 Q. Okay. Mr. Way, can you confirm that all
 9 expenditures incurred in connection with projects
 10 approved in the Work Plan, pre-approved in the Work
 11 Plan by the Board will, in fact, ultimately receive
 12 Guidelines credit?
 13 A. I'm sorry, could you repeat that, please.
 14 Q. Yes.
 15 You are--actually, let me--before I get to
 16 that, let me ask a different short set of questions
 17 first.
 18 Would you agree with me--well, I will ask it
 19 a different way.
 20 Is research and development experimental?
 21 A. Some of it is, certainly research.
 22 Q. And it includes the--it involves the

11:40:43 1 any insinuation, how long will you continue?
 2 MR. RIVKIN: I expect no more than five
 3 minutes.
 4 PRESIDENT van HOUTTE: Okay, because then I
 5 would suggest that you will have a break.
 6 MR. RIVKIN: That will be fine.
 7 I'm happy to take the break right now, if you
 8 prefer.
 9 PRESIDENT van HOUTTE: No, that's fine.
 10 BY MR. RIVKIN:
 11 Q. Would you turn to Claimants' Exhibit 188,
 12 please, Mr. Way.
 13 A. Yes.
 14 Q. Do you recognize this document? Actually, we
 15 should probably go into confidential mode at this
 16 point.
 17 THE SECRETARY: Please close the session.
 18 The session is closed.
 19 (End of open session. Confidential business
 20 information redacted.)
 21
 22

11:39:22 1 development, testing and qualifying of new
 2 technologies; correct?
 3 A. Some of that could be a part of development,
 4 yes.
 5 Q. And it--research and development, therefore,
 6 involves a level of technological uncertainty; isn't
 7 that right?
 8 A. I presume.
 9 Q. And in deciding whether a piece of work
 10 qualifies as R&D under the Guidelines, the Board
 11 applies the criterion that the research and
 12 development must be experimental; isn't that right?
 13 A. Not that it must be. There's...
 14 Q. Well, are you--let me--are you aware that the
 15 Board has declared ineligible expenses on the basis
 16 that the project involves no scientific research or
 17 experimental design and includes only the application
 18 of standard engineering practices?
 19 A. Which project are you speaking of?
 20 Q. Well, let's take a look at Claimants'
 21 Exhibit 188.
 22 PRESIDENT van HOUTTE: Mr. Rivkin, without

11:41:27 1 CONFIDENTIAL SESSION
 2 MR. RIVKIN: Okay.
 3 BY MR. RIVKIN:
 4 Q. Do you recognize this document, Mr. Way?
 5 A. It appears to be a staff analysis of a Suncor
 6 proposal.
 7 Q. Of Suncor--of an application by Suncor for
 8 research and development for--and education and
 9 training expenses to count against the guide--as
 10 eligible expenditures; correct?
 11 A. Yes, it appears to be.
 12 Q. Okay. And so take a look at--on Page 5 of
 13 the report, which is EMM-3295, the very bottom
 14 paragraph, about [REDACTED]
 15 A. Where on Page 5?
 16 Q. The very bottom paragraph.
 17 A. Um-hmm.
 18 Q. The Board denied these expenses as eligible
 19 expenses because the project involved no scientific
 20 research or experimental design and includes only the
 21 application of standard engineering practices, the
 22 project is--and the project is, therefore, not

11:42:50 1 eligible; right?
 2 A. Yes.
 3 Q. And if you could take a look at Claimants'
 4 Exhibit 178. It's in the same binder. This is a
 5 similar report for--and Board analysis for Hibernia,
 6 is that right?
 7 A. Yes.
 8 Q. And if you take a look first to Page 3104,
 9 you can see that, for example, with respect to [REDACTED]
 [REDACTED] that's
 11 the second bullet point on the page...
 12 A. Yes.
 13 Q. ...that was deemed to be eligible because a
 14 technological uncertainty exists?
 15 A. Yes, that's what it says.
 16 Q. And the item right below that, which is the
 17 [REDACTED] that
 18 was also considered to be the development and testing
 19 of new technology and, therefore, eligible?
 20 A. Yes.
 21 Q. But if you take a look at--two pages back, on
 22 Page 3102, the [REDACTED] do you see that?

11:46:33 1 certainly no guarantee that it will result in any
 2 success or any useful application; correct?
 3 A. Can you repeat that?
 4 Q. You would agree with me, wouldn't you, that,
 5 if research is experimental, we don't know how it's
 6 going to turn out?
 7 A. I guess so. No one knows how research is
 8 going to turn out.
 9 Q. And it may produce applicable technology and
 10 it may not; right?
 11 A. Some of this is the application of known
 12 technology.
 13 Q. It would not then be deemed either
 14 experimental or technologically uncertain, would it?
 15 A. If it's the application of known technology,
 16 I think our people would generally come to a
 17 conclusion that it is not research and development.
 18 Q. Okay. And you're aware, Mr. Way--well, are
 19 you aware, Mr. Way, of the Board's pre-approval
 20 process required under the Guidelines for research and
 21 development expenditures?
 22 A. Yes.

11:44:51 1 A. Yes.
 2 Q. I'm sorry, the [REDACTED]
 3 There are two of them.
 4 It was deemed to be ineligible because they
 5 were either operational studies or engineering studies
 6 that did not involve any R&D? Do you see that?
 7 A. I see it.
 8 Q. So, the Board considered that there was not
 9 sufficient technological uncertainty or
 10 experimentation in that study; is that right?
 11 A. Yeah. It concludes that part of this work
 12 was eligible and part of it was not.
 13 Q. And the standard being applied was whether or
 14 not the work was sufficiently experimental and
 15 involves sufficient technological uncertainty--isn't
 16 that right?--from the other items we've seen.
 17 A. It says here that they are either operational
 18 studies or engineering studies that do not involve any
 19 R&D.
 20 Q. Okay. And you would agree with me, wouldn't
 21 you, Mr. Way, that when there is technological
 22 uncertainty or when research is experimental, there is

11:47:57 1 Q. And that did not exist before the Guidelines,
 2 did it?
 3 A. Operators did approach us, before the
 4 Guidelines, with some expenditures that they were
 5 contemplating to ask us if we thought it would apply
 6 to the Guideline which was then under development.
 7 So, I guess, strictly speaking, that did precede the
 8 Guidelines.
 9 Q. It was--pre-approval of R&D expenses was not
 10 required prior to the Guidelines, was it?
 11 A. Not that I recall.
 12 Q. And before there was consultation about the
 13 Guidelines, Proponents did not come to the Board and
 14 ask for pre-approval of any research and development,
 15 did they?
 16 A. They submitted their plans every year, which
 17 talked about what they had done in the previous years
 18 and what they were participating doing in the coming
 19 year.
 20 Q. Okay.
 21 A. And while it may have been tacit, it would
 22 have been an opportunity for the Board at that point

11:49:32 1 to express a view.
 2 Q. Okay. Mr. Way, as Vice-Chairman of the
 3 Board, can you confirm that all research and
 4 development expenditures pre-approved by the Board
 5 will, in fact, be deemed as eligible for Guidelines
 6 credit, once completed?
 7 A. No, I can't.
 8 Q. As Vice-Chairman of the Board, can you
 9 confirm whether all of these expenditures will result
 10 in royalty credits?
 11 A. I don't know what a royalty regime--I have no
 12 responsibility for the royalty regime, so I can't
 13 address that question.
 14 Q. Can you confirm whether--again, as
 15 Vice-Chairman of the Board, whether all of these
 16 expenditures will result in credit under the SR&ED
 17 program?
 18 A. No, I can't, and they're not required to.
 19 MR. RIVKIN: I have no further questions.
 20 PRESIDENT van HOUTTE: Thank you, Mr. Rivkin.
 21 Then I suggest that we have 15 minutes'
 22 break.

12:09:40 1 OPEN SESSION
 2 REDIRECT EXAMINATION
 3 BY MR. GALLUS:
 4 Q. I have one quick question for you, Mr. Way,
 5 arising from the questions that were asked of you by
 6 Mr. Rivkin, and that's with regard to an issue he was
 7 addressing with regard to Guidelines and whether they
 8 are forward-looking or backward-looking.
 9 I think his point was that previous
 10 Guidelines before the Research and Development
 11 Guidelines were all forward-looking in the sense that
 12 they only apply to projects that would receive
 13 approval in the future, and I was just wondering if I
 14 could refer you to Paragraph 40 of your First Witness
 15 Statement, and if you could just highlight the second
 16 sentence there from in 2002--so, take your time.
 17 You see Paragraph 40 there?
 18 A. Yes.
 19 Q. You see the second sentence beginning in
 20 2002?
 21 A. Paragraph 40?
 22 Q. Yes.

11:50:31 1 And Mr. Way you are still as a witness in
 2 function; therefore, you are obliged not to speak to
 3 anyone, either of the Canadian team or the other team.
 4 THE WITNESS: We're allowed 15 minutes.
 5 PRESIDENT van HOUTTE: It will be 15 minutes
 6 of solitary confinement. Thank you.
 7 (Brief recess.)
 8 THE SECRETARY: Are we now in open session?
 9 MR. GALLUS: We are open.
 10 THE SECRETARY: Please open the session.
 11 (End of confidential session.)
 12
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12:11:09 1 You see the second sentence, starting in
 2 2002?
 3 A. Yes.
 4 Q. And you're referring to there to the 2002
 5 updated Offshore Waste Treatment Guidelines?
 6 A. Yes.
 7 Q. And those updated Guidelines were issued in
 8 2002?
 9 A. Yes.
 10 Q. And they applied to the Terra Nova Project?
 11 A. They would have applied to all projects in
 12 the area.
 13 Q. So, they applied to the Terra Nova Project,
 14 even though it was Benefits Plan was approved in 1997?
 15 A. Yes.
 16 Q. And it applied to the Hibernia Project?
 17 A. Yes.
 18 Q. Even though the Hibernia Benefits Plan was
 19 approved in 1996?
 20 A. Yes.
 21 MR. RIVKIN: Mr. President, I have an
 22 objection to the relevance. The Benefits Plan has

12:11:50 1 nothing to do with Offshore Waste Treatment.
 2 PRESIDENT van HOUTTE: I don't know whether
 3 it should be an objection or you should address this
 4 issue when you are readdressing the witness.
 5 Mr. Gallus.
 6 MR. GALLUS: We have no further questions.
 7 MR. RIVKIN: May I ask a question along those
 8 lines?
 9 PRESIDENT van HOUTTE: Yes.
 10 RE-CROSS-EXAMINATION
 11 BY MR. RIVKIN:
 12 Q. Mr. Way, do Benefits Plans deal with Offshore
 13 Waste Treatment?
 14 A. No, that's dealt with by the Development
 15 Plan.
 16 Q. Thank you.
 17 MR. GALLUS: Could I have a follow-up
 18 question?
 19 PRESIDENT van HOUTTE: Yes, you may.
 20 FURTHER REDIRECT EXAMINATION
 21 BY MR. GALLUS:
 22 Q. And the Hibernia Development Plan, when was

12:13:47 1 his, I guess, first statement, he says--now, it gives
 2 the history of the Guidelines, and it says,
 3 Paragraph 9, that after January 2002 when you had the
 4 specific consultant, Mr. Feehan or whatever, the
 5 Statistics Canada was discovered as a possible
 6 benchmark.
 7 THE WITNESS: Yes.
 8 PRESIDENT van HOUTTE: Then, you proceeded on
 9 those lines, then there were consultations with the
 10 industry. And then I go to Paragraph 22, the
 11 Operators made a further presentation, and then I
 12 quote, "the Operators were not willing to provide
 13 cumulative dollar figures or benchmarks."
 14 And from that I concluded--implied they--that
 15 they did not include any benchmark, including
 16 Statistics Canada, so am I wrong or am I right? In
 17 other words, they, in fact, opposed the notion of the
 18 bench?
 19 THE WITNESS: I think they certainly opposed
 20 the notion of the Guideline. I don't recall any
 21 specific criticism or rejection on their part of using
 22 Statistics Canada benchmark.

12:12:37 1 that approved?
 2 A. First approved in 1986.
 3 Q. And the Terra Nova Development Plan was
 4 approved in 1997?
 5 A. Yes.
 6 Q. Thank you.
 7 PRESIDENT van HOUTTE: No other questions?
 8 MR. GALLUS: No.
 9 QUESTIONS FROM THE TRIBUNAL
 10 PRESIDENT van HOUTTE: The Tribunal has a few
 11 question, and Mr. Way, I'm sorry, but I have four
 12 questions just to understand better the mechanisms
 13 which have been followed.
 14 The first question is, yes, when yesterday,
 15 Mr. Smyth was a witness here, we discussed this
 16 statement, and today you said that the--if I
 17 understood it correctly--that the Operators did not
 18 object to a benchmark. Did I understand it correctly?
 19 THE WITNESS: They objected to the Guideline,
 20 but I don't recall any specific objections to the
 21 benchmark that we were proposing.
 22 PRESIDENT van HOUTTE: Because when I go to

12:15:02 1 PRESIDENT van HOUTTE: And my second question
 2 is, then, I guess you also mentioned this morning that
 3 there was a possibility to discuss alternatives,
 4 alternative solutions, but I go back to Mr. Smyth's
 5 statement, Paragraph 22, where it says, and I will say
 6 it in a very simplistic way, the alternatives could
 7 have been proposed as long as they yielded the same
 8 result. In other words, and maybe I misunderstand it,
 9 as long as the results, the monetary results, of the
 10 proposal was the same as what was proposed by the
 11 Board, it was fine, but it should have the same yield.
 12 Now, my impression when I read that was, was
 13 it more a question of money, or was it more a question
 14 of research and development?
 15 THE WITNESS: It was a question of money. We
 16 were being motivated by the legislation, which talked
 17 of requirement for research and development
 18 expenditures, and what we were searching for was what
 19 would be an appropriate expenditure. Clearly, zero
 20 would not have been appropriate, clearly a penny or a
 21 dollar would not have been appropriate, but where to
 22 find an appropriate measure in there was what we were

12:16:39 1 looking for.

2 PRESIDENT van HOUTTE: And my third question
3 is--concerns the use of a benchmark. And let's say I
4 will make an analogy to the Stock Exchange because
5 that's a more innocent area, probably, I don't know,
6 than oil.

7 Now, a benchmark is an average.

8 THE WITNESS: Yes.

9 PRESIDENT van HOUTTE: And average means that
10 you have companies which are above the average and
11 companies which are below the average. The same for
12 the research and development: Probably you will have
13 companies which are above the average and companies
14 which are below the average, and the average is the
15 benchmark.

16 Now, those companies are doing research and
17 development besides legal obligations because they
18 think research and development is necessary. You do
19 not do research and development to please your
20 Government. You do it just because you think it's
21 necessary. I would say that's a starting point.

22 Companies which are doing more research and

12:19:06 1 cannot regulate groups of companies or an industry; we
2 can only regulate a company. So, we did not have the
3 luxury--on this, the industry came forward with their
4 own proposal, as we'd invited them to. Failing
5 that--and which the Operators still have the ability
6 to do in the Guideline, but if they leave it to us to
7 regulate, we can only have a regulatory relationship
8 with an individual Operator.

9 PRESIDENT van HOUTTE: And then, my last and
10 final question relates to this discussion about the
11 anecdote, if I may use that word, that some expenses,
12 research expenses, were not accepted because they, and
13 I quote on Page 100, "because the project involved no
14 scientific research or experimental design and
15 includes only the application of standard engineering
16 practices," and this was discussed this morning.

17 Now, we all know that the points of the
18 benchmark is the statistics--Statistics Canada, where
19 I assume research and development is a specific item
20 and they get information for the companies, and then
21 they make their statistics on the basis on what has
22 been qualified in their eyes as research and

12:17:40 1 development than the average company, they know very
2 well why they are doing it, and they will not decrease
3 their research and development because there is a
4 statute which says that they are not obliged to do so
5 much research and development or they are not incited
6 or whatever, whatever word you use.

7 On the other hand, the companies which are
8 doing less research on the development, because of the
9 legal rules or the Guidelines--you could call it the
10 way you want--are incited--I use that word--to do more
11 research and development. The final result will be
12 that the average increases, because those will do more
13 anyway, and those who did less than the average will
14 do more, which means that the average increases.

15 Is that a correct perception, or where am I
16 mistaken here?

17 THE WITNESS: So, you're not mistaken, and
18 benchmarks are surely averaged. The Statistics Canada
19 number is an averaging process.

20 Unfortunately, we are a regulator. As a
21 regulator, you are not enabled or entitled to do as
22 much free thinking even as governments are. So, we

12:20:40 1 development.

2 Yesterday, I asked your colleague whether it
3 was possible for the Board to apply the same criteria
4 as Statistics Canada so that when some amounts in
5 research and development have been included in the
6 statistics, that you can also deduct them yourself
7 from the amounts you have to invest in the research
8 and development. My question to you--and there the
9 answer was, no, we cannot do it because it's very
10 confidential and Statistics Canada do not--are not
11 transparent on the date that they are giving. I guess
12 that is how I understood it, and I accept that.

13 But my question is the following: It's a
14 question of methodology again. Apparently, Statistics
15 Canada has a specific methodology to qualify something
16 as research and development to enter as such in their
17 statistics.

18 Now, did you, as a Board, make sure that your
19 notion of research and development was exactly the
20 same as the notion of research and development of
21 Statistics Canada, or didn't you care, or didn't you
22 think that important? Because, to some extent, you

12:22:02 1 are using Statistics Canada to put the threshold, but
2 you are--that's my impression--using your own
3 definition of research and development to allow the
4 deductions from the threshold. But am I wrong, or am
5 I right?

6 THE WITNESS: That's a long question.

7 We purposely, in formulating a definition of
8 what we would consider as research and development in
9 the Guideline, we were very conscious that this was
10 broader than the Statistics Canada definition, and we
11 were also aware that it was broader than the revenue
12 Canada--the Canada Revenue Agency, the tax
13 collector--it was broader than their definition of
14 scientific research and experimental development,
15 which is a specific term in their legislation. What
16 we did in the Guideline was, if something meets these
17 definitions, then it's automatically covered, we want
18 to make this broader so that it could look at things
19 like education, infrastructure, scholarships, funding
20 of chairs at the university and so on, which would not
21 have been included in the Canada Revenue Agency
22 definition or in the Statistics Canada definition.

12:24:58 1 whatever. The Parliament of Canada had previously
2 just drafted a very similar piece of legislation for
3 application in another Canadian Province in which it
4 added a phrase "with respect to the offshore," or some
5 similar language, I am not entirely--but it did put
6 that requirement in the legislation for the other
7 Province, Nova Scotia. The same Government did not
8 put it in the legislation in Newfoundland so, it was
9 the same government, so therefore there was a
10 conscious difference.

11 There is no requirement in our legislation
12 that the research and development be for their
13 project, a project, or an industry. It just says,
14 research and development, education and training, in
15 the Province.

16 ARBITRATOR JANOW: See, I think prior to the
17 introduction of Guidelines and--If I'm understanding,
18 it was a kind of case-by-case review in looking at the
19 expenditures that were being made for R&D and E&T in
20 the Province of the Project Operator.

21 And if I am understanding the evolution,
22 there was a change, then, to the introduction of a

12:23:38 1 PRESIDENT van HOUTTE: But that's another
2 category, it's E&T, but under R&D, it may be a
3 different notion than Statistics Canada?

4 THE WITNESS: Well, the chairs at the
5 university could have been purely research meant these
6 people may not be teaching. Some of these chairs are
7 purely research chairs.

8 PRESIDENT van HOUTTE: Thank you very much.
9 My colleagues?

10 ARBITRATOR JANOW: I just have a couple of
11 questions to understand how the Guidelines were
12 designed.

13 Could you just say a little bit more. Do the
14 Guidelines now take into consideration the actual R&D
15 and E&T needs of a particular Operator? Does that
16 come into the process at all now?

17 THE WITNESS: No, it doesn't, and the Board
18 was very deliberate about this. We focused on what
19 the legislative language was in the Act of Parliament.

20 In our legislation, it simply said, research
21 and development, education and training in the
22 Province. It didn't say, in respect of a project or

12:26:16 1 benchmark.

2 So, what I'm trying to ask you to say a
3 little bit more about is the extent to which
4 individual Operators are relevant to the establishment
5 of a benchmark or you're thinking of about whether to
6 establish a benchmark or how to establish a benchmark.

7 THE WITNESS: A lot of our--as I say, we
8 first addressed this in a structured thinking when we
9 were considering the White Rose Decision in the fall
10 of 2001.

11 We had received these reports, performance
12 reports, from the existing Operators in the spring of
13 2001 in which the expenditures were dropping and
14 projected to drop further.

15 And this, of course, was against the
16 background, and we had gone through a fairly long
17 debate in Canada, in eastern Canada--it was called the
18 Atlantic Energy Roundtable, whereby the main key
19 mantra that was coming forward from industry to
20 Governments and regulators was, give us certainty;
21 give us benchmarks. We can't live with uncertainty.
22 Tell us what you want as regulators, and then we will

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12:27:38 1 do it.

2 So, industry was very much advocating
3 certainty and benchmarks from Governments and from
4 regulators in that period.

5 ARBITRATOR JANOW: Okay. Thank you. That's
6 a helpful comment.

7 I think, if I'm understanding properly, the
8 Stats Can benchmark was, in effect, one way of looking
9 at national norms for private sector investment in
10 R&D. I think that was a notion that was in your
11 submission. But in evaluating a national norm, is
12 the--sort of the age of a project, the production
13 capacity of a project, other attributes of a project
14 kind of relevant in evaluating whether that project's
15 R&D expenditures would naturally be in line with or
16 not in line with the national norm?

17 THE WITNESS: I'm not certain--I'm not
18 certain that I understand the question.

19 We were dealing with the offshore, which was
20 a new area in Canada and our area only produces 3-
21 400,000 barrels a day. Canada is a much larger
22 producer, but also Canada was entering a different era

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12:30:42 1 relevant comparator for this the industry.

2 ARBITRATOR JANOW: Let me ask you another
3 question. Did I understand you to say that the
4 Operators were asking for a benchmark, just give us a
5 benchmark, because I understand--

6 THE WITNESS: They weren't asking for a
7 benchmark specifically in R&D, but in the old--there
8 was a large discussion in Canada which involved the
9 oil industry, particularly the offshore oil-and-gas
10 industry, governments, and regulators; and, in that,
11 it was a very familiar theme of the industry to say to
12 Governments and regulators, give us certainty, we need
13 benchmarks--if you're expecting us to operate in a
14 certain way, give us some certainty. So, they need
15 it. They were looking for benchmarks and performance
16 expectations.

17 ARBITRATOR JANOW: So, just to be clear, so,
18 you felt that a benchmark was necessary to offer the
19 Operators the answer to your question of certainty.

20 THE WITNESS: We thought it would be helpful.

21 ARBITRATOR JANOW: Okay. Thank you very
22 much.

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12:29:20 1 of petroleum production as well with the oil sands and
2 so on, which were new areas.

3 So, I'm not sure that there was any
4 standardization, whether it was age or maturity of
5 project, but I think it might have been that the
6 country was going into new areas anyway in oil and gas
7 production. I'm not sure if that's helpful or...

8 ARBITRATOR JANOW: I guess it offers a
9 perspective about the extent to which there was such a
10 thing as a national norm.

11 THE WITNESS: There were no--this was the
12 closest we could find to a national norm. It
13 certainly applied to the industry we were looking, the
14 specific part of the industry was--I think the term in
15 the Statistics Canada catalog is the upstream oil and
16 gas extraction companies.

17 We looked up a lot of other norms, none of
18 which--we looked at other industries, for instance,
19 the pharmaceutical industry, the chemical industry, it
20 was all very high, much higher than the petroleum
21 industry. So, clearly that wasn't a relevant--even
22 though they were large corporations, but it wasn't a

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12:31:51 1 ARBITRATOR SANDS: Just a number of
2 questions.

3 Just coming back to the question to
4 alternative methodologies as opposed to benchmark,
5 what consideration, if any, was given to alternative
6 approaches to setting in a predictable certain way the
7 amount that would have to be expended on R&D? Were
8 other options than the benchmark option considered?

9 THE WITNESS: I think rather--rather than
10 looking for alternatives, we spent some time looking
11 for what would be an appropriate benchmark, and the
12 language in the White Rose Decision probably reflected
13 that. We were looking at something that would
14 represent reasonable national or industry norms.

15 ARBITRATOR SANDS: And what drove you to
16 that? I asked the question just because, if you read
17 Article 45(3)(c) of the relevant legislation, the
18 Acts, it doesn't obviously indicate, on its face, any
19 particular criteria. So, another option would be just
20 to take an annual amount for per project.

21 I am just curious to know what was the basis
22 upon which you jumped, as you apparently say you did,

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12:33:14 1 to benchmark rather than consider other models.
 2 THE WITNESS: And this would probably come
 3 from a reading of the Atlantic Accord, if you like,
 4 more than the legislation; but, of course, the accord
 5 is incorporated into the legislation by Section 17.
 6 And this concept behind the Atlantic Accord
 7 was that this was a depleting resource which should be
 8 developed in some way to leave some--when the resource
 9 is depleted, to leave some lasting or legacy benefit
 10 to the resource owners.
 11 ARBITRATOR SANDS: And so, as you--sorry.
 12 THE WITNESS: And I think that--just--and I
 13 think we tried to reflect that in the Preamble to the
 14 Guideline.
 15 ARBITRATOR SANDS: And so, as you were
 16 looking to the alternative and jumping to benchmarks,
 17 to what extent did you have in mind the benefit that
 18 expenditure on R&D would bring either to the Project
 19 Operator or to the region?
 20 THE WITNESS: We focused on the region.
 21 ARBITRATOR SANDS: So, you didn't take into
 22 account at all, did you, the benefit to the Operator?

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12:36:17 1 you, so to speak--and the new Operators are subject to
 2 the Guidelines. I'm not expressing a view on the
 3 merits or the demerits of the approach, but it was
 4 another option. Why was that option not adopted?
 5 THE WITNESS: I think the piece you had to
 6 look at in there was the reports that we were
 7 receiving in the spring of 2001, which indicated a
 8 significant decline and projected a continuing decline
 9 by the existing Operators. So, that's why we felt
 10 that this Guideline will would be helpful to them as
 11 well on a going-forward basis.
 12 ARBITRATOR SANDS: Just a final
 13 question--it's just a mechanics question--for those
 14 pre-existing Operators, Hibernia and Terra Nova, who
 15 got their Benefits Plans, Guidelines come in, a new
 16 regime emerges, what exactly happens to the Benefits
 17 Plans? Is there some formal process of amendment, or
 18 does the system under the Guidelines operate
 19 side-by-side and in addition to the Benefits Plan,
 20 modalities for making that change.
 21 THE WITNESS: It operates side-by-side
 22 with--I can't recall there being an amendment to a

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12:34:49 1 THE WITNESS: We certainly didn't want it to
 2 be an unreasonable requirement on the Operator, but we
 3 were certainly looking at the region and the
 4 community, as was--we felt we were directed to by the
 5 legislation.
 6 ARBITRATOR SANDS: Just moving on from that,
 7 so, you find yourself in a situation in 2001-2002
 8 where you have existing Operators and possible future
 9 Operators. So, another scenario altogether would have
 10 been a possibility that there would be different
 11 regimes for different actors. The existing Operators
 12 would operate by reference to the regime that applied
 13 from the mid-Eighties onwards, and the new Operators
 14 would apply by reference to a Guideline system. Why
 15 was that possibility not adopted?
 16 THE WITNESS: I'm sorry, I don't understand.
 17 ARBITRATOR SANDS: I mean, putting it another
 18 way, you didn't have to decide that the Guidelines
 19 applied in relation to Operators that already had a
 20 Development Plan and a Benefits Plan, but that they
 21 could continue to operate on their pre-existing
 22 system--they decide how much they are going to give

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12:37:49 1 Benefits Plan. There may have been, but I can't
 2 recall there being one. There would have been lots of
 3 amendments to Development Plans.
 4 ARBITRATOR SANDS: Thank you.
 5 PRESIDENT van HOUTTE: Do the Counsel have
 6 questions?
 7 MR. GALLUS: No questions from Canada.
 8 MR. RIVKIN: I have a couple of short
 9 questions, if I may, which I think might help
 10 illustrate your questions.
 11 PRESIDENT van HOUTTE: (Off microphone.)
 12 MR. RIVKIN: Absolutely.
 13 FURTHER RE-CROSS-EXAMINATION
 14 BY MR. RIVKIN:
 15 Q. I'm not sure if it's in the documents in
 16 front of you, Mr. Way, but could you look and see if
 17 Claimants' Exhibit 135 is there. If not, then Greg
 18 will hand it to you. And if Greg is handing it to
 19 you, that means it is not in your Common Bundle,
 20 either. Do we have other copies? Yes, please.
 21 Mr. Way, these are notes from a meeting that
 22 you and others from the Board had with members of

12:38:54 1 industry in May 2004; is that right?
 2 A. Yes.
 3 Q. And-and this memo, Mr. MacDonald is with the
 4 Board; is that right?
 5 A. He was a worker with us, yes.
 6 Q. Yes. So, he was reporting to you and others
 7 on what happened at the meeting; right?
 8 A. Um-hmm.
 9 Q. He said there that the industry indicated, if
 10 you look at the fourth paragraph from the bottom of
 11 the first page, that the alternative was based on
 12 needs and project requirements, not a specified dollar
 13 level; is that right?
 14 A. Yeah, that's what that sentence says, yes,
 15 that's correct.
 16 Q. And you asked for an individual dollar
 17 figure, and industry said no, none was available, but
 18 there were annual R&D spends; is that right?
 19 A. Um-hmm.
 20 Q. And in part, nothing--and you knew at this
 21 point--
 22 (Pause.)

12:41:46 1 paragraph.
 2 Q. Okay.
 3 A. The line.
 4 Q. And Tim Cutt, he was also from Hibernia;
 5 correct?
 6 A. Yes.
 7 Q. And he informed you there wasn't much R&D
 8 left to spend in Hibernia; isn't that right?
 9 A. Where does Mr. Cutt say that?
 10 Q. Immediately below Mr. O'Keefe's line that you
 11 were just looking at.
 12 A. Yes.
 13 Q. Okay. And that's because Hibernia was in an
 14 operations phase, and they had already solved the very
 15 difficult design and construction problems associated
 16 with operating in the offshore environment; isn't that
 17 right?
 18 A. Yes. We acknowledge Hibernia had spent a lot
 19 of money up to that point.
 20 Q. And, for example, they already had a very
 21 effective mechanism for controlling icebergs?
 22 A. There had been considerable advances in ice

12:40:11 1 Q. You asked for an individual dollar figure,
 2 and the industry said none were available, but there
 3 were annual R&D spends; correct?
 4 A. Yes.
 5 Q. And until 1998, the Board did not require
 6 specific reporting on R&D expenditures, did it?
 7 A. I don't know. I wasn't at the Board in '98.
 8 Q. Were you aware in May 2004 that Hibernia had
 9 already spent more than \$100 million on research and
 10 development?
 11 A. I was aware they spent a lot. I don't recall
 12 what the number actually was.
 13 Q. Well, let's look at Page 2.
 14 On Page 2, Mr. O'Keefe, who used to be at
 15 Board and has now--at ExxonMobil--at Hibernia; right?
 16 Mr. O'Keefe told you that Hibernia had spent a \$100
 17 million just on SR&ED, on research and development in
 18 the Development Phase?
 19 A. You're reading that here somewhere?
 20 Q. It's the fourth paragraph down on the second
 21 page. Do you see the statement by Ted O'Keefe?
 22 A. Oh, yes. Ted O'Keefe, yes. Yeah, I see the

12:42:59 1 management technology in the area, yes.
 2 Q. And, in fact, some of those advancements were
 3 by Hibernia, through their research; right?
 4 A. Yes.
 5 Q. And they already had them in place in 2004?
 6 A. Yes.
 7 Q. Okay. And you state, then, through the rest
 8 of this memo--you were recorded as saying, for
 9 example, industry has a problem with targets. You're
 10 willing to consult further, but not too much further,
 11 maybe June, and then you said, industry has to present
 12 something consistent with our 0.6, then we may
 13 consider it.
 14 Do you see that?
 15 A. Yes.
 16 Q. So, essentially you wanted a fixed sum,
 17 however that came about?
 18 A. Yes.
 19 Q. And regardless of which project was involved,
 20 regardless of which project--which phase each project
 21 was in?
 22 A. We weren't focusing on the needs of projects.

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12:43:57 1 Q. Yes. Thank you.
 2 MR. RIVKIN: And Members of the Tribunal,
 3 because you asked some questions around this area, I
 4 will refer you also to Claimants' Exhibit 130, 131,
 5 131(a), 132.
 6 ARBITRATOR SANDS: Would you slow down.
 7 MR. RIVKIN: Sure. 130, 131, 131(a), 132,
 8 133, 136, and 138.
 9 And also to Mr. Phelan's Witness Statement.
 10 I believe it is his Second Witness Statement at
 11 Paragraphs 29 and following in which he discusses
 12 these issues.
 13 BY MR. RIVKIN:
 14 Q. Mr. Way, you were asked also by the Chairman
 15 some questions about what the research and development
 16 that goes into the Stats Can report. Are you aware
 17 that companies report R&D to Stats Can that is
 18 subsequently disallowed by the CRA as eligible under
 19 the SR&ED Guidelines?
 20 A. No, I'm not aware. It could be the case, but
 21 I'm not aware.
 22 MR. RIVKIN: Thank you.

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12:46:56 1 you shouted at Mr. Cutt or what the significance of
 2 the exclamation point might be, but you did say,
 3 following that, present an alternative, then?
 4 A. The industry had asked for a consultation.
 5 Recall, this was 2004, and we had started this process
 6 in 2001, 2002, and industry was asking for time to
 7 present an alternative, and we said yes. I would
 8 think that two years later we were probably running
 9 out of patience because industry hadn't presented
 10 anything.
 11 Q. And Mr. Rivkin also referred you to your
 12 comment at the bottom of the page, "spending and
 13 outlook must be close to .6 percent," if we could
 14 highlight that part.
 15 A. Yes.
 16 Q. In this document or at any other time, did
 17 the Operators challenge this specific benchmark?
 18 A. No, I don't recall them challenging the
 19 .6 percent or the Statistics Canadian piece. I don't
 20 recall any specific objection on their part to that.
 21 MR. GALLUS: Thank you.
 22 MR. RIVKIN: Just clarify to a factual

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12:45:26 1 PRESIDENT van HOUTTE: Mr. Gallus?
 2 MR. GALLUS: Canada will just take one moment
 3 to consult.
 4 PRESIDENT van HOUTTE: Yes.
 5 (Pause.)
 6 MR. GALLUS: Canada just has two follow-up
 7 questions to the document to which the Claimants
 8 referred Mr. Way.
 9 FURTHER REDIRECT EXAMINATION
 10 BY MR. GALLUS:
 11 Q. On the page to which you are referring, Mr.
 12 Way, to the second page of this document, Mr. Rivkin
 13 referred you to the comment of Mr. Cutt--I think
 14 that's the document. Yes, the second page, we have
 15 the quote from Tim Cutt, if we could find that on the
 16 second page.
 17 A. Yes.
 18 Q. Where Mr. Rivkin referred to the passage
 19 where Mr. Cutt says what it says on the screen there.
 20 Then, have you a follow-up to that, where you
 21 said, present an alternative there, and there is an
 22 exclamation manager mark. I'm not sure if that means

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12:48:19 1 statement.
 2 FURTHER RE-CROSS-EXAMINATION
 3 BY MR. RIVKIN:
 4 Q. Mr. Way, Mr. Smyth says, in Paragraph 12 of
 5 his First Witness Statement, the consultation draft of
 6 the Guidelines was first sent to industry in
 7 July 2003; is that correct?
 8 A. If Mr. Smyth says it, then I guess it's
 9 correct. There were discussions with industry before
 10 that, though.
 11 Q. Well, that's not actually what Mr. Smyth or
 12 you state in your Witness Statements, and you would
 13 agree with me that July 2003 to May 2004 is less than
 14 two years, wouldn't you?
 15 A. I would think so.
 16 Q. Okay. Thank you.
 17 PRESIDENT van HOUTTE: That puts an end on
 18 the examination of Mr. Way. Thank you very much for
 19 your testimony, and now we will have--of course you
 20 are released from the witness stand.
 21 (Witness steps down.)
 22 PRESIDENT van HOUTTE: We will reconvene at

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12:49:15 1 2:00, but before, I would like--or the Tribunal would
 2 like to have a short conversation with the two
 3 counsel.
 4 THE SECRETARY: Please close the session.
 5 (Whereupon, at 12:49 p.m., the hearing was
 6 adjourned until 2:00 p.m., the same day.)
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02:10:50 1 information redacted.)
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1 AFTERNOON SESSION
 2 PRESIDENT van HOUTTE: Good afternoon,
 3 Mr. Robert Rosen.
 4 THE WITNESS: Howard Rosen.
 5 HOWARD N. ROSEN, CLAIMANTS' WITNESS, CALLED
 6 PRESIDENT van HOUTTE: Welcome. You have
 7 been here. You know how it works. You are an expert
 8 witness. And can you just repeat, I hereby declare
 9 upon my conscience and honor...
 10 THE WITNESS: I hereby declare upon my
 11 conscience and honor...
 12 PRESIDENT van HOUTTE: ...that I will make my
 13 statements to the best of my knowledge.
 14 THE WITNESS: ...I will make my statements to
 15 the best my knowledge.
 16 PRESIDENT van HOUTTE: Thank you.
 17 MR. DOUGLAS: Thank you, Mr. President. I
 18 believe we are in a closed session.
 19 THE SECRETARY: Please close this session.
 20 Confirmed?
 21 Thank you.
 22 (End of open session. Confidential business

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02:10:50 1 CONFIDENTIAL SESSION
 2 DIRECT EXAMINATION
 3 BY MS. LAMB:
 4 Q. Mr. Rosen, you've provided three reports in
 5 this arbitration. Do you confirm those reports and
 6 the conclusions that you've arrived at?
 7 A. Based on the information available to me, at
 8 the date of writing those reports, yes, I do.
 9 Q. Mr. Rosen, perhaps you'd like to say just a
 10 few words about your credentials and experiences in
 11 these types of matters.
 12 A. I am a Chartered Accountant, which is a
 13 professional accounting designation in Canada.
 14 I'm also a Chartered Business Valuator. And
 15 for the past 30 years, I have been providing analysis
 16 of business valuation and damages claims in litigation
 17 cases in Canada and the U.S., and in international
 18 arbitration cases around the world.
 19 I have provided evidence in courts and
 20 Tribunal hearings over 100 times over the last 30
 21 years, and I'm in charge of a group of individuals at
 22 FTI who specialize in doing damage analysis and

02:12:03 1 valuations in the context of treaty and commercial
2 arbitration work.
3 Q. Thank you.
4 By way of direct examination, I'm going to
5 ask Mr. Rosen just to say a few words about his
6 methodology, and also to explain where, in his view,
7 the Experts have taken a consistent approach and, by
8 contrast, where they diverge and the reasons for that.
9 Mr. Rosen has prepared some slides by way of
10 visual aid for some of those points. Before I hand
11 those to you, I would just like Mr. Rosen to confirm
12 where there is information in those slides, where does
13 it come from?
14 A. The information in the slides either comes
15 from either Mr. Walck's report, from one of my
16 reports, or from the exhibits that are before this
17 Tribunal. There's no new information in--
18 MS. LAMB: Thank you.
19 PRESIDENT van HOUTTE: Did you receive the
20 slides already?
21 MR. DOUGLAS: We have not, Mr. President.
22 PRESIDENT van HOUTTE: When you have any

02:14:48 1 price of oil which is equal to the U.S. dollar price
2 of oil multiplied by an exchange rate. That price is
3 multiplied by a volume of production, a Stats Can
4 factor is applied to that, and a Development Phase
5 credit which was allowed for the period 2004 through
6 2008 was applied to that number.
7 That gives us a total amount of spending.
8 From that there must be deducted ordinary course
9 spending in order to determine what would be ordinary
10 course spending in the future. I examined what was
11 ordinary course spending in the absence of incremental
12 spending, and normalized that spending, and I'll
13 discuss that in more detail, but I normalized that
14 spending to project what would be ordinary course
15 spending in the future. That produced an annual cost
16 or an annual excess incremental spending; and, in
17 order to quantify that as a single number as a present
18 value, you're required to take the present value of
19 that sum at a discount rate; and then the question is
20 what should the appropriate discount rate; and for
21 that I used a Government of Canada Bond which is known
22 as a risk-free rate of return; and I also needed to be

02:13:08 1 objection, then please indicate.
2 MS. LAMB: Thank you. So, can I please ask,
3 then, that the handouts be distributed.
4 MR. DOUGLAS: Mr. President, we just want to
5 reserve the right to review them and make comments on
6 them later as well.
7 BY MS. LAMB:
8 Q. So, Mr. Rosen, perhaps you would like to
9 begin, then, by saying a few words about your general
10 approach to damages in this case.
11 A. Yes. The approach I took in valuing damages
12 in this case was consistent across my three reports.
13 I attempted to do a but-for damages calculation, but
14 for the alleged measure and assuming that the alleged
15 measure violated NAFTA and that the Claimant was
16 entitled to damages, how would you calculate monetary
17 damages to put the Claimant in the position they would
18 have been but for the alleged measure.
19 To do so, I started with a calculation of the
20 net research and development requirement. That is
21 calculated as a function of gross revenue, and the
22 gross revenue is a function of the Canadian dollar

02:16:02 1 mindful of how Income Taxes would impact the award and
2 the amounts spent as incremental spending by the
3 Claimant--by the Claimant companies in Canada. And
4 that is the general methodology I used, the general
5 approach to quantify damages.
6 Q. Can you just talk us through this slide, and
7 in particular there seems to be a sort of designation
8 of time period as we move across the top axis there.
9 Can you explain to the Tribunal what the chart
10 represents?
11 A. So, what I wanted the Tribunal to get an
12 appreciation for was some of the information that I'm
13 relying on and quantifying damages is historical, as
14 past, and some of it occurs in the future. And the
15 variables listed down the left column, the U.S. dollar
16 price of oil, the exchange rate, oil production
17 volumes, the statistics Canadian factor, the
18 Development Phase credit, and spending in the ordinary
19 course were the main variables, as I just identified
20 in the approach, that go into the calculation of
21 damages.
22 So, for the initial period April 1, 2004, to

02:17:16 1 the end of 2004, all of that information is
2 historically known and accepted by the Board, so that
3 is just a matter of fact that has happened in the
4 past.

5 For the second period, which is the calendar
6 Year 2009--

7 Q. Sorry, Mr. Rosen, the LiveNotes reflects that
8 you said April 1st, 2004, to the end of 2004.

9 A. I'm sorry, to the end of 2008, as the slide
10 indicates. My mistake.

11 And that calculation, if you look at the top
12 of the column, is [REDACTED] and it accounts for
13 approximately [REDACTED] of the total damages
14 calculation.

15 I move across the columns now to the Calendar
16 Year 2009, and again I look at the first four
17 variables, the U.S. dollar price of oil, the Canadian
18 U.S. exchange rate, the oil volume produced, and the
19 Statistics Canada factor, and again those are all
20 historical amounts that are known and acknowledged by
21 the Board. The Development Phase credit for the
22 initial period April 2004 through December 2008 is

02:19:49 1 normalization of what I expected would be ordinary
2 spending in the ordinary course, and I'll--I have a
3 later slide discussing that in a little bit more
4 detail.

5 So, for the period, then, for the Calendar
6 Year 2009 up until May 2010, so up until essentially
7 the current time, there is a calculation of damages of
8 a further [REDACTED] and it represents approximately
9 [REDACTED] of the total damages calculated.

10 When we get into the period June 1st, 2010,
11 again recognizing my report was written in
12 August 2010, we're into a period where the price of
13 oil, the exchange rate, and the actual oil production
14 were not a certainty, were not known, and so a
15 forecast was required. And that holds true for the
16 period from 2011 until the end of the period of
17 production, 2023; and so the U.S. dollar price of oil,
18 the Canadian-U.S. exchange rate, and oil production
19 volumes were required to be forecasted or estimated.

20 The Stats Can factor to the end of 2010 is
21 known, so that's based on historical information, but
22 past that, it requires again a forecast. And spending

02:18:29 1 applied at this point, so it no longer becomes
2 relevant to an estimation.

3 And spending in the ordinary course, we know
4 what was spent in the Calendar Year 2004; however, we
5 don't know how much will be accepted by the Board, so
6 that was--that's a mixture of actual spending with an
7 estimate as to how much will be accepted as
8 qualifying, and that is based on the amount that was
9 qualified in the years preceding 2009--so from April,
10 1, 2004, to the end of 2008.

11 For the balance--sorry, for the beginning of
12 2010, current year, from January until May, and my
13 last report was written in August and I had
14 information until the end of May, I had historical
15 information that was actual information but not
16 accepted yet by the Board for the first four variables
17 again: the price of oil, the exchange rate, the volume
18 of production and the Stats Can factor. However, the
19 spending in the ordinary course, I was required to
20 make a forecast or an estimate of what that would
21 likely be, and spending in the ordinary course was
22 forecast based on, as I indicated in my approach, a

02:21:17 1 in the ordinary course, as I said, for the balance of
2 two thousand--or for the first part of 2010 was based
3 on a forecast from the initial period under the regime
4 and is also forecast to the end of the production
5 cycle. So, those items are noted with red boxes, and
6 those are forecasted based on methodologies that I
7 briefly introduced, but I will go into greater detail.
8 That equals approximately, broken into two periods to
9 the end of this end, [REDACTED] or about [REDACTED]
10 of the overall damages calculated.

11 So, from the beginning of the measure,
12 April 1st, 2004, until the end of this calendar year,
13 approximately [REDACTED] of the total damages figure
14 relates to that period, and then approximately
15 [REDACTED] relates to the Calendar Year 2011 and
16 beyond, and that number is [REDACTED]

17 [REDACTED]
18 Q. Thank you, Mr. Rosen.

19 Why don't we talk about some of the areas of
20 agreement as you see it between yourself and
21 Mr. Walck.

22 A. All right. So, as I said, the information

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02:22:34 1 from April 1st, 2004, to December 31st, 2008, the
2 shortfall in spending and as acknowledged by the
3 Board, that is a fairly obvious area of agreement.
4 There is nothing that we differ, between myself and
5 Mr. Walck, there.

6 We also agree on the January 2009 to
7 December 2009 shortfall in spending aside from two
8 issues. One is an allocation of some of the spending
9 to the AA Blocks and the Southern Extension unit, and
10 I'll go into more detail about that later on. And
11 then there is a letter from the Board to Suncor
12 regarding Terra Nova, approving expenditures, and
13 that's about [REDACTED] different than I had estimated
14 under my methodology, and that was a letter that,
15 although dated prior to the date of my last report,
16 was not received by me, and so I agree with Mr. Walck
17 we have actual information, and I have incorporated
18 that in my summary, which will be one of my last
19 slides that I share with the Tribunal.

20 From January 1st, 2010, onwards, Mr. Walck in
21 his last report did provide one version of
22 calculations where he adopted the price forecast of

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02:25:21 1 expropriated and we are valuing a business loss or a
2 loss of cash flows that have business risk that the
3 Claimant has lost or has offloaded. In that case, you
4 would use the Weighted Average Cost of Capital of the
5 business to value those expropriated cash flows
6 because the Claimant has actually given away those
7 cash flows and is no longer exposed to those risks.

8 The other type of case is typically what you
9 see is a business loss; and, in a business loss case,
10 again, sometimes a Weighted Average Cost of Capital
11 approach is used for a discount rate because the
12 assumption is that the Claimant, when receiving the
13 award, can put the money to use in the business, and
14 that that money will generate a Weighted Average Cost
15 of Capital return and, thus, put the Claimant back in
16 the position they would have been but for the business
17 loss.

18 This case is quite different. In this case,
19 the Claimant has a business with all the risks and
20 benefits that go with that business; and, a day after
21 the measure, it has the identical business with all
22 the risks and benefits that go with that business. It

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02:23:59 1 Sarah Emerson. He accepted the exchange rate in The
2 Economist. He accepted the oil production profiles in
3 the two exhibits for Terra Nova and Hibernia, and he
4 adopted my Stats Can factor. Now, again I stress,
5 this is just one of the scenarios he presented, and I
6 believe he notes in his report he did it so that our
7 numbers would be comparable.

8 Q. So, let's move on, then, to the principle
9 areas of divergence between you and Mr. Walck:
10 discount rate.

11 A. Yes, first and foremost is the discount rate.
12 I have adopted the use of a risk-free Government of
13 Canada Bond rate, and Mr. Walck uses something that is
14 a return on equity as opposed to a cost of equity.

15 So, let me just say a little bit about why I
16 used a risk-free approach in this case because it is
17 quite unusual to value a damages claim using a
18 risk-free approach.

19 In the opening comments, opening remarks,
20 Mr. Gallus made a remark that this is not a fair
21 market value valuation, and I agree with that. This
22 is not a transaction where an item has been

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02:26:30 1 is not divested of any risks. It has not sold off any
2 risks. Nor--and this is the most important
3 point--does it have the opportunity to invest
4 additional capital in its business, and that's the
5 most important point, I think.

6 Q. And can you explain that, why is it? How
7 have you arrived at that conclusion?

8 A. Well, ExxonMobil, being the largest or one of
9 the largest oil companies in the world and presumably
10 a for-profit company, public company, maximizes its
11 returns. If it could spend more money to make more
12 money, it would. It has capital available. In fact,
13 the capitalization of ExxonMobil Canada is almost all
14 equity. There is very little debt; and, if it needed
15 to, it could easily go out and raise more debt and put
16 this capital to work in this project. It doesn't
17 choose to because it's not profitable to do so.

18 As well, the measure calls for incremental
19 spending, and I think that's an important concept to
20 understand. If it wasn't incremental, ExxonMobil
21 would be spending it. The Claimants would be spending
22 the money because it made money. The fact that

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02:27:43 1 they're not spending additional money means, in their
2 opinion, there is no additional money to be invested
3 in this project.

4 Because of that, they cannot earn their
5 Weighted Average Cost of Capital on the Award, if any,
6 that they are awarded by this Tribunal; they simply
7 can't. And so in order not to have them shoulder the
8 additional burden of finding a different project
9 somewhere else to invest the money, some other risk to
10 find, it would be appropriate to put it into a fund
11 that invests in risk-free bonds in Canada, which are
12 Government of Canada Bonds.

13 And this is important for a couple of
14 reasons: One is the risk that I just mentioned, and
15 the other is, if we adopt the approach of a standard
16 business loss, where we use a Weighted Average Cost of
17 Capital, the Claimant is going to be required from
18 time to time in the future to spend cash, actual cash;
19 and, therefore, any investment it buys must have the
20 feature of returning either Mr. Walck's 15 percent or
21 the Weighted Average Cost of Capital, but must do so
22 in a manner that the cash is available

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02:29:56 1 why that is?

2 A. The SR&ED credit, the SR&ED program has
3 specific requirements in order to meet the Canada
4 Revenue Agency Guidelines for credit, and we've seen
5 historically an actual rate that the company--the
6 Claimant has enjoyed in generating SR&ED credits, and
7 that's on spending that it deemed necessary.

8 And then to use that as a benchmark from
9 which to judge incremental spending which it deems
10 unnecessary, noncommercial, is irrelevant, and so
11 there is no reasonable basis upon which someone in my
12 position can estimate what any potential value, if
13 any, would be received in SR&ED credits.

14 In fact, in this case, if the Claimant does
15 not find an opportunity to make any R&D incremental
16 spend, there is a Letter of Credit filed in favor of
17 the Government that will be drawn on, in which case
18 there will be absolutely no SR&ED credit because it
19 was never invested in R&D. So it's entirely unknown.
20 There is no basis upon which to judge how it might be
21 calculated.

22 Q. Okay. In the interest of time, perhaps you'd

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02:28:47 1 whenever--whenever--the Claimant needs it, without
2 penalty for early withdrawal, without cost of
3 borrowing against it. The cash actually has to be
4 available whenever they need it.

5 And so the only way to achieve that, to put
6 them in the exact same position they would have been
7 but for this measure, is to set up a fund that they
8 can set aside, and whenever there is a call for
9 incremental spending, they simply withdraw it from the
10 fund. They take no additional risk. It earns
11 interest at the rate of a Government of Canada Bond
12 because that is the safest investment in Canada.

13 And the reason we calculate the rate of
14 return after tax is because when--if there is an
15 award, for every dollar that's invested and every
16 interest rate it earns, it's going to pay tax on that
17 interest, and so you have to use an after-tax rate of
18 interest to keep it whole. And that's one element of
19 tax incorporated into the discount rate.

20 Q. So, the second item there on your list is
21 SR&ED credits. You haven't applied a deduction in
22 your model for SR&ED credit. Can you explain, please,

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02:31:18 1 just like to summarize the rest of the bullets on the
2 list on this page.

3 A. Certainly.

4 The third major area of disagreement is the
5 treatment of Income Taxes. And as I said in my
6 earlier reports at the time I was writing them, I
7 don't know to the extent that the Claimant will be
8 taxed on the Award it receives or that the Canadian
9 entities will be able to deduct incremental
10 expenditures. And to the extent that they're
11 different, different amount, there may be a tax
12 impact.

13 In fact, when I was making my Final Report, I
14 had an opportunity to interview the people in the Tax
15 Department at ExxonMobil and discover that, in fact,
16 the Claimant is a U.S. entity and will be taxed in the
17 U.S. The companies incurring the expenditures are
18 Canadian and make expenditures in Canada; and, because
19 of that, they get to deduct those expenditures for tax
20 purposes.

21 However, the two tax rates are different;
22 and, because the two tax rates are different, it

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02:32:19 1 results in a gross-up, and I have a slide that
 2 demonstrates that in more detail.
 3 Mr. Walck's criticism, and actually there is
 4 quite a number of pages devoted to this criticism in
 5 his last report, acknowledges that if there was a
 6 disparity in rates, you would have to make a tax
 7 calculation. However, U.S. companies are taxed on
 8 their worldwide income, which is--which is
 9 academically correct if dividends are paid from a
 10 Canadian entity to the U.S., but in this case they
 11 aren't. The money is spent in Canada, so they can't
 12 be. So factually it's just incorrect.
 13 Q. Okay. Thank you.
 14 A. I see there is a bit of a--
 15 PRESIDENT van HOUTTE: I have a lot of
 16 questions, but I wait for them.
 17 THE WITNESS: Okay.
 18 The fourth area of disagreement deals with an
 19 allocation of some of the ordinary course spending to
 20 the AA Blocks and the Southern Extension units. And
 21 as Mr. Phelan noted, there was very little production
 22 or no production--I think there was just a little bit

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02:34:32 1 appropriate, and certainly in my business we look at
 2 normalizing things and certainly in interviewing
 3 management of ExxonMobil, that is something they do.
 4 Mr. Walck uses a simple average in this case, and I
 5 have a slide dedicated to that later on that explains
 6 it in more detail.
 7 And the last area of disagreement is that, as
 8 the projects wind down, as they age, and volume
 9 decreases, I've been advised by management that the
 10 R&D expenditures will decline significantly, and so
 11 I've tried to reflect that in my calculations. And
 12 Mr. Walck has other information, so he's made no
 13 reduction in that regard.
 14 Q. Okay. So, looking, then, to the next slide,
 15 you can see some figures there and percentage
 16 deductions. Can you just briefly explain what you've
 17 tried to do in this slide.
 18 A. Right.
 19 So, what I tried to do here is give the
 20 Tribunal a sense of what are these differences really
 21 worth.
 22 MR. DOUGLAS: Mr. President--sorry,

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02:33:21 1 of production in 2009 for these two areas, but they're
 2 part of the Hibernia field, but they're not part of
 3 this arbitration and they're with separately and
 4 completely differently.
 5 However, all of the research and development
 6 that occurs in Hibernia benefits all of the wells in
 7 Hibernia; and, therefore, what I've done is simply
 8 allocate the amount of R&D that benefits all of the
 9 wells, including the AA Blocks and the Southern
 10 Extension units based on the volume, based on the same
 11 methodology that the Board uses to measure the R&D
 12 requirement.
 13 So, I've allocated based on the fact that
 14 these two areas will benefit from the R&D, but require
 15 no incremental R&D on their own.
 16 BY MS. LAMB:
 17 Q. And then if we click through to the next
 18 slide, I think you talk here about how it is that
 19 you've arrived at a conclusion with regard to the
 20 ordinary course spending in future years. How does
 21 that differ to the approach that Mr. Walck is taking?
 22 A. I use a normalized average, which I think is

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02:35:31 1 Mr. Rosen, I do want to give you a chance to explain,
 2 but I just want to note Canada has not seen these
 3 calculations. They're not a part of any report, so we
 4 have no way of verifying the numbers at this stage.
 5 BY MS. LAMB:
 6 Q. Can you just explain, then, how you arrive at
 7 these numbers so that it's clear for Canada's benefit.
 8 A. Certainly.
 9 Mr. Walck and I both have an economic model,
 10 an Excel spreadsheet. I know I do; I imagine he does.
 11 And so what I did was simply take my Excel spreadsheet
 12 and where I had my discount rate, I simply substituted
 13 his to determine the first number.
 14 PRESIDENT van HOUTTE: I would say in view of
 15 the fact that those calculations have not been
 16 submitted to the other side, that if they do not
 17 object at this moment, that it doesn't mean that they
 18 agree with it.
 19 MR. DOUGLAS: Correct, Mr. President, and we
 20 can review them at a later date.
 21 THE WITNESS: Yes, and just from a
 22 methodological point of view, just trying to give the

02:36:21 1 Tribunal and the Respondent a sense of what the
2 differences are in magnitude--and these are each
3 stand-alone. It's not that you can add these together
4 because a lot of these variables are intertwined. So,
5 by changing one variable it could change another, and
6 I have a reconciliation at the end between our two
7 reports, but this sort of gives you an order of
8 magnitude.

9 For each of the six variables I talked about,
10 if I adopt Mr. Walck's calculation versus my own, this
11 is the change that would occur in my conclusions. So,
12 it just gives you an idea of sort of which ones are
13 really important and which ones are less important.

14 BY MS. LAMB:

15 Q. Okay. Let's talk about the discount rate
16 because that is an area where you do have a different
17 approach. Can you explain to us the discount rate
18 that you've understood Mr. Walck to be employing in
19 this case?

20 A. Mr. Walck, in his disagreement with my
21 approach, cites the risks that are attached to the
22 cash flows of this business, and that's sort of where

02:38:37 1 called a return on equity, and he calls it an equity
2 rate of return, and he goes through several different
3 steps to indicate that he's been conservative in
4 choosing 15 percent. And this is where--one of the
5 mistakes I would say is a factual error occurs in
6 Mr. Walck's analysis, and it's quite a common mistake,
7 and if we flip to the next slide, I can could
8 demonstrate it.

9 Q. So, why don't you just confirm. We've got a
10 chart here, some data. Where does that data come
11 from?

12 A. This is Mr. Walck's Exhibit GFA-38.

13 And in his report he says he's observed
14 equity returns of between 15 and 40 percent, and if we
15 look at the analysts' document that he included in his
16 report as GFA-38, I've highlighted the 15 and the 40,
17 just sort of tying in that that in fact a return on
18 Shareholder's equity, and that's what he's
19 interpreted, this to be the cost of equity. And it's
20 a little bit technical, and it's why it's such a
21 common mistake. This is not the cost of equity.

22 If we flip to the next page, we can see from

02:37:33 1 we're talking at cross-purposes. And as I explained
2 just before, you're not valuing a lost-profits claim
3 here. This is almost like an indemnity. You're
4 trying to put the Claimant back in the position they
5 would have been but-for, and without causing them any
6 additional risk to do so. And because of the nature
7 of the expenditure and the inability to invest an
8 award in the company to produce the average return the
9 company would generate or its Weighted Average Cost of
10 Capital, you have to use the approach I've used in
11 order to keep it whole.

12 Mr. Walck, in recognizing a different
13 approach, says no, the cash flows of the business
14 should be valued as if they're cash flows of the
15 business. Whether you've lost a dollar of profit or
16 incurred an extra dollar of expense, it doesn't
17 matter. They're the same, and they should be treated
18 the same.

19 So, therein lies our fundamental
20 disagreement, from an opinion point of view. He
21 believes he's right, and I believe I'm right.

22 But Mr. Walck purports to use something

02:39:52 1 the very same document how this cost of equity is
2 calculated.

3 Again, looking at the highlighted portions we
4 can see \$27, which is the Book Value per share, and
5 this is an accounting concept, Book Value. And what
6 Book Value represents is the historic costs of a
7 business. It has nothing to do with its Market
8 Value--oh, especially in this case; in some businesses
9 it might, but not in this case.

10 Just below that we see the number of common
11 Shares outstanding, and if we multiply those two
12 numbers \$27 by 4,575,000 Shares, we get to
13 Shareholder's equity of \$123 billion. Again, this is
14 Book Value, not Market Value.

15 If we flip to the next slide, we can see the
16 net profits line, which is 25,950,000. We can see the
17 Shareholders equity that was just calculated at Book
18 Value on the prior slide. And the return on
19 Shareholders equity of 21 percent, and that's the line
20 that Mr. Walck picked up for his observation of return
21 on Shareholders equity. And it's--again, it's
22 just--it's an error. It's not a matter of opinion,

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02:41:05 1 and it's quite a common error. And what you end up
2 with is a return on equity that he--he thinks he's
3 been conservative taking the low end at 15 percent.
4 If we go back to the first slide in this series of
5 slides, where it shows 14.8 to 40, he thinks he's
6 being conservative using that 14.8 around 15 percent,
7 but really that's based on the Book Value. That has
8 no relevance to the cost of equity.

9 In fact, if you look at the same report, a
10 couple of slides back to where we were--sorry, if you
11 could flip ahead three or four slides--right there--we
12 can see the stock actually trades at \$65.5 at this
13 date. So the Market Value was \$65.5, not the \$27 that
14 Mr. Walck based his calculations on. So his cost of
15 equity is just wrong.

16 The other benchmark he uses to test its
17 reasonableness is from the Royalty Agreement [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] That is a pre-tax,
22 pre-royalty measure, and equity returns are after-tax

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02:43:29 1 years to \$1 million, so that's all that's left on the
2 books. That's the Book Value. However, real estate
3 going up since 1960, the current Market Value is
4 around 50 million. The annual cash flow from that
5 building is two-and-a-half million. According to
6 Mr. Walck's methodology to calculate return on equity,
7 which he equates to the cost of equity, he calculates
8 the two-and-a-half million revenue or income, rather,
9 divided by the Book Value of equity, which is a
10 million, which would give you 250 percent cost of
11 equity.

12 If the building were destroyed or
13 expropriated, Mr. Walck would value damages at a
14 million dollars or the income divided by the cost of
15 equity because real estate is valued in perpetuity
16 like this.

17 The proper method would be to look at the
18 return on Market Value of equity. The annual cash
19 flow was still \$2.5 million, but the Market Value of
20 the building is 50 million, which is a 5 percent
21 return, which is the market return on equity, which is
22 the number you're supposed to measure. If the

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02:42:22 1 measures.

2 So, again, it's just a mistake. It's a
3 common mistake, but it's just--it's not--it's not a
4 matter of opinion. This is just an error.

5 Q. Mr. Rosen, there is some text here,
6 international valuation standards, where has that come
7 from, and what--

8 A. This is from Mr. Walck's Rejoinder Report at
9 Paragraph 175, and he quotes from IVS what a discount
10 rate is, and this just confirms that discount rates
11 should reflect the opportunity cost of capital. So
12 it's a Market Value, not a Book Value approach.

13 So he's understood what he was supposed to
14 do. He's just picked up the wrong numbers.

15 By way of example, because not everyone in
16 the room is an accountant or an economist, just to
17 make it crystal clear, I have an example, and it's an
18 example I've used many times because, as I said, this
19 is a pretty common mistake.

20 Assume we purchased an office building in
21 1960 for \$10 million. The building has been
22 maintained but it's been depreciated in the next 50

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02:44:28 1 building were destroyed or expropriated, damages would
2 be calculated at 2.5 million divided by 5 percent,
3 which gets you to your Market Value of 50 million. It
4 just proves that when you're using Market Values, you
5 get to Market Value of damages or Market Value,
6 period.

7 In this slide, though, I did consider that
8 the Tribunal may not agree with me, even though I feel
9 the appropriate discount rate is the risk-free rate on
10 a Government of Canada Bond portfolio. The Tribunal
11 may choose a cost of equity or a Weighted Average Cost
12 of Capital because it's more familiar with that
13 approach.

14 In this case, the cost of equity for
15 ExxonMobil is somewhere between 6.5 and 7 percent
16 based on the same type of report that Mr. Walck uses,
17 an analyst report. And again, it's a matter of fact;
18 it's not a matter of conjecture. And you can actually
19 see it from his own analysts report, if you take the
20 income right--right there--if you take the PE ratio,
21 the median of 14 gives you about a 7 percent cost of
22 equity.

02:45:40 1 And so I recalculated my numbers at a cost of
2 equity in case the Tribunal was interested. And what
3 it does, and again subject to the Respondent verifying
4 that I've done the calculation correctly, it reduces
5 my damages by about [REDACTED] if I choose that
6 methodology, about [REDACTED].

7 Q. So to be clear, if you were to use a discount
8 rate of 7 percent rather than Mr. Walck's 15 percent,
9 those are the deductions that you would make from your
10 number.

11 A. Actually, if you use 7 percent instead of the
12 risk-free rate that I used, the bond rate, this would
13 be the adjustment.

14 Q. Yes. Thank you.

15 A. The next slide is just a pictograph showing
16 the effect of Income Taxes, and Canada in red, U.S. in
17 the blue. The Canadian entity being the entity that
18 actually pays out the incremental spending. The U.S.
19 parent being the Claimant that actually receives the
20 award of damages, so the investor and the investment.
21 There is no permanent establishment in the U.S. of the
22 Claimant, and there is no permanent establishment in

02:48:03 1 payable is [REDACTED] because it's taxed at [REDACTED]
2 leaving [REDACTED] as net after-tax receipt, so a shortfall
3 of [REDACTED]

4 If I look at my approach, I take the
5 after-tax cost of the incremental spending which is
6 [REDACTED] I gross it up by [REDACTED] which is the tax
7 rate which gives me [REDACTED] in my hands if I'm the U.S.
8 Claimant.

9 And if we go to the next slide, we can see
10 the [REDACTED] received by the U.S. Claimant gets taxed,
11 turns into [REDACTED] goes north of the border, and provides
12 the Canadian entity with its after-tax award on an
13 annual basis which it can fund the projects with on an
14 after-tax basis. So, it just proves that tax regimes
15 in different countries with different tax rates result
16 in the necessity to gross up.

17 And I should point out this shows it as a
18 single transaction. My model actually shows the
19 after-tax cash being deducted from the value of the
20 Canadian entities on an annual basis and reflects the
21 timing of the Award being made in the present. So the
22 present value of all this is incorporated in my

02:46:52 1 Canada--sorry, no permanent establishment in Canada of
2 the Claimant and no permanent establishment in the
3 U.S. of the entities, and, therefore, there is no tax
4 in the U.S. parent on worldwide income. Only when
5 dividends are repatriated to the U.S. is there any
6 kind of integration in U.S. tax.

7 So, the average tax rate changes in the
8 Canadian entities between [REDACTED] over the
9 period of my calculation, and as Mr. Phelan pointed
10 out, that's the maximum it could be based on the
11 Newfoundland tax, and because of some special
12 concessions the actual tax rates are likely to be a
13 little bit lower, but I use the statutory rates at
14 maximum. And the U.S. parent receiving the Award
15 would pay tax at [REDACTED].

16 If we turn to the next slide, we can follow
17 cash. So, the first line is there is incremental
18 spending in Canada of a hundred dollars, for example.
19 They get to deduct between [REDACTED] I used
20 [REDACTED] as an average. So the after-tax cost of
21 incremental spending is [REDACTED]. We can see that if I've
22 calculated an award of \$100 in the U.S., the U.S. tax

02:49:22 1 analysis. This is just a simplification to show how
2 the cash would flow for a mythical hundred dollars.

3 I promised to come back to the SR&ED credits,
4 to give a little bit more context to this. So, as I
5 said earlier in my presentation, I don't believe that
6 you can use history to value what SR&ED credit the
7 Claimant may receive in the future because it's a
8 different type of expenditure. But again if the
9 Tribunal disagrees with me and feels there is some
10 relation, how should it be calculated?

11 Mr. Walck has valued this benefit of SR&ED
12 credit at [REDACTED] for Hibernia and [REDACTED]
13 for Terra Nova. And I'm sure when Mr. Walck gets to
14 address the Tribunal, he'll explain the [REDACTED]
15 but it's based on a Work Plan that has extremely wide
16 margins of guesstimates.

17 If you look at the actual SR&ED credits that
18 have been earned by the company as opposed to
19 projecting what might happen, you can look at
20 Claimants' Exhibit 144 for the historical acceptance
21 rate, and the historical acceptance rate multiplied by
22 the appropriate SR&ED claim of [REDACTED] results in

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02:51:09 1 either a benefit of [REDACTED] or [REDACTED]
 2 depending on which normalization period you take.
 3 Mr. Walck, in his Figure 4 of his last
 4 report, used a period, including '07 and '08 and '06,
 5 '05, '04. But '07 and '08 were not yet assessed by
 6 Canada Revenue Agency. They're just filed, so he
 7 assumed they'd be at a hundred percent, which I think
 8 is a fairly aggressive assumption given their history.
 9 And he also takes out the [REDACTED] which is
 10 an interesting deduction because the Claimant actually
 11 filed for a SR&ED credit for the [REDACTED] and was
 12 denied. Excluding this severely distorts the numbers.
 13 If you make that correction, you get to a SR&ED
 14 benefit of [REDACTED]
 15 If, instead, you do it for the whole history
 16 of the Hibernia Project and look at its entire history
 17 of SR&ED success, you would get to a benefit of about
 18 [REDACTED] but it's drastically different than
 19 Mr. Walck's calculations and would decrease over--or
 20 increase overall damage calculation by over
 21 [REDACTED]
 22 Just a couple more things to discuss. One of

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02:53:40 1 from the beginning of time, normalized spending would
 2 be about [REDACTED] And if I look from 1998, the
 3 Production Phase through 2008, so that 10-year
 4 Production Phase, it would actually be about
 5 [REDACTED] both numbers lower than my normalized
 6 average. So, I found no reason after reviewing
 7 Mr. Walck's criticism. I went back and--trying to
 8 recognize, you know, he may have a valid point there.
 9 I go back there and I look at other data for
 10 corroboration, and it seemed to corroborate my result.
 11 So, I felt comfortable sticking with my normalized
 12 spending average.
 13 Q. And just to be clear, if you had used the
 14 average from 1990 or the average from 1998, what
 15 impact would that have overall on your assessment?
 16 Would your damages assessment have been higher or
 17 lower?
 18 A. If I'd used those other averages, it would
 19 have been higher.
 20 And finally, the penultimate slide. And
 21 again, Respondent would not have had a chance to
 22 review these calculations, so they're take--they're

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02:52:27 1 them is normalized spending. And again there was
 2 quite a bit of criticism on normalizing spending as
 3 being arbitrarily--excluding a very high number and
 4 then a very tiny number.
 5 So, what I did was I looked at normalized
 6 spending based on the period during which the measures
 7 had been effective--2004 through 2009--that I had
 8 actual information more, and it appeared to me and I
 9 confirmed with management that 2006 was an outlier
 10 year for Hibernia and that 2009 was an outlier year
 11 for Terra Nova, just based on the R&D. And I
 12 calculated my averages.
 13 And as Mr. Walck notes in his report, this
 14 reduced my--the normalized average by over [REDACTED] per
 15 year for Hibernia, but he says it was a very small
 16 number for Terra Nova. In fact, it was around a
 17 [REDACTED] This is before looking at
 18 the ownership interests of the Parties.
 19 So, I felt it was reasonable. So, what I
 20 also did was I went back with Mr. Phelan's assistance
 21 and discussion and said, well, okay, let's look at a
 22 couple of different periods. If we look from 1990,

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02:54:48 1 just offered for what it's worth. It's to assist the
 2 Tribunal in reconciling my conclusion with
 3 Mr. Walck's.
 4 So, in the gray area, what I've done is
 5 I've--the first thing I've done is reflect the Terra
 6 Nova July 23, 2010 letter on the 2009 expenditures.
 7 So that is an actual fact, so my number must be
 8 adjusted by that. So we see it doesn't have a
 9 material impact, but it still must be adjusted. So it
 10 takes from about [REDACTED] down to about
 11 [REDACTED] Then, if I used a weighted--or, sorry,
 12 an equity rate of return based on market, it would
 13 have reduced it further down to about [REDACTED]
 14 And then this area in pink or red are
 15 incorporating Mr. Walck's assumptions to get back to
 16 his number of about [REDACTED] And the order that
 17 you do these in matters so that if Respondent is
 18 trying to reconcile with this, the order that you do
 19 them in matters because some of them are interrelated
 20 calculations.
 21 So, if we, for instance, reordered 876543 the
 22 other way, each individual item would have a different

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02:56:04 1 financial impact. I put them in this order because I
2 felt the first two were errors that the Tribunal could
3 be comfortable in assuming those would be the first
4 two things to fix, and then sort of in the order of
5 not necessarily magnitude but sort of common sense
6 that appealed to me, but there is no particular order
7 to them.

8 And the last one is Mr. Walck's calculations
9 are done at a different date than mine, so I simply
10 try to bring his to my date to reconcile to the two
11 numbers. Mine are back in June because I did an
12 August report, and his was at a later date, so I just
13 tried to make apples to apples.

14 Q. Mr. Rosen, just a couple of questions, and
15 then I'm sure the Tribunal and, of course, then Canada
16 will have some questions for you.

17 Were you here yesterday while Ms. Emerson was
18 giving her evidence?

19 A. Yes, I was.

20 Q. You will have heard Professor van Houtte ask
21 Ms. Emerson about reasonable certainty and what she
22 understands by that. So, what I want to ask you is to

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02:58:24 1 similar to that prepared by Ms. Emerson for any other
2 purpose?

3 A. Yes, actually, in almost--I shouldn't say
4 almost. I think in every single resource case I've
5 worked on, whether it's oil and gas, minerals, timber,
6 any resource that requires some expectation with
7 respect to a future price line, you must rely on some
8 element of forecasting.

9 Q. And in what form would that price forecast be
10 presented to you?

11 A. Typically, in an oil-and-gas case or in a
12 mineral case, exactly the way Ms. Emerson presented
13 her information to me, a forecasted price line.

14 Q. You will have heard a discussion with
15 Mr. Davies about scenarios versus a price line or a
16 forecast. Is that something you've seen in the price
17 data that's been--that you have seen when you have
18 undertaken these types of tasks?

19 A. A scenario analysis is something quite
20 different. A scenario analysis is I'm a company and
21 I'm deciding whether to build a certain plant or a
22 certain machine, and at what price does it make sense

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02:57:07 1 what extent does, if at all, does a notion of
2 reasonable certainty inform the analyses that you
3 perform and the conclusions that you arrive at?

4 A. Well, in order for me to get to a position of
5 reasonable certainty, first of all, by professional
6 standards, being a CAA and CBV, I'm required in my
7 reports if I express an opinion, if I have less than
8 reasonable certainty or words to that effect to
9 qualify my opinion. So I have not qualified my
10 opinion, so you can understand that I feel reasonably
11 certain about my results.

12 So, in order to gain that reasonable
13 certainty, you undertake a methodology that you
14 believe in, that is sound theoretically and sound
15 academically. And to that you examine actual
16 information and projected information and perform your
17 due diligence to ensure that from your professional
18 point of view it is sufficiently robust and correct
19 and worthy of reliance that you can arrive at an
20 unqualified opinion.

21 Q. And obviously you've used Ms. Emerson's
22 forecast in your model. Have you used forecasts

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02:59:47 1 economically for me to do that. And so I might look
2 at a forecast and say, are the forecasted prices
3 higher than I need to hit my benchmark so that I can
4 justify billing this from an economic point of view.
5 But they are two different things.

6 Q. Thank you. I have no further questions for
7 you, but I'm sure that others will.

8 A. Thank you.

9 PRESIDENT van HOUTTE: Thank you.

10 The floor is for Canada's counsel.

11 Mr. Douglas?

12 MR. DOUGLAS: I am of the firm view that
13 damages should always be discussed first in an
14 arbitration because they can tend to go on with a
15 bunch of numbers. We have gone on for about an hour.
16 Would it be possible to take a short break before
17 going on?

18 PRESIDENT van HOUTTE: Sure.

19 MR. DOUGLAS: Thank you.

20 (Brief recess.)

21 MR. DOUGLAS: Thank you.

22 CROSS-EXAMINATION

03:10:23 1 BY MR. DOUGLAS:
 2 Q. Good afternoon, Mr. Rosen.
 3 A. Good afternoon.
 4 Q. Just, if I understand your damages model
 5 correctly on sort of the highest platform we have,
 6 obligations under the Guidelines less what the
 7 Claimants would have spent in the ordinary course or
 8 in the absence of the Guidelines, and the difference
 9 between those two creates a shortfall. Am I good so
 10 far?
 11 A. Yes.
 12 Q. Okay. And that shortfall is what you refer
 13 to as incremental spending?
 14 A. Correct.
 15 Q. Okay. And it's the incremental spending that
 16 is the Claimants'--your assessment of the Claimants'
 17 damages in this case.
 18 A. That's a starting point, but yes.
 19 Q. Starting point. Okay.
 20 Until cash outlays are actually made, does
 21 incremental spending--is it an actual economic loss to
 22 the Claimants?

03:12:01 1 First Report, please.
 2 And if we just look at the second sentence in
 3 that paragraph you state that "the incremental
 4 spending does not represent an economic loss to the
 5 Claimants until the cash outlays are ultimately made."
 6 So, are you changing your view now?
 7 A. No. If you look at Footnote 17, it says,
 8 "irrespective of the cash outlay, the implementation
 9 of the Guidelines has created a liability relating to
 10 the incremental spending. The timing of the cash
 11 flows is associated with discharging this liability
 12 has been reflected in my analysis."
 13 So, it still creates a liability.
 14 Q. Okay. But is there a difference between a
 15 liability and an economic loss?
 16 A. It's semantics, really, I think.
 17 Q. Okay. So, when you say the incremental
 18 spending does not represent an economic loss, that it
 19 does not represent an economic loss until a cash
 20 outlay--what's a cash outlay?
 21 A. Until they write the checks.
 22 Q. Okay. So until they spend the incremental

03:11:11 1 A. It's an economic loss. It's not a cash loss
 2 until it's spent.
 3 Q. So, it is an economic loss even before
 4 they've spent the incremental spending?
 5 A. That's correct.
 6 Q. Okay. If I could just ask you to turn to--
 7 MR. DOUGLAS: And I should maybe first of all
 8 make sure everybody has everything. There's two
 9 volumes of the Core Bundle as well as three Expert
 10 Reports. Sadly, we will be flipping through a number
 11 of things today, if we are having trouble following,
 12 then please just stop me and I will make sure you're
 13 following along appropriately.
 14 I'm also mindful, we will be looking at some
 15 models, and the Tribunal has some smaller versions, I
 16 think, so we'll try to get those up on these--they're
 17 Mr. Rosen's economic models, and because they're in
 18 the smaller books, they might be really small print.
 19 So, we'll get them up on the screen. And again if you
 20 have any question, please, by all means.
 21 BY MR. DOUGLAS:
 22 Q. So, again, looking to Paragraph 43 of your

03:13:13 1 spending?
 2 A. Correct.
 3 Q. So, you do state here it does not represent
 4 an economic loss?
 5 A. Again, it's--I think you're splitting words
 6 with me. It's a liability, so, in the sense it's an
 7 economic obligation. But for the purpose of
 8 calculating the cost of that obligation, so the
 9 interest that might accrue on it or your cost of
 10 capital on it, there is no economic sense on it until
 11 it's actually spent.
 12 Q. Okay. Now, just referring back then to that
 13 footnote, you skipped over a portion.
 14 A. Yeah.
 15 Q. Which states that--and if I'm correct, your
 16 report was filed on August 4, 20009?
 17 A. Correct.
 18 Q. And you state that the Guidelines have
 19 created a liability relating to incremental spending
 20 for April 1st to June 30, 2009.
 21 A. Correct.
 22 Q. And you don't mention any future dates past

03:14:02 1 2009. You just say the liability is June 30, 2009; is
2 that correct?
3 A. In this section, yes.
4 Q. Okay.
5 A. The next section deals with the future.
6 Q. So, have the Claimants suffered an economic
7 loss with respect to future incremental spending?
8 A. I'm going to have to--I'm not trying to be
9 difficult. I'm going to have to get to you define
10 what you mean by "economic loss."
11 Q. I'm actually just trying to use your words
12 and the words you used in your report, so I'm not
13 quite sure what the definition is, which is why I'm
14 asking the question.
15 A. Okay. From my point of view they've suffered
16 a loss. They will not feel the economic impact of the
17 loss until they start spending the money, so they
18 won't be out of pocket, out of cash, incurring
19 interest expense, other costs until they actually
20 spend it, but they have a loss, certainly, that has
21 been crystallized as an obligation.
22 Q. Okay. And we heard from--you were in the

03:16:05 1 [REDACTED]
2 A. That's correct.
3 Q. Okay. And these figures were based on the
4 most up-to-date information at the time?
5 A. The most up to date information I had at the
6 time, yes.
7 Q. Okay. And in your Third Report you updated
8 these figures; is that correct?
9 A. For actual numbers, yes.
10 Q. For actual numbers, yes.
11 And for Hibernia the new figure is
12 [REDACTED]
13 A. I believe that's also correct.
14 Q. Is and for Terra Nova it's [REDACTED]
15 A. I believe that is also correct.
16 Q. Okay. So, these figures total, in your Third
17 Report, [REDACTED]
18 A. Correct.
19 Q. So, if I'm just summarizing and trying to
20 understand between your First Report and your Third
21 Report, ordinary course spending between '04 and '08
22 only grew by [REDACTED]

03:15:12 1 room, I believe, when Mr. Phelan testified employ; is
2 that right?
3 A. That's correct.
4 Q. And Mr. Phelan took us through Hibernia
5 statement of joint account costs.
6 A. Correct.
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 Q. Okay. In your First Report, you assessed the
13 project's ordinary course expenditures between 2004
14 and 2008; is that right?
15 A. Correct.
16 Q. For Hibernia, that totaled [REDACTED]
17 A. I believe that's correct.
18 Q. Okay. And for Terra Nova, that totaled
19 [REDACTED]
20 A. I believe that's also correct.
21 Q. Okay. So, in total, ordinary course spending
22 between '04 and '08 in your First Report was about

03:16:47 1 A. That's what the Board had accepted. There
2 was new information that would have been accepted
3 between the dates of the First Report and the Second
4 Report, that's correct.
5 Q. So, in your First Report you underestimated
6 ordinary course expenditure in that time by
7 [REDACTED]
8 A. Simply because there was no indication that
9 the Board had accepted it, yes.
10 Q. Okay. And just so we are clear, in terms of
11 your model of obligations minus ordinary course,
12 higher ordinary course figures decrease incremental
13 spending?
14 A. That is correct.
15 Q. Okay. Now, the projects have filed with the
16 Board two Work Plans; is that right?
17 A. That's correct.
18 Q. One for Hibernia?
19 A. And one for Terra Nova, yes.
20 Q. One for Terra Nova.
21 And you were present in the room also for
22 Mr. Ringvee's testimony; is that correct?

03:17:27 1 A. For most of it, I believe, yes.
 2 Q. Okay. And if there is a portion that I refer
 3 to that you weren't in, just let me know and we could
 4 refer to the transcript or whatnot.
 5 He gave testimony as to how the Work Plans
 6 were reformed?
 7 A. That may have been the little bit I missed.
 8 I missed the first little bit of his testimony, I
 9 believe.
 10 Q. Okay. That's not that relevant, really.
 11 Do you recall that he said that the Claimants
 12 and the other owners in the projects have met since
 13 2008?
 14 A. I don't recall that statement, but I'm sure
 15 you're reading from the transcript.
 16 Q. Okay. And that they've met about 40 times
 17 since 2008?
 18 A. Okay.
 19 Q. That's also in his Second Witness Statement
 20 at Footnote 1.
 21 The Claimants have a desire to spend
 22 incremental spending in ways that are economically

03:19:07 1 Q. Okay. Does your quantification account for
 2 any benefits the Claimants might receive from these
 3 expenditures?
 4 A. You're incapable of calculating those
 5 benefits, so no, they do not.
 6 Q. Okay. Why don't we review some of them
 7 together.
 8 If I could turn you to Tab 7, please--
 9 MR. DOUGLAS: This is Tab 7 of my Core Bundle
 10 of my cross-examination, of which there are two
 11 volumes.
 12 BY MR. DOUGLAS:
 13 Q. --this is an [REDACTED] is that
 14 right?
 15 A. The [REDACTED] yes.
 16 Q. The [REDACTED] absolutely.
 17 Were you in the room when Mr. Ringvee
 18 testified about this expenditure?
 19 A. I don't recall specifically.
 20 Q. Why don't we take a look at his--
 21 A. Sure.
 22 Q. If we could pull up 464, Line 6.

03:18:28 1 efficient?
 2 A. That should their desire, yes.
 3 Q. Okay. And that would provide them value?
 4 A. That would certainly be their motivation.
 5 Q. Okay. Have you reviewed the Work Plans in
 6 their entirety?
 7 A. Yes, I have.
 8 Q. And the Work Plans address the Claimants'
 9 incremental spending between 2004 and 2008?
 10 A. Targets--with the intent, yes.
 11 Q. Yes. And the Work Plans also address future
 12 incremental spending, as well?
 13 A. Again, planned.
 14 Q. Planned.
 15 A. Yes.
 16 Q. So, the Work Plans are planned incremental
 17 spending, is what you're saying?
 18 A. Yes.
 19 Q. Okay. Fair enough.
 20 And but for the Guidelines, these
 21 expenditures would not have been undertaken?
 22 A. That is my understanding, yes.

03:20:11 1 No need to highlight right now, Thomas.
 2 You see there at Line 6 that's on the screen?
 3 A. Yes, I do.
 4 Q. And he was asked, and why is Hibernia
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 Do you see that there?
 15 A. Yes, I do.
 16 Q. Okay. If you could turn to Page 2 of Tab 7,
 17 and it's Page 2 of the document, as labeled on the
 18 document, and you will see a project schedule for the
 19 [REDACTED] is that right? Under--
 20 A. Yeah, yep.
 21 Q. So, it's intended to take place in 2009,
 22 2011, and completed in 2000--sorry, 2010 and completed

03:21:33 1 in 2011; is that right?
 2 A. I see that, yes.
 3 Q. Okay. Now, according to the cost estimate,
 4 the amount of R&D spent [REDACTED]
 [REDACTED]
 6 A. That's what it says here, "estimate."
 7 Q. Yes, "estimate."
 8 If we could now pull out your Third Report,
 9 and again, sorry for all the flipping around, and if
 10 we could just turn to Paragraph 21, please.
 11 A. Yes.
 12 Q. It's under the heading R&D and E&T
 13 expenditures in the ordinary course?
 14 A. Yes.
 15 Q. So, this is a discussion of the Claimants'
 16 2009 ordinary course expenditures; is that right?
 17 A. Yes.
 18 Q. And you state in the first line of
 19 Paragraph 21, "as at the updated calculation date, the
 20 projects have provided their R&D 2009--R&D and E&T
 21 expenditure submissions to the Board"?
 22 A. Yes.

03:23:49 1 [REDACTED]
 2 A. Yes.
 3 Q. Okay. And in your report, [REDACTED] is
 4 incremental spending.
 5 A. No, not all of it.
 6 Q. Not all of [REDACTED] is incremental spending?
 7 A. Some of it is ordinary course spending.
 8 Q. Some of it. Would you be able to tell me
 9 which portions are and which portions are not?
 10 A. I might have to get all my worksheets out,
 11 but--
 12 Q. Well, how about this: Is there any place in
 13 your reports that you filed where you make that
 14 indication?
 15 A. I would have to go into the schedules to have
 16 a look.
 17 Q. Okay.
 18 A. But certainly in [REDACTED] there was some
 19 portion of it that was ordinary course spending, and I
 20 think we footnoted it for that very purpose.
 21 Q. Okay. So, when I asked you at the beginning
 22 when the Work Plan expenditures would not have been

03:22:47 1 Q. And there is a Footnote 9?
 2 A. Correct.
 3 Q. If we look down to footnote line, we will see
 4 FTI UC-16?
 5 A. Correct.
 6 Q. So, that's their ordinary course submissions
 7 to the Board; is that right?
 8 A. Correct.
 9 Q. Again, we have to flip to FTI UC-16, which is
 10 going to be Tab 43 of the Core Bundle, so I believe
 11 that's in Volume 2 of the Core Bundle.
 12 A. Yes, it is.
 13 Q. There are no pages on this document, but I
 14 believe if you flip one, two--it should be on Page 4.
 15 You see a project description?
 16 A. Yes, I do.
 17 Q. And you see line item 12?
 18 A. Yes, I do.
 19 Q. And that's the [REDACTED]
 20 A. Yes, I do see that.
 21 Q. So, the Claimants submit to the Board an
 22 ordinary course expenditure in 2009, which is the [REDACTED]

03:24:39 1 taken--undertaken but for the Guidelines, that wasn't
 2 entirely true?
 3 A. In a general sense, there were certainly part
 4 of [REDACTED] that was ordinary course, which is why it
 5 was footnoted here.
 6 Q. Okay. Would you be able to let me know or
 7 tell me--
 8 A. I think--
 9 Q. I don't want you to flip through your Work
 10 Plans, but based on your reports that you'd filed, can
 11 you let me know which expenditures in the Work Plans
 12 are ordinary course expenditures and which ones are
 13 incremental spending?
 14 A. I believe there's [REDACTED]
 [REDACTED], and the others are not.
 16 Q. So, [REDACTED] are ordinary
 17 course?
 18 A. Correct.
 19 Q. And the rest are not?
 20 A. Correct.
 21 Q. Which [REDACTED]
 22 A. [REDACTED]

03:25:21 1 Q. [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 Q. Okay. So, is there any indication in the
 9 Work Plans that there is, on the one hand, ordinary
 10 course R&D and, on the other hand, unnecessary
 11 additional incremental spending?
 12 A. I think the Work Plans generally deal with
 13 what you would call--what I would call incremental
 14 spending, generally.
 15 Q. Okay. So, this [REDACTED] is not even in the
 16 Work Plans?
 17 A. It might very well be. We would have to pull
 18 out the Work Plan and look at the total. But of [REDACTED]
 19 [REDACTED] I know there were [REDACTED]
 20 [REDACTED] that were in the ordinary course, and the
 21 rest was incremental.
 22 Q. Okay. SO, if we go--sorry, if we just go

03:27:48 1 (Witness reviews document.)
 2 Q. Do you see any indication there, Mr. Rosen?
 3 A. These are cost estimations. It doesn't give
 4 an indication on this.
 5 Q. Okay. So--
 6 A. So, you can't--I don't think you can tie one
 7 number in. These are just cost estimates.
 8 Q. Cost estimates that were pretty close to what
 9 happened; is that right?
 10 A. Well, I mean, [REDACTED] compared to [REDACTED].
 11 (Pause.)
 12 Q. Why don't we go back to the testimony of
 13 Mr. Ringvee for a moment.
 14 A. Certainly.
 15 Q. Page 465, beginning at Line 4 and he starts
 16 talking about some of the benefits of the [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 do you see that there, Mr. Rosen?
 22 A. That's the question I see. He says, "I see

03:26:19 1 back to table--that table in Tab 7, Page 2.
 2 A. Yes.
 3 Q. And in 2009 there was an estimated
 4 [REDACTED] and that's--that's estimated duration.
 5 Actually, Thomas, it's the next table.
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 Q. And the table above that was to take place in
 10 2009?
 11 A. Right.
 12 Q. Okay. And so, the [REDACTED] here, is that
 13 any portion of the [REDACTED] that the Claimants
 14 filed as ordinary course in 2009?
 15 A. It would have been--it would have been the
 16 total spending on [REDACTED] but this portion would have
 17 been ordinary course, [REDACTED]
 18 Q. [REDACTED] So, sorry, this one is part of [REDACTED]
 19 [REDACTED] or is not part of [REDACTED]
 20 A. Sorry, you are going to have to let me review
 21 the document just to make sure.
 22 Q. Please.

03:30:27 1 that."
 2 Q. Then down towards the bottom, Mr. Luz asked
 3 Mr. Ringvee, "Generally, do you think it would be an
 4 expensive project to do," Again, referring to [REDACTED]
 5 [REDACTED] and he says, "yeah, it's a
 6 significant expenditure," but he wasn't able to
 7 provide an amount; is that right?
 8 A. I'm just catching up with you. Sorry.
 9 Q. No, sorry.
 10 I read this at about 3:00 in the morning, so
 11 I might be wrong.
 12 A. He asked a question, and Mr. Ringvee says,
 13 "Is that a question?" He says, "Did I accurately
 14 summarize what the project is?" He says, "I think
 15 that summarizes it, to my understanding." So, I mean,
 16 I am not going to second-guess Mr. Ringvee.
 17 Q. Yes. Okay. Do you know how much it costs to
 18 [REDACTED]
 19 A. I don't.
 20 Q. Okay. Would about [REDACTED]
 21 A. I know it's a substantial sum. I just don't
 22 know exactly.

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03:31:28 1 Q. Okay. Why don't we look to Tab 42, if we
2 could, please. Again, that's in that second volume of
3 the Core Bundle.
4 This is Claimants' Exhibit 170, and it's an
5 annual benefits report that Hibernia provides to the
6 Board; is that right, Mr. Rosen?
7 A. Yep.
8 Q. Okay. If we just flip that first page, and
9 down at the very bottom we see "operating expenditures
10 are higher than typical annual expenditures"--and
11 again this was in 2009--"due to ██████████ spent in
12 2010 towards preparations for the ██████████
13 project to be anticipated to be completed in 2011?"
14 A. I see that.
15 Q. So, again, ██████████ a significant
16 expenditure?
17 A. Correct.
18 I'm sorry, were you suggesting this was R&D?
19 Q. No, I was not.
20 A. I thought you were talking about--
21 Q. Sorry, I'm just talking about--
22 A. I thought you were relating it to--

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03:33:41 1 Q. Okay. So, you acknowledged the Claimants
2 would have ██████████ anyway. As a whole, this
3 is something they were going to do in any event?
4 A. If that's Mr. Ringvee's evidence, I certainly
5 wouldn't contradict it.
6 Q. Okay. Why don't we look at another
7 expenditure.
8 A. Sure.
9 MS. LAMB: Sorry, can I ask, just to be
10 clear, could you please ask Mr. Rosen whether he is
11 speaking to his own knowledge or not? I think it's
12 only fair.
13 MR. DOUGLAS: Fair?
14 MS. LAMB: Do you have personal knowledge of
15 whether ██████████ was to be incurred or not?
16 THE WITNESS: I don't.
17 BY MR. DOUGLAS:
18 Q. Looking at the ██████████ Ringvee
19 testified about the nature of this project?
20 A. Yes.
21 Q. Why don't we turn to that. Again,
22 Mr. Ringvee's transcript, Page 468, beginning at

882

03:32:50 1 Q. No, just the cost of the project altogether.
2 So, ██████████
██████████
██████████ the savings could
5 be substantial?
6 A. So, that's why I asked you, are you
7 suggesting this is an incremental spend on R&D, or is
8 this just capital spending?
9 Q. Well, that's just a capital spending, but
10 what I'm saying is, ██████████
██████████
██████████
13 A. Yeah, I'm sorry. I didn't see the
14 connection. Maybe you should go back and do that for
15 me again.
16 Q. Okay.
17 The Claimants are engaging in an ██████████
██████████ correct?
19 A. Correct.
20 Q. And you've identified that as being partially
21 incremental spending and partially ordinary course?
22 A. Correct.

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03:34:54 1 Line 11. I won't be going back to the transcripts all
2 the time, just for a couple of examples.
3 ██████████
██████████
██████████
██████████
8 Do you see that there, Mr. Rosen?
9 A. Yes, I do.
10 ██████████
██████████
12 A. Yes, I saw it.
13 Q. Okay. This expenditure is incremental
14 spending?
15 A. Sorry--
16 Q. The ██████████ is incremental spending?
17 A. I believe so, yes.
18 Q. Okay. If we could turn back again to Tab 43
19 again.
20 A. I still have it open.
21 Q. You still have it open.
22 These are the Claimants' ordinary course

03:35:59 1 filings for 2009?
 2 A. Correct.
 3 Q. And line just below [REDACTED] what
 4 does that say, Mr. Rosen?
 5 A. Sorry, which?
 6 Q. Thomas, back. Stop--no, forward, forward.
 7 Stop there, please. Thank you.
 8 A. Before you--
 9 Q. And the line--
 10 A. Oh, 43. So, I was on 42.
 11 Q. Line 13.
 12 A. [REDACTED]
 13 Q. Okay. Again, it's a small amount, but one
 14 that has been included as an ordinary course
 15 expenditure in 2009?
 16 A. Correct.
 17 Q. Okay. So, before when you stated that this
 18 was incremental spending, that was a misstatement?
 19 A. Whether this particular was incremental
 20 spending?
 21 Q. Um-hmm.
 22 A. No, I believe this is ordinary course

03:37:58 1 A. 13. That's why I didn't find it.
 2 Yes, I have it now.
 3 Q. And that was Bates number 3471, if you would,
 4 please.
 5 A. Yes.
 6 Q. So, this is an expenditure, a part of the
 7 Work Plans; is that right?
 8 A. Yes.
 9 Q. I already asked you whether this was
 10 incremental spending, and I believe your answer was
 11 yes?
 12 A. That's correct.
 13 Q. But you've included a portion of the [REDACTED]
 [REDACTED] as ordinary course spending in 2009?
 15 A. Correct.
 16 Q. Okay. So, which one is it, Mr. Rosen?
 17 A. Well, the cost estimate for Phase I is
 18 between [REDACTED]
 19 Q. Um-hmm.
 20 A. So--
 21 Q. Over a period of time?
 22 A. Over a period of time, correct.

03:36:44 1 spending.
 2 Q. Yes.
 3 And so there is also a split between what is
 4 ordinary course and incremental spending with respect
 5 to the [REDACTED]
 6 A. Well, all I see here is [REDACTED]
 7 Q. And you see a reference to the [REDACTED]
 8 correct?
 9 A. Yes, yes.
 10 Q. And the [REDACTED] is an expenditure under the
 11 Work Plans?
 12 A. Yes.
 13 Q. That is incremental spending?
 14 A. Can you take me to the Work Plan where that
 15 is?
 16 Q. Absolutely. That would be Tab 212--it would
 17 be Tab 3.
 18 A. Of Volume 1?
 19 Q. This is Claimants' Exhibit CE-212, and the
 20 page is 34--it's Bates number 3471.
 21 A. So, this is at tab--
 22 Q. Three, I believe.

03:38:55 1 Q. So, are there portions that are incremental
 2 spending and portions that aren't--that are ordinary
 3 course? Is that how this works?
 4 You know what, Mr. Rosen, it's okay, we could
 5 just move on, if you would like.
 6 A. No, I just want to make sure I give you the
 7 correct answer.
 8 Sorry. Give me a moment with these dates.
 9 (Pause.)
 10 A. So, the Work Plan details the [REDACTED] and
 11 the other example you gave me of [REDACTED] and on the
 12 same day this letter that you have under Tab 43 sets
 13 out expenditures for 2009 that are seeking approval
 14 under the Guidelines.
 15 Q. Um-hmm.
 16 A. So, there is no indication that they're not
 17 incremental spending, so if I indicated before that
 18 they were, I apologize.
 19 Q. Yeah, I believe that that document is
 20 referred to under that Footnote 9 under Paragraph 21
 21 of your Third Report--
 22 A. Yes.

03:46:52 1 [REDACTED]
 2 A. Yes.
 3 Q. Okay. And then, the bullet under that says,
 4 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 13 A. It's the same response. Again, this is--if
 14 the company felt that it was economically feasibility
 15 to do this, I would have assumed it would have been
 16 ordinary course. That's certainly the rationale I
 17 have adopted in my analysis.
 18 Q. Okay. If I could have you just flip that tab
 19 over, this is GFA-Exhibit 71 and Tab 15 of the Core
 20 Bundle. This is a [REDACTED]
 21 A. Yes.
 22 Q. If you look under page--the page that's on

03:48:57 1 Just again very quickly, Tab 16.
 2 A. Sure.
 3 Q. This is a [REDACTED]
 [REDACTED] Again, this is GFA Exhibit 69.
 5 A. Okay.
 6 Q. Do you know anything about this expenditure?
 7 A. Let's see, [REDACTED] I'm sure
 8 I have seen the document but I can't tell you what
 9 it's--I can read it, if you like, and tell you.
 10 Q. It's a little long.
 11 Why don't we just look at the application
 12 page, which is the previous page.
 13 A. Yes.
 14 Q. Just back one page, Thomas, and there we go,
 15 and down at the description of E&T, it says, [REDACTED]
 [REDACTED]
 [REDACTED]
 19 A. I'm sorry, where are you reading?
 20 Q. Just down at the description of the E&T
 21 activity.
 22 A. Description, yes. The objective of this

03:47:53 1 the screen that's not number--under "description," can
 2 you read for me the first line of that description.
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 9 Q. That's fine if you wanted to stop, or you can
 10 keep going--just the first line was fine.
 11 This expenditure, [REDACTED] forms
 12 part of the Claimants' incremental spending?
 13 A. The E&T spending, yes.
 14 Q. So, in the absence of the Guidelines, this
 15 [REDACTED] would not have been established?
 16 A. That's my understanding.
 17 Q. Okay. And so, by seeking to have Canada pay
 18 an award, Claimants are in effect asking Canada to pay
 19 for [REDACTED]
 20 A. I'm not--I'm not sure I'm the right person to
 21 answer that question.
 22 Q. Okay.

03:49:56 1 activity is to [REDACTED]
 [REDACTED]
 [REDACTED]
 4 Q. Okay. Okay. So, again this is incremental
 5 spending?
 6 A. Yeah, this is E&T incremental.
 7 Q. They would not have engaged this expenditure
 8 in the absence of the Guidelines?
 9 A. As far as I know, that's correct.
 10 Q. If we flip the tab to Tab 17, this is GFA
 11 Exhibit 75.
 12 A. Yes.
 13 Q. And if you just flip that application page to
 14 the top where it says project proposal?
 15 A. Yes.
 16 Q. Under project purpose, you see it says, [REDACTED]
 [REDACTED]
 [REDACTED]
 20 A. Yes.
 21 Q. So, this is an expenditures for these items
 22 generally?

03:50:44 1 A. Yes.
 2 Q. Okay. This is also increment spending?
 3 A. Yes, this would be more E&T.
 4 Q. Okay.
 5 In your damages assessment, you don't make
 6 any deductions for SR&ED tax credits in the Work Plan
 7 expenditures; is that right?
 8 A. Correct.
 9 Q. And you don't make any deductions for savings
 10 on royalty payments?
 11 A. Correct.
 12 Q. All right. Is it possible that the Work Plan
 13 expenditures will result in SR&ED tax credits?
 14 A. Anything is possible.
 15 Q. Okay. And it's possible they might resolve
 16 in savings on their royalty payments?
 17 A. It is possible, yes.
 18 Q. But believe it is uncertain whether the Work
 19 Plan will result in SR&ED tax credits?
 20 A. I have two problems with the way it was
 21 quantified or dealt with by your Expert. The first
 22 was the benchmark that was used, I thought, was--and I

03:52:45 1 pages that is numbered, and it's Page 13 of 14, the
 2 very back--the back looseleaf portion.
 3 Now, first of all, you saw what this document
 4 is?
 5 A. Yes, I do.
 6 Q. It's a funding for the--
 7 A. [REDACTED]
 8 Q. Yeah. The top paragraph, it says [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] should be automatically SR&ED-eligible.
 13 A. Should be.
 14 Q. Okay. You don't make any deductions for
 15 SR&ED for this expenditure in your calculations?
 16 A. No. It's not--it hasn't been SR&ED-approved.
 17 Q. Okay. If I could refer you to Tab 3 of the
 18 Core Bundle?
 19 A. Yes.
 20 Q. My apologies, I actually meant Tab 4.
 21 A. Okay. The Terra Nova Work Plan?
 22 Q. This is the Terra Nova Work Plan. This is

03:51:44 1 don't want to e repeat myself at length, but I didn't
 2 think it was an appropriate benchmark, and the I found
 3 that there was sort of an aggressive assumption that
 4 led to an overvaluation of what the potential benefit
 5 would be. So, I looked at it and said it might be a
 6 small benefit, but there is certainly nothing I could
 7 hang my hat on to arrive at a number.
 8 Q. Okay. And that's because the incremental
 9 spending or the Work Plan expenditures, uncertain as
 10 to whether they would be eligible under the SR&ED
 11 regime?
 12 A. Whether they'll be eligible or whether
 13 they'll actually be undertaken.
 14 Q. Okay. If we could look Tab 22, which is
 15 GFA-62.
 16 Why don't I address each of your concerns.
 17 You mentioned two concerns; one, whether the
 18 expenditure will be undertaken; and two, whether would
 19 be eligible under SR&ED; is that right?
 20 A. Correct.
 21 Q. Okay. Now, if I could have you turn to--this
 22 one is actually numbered, but it's one of the only

03:54:04 1 Claimants' Exhibit 213. And we are looking at Bates
 2 Page 3527.
 3 A. Yes.
 4 Q. And the fourth bullet down?
 5 A. The Work Plan [REDACTED]
 6 Q. Yes.
 7 A. About [REDACTED]
 8 Q. Yes.
 9 A. -- will immediately reduce shortfall to about
 10 [REDACTED]
 11 Q. Okay. So, there is no uncertainty as to
 12 whether or not this expenditure will occur?
 13 A. If it's spent, it will reduce the shortfall.
 14 Q. Okay. If it's spent; right?
 15 A. Right.
 16 Q. Okay. If you were to deduct the SR&ED tax
 17 credits, it's approximately [REDACTED]
 18 A. Correct.
 19 Q. And so, the expenditure on the [REDACTED]
 [REDACTED]
 21 A. Sorry, where is your [REDACTED] coming from?
 22 Q. I have to take you back to the previous tab.

03:55:20 1 A. Well, there is a bullet point in the same
2 page. [REDACTED]
[REDACTED]
[REDACTED] oh,
5 no, I'm sorry. That's not the [REDACTED]
6 Q. Well, it's about right. It's [REDACTED] for
7 Hibernia and [REDACTED] for--actually [REDACTED] for Hibernia
8 and [REDACTED] for Terra Nova.
9 A. Okay.
10 Q. So, as a whole, [REDACTED]
11 A. Approximately, yes.
12 Q. And if you were to apply a SR&ED tax credit
13 to [REDACTED] any idea as to what that would be?
14 A. Roughly [REDACTED]
15 Q. Okay. You mentioned before that the
16 Claimants have an intention to spend in ways that are
17 financially efficient.
18 A. It's only rational that anybody would. If
19 there is a project where they could spend, they would
20 not throw their money away presumably. They would try
21 and spend it in a way that is rational.
22 Q. Okay. And that would include trying to spend

03:57:20 1 A. --if you want to read that graph for me.
2 Q. Why don't we turn to Tab 5, if you will.
3 A. Okay.
4 Q. Tab 5 of one--obviously, the Core Bundle.
5 This is Exhibit 140.
6 A. Okay.
7 Q. These are notes from a CAPP task team
8 discussion from December 2008.
9 A. Okay.
10 (Cellphone rings.)
11 MR. DOUGLAS: One of my favorite rings.
12 BY MR. DOUGLAS:
13 Q. If I could just have you turn--and
14 Mr. Ringvee testified to the nature of some of these
15 meetings--so, meetings on behalf of industry to
16 discuss how they intend to meet their Guideline
17 obligations; correct?
18 A. Okay. Yeah.
19 Q. Okay. If we just turn the page to Bates
20 number 2260.
21 A. Okay.
22 Q. And under considerations, the third bullet

03:56:19 1 it in ways that are SR&ED-eligible?
2 A. That may or may not be one of the rationales.
3 I think it's something that produces benefit to them
4 if they could. If it's SR&ED-eligible, it might.
5 Therein lies the problem. Everything that
6 they can do that's economically sound, being a
7 profit-motivated company, if you follow the logic,
8 they would be don. So, everything they're not doing,
9 presumably, is because it doesn't meet those criteria.
10 If you follow that logic, you are fine with my
11 analysis. If you don't follow that logic and think
12 that for some reason they won't spend things that are
13 reasonable to spend, then you're right, then my
14 calculations would not be correct.
15 Q. Okay. But in terms of spending incremental
16 spending, in the category of incremental spending, is
17 there an intent on the part of the Operators to spend
18 in ways that will entitle them to SR&ED tax credits?
19 A. I mean, you had Mr. Phelan and Mr. Ringvee
20 here. I guess they could answer that question. I
21 mean, I can assume you could--
22 Q. Okay.

03:58:10 1 down.
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
8 Q. That's fine. So--
9 A. It's certainly a goal, and I would assume any
10 rational--you would assume any rational company would
11 have that goal.
12 Q. Okay. [REDACTED]
[REDACTED]
15 A. Yes, as I said. Any rational company will
16 try and do that.
17 Q. The Claimants do not have a desire to pay
18 just a lump-sum over to the Board; is that right?
19 A. I could only assume they don't.
20 Q. Okay. Well, why don't we stick just to that
21 tab, and we will go to Page 2262, if you would.
22 A. Okay.

04:03:15 1 A. And I answered yes, less than certain.
 2 Q. You said less than certain. Okay. And here,
 3 it says, as discussed above, all damages calculations
 4 of future--I'm just really quoting from you.
 5 A. Yes, and I agreed with you, they are less
 6 than certain.
 7 Q. Okay. And you agree that your quantification
 8 that you provide will be higher or lower than future
 9 actual results?
 10 A. Correct.
 11 Q. Okay. And in your view, the role of an
 12 expert is to determine the most likely quantum of
 13 damages?
 14 A. Correct.
 15 Q. The most likely quantum of damages in this
 16 case is one that does not include SR&ED tax credits?
 17 A. Correct.
 18 Q. And does not include savings on royalty
 19 payments?
 20 A. Correct.
 21 Q. And does not include operational benefits?
 22 A. Correct.

04:05:03 1 Q. Yes. And then, your Third Report,
 2 incremental spending is now [REDACTED]
 3 A. Correct, because we have up-to-date
 4 information.
 5 Q. Okay. So, in total, that's about [REDACTED]
 6 [REDACTED] in incremental spending from your
 7 First Report to your Third Report?
 8 A. Yes. I mean, the Board had not yet approved
 9 it, and we didn't have information. So, when the
 10 Respondent approved it, we had the correct
 11 information.
 12 Q. So, in terms of mitigating future uncertainty
 13 by relying on the most up-to-date information, did
 14 that happen with your First Report?
 15 A. Between my first and my last report, yes.
 16 Q. Okay.
 17 MR. DOUGLAS: I think that's a good place to
 18 take a break.
 19 PRESIDENT van HOUTTE: Then, a 15-minute
 20 break.
 21 Mr. Rosen, you are as a witness here. Of
 22 course you can walk around, but you should not speak

04:03:56 1 Q. Okay. Even though damages calculations of
 2 future losses are, by their nature, uncertain.
 3 A. Yes, they're future-oriented. All future
 4 information is uncertain.
 5 Q. Okay. You argue that, by using the most
 6 up-to-date information, you can mitigate the
 7 uncertainty associated with future events and gain
 8 sufficient certainty to arrive at a conclusion on
 9 damages?
 10 A. Yes.
 11 Q. Okay. In your First Report, incremental
 12 spending out of Hibernia between 2004 and 2008 was
 13 about [REDACTED]
 14 A. That's about right.
 15 Q. Okay. And if we look at your Third Report,
 16 that would be [REDACTED]
 17 A. That's about right.
 18 Q. For Terra Nova in your First Report,
 19 incremental spending between '04 and '08 was
 20 [REDACTED]
 21 A. Yes, based on the preliminary information at
 22 that time, yes.

04:05:54 1 with anyone of both sides. Thank you.
 2 (Brief recess.)
 3 PRESIDENT van HOUTTE: Please.
 4 (Comments off microphone.)
 5 MS. LAMB: That's fine, sir.
 6 MR. DOUGLAS: And I assume we're still in a
 7 closed session?
 8 THE SECRETARY: Yes, we are.
 9 BY MR. DOUGLAS:
 10 Q. When you calculate what the Claimants will
 11 owe under the Guidelines in the future, you adopt the
 12 oil price forecast of Ms. Emerson.
 13 A. That is correct.
 14 Q. And her forecast is in U.S. dollars.
 15 A. Correct.
 16 Q. And you convert her oil price forecast into
 17 Canadian dollars.
 18 A. Correct.
 19 Q. To make that conversion, you project the
 20 future Canada-U.S. exchange rate?
 21 A. Excuse me, I adopt the projection of The
 22 Economist.

913

04:21:50 1 Q. Okay. In your First Report you relied on The
2 Economist.
3 A. Correct.
4 Q. But just for the years 2009 to 2013; is that
5 right?
6 A. Yes.
7 Q. Okay. And that was the most up-to-date
8 available information to you at that time.
9 A. Correct.
10 Q. Okay. In your First Report, the exchange
11 rate was forecasted to be \$1.20 cents in 2009; is that
12 right?
13 A. Average for the year, yes.
14 Q. Okay. And that would take \$1.20 cents
15 Canadian to buy one U.S. dollar.
16 A. Correct.
17 Q. Okay. The actual exchange rate in 2009 was
18 \$1.14.
19 A. Correct, on average.
20 Q. On average.
21 So, the Canadian dollar in 2009 was stronger
22 in 2009 than The Economist predicted.

915

04:23:43 1 stable--so from 2014 for the future you predicted a
2 stable exchange rate of \$1.04 cents; is that right.
3 A. I didn't--I didn't have information past
4 that, so I just assumed it would remain constant past
5 that date.
6 Q. Okay.
7 A. In my updated calculation, I had the more
8 complete analysis from The Economist magazine which
9 projected it more long time.
10 Q. Did The Economist not produce these long-term
11 forecasts at the time of your First Report?
12 A. It has to be purchased, and so it just wasn't
13 purchased for the First Report.
14 Q. But you decided to purchase it for your third
15 Report.
16 A. For the final Report, yes.
17 Q. Okay. In The Economist forecast in your
18 Third Report for 2014 is not \$1.04 cents, as you
19 reflected in your First Report, but is actually 98
20 cents?
21 A. That is correct.
22 Q. Such that 98 Canadian cents will buy one U.S.

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04:22:38 1 A. Correct. One of the principal reasons is
2 because the price of oil appreciated. Canadian dollar
3 and the price of oil tend to move in tandem.
4 They refer to it as the petro buck.
5 Q. "In tandem" meaning--
6 A. They're highly correlated. As you see
7 increase in the price of oil, the Canadian dollar
8 strengthens against the U.S. dollar.
9 Q. Okay. Is the Canadian dollar strengthened in
10 your updated calculation?
11 A. Yes.
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 Q. Okay. So, in your First Report, the exchange
16 rate was forecasted to be \$1.12 in 2010?
17 A. I believe that's correct.
18 Q. And the actual exchange rate is \$1.04.
19 A. I believe that's about right.
20 Q. Okay. By about 8 cents.
21 A. Correct.
22 Q. In your First Report you predicted a

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04:24:40 1 dollar.
2 A. That is correct.
3 Q. Okay.
4 A. That is at the date of writing the report,
5 that was the most up-to-date forecast of exchange
6 rates.
7 Q. And that's a six cent difference?
8 A. Yes.
9 Q. Okay. And in 2015, again the Canadian dollar
10 strengthens to 97 cents.
11 A. That is the forecast at that date, yes.
12 Q. Okay. And again compared to the \$1.04 in
13 your First Report, that's a seven cent difference.
14 A. Yes.
15 Q. And then 2018, new projection's 95 cents,
16 again compared to a \$1.04?
17 A. Yeah. The \$1.04 was constant from that last
18 date.
19 Q. It was constant.
20 A. Yeah.
21 Q. Okay.
22 A. There was no forecast compared to.

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04:25:14 1 Q. Okay. And the Canadian--
 2 A. Not really a fair comparison but...
 3 Q. And the Canadian dollar, in your Third
 4 Report, keeps strengthening.
 5 A. That is--that is the current fore--well, that
 6 is the forecast in August of The Economist.
 7 Q. Okay. At any point in the new forecast, does
 8 the future exchange rate hit \$1.04 cents?
 9 A. I don't believe so.
 10 Q. Okay.
 11 A. It's not really relevant but...
 12 Q. Okay. If we kept your model in your First
 13 Report, kept everything the exact same and put in the
 14 new Economist forecast back into your first model,
 15 just to change the exchange rate, do you have any idea
 16 what impact on damages that might have?
 17 A. It would be completely irrelevant because
 18 you'd be mixing forecasts at different dates. And I
 19 think listening to the evidence concerning future oil
 20 price forecasts and now this line of questioning, you
 21 have to understand that when economists and valuers
 22 value anything, it's at a point in time. There

04:27:23 1 time of your First Report to the point in time in your
 2 Third Report, the assessment--and that's a period of
 3 one year, correct?
 4 A. Approximately, yes.
 5 Q. And assessment of the Claimants' future
 6 obligations under the Guidelines has changed in that
 7 period of time.
 8 A. Principally because of what the Board has
 9 approved by way of eligible expenditures, but
 10 certainly there are other factors that have changed in
 11 a material sense.
 12 Q. Okay. You mentioned there are other factors
 13 that changed in a material sense. Could you identify
 14 those factors for me?
 15 A. You just did.
 16 Q. Which were?
 17 A. The price of oil and the exchange rate. You
 18 said you showed me the differences between the
 19 projections at the different dates.
 20 Q. Okay. How much the Claimants owe under the
 21 Guidelines in the future depends on the amount of oil
 22 they produce in any given year; is that correct?

04:26:20 1 is--there is certainly no promise that the future on
 2 any specific date will be that specific number. Value
 3 only exists at a point in time. So, whenever you do a
 4 damages calculation, whenever you value a business and
 5 you determine a cost of capital, which Mr. Walck and
 6 Mr.--I do every day of our lives, you're taking it at
 7 a point in time.
 8 If I looked at the value of General Motors
 9 two years ago and what the analysts said about what
 10 the price would be and then I you looked at General
 11 Motors during the financial crisis and then I looked
 12 at General Motors today, I would see completely
 13 different value, markedly different values. But
 14 you're looking at it at a point in time. Was the
 15 market wrong? Was trillions of dollars invested
 16 incorrect? That was the value at that point in time,
 17 and that's all we do when we value future damages.
 18 The awards are made at a particular point in time, and
 19 those projections exist at a certain point in time,
 20 and I think that's also what Ms. Emerson was saying
 21 yesterday.
 22 Q. And from your assessment and the point in

04:28:21 1 A. Over the life of the project.
 2 Q. But in terms of what they will owe under the
 3 Guidelines for Year 2016, for example, you know, it
 4 was a projection as to what they will produce in 2016;
 5 is that right?
 6 A. For an individual year, it is based on those
 7 projections; but overall, it's based on the total
 8 volume in the reservoir.
 9 Q. Okay.
 10 A. Which is fairly stable right now.
 11 Q. Okay.
 12 A. The last few estimates.
 13 Q. Okay.
 14 And so you use a production profile in your
 15 Third Report for Hibernia; is that right?
 16 A. Which is the most current production profile;
 17 that's correct.
 18 Q. And a production profile for Terra Nova.
 19 A. Correct.
 20 Q. In your First Report you used two production
 21 profiles from 2009?
 22 A. Yes, from an earlier date.

04:29:15 1 Q. Okay. And in your Second Report you defended
2 these forecasts as reliable because the projects are
3 mature businesses?
4 A. I said as projects mature. They were
5 criticized by Mr. Walck, and he used a variety of
6 benchmarks to criticize the production profile, saying
7 that they're not reliable because certain profiles in
8 a pre-Production Phase and an Exploration Phase were
9 markedly different than from a Production Phase. And
10 I simply said management, generally speaking, as a
11 project goes from exploration to development to
12 production gets better at estimating the total size of
13 the reserve and the production profiles increase in
14 reliability.
15 Q. Okay.
16 A. And I think that was my point.
17 Q. Okay. Your First Report predicted that Terra
18 Nova in 2009 would produce [REDACTED] of oil?
19 A. Both Hibernia and Terra Nova are both about
20 [REDACTED]
21 Q. Okay. And actual production at Terra Nova
22 was [REDACTED] of oil?

04:31:00 1 15 percent.
2 Q. Okay. And the Board approved a Terra Nova
3 Development Plan in 1987?
4 A. Yes.
5 Q. And as part of that Development Plan, the
6 Board approved a production profile?
7 A. Yes.
8 Q. In 2002, the Board approved an amendment to
9 the Development Plan?
10 A. That's correct.
11 Q. With another production profile?
12 A. Yes.
13 Q. And in 2005, the Board approved another
14 amendment?
15 A. I believe so, yes.
16 Q. With another production profile?
17 A. They keep getting updated, yes.
18 Q. Okay. Historically, has Terra Nova
19 production matched what has been forecast?
20 A. In some years yes, some years no.
21 We can go to the exhibit of the production.
22 Q. No, that's okay.

04:30:14 1 A. Correct. It was lower and Hibernia was
2 higher.
3 Q. Okay. So it was lower by about [REDACTED]
4 [REDACTED]
5 A. Correct.
6 Q. Okay. Was it about [REDACTED] less?
7 A. Total reserve didn't change, but for that one
8 particular year, yes, that's correct.
9 Q. Okay.
10 A. So, they had some unanticipated problems in
11 that year that led to lower recoveries, but certainly
12 the overall size of the reservoir did not change.
13 Q. So, what you're saying is total recoverable
14 oil don't reserve. Are you implying that oil will
15 just then be produced, why it was short this year but
16 it'll just be made up in a future year?
17 A. Yes.
18 Q. Okay. Let's assume for the sake of argument
19 a 15 percent discount rate. If the oil being produced
20 is put off to a subsequent year, what impact would a
21 15 percent discount rate have on that?
22 A. It would reduce your calculations by

04:31:57 1 Let's assume that on an historic basis
2 they've been 25 percent lower. Would that have any
3 impact on your assessment of their future production?
4 A. It might mean these are the years they're
5 going to be catching up, so it might be higher than
6 projected. But again I'm not an engineer in the
7 petroleum field.
8 Q. No.
9 A. So I wouldn't hazard a guess there. I'd
10 stick with the Experts on their expectations.
11 Q. In your First Report, just turning to
12 Hibernia now, the production profile you used was
13 submitted to the Board?
14 A. Yes.
15 Q. And that production profile was determined by
16 the Board to be reasonable?
17 A. Yes.
18 Q. Okay. Do you have enough water?
19 A. I do. I'm just--for some reason the dryness
20 of the air, it just makes me cough.
21 Q. I know. And you updated that production
22 profile in your Third Report.

04:32:50 1 A. Well, I didn't update it. The company did.
 2 I adopted what the company updated.
 3 Q. Okay. And if we could open up to Tab 37 of
 4 your Core Bundle. This is Claimant Exhibit 238.
 5 Is this the production profile you used in
 6 your Third Report?
 7 A. It's not labeled, but I believe this is it.
 8 Yes.
 9 Q. Okay. Has this production profile been
 10 submitted to the Board?
 11 A. Submitted but not approved--oh, actually I
 12 don't think it's been submitted, no. But the Board's
 13 only--I'm sorry, the Board's own estimation of the
 14 total reservoir is about the same number.
 15 Q. Okay. So, in total, it says there a--I might
 16 mix up my numbers. Is that [REDACTED] of
 17 oil?
 18 A. Yes, about [REDACTED], yeah.
 19 Q. Okay. But that would include Hibernia South
 20 and the AA Blocks; is that correct?
 21 A. Correct.
 22 Q. Oil that you do not use as part of your

04:35:00 1 think.
 2 A. Okay.
 3 Q. See it's a letter?
 4 A. Yes.
 5 Q. The Board sent a letter to HMC requesting
 6 clarification or further information?
 7 A. Sorry, this is an HMC letter.
 8 Q. You're right. This is an HMC letter filed to
 9 and provided to the Board because HMDC is providing
 10 the clarification to the Board.
 11 A. Correct. I thought you said this was a
 12 letter to--
 13 Q. Oh, you know, I won't lie. I probably did.
 14 My apologies.
 15 A. Okay.
 16 Q. So, this is a letter from HMDC to the Board.
 17 A. Correct.
 18 Q. Clarifying their Development Plan Amendment?
 19 A. Correct.
 20 Q. Okay. If we just turn the page over.
 21 A. Yes.
 22 Q. We see on the bottom of Page 2.

04:34:01 1 damages calculation; is that right?
 2 A. Correct.
 3 Q. So, Hibernia North figure is [REDACTED] I
 4 don't know. [REDACTED] barrels of oil?
 5 A. [REDACTED]
 6 Q. I think that's easier. Thank you.
 7 A. From this document, yes.
 8 Q. Okay. Since you filed your First Report, the
 9 Claimants have sought to amend their Development Plan;
 10 is that right?
 11 A. Yes.
 12 Q. Okay. And they submitted an application to
 13 the Board in January 2010 for that amendment?
 14 A. I believe so.
 15 Q. Okay. Are you aware they clarified some
 16 aspects of their application in April 2010?
 17 A. If you could show me the document, that might
 18 be helpful.
 19 Q. Sure. This is GFA Exhibit 59. It's Tab 36
 20 of your Core Bundle.
 21 So, if you just hold your finger there on
 22 that production profile, that would be helpful, I

04:35:45 1 A. Yes.
 2 Q. Again, another production profile, some less
 3 detailed than the one that you've provided.
 4 A. Yes. It says this is a corrected table.
 5 Q. And if we look at the most likely
 6 recoverable, we see Hibernia B Pool non-HSE unit [REDACTED]
 [REDACTED] of oil?
 8 A. Yes.
 9 Q. Okay. Are you aware that last week the Board
 10 approved this production profile?
 11 A. I was not aware of that.
 12 Q. Okay. So why don't we look to--and the
 13 Claimants have filed this as their new materials,
 14 Claimants' Exhibit 244. And that will be at Tab 44 of
 15 your bundle.
 16 Yes, sir.
 17 PRESIDENT van HOUTTE: Mr. Douglas, we
 18 started with examining Mr. Rosen at 2:00. It's now
 19 4:30. For me it's all fine, but Mr. Walck is also on
 20 the schedule, and I had the feeling that he shall also
 21 be examined by the two Parties extensively.
 22 Now how do you see--how do both Parties see

04:37:13 1 the timing with regard to what we will have to do
 2 tomorrow?
 3 MR. DOUGLAS: I'm--and just--
 4 PRESIDENT van HOUTTE: And I don't want to
 5 cut you short--
 6 MR. DOUGLAS: No, fair enough. And just in
 7 fairness, Mr. President, the examination did start at
 8 2:00, but the Claimants did examine their Expert for
 9 an hour until 3:00. So I'm just--
 10 PRESIDENT van HOUTTE: No, no, no. But it's
 11 just I speak about persons--
 12 MR. DOUGLAS: Fair enough.
 13 PRESIDENT van HOUTTE: That's why I addressed
 14 the question to both sides. And if you will do the
 15 same with Mr. Walck, and you are entitled to do it,
 16 and it will be 6:00 before we know it.
 17 MR. DOUGLAS: Not quite--
 18 PRESIDENT van HOUTTE: No, no, but I just
 19 raise the issue.
 20 MR. DOUGLAS: Of course.
 21 PRESIDENT van HOUTTE: And I would like to
 22 know the position of both sides, so not only from

04:39:26 1 MR. RIVKIN: And then the hope would be what
 2 Mr. Gallus and I talked about--he's not in the room
 3 now--but what we talked about was along the lines that
 4 we discussed with the panel at the end of the day
 5 yesterday which is each day would do openings
 6 of--closings, rather, of about 90 minutes which we
 7 would then hopefully get done by lunch, including your
 8 questions, have a lunch break and then have time for
 9 short rebuttal, 20 to 30 minutes after lunch, and that
 10 would still hopefully give you all some time to
 11 deliberate before you take off.
 12 PRESIDENT van HOUTTE: And I insist, my
 13 inquiry was not to cut short someone, but it was just
 14 to try to get the most out of the hearing.
 15 MR. DOUGLAS: I'll be mindful of the time as
 16 I proceed. Thank you.
 17 BY MR. DOUGLAS:
 18 Q. So, we've just looked at a production profile
 19 submitted by the Proponent of Hibernia to the Board;
 20 is that right, Mr. Rosen?
 21 A. Yes.
 22 And, sorry, you were just taking me to Tab 40

04:37:55 1 Canada.
 2 And of course I don't have to repeat. You
 3 should absolutely have the feeling that did whatever
 4 you had to do.
 5 MR. DOUGLAS: Okay.
 6 MR. RIVKIN: How long do you think you might
 7 have?
 8 MR. DOUGLAS: I think I might have another 30
 9 to 40 minutes.
 10 (Discussion off microphone.)
 11 MR. DOUGLAS: Probably about 30 minutes.
 12 MR. RIVKIN: Perhaps we can try to finish up
 13 with Mr. Rosen and get Mr. Walck's direct done, and we
 14 could perhaps start a little bit earlier tomorrow than
 15 planned.
 16 PRESIDENT van HOUTTE: Are you planning to go
 17 to 7:00?
 18 MR. RIVKIN: Well, we had thought that we'd
 19 start at 9:00 with the openings.
 20 (Discussion off microphone.)
 21 PRESIDENT van HOUTTE: Would that be possible
 22 for the Court Reporter to start at 8:30?

04:40:19 1 something?
 2 Q. And I was just pointing you to the Board's
 3 approval of that profile?
 4 A. Was it tab 44, you said?
 5 Q. I believe it was Tab--44, correct. That's
 6 Claimant Exhibit 244.
 7 A. Okay. This is staff analysis dated
 8 September 2?
 9 Q. Correct.
 10 A. Yes, I got it.
 11 Q. Would you go to Page 31 of that document?
 12 A. Okay.
 13 Q. Again, if you look down the B Pool, which
 14 does not include the AA or the Hibernia itself, we see
 15 that [REDACTED] figure again?
 16 A. Yes.
 17 Q. Okay. So, if we take this figure and compare
 18 is it to the forecasts you use...
 19 A. Okay.
 20 Q. Which again was Tab 37 of the Core Bundle.
 21 A. Oh, sorry.
 22 Yes.

04:41:12 1 Q. It's Claimant Exhibit 238.
 2 A. Yes.
 3 Q. We see a total of [REDACTED]
 4 A. Yes.
 5 Q. That's about [REDACTED] higher than
 6 the forecast that was approved by the Board last week?
 7 A. If I could, I'd just like to follow that
 8 production into my report.
 9 Q. Okay.
 10 A. If that doesn't create a problem.
 11 Okay, if we could go to Schedule 2 of my
 12 Third Report, and so to determine what effect, if any,
 13 this would have on my numbers, you would have to
 14 compare this development, amended Development Plan
 15 production schedule with that used in my Schedule 2.
 16 So, if you look at net R&D requirement per the
 17 Guidelines, you'll see the annual production in
 18 millions of barrels?
 19 Q. Yes, I do.
 20 A. Okay. And it says Footnote 1. And this is
 21 off of the letter to the Board dated February 26, '09.
 22 But if we insert these figures, for instance, if we

04:44:16 1 Q. You will see in 2010 the figure there is
 2 [REDACTED]
 3 A. Correct.
 4 Q. And the figure you use in your report is
 5 [REDACTED]
 6 A. Correct.
 7 Q. Why is there a discrepancy?
 8 A. This is their share of that number.
 9 Q. Whose share of what number?
 10 A. The Claimants.
 11 Q. Rather than the Operator as a whole.
 12 A. Correct.
 13 Q. I thought your methodology was to take
 14 incremental spending for the projects as a whole and
 15 then at the end take the ownership interest. So, for
 16 example, if we look to Paragraph 4 of your Third
 17 Report--you see that, Mr. Rosen?
 18 A. Yeah, I'm sorry. I'm just looking at
 19 the--I'm just looking at the schedule itself. Just
 20 give me a minute to...
 21 (Witness reviews document.)
 22 A. Sorry, could you bring up my document FTI

04:43:19 1 start with 2011--
 2 Q. Which figures are you referring to?
 3 A. The figures that you've just shown me in the
 4 recently approved.
 5 Q. Okay.
 6 A. So, for instance, starting next year in 2011,
 7 it's showing the B Pool at [REDACTED] barrels.
 8 Q. That's correct.
 9 A. My forecast has it at [REDACTED], so this is
 10 considerably higher.
 11 And then 2012 would be [REDACTED] compared to [REDACTED] in
 12 my forecast.
 13 And then 2013 would be [REDACTED] which is
 14 considerably higher than my forecast, [REDACTED]
 15 Then [REDACTED] in this new forecast compared to mine
 16 of [REDACTED]
 17 And so what it does is it accelerates a lot
 18 of production closer and would actually increase the
 19 calculation.
 20 Q. If I can turn you back to the production,
 21 Claimants' Exhibit 238 at Tab 37.
 22 A. Yes.

04:46:21 1 UC-3.
 2 Q. I believe it's the same as CE-38. CE-38 just
 3 happens to be the one referred to by the witness Paul
 4 Phelan but we can bring that up--
 5 A. I'm just trying to match up the numbers.
 6 Q. UC-3, please.
 7 A. I'm sorry. I need a few minutes with a
 8 calculator to tie this stuff in.
 9 Q. Actually, I think I might be able to explain
 10 if you follow with me.
 11 A. Sure.
 12 Q. If I can take you back to CE-238?
 13 A. Yes.
 14 Q. You see at the top it says "kbd"?
 15 A. Ah, okay. Yeah.
 16 Q. So these are in thousands.
 17 A. Right.
 18 Q. So, if we look at the Board's approval, we
 19 see it as--oh, and that's again Tab 44?
 20 A. Right.
 21 Q. We see that's also in kbd?
 22 A. Correct.

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04:47:31 1 Q. Okay. So, it's not the fact that the oil
2 production in your model has been taken--you know,
3 accounted for, the ownership interests.
4 A. No, no, no. It should be the raw--
5 Q. Okay.
6 A. --in millions of barrels.
7 Q. Okay. You just stated that there was--
8 A. Yeah, I'm sorry, I thought that was the--I
9 thought that was the difference there.
10 Q. Did you prepare the spreadsheet we were
11 referring to?
12 A. Did I actually type this in myself? No.
13 Someone working with me did.
14 Q. Okay. So, turning back, then, to what the
15 Board approved--
16 A. Yes.
17 Q. --which is [REDACTED]
18 A. Yes.
19 Q. And I should--also what--I see the BNA in
20 this line, and it--the BNA also is a part of
21 Hibernia--
22 A. Hibernia, yes.

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04:49:03 1 [REDACTED] out of the ground, it would have a very small
2 impact because it's so far in the future.
3 Q. Why would it have a small impact if it's far
4 in the future?
5 A. Because it's discounted back to present
6 value.
7 Q. What is your discount rate?
8 A. It varies between one and one and a half,
9 two percent.
10 Q. So it wouldn't actually have much of an
11 impact.
12 A. Oh, sure it does.
13 Q. Okay. Let's just say for the sake of
14 argument a [REDACTED] of oil are
15 produced.
16 A. Okay.
17 Q. At 75--a price of \$75. [REDACTED] in
18 revenue?
19 A. [REDACTED], yes.
20 Q. Okay. And if we took, say, a .4 percent
21 Stats Can factor.
22 A. Okay.

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04:48:13 1 Q. --part of your calculations.
2 A. Yes.
3 Q. So, that's [REDACTED] If we were to add those two
4 together, we'd be about [REDACTED] barrels
5 of oil?
6 A. Correct.
7 Q. Okay. That's still lower than the [REDACTED] you
8 use in your Third Report.
9 A. Correct.
10 Q. By about [REDACTED] barrels of oil.
11 A. Correct.
12 Q. So again, let's assume for the sake of
13 argument a \$75 barrel--sorry, oil price. Do you know
14 what the gross revenues would be of [REDACTED]
15 [REDACTED] of oil?
16 A. What you would have to do, though, I'm sorry,
17 is you'd have to go back and compare it year by year
18 because if it's in the later years, it will have a
19 very small impact, and if it's in the earlier years it
20 will have a greater impact. So you can't just
21 multiply it by the price of oil.
22 So, if it was the last [REDACTED]

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04:49:42 1 Q. Do you have any idea what the requirement
2 under the Guidelines would be?
3 A. You'd have to give me a calculator.
4 Q. Okay. Would [REDACTED] sound--
5 A. I'd have to have a calculator to do it.
6 Q. Okay. Do you have any reason to disagree
7 with [REDACTED] roughly?
8 A. Like I said, if you want me to do the
9 calculation, I'm happy to grab a calculator and do it.
10 Q. Okay. So assuming it's [REDACTED] --
11 A. Okay.
12 Q. --that would be a [REDACTED] increase in
13 their obligations under the Guidelines under your
14 production profile that you use against what the Board
15 approved last week.
16 A. Correct.
17 Q. Okay.
18 A. If you assume that's correct.
19 Q. Okay. In your First Report, the Claimants
20 ordinary course expenditures at Hibernia were
21 [REDACTED]
22 A. I believe that's correct. I can pull out the

04:50:39 1 First Report and--
 2 Q. Sure. That's for you. That would be
 3 Schedule 2--
 4 A. Yeah.
 5 Q. --to the Experts' First Report.
 6 We see there the line item "R&D expenditures
 7 in the ordinary course?"
 8 A. Yes.
 9 Q. That's [REDACTED]
 10 A. Correct.
 11 Q. Okay. And at Terra Nova, Schedule 3, it was
 12 [REDACTED]
 13 A. [REDACTED] yes.
 14 Q. [REDACTED]
 15 And this was based on the most up-to-date
 16 information you had at the time.
 17 A. Correct.
 18 Q. And you update these figures in your Third
 19 Report.
 20 A. Correct.
 21 Q. And for Hibernia, your Third Report says that
 22 ordinary course expenditures are [REDACTED]

04:53:02 1 A. Correct, based on what was approved by the
 2 Board.
 3 Q. Decreasing your damages assessment by
 4 [REDACTED] or your assessment of incremental
 5 spending.
 6 A. Incremental spending, yes, not damages.
 7 Q. Okay. At Terra Nova, you decrease the
 8 Claimants' ordinary course projection going forward in
 9 2016 by 50 percent; is that right?
 10 A. Correct.
 11 Q. Okay. So, every year after and including
 12 2016, the ordinary course projection is decreased by
 13 50 percent?
 14 A. Correct.
 15 Q. Okay. If you were not to make that
 16 deduction, would the Claimants have any incremental
 17 spending in 2016 and beyond?
 18 A. I don't believe so.
 19 Q. Okay.
 20 A. And again, when I say I deducted 50 percent,
 21 this is on the advice of management that their
 22 ordinary course spending would decrease in that

04:51:42 1 If we can pull up the Third Report. Schedule
 2 2.
 3 Thank you.
 4 A. [REDACTED]
 5 Q. Yeah.
 6 A. Yeah.
 7 Q. And, Terra Nova, it's [REDACTED]
 8 A. Yes.
 9 Q. So, for adding those two together, it's a
 10 total of about [REDACTED] Roughly [REDACTED]
 11 A. Yeah, yep, yep, yep.
 12 Q. And that would be [REDACTED] greater than
 13 what you said in your First Report.
 14 A. Yes, as I said, a lot more was approved in
 15 the meantime.
 16 Q. Okay. So again, referring to your damages
 17 model of obligations under the Guidelines less
 18 ordinary course expenditures creates incremental
 19 spending. That's your model?
 20 A. Yes.
 21 Q. The ordinary course expenditures between your
 22 First and your Third Reports climbed by [REDACTED]

04:54:20 1 period.
 2 Q. Okay. And as we discussed, when you take and
 3 assess the Claimants' incremental spending, you assess
 4 incremental spending for the projects as a whole and
 5 then take the ownership interests out to determine the
 6 Claimants' incremental spending; is that correct?
 7 A. Correct.
 8 Q. And currently Murphy Oil's ownership interest
 9 at Terra Nova is 12 percent.
 10 A. Correct.
 11 Q. And you assess their damages on a 12 percent
 12 basis.
 13 A. Correct.
 14 Q. You are aware of the current redetermination
 15 process?
 16 A. I am.
 17 Q. That is to be concluded at the end of this
 18 year.
 19 A. I believe it's the end of December, correct.
 20 Q. Okay. And Murphy, in its 10(k)--and 10(k) is
 21 an annual report?
 22 A. Yes, it is.

04:55:09 1 Q. In 2009 they filed one?
 2 A. I believe they did.
 3 Q. And they filed it with the Securities
 4 Exchange Commission of the United States?
 5 A. Yes.
 6 Q. Okay. And in that they state that they
 7 anticipate their ownership interest will decrease to
 8 10.5 percent?
 9 A. I believe I've seen that document, yes.
 10 Q. Now, in order to determine the present value
 11 of the Claimant's future incremental spending, you
 12 employ a discount rate.
 13 A. Correct.
 14 Q. Your discount rate starts at about 1 percent
 15 and then by 2020 it goes up to 2.62 percent?
 16 A. Yeah. What it does is it reflects the
 17 returns on short-, medium- and long-term Government of
 18 Canada Bonds.
 19 Q. Okay.
 20 A. So a portfolio of bonds that would allow the
 21 Claimant to withdraw cash on an as-needed basis in the
 22 future.

04:57:00 1 Q. Okay. And in that second portion you say a
 2 dollar received today has greater value than a dollar
 3 to be received in the future because there is
 4 typically some risk that the dollar, future dollar
 5 will not be received.
 6 A. Correct.
 7 Q. Okay.
 8 A. And that's what I was explaining: The higher
 9 the risk, the higher the rate of return investors
 10 demand.
 11 Q. Okay. It doesn't say anything about where
 12 the monies are invested in that paragraph, though,
 13 does it?
 14 A. No, I mean it's common sense. If you invest
 15 in a Government of Canada Bond versus a corporate
 16 bond, you're going to get a lower rate of interest
 17 reflecting a lower rate of risk inherent in the
 18 guarantee of the Government of Canada.
 19 Q. Okay. Your quantification, as you said, may
 20 be higher or lower than the Claimants' actual future
 21 incremental spending.
 22 A. The risks of what the incremental spending in

04:55:55 1 Q. Okay.
 2 A. On a liquid basis.
 3 Q. Discounting recognizes the fact that a dollar
 4 today is worth more.
 5 A. Yeah, it recognizes two things: the risk
 6 inherent in the instrument it's invested in and the
 7 time value of money, which is a dollar invested
 8 tomorrow is worth less than a dollar invested--or a
 9 dollar received tomorrow is worth less than a dollar
 10 received today.
 11 Q. Okay. So, you mentioned the risk inherent
 12 where it is invested.
 13 A. Correct. So, if you buy a municipal bond or
 14 a corporate bond, you're likely to get a higher rate
 15 of interest reflecting a higher rate of risk.
 16 Q. Yes. If I could turn you to Paragraph 46 of
 17 your First Report.
 18 A. Sure.
 19 Q. We're almost there.
 20 And you state some of the principles of
 21 discounting; correct?
 22 A. Yes.

04:57:48 1 the future are the same irrespective of the Award. So
 2 they will actually incur incremental spending in the
 3 future and it will be different than they expected.
 4 It will be either higher or lower.
 5 Q. Higher or lower than you calculated.
 6 A. Correct.
 7 Q. Okay. And you leave the risk of it being
 8 higher or lower to the marketplace?
 9 A. I leave it with the Claimant because there is
 10 no other place to leave it. They can't--they can't
 11 divest of that risk.
 12 Q. In your Second Report you state that you
 13 leave the risk of being higher or lower to the
 14 marketplace.
 15 A. Well, the marketplace affects their outcome,
 16 so the price of oil, exchange rate, the marketplace
 17 affects what the company will actually end up owing
 18 under the Guidelines.
 19 Q. So, whatever happens in the world happens in
 20 the world--
 21 A. Irrespective of what we do here.
 22 Q. The risks are out there.

04:58:37 1 A. Correct.
 2 Q. Okay. So, the risk of your assessment of
 3 future incremental spending being higher or lower is
 4 not a component in your discount rate.
 5 A. Correct. It can't be.
 6 Q. Okay.
 7 A. You would be double counting that risk.
 8 Q. And you argue in your--that your discount
 9 rate is appropriate because the Claimants are not
 10 seeking lost profits; right?
 11 A. Well, in a typical lost profits case, as I
 12 said in my introductory remarks, you would typically
 13 expect the award received by the Claimant to be
 14 reinvested in their business to reproduce the loss of
 15 earnings or loss of profits that they are claiming;
 16 and the assumption inherent in that is, in all
 17 economic damage calculations, is that the Claimant can
 18 actually take the award and invest it in his business
 19 and earn that rate of return. It's inherent in that
 20 type of calculation. If the Claimant can't, then they
 21 are undercompensated other than using a risk-free rate
 22 of return where they can draw from a fund. And this

05:00:41 1 as lump sums.
 2 Q. And the principle and the interest from the
 3 investment in the Government bond would then meet
 4 future--their future Guideline costs. Is that--
 5 A. Net of tax, that's correct.
 6 Q. Okay. Would you agree that the Claimants
 7 will need to pay future operating costs for the
 8 projects over the remainder of the projects' lives?
 9 A. Future operating costs just in the ordinary
 10 course?
 11 Q. Yes.
 12 A. Yes.
 13 Q. Okay. Do the Claimants have estimated
 14 amounts of those future costs escrowed in a risk-free
 15 account?
 16 A. No.
 17 Q. You criticize Mr. Walck for failing to
 18 recognize your theory behind the use of a risk-free
 19 rate of return to create a fund to cover future
 20 incremental spending?
 21 A. I don't criticism him for failing to agree
 22 with it. My criticism is that he simply doesn't

04:59:51 1 is a fairly unique situation, so you just don't see it
 2 that often.
 3 Q. Okay. So, in a lost profits analysis, would
 4 the operational risks associated with the projects be
 5 factored into the discount rate?
 6 A. In a typical lost profits case, yes.
 7 Q. Okay. And those risks would include future
 8 oil production?
 9 A. Yes.
 10 Q. Future oil price?
 11 A. Yes.
 12 Q. Future exchange rate?
 13 A. Yes. If, for instance, if one of the wells
 14 went off-line due to someone's negligence and you were
 15 suing for the lost income from that well that you've
 16 lost, if you could deploy the capital received in an
 17 award into the project to do something else and
 18 receive the same rate of return, that would compensate
 19 you for that loss.
 20 Q. Okay. And you argue that Claimants should be
 21 given a lump-sum that can be invested?
 22 A. All awards are--monetary awards are received

05:01:35 1 address it. He simply treats it as if it was a
 2 traditional business loss case without attempting to
 3 answer the questions I've raised.
 4 Q. Okay.
 5 A. And that's what I said: We're sort of like
 6 two ships passing each other.
 7 Q. Yeah. In your reports, do you cite any
 8 journals to support your view?
 9 A. No.
 10 Q. Do you cite any textbooks?
 11 A. No.
 12 Q. Any articles?
 13 A. No. No, it's just basic economic theory.
 14 There are some things you just don't need to cite.
 15 Q. And you assume that future incremental
 16 spending will be--will take place in the year it is
 17 accumulated?
 18 A. In the future, yes.
 19 Q. Okay. And you apply the discount rate to
 20 each year incremental spending is spent?
 21 A. Correct.
 22 Q. Okay. So, assuming incremental spending

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05:02:20 1 would actually be spent in a later year, a different
2 discount rate would be applied, or more discount rate,
3 more discounting would take place.
4 A. It could be earlier, it could be later. So
5 it could be compounded less, it could be compounded
6 more.
7 Q. Okay?
8 A. Works both ways.
9 Q. Okay. Now, in your Third Report, your
10 quantification of the Claimants' loss is about
11 \$60 million?
12 A. Correct.
13 Q. To reach that figure, you gross up your
14 assessment to account for U.S. taxes?
15 A. Correct.
16 Q. You were advised by management that an award
17 would likely be taxable in the U.S.?
18 A. The Claimant is a U.S. taxpayer, so yes.
19 Q. Okay. I think in your words in your opening,
20 you happened to be talking to the tax advisors at
21 Exxon?
22 A. I wasn't happened to be talking. It was

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05:04:07 1 Q. Okay. So, that's just--because in your First
2 Report, you don't deduct for Canadian taxes; is that
3 right?
4 A. Right. And there's no benefit received and
5 no cost incurred.
6 Q. And you don't perform the gross-up?
7 A. Right, so on both sides.
8 Q. And then you do both things in your Third
9 Report.
10 A. Correct. Because Canadian taxes often add
11 U.S. taxes on.
12 Q. So, reversing this new thing you do in your
13 Third Report adds about [REDACTED] of
14 dollars to the Claimants' damages?
15 A. It's not a new thing. I said taxes would
16 have to be accounted for at some point if there were
17 two different tax regimes, and this is the case.
18 Taxes do have an effect here. It's a fairly
19 black-and-white tax effect, but the result is about
20 [REDACTED]
21 It's not like they can avoid it. It's pretty
22 black and white.

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05:03:08 1 something I need to do for the purposes of my Final
2 Report, so I talked to several tax advisors at Exxon
3 in their Canadian Tax Department and their U.S. Tax
4 Department.
5 Q. Okay. Did you perform this gross-up in your
6 first report?
7 A. No. And I believe I say in my Second Report
8 that there has been no effect to any taxes at this
9 point, and I don't know what the tax effect is, but I
10 will for my final determination include an element, if
11 it's appropriate.
12 Q. How much of the Claimants' damages does not
13 gross-up account for?
14 A. Well, it depends. If you're Mr. Walck, you
15 only look at the gross-up side without the cost
16 savings of the Canadian side, but the net is about
17 [REDACTED]
18 Q. Okay. So, in total, just millions of
19 dollars?
20 A. Well, actually there's a slide that shows it.
21 If I adopted Mr. Walck's no tax treatment, it's about
22 [REDACTED]

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05:04:55 1 Q. Okay. Why don't we turn to Paragraph 39 of
2 your Third Report.
3 A. Sure.
4 MR. DOUGLAS: And I am near completion here,
5 so bear with me.
6 BY MR. DOUGLAS:
7 Q. You state at the first sentence, "In
8 preparation of my updated calculation, I was advised
9 by management that an award of damages would likely be
10 taxable, in the United States, at an expected rate of
11 [REDACTED]
12 A. Correct.
13 Q. Okay. In doing a gross-up, would you need to
14 know how the normal income from Hibernia or Terra Nova
15 is taxed in Canada or the U.S.?
16 A. Sure.
17 Q. Did you set that out in your Third Report?
18 A. How the ordinary is taxed?
19 Q. Yeah.
20 A. No.
21 Q. Okay. Beyond this statement, did you provide
22 any evidence as to how the tax--how the corporate tax

05:05:57 1 structure of the Claimants works?
 2 A. No. I think it's fairly obvious. We have
 3 Canadian entities who are getting a tax deduction. We
 4 have a U.S. company that is nonresident in Canada that
 5 is paying taxes in the U.S. without a permanent
 6 establishment in Canada. It's fairly obvious. They
 7 get taxed at [REDACTED] which is their rate of tax on
 8 the Award; and the Canadian companies, when they make
 9 the expenditure get to make the deduction, because
 10 it's incremental spending. The only time a U.S.
 11 company pays tax on a worldwide basis is when it
 12 actually receives the cash under the Treaty, so it
 13 can't be taxed under it. It's spent.
 14 Q. I think what is obvious to you might not be
 15 for me, but that evidence that you provided in your
 16 direct examination, I'm kind of referring blankly to
 17 these screens, but I was more trying to point at these
 18 slides you were referring to in your First Report.
 19 And that explanation you provided, do you provide any
 20 of that explanation here in your Third Report?
 21 A. What? The way the money goes around?
 22 Q. Yeah.

05:08:00 1 Q. --is a tax gross-up required?
 2 A. No.
 3 MR. DOUGLAS: Those are my questions.
 4 Oh, sorry, actually, I apologize. I think my
 5 colleague, Mr. Luz, just had a couple of questions
 6 relating to oil prices, if he could.
 7 MR. LUZ: I won't take more than 30 seconds.
 8 BY MR. LUZ:
 9 Q. Mr. Rosen, you said in response to a question
 10 from Ms. Lamb during direct that you were required by
 11 your professional standards to qualify your opinion if
 12 you have less than reasonable certainty with respect
 13 to certain variables in your valuation?
 14 A. With respect to the overall conclusion.
 15 Q. Okay. And you were here during Ms. Emerson's
 16 testimony?
 17 A. Yes.
 18 Q. And you heard quotations from various
 19 publications of the United States Energy Information
 20 Administration that--and I will quote from the IEA
 21 Annual Energy Outlook 2008, which is Davies
 22 Exhibit 17, Page 50: "Any long-term projection of

05:06:55 1 A. I didn't think I needed to. I thought it was
 2 pretty obvious.
 3 Q. Okay. That first line that you provided here
 4 was sufficient--
 5 A. Well--
 6 Q. --in your view.
 7 A. No. And it's detailed. The detailed
 8 calculations are set out in my schedules, where I
 9 deduct the Income Tax. And Mr. Walck, in his Third
 10 Report says--and I'm sure he'll be able to defend what
 11 he said--but he says, to the extent that it's taxed in
 12 the U.S. and not in Canada, and it's not taxed in the
 13 U.S., there would be a gross-up. But because that's
 14 not the case, there is no gross-up. So your own
 15 Expert just misunderstood the tax system, but he
 16 acknowledges that if the income is not taxed in the
 17 U.S., the Canadian side of it, that there would be a
 18 need for a gross-up. It's in a footnote to his
 19 report, his Third Report.
 20 Q. Okay. If an award is made payable to the
 21 Canadian entity--
 22 A. Yes.

05:08:53 1 world oil prices is highly uncertain."
 2 Did you hear those quotations?
 3 A. Yes, I did.
 4 Q. And you were here during Mr. Davies'
 5 testimony?
 6 A. Yes, I certainly was.
 7 Q. And his opinion, which is at--and you heard
 8 his testimony and his opinion which I think is
 9 surmised at Paragraph 66, that no forecaster can
 10 predict the price of oil with any degree of certainty.
 11 A. Yes, yeah.
 12 Q. Do you want to qualify your opinion with
 13 respect to Ms. Emerson's oil price forecast?
 14 A. Absolutely not. I think this misses the
 15 point completely, and I think that's again where we
 16 are talking at cross-purposes.
 17 Every valuation of damages that involves any
 18 kind of future-looking information suffers from the
 19 exact same uncertainty. We value these damages every
 20 day. We value businesses on this basis every single
 21 day.
 22 Valuation occurs at a point in time. It is

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05:09:44 1 not a crystal ball that says with certainty that I
2 know what the future price of this business is going
3 to be. I know what a price of a commodity is going to
4 be. I know what the price of anything is going to be.
5 It can't. It's not meant to.

6 What we're meant to do, and what markets
7 around the world do every day is based on a single
8 valuation date make a decision on value, and that's
9 what Mr. Walck does when he values businesses and
10 values damages that have any kind of future component,
11 and it's what I do. It's what our whole profession
12 does. It's what commodity markets do. It's what the
13 NYMEX does. It's what the stock market does. It's
14 what we all do.

15 So, to say that someone buying in a pension
16 fund buying a billions dollars worth of stock knows
17 with certainty that the stock is going to be worth 2X
18 five years from now is not the point. They don't.
19 They have an expectation at a point in time. That's
20 all it is.

21 PRESIDENT van HOUTTE: Anything else?

22 MR. DOUGLAS: I do not.

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05:11:58 1 A. Yes, that is Line K.
2 Q. So, in each year going forward, the number we
3 see at Line K, that is your E&T figure for that year.

4 A. Correct.

5 So it's--the actual figures are reflected
6 there for the historical period and in the future,
7 it's about [REDACTED] per year indexed in nominal
8 dollars to inflation.

9 Q. Thank you.

10 Can I ask you, please, to look at Exhibit
11 CE-233, and you'll find it in the exhibits to
12 Claimants' updated damages calculation file that
13 perhaps Greg can help you with that.

14 A. Thank you.

15 Okay, I have 233.

16 Q. What you won't have there, because you
17 haven't got the actual exhibit file, is the index.
18 The index reads: CE-233 Hibernia Research and
19 Development Expenditure Outlook.

20 A. Yes.

21 Q. If you have a look on the second page, if you
22 would.

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05:10:51 1 MS. LAMB: Thank you. Just a couple of
2 questions by way of re-exam. Just a couple. Thank
3 you.

4 PRESIDENT van HOUTTE: Just a couple means
5 two? Please proceed.

6 REDIRECT EXAMINATION

7 BY MS. LAMB:

8 Q. Mr. Rosen, you were asked some questions
9 about the Work Plan and the work that is envisaged by
10 the Work Plan, and Mr. Douglas took you to some
11 examples of R&D and some examples of E&T.

12 Can you tell me, in your damages model for
13 future years, do you assume that the Claimants would
14 have made E&T expenditures in any event?

15 A. Yes.

16 Q. Can you show me in your schedule, please,
17 where we can see that?

18 A. If we go to Schedule 2, it says "R&D
19 expenditures in the ordinary course." The first line
20 is R&D. The second line is noted as being E&T,
21 education and training.

22 Q. Is that Line K?

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05:13:39 1 A. Yes.

2 Q. Can you just go down to Line 18, please?

3 A. "Previous Budgeted Projects and Studies."

4 Q. And if you have a look at the list of study
5 of projects there, so, what is Line 18 telling us
6 about the studies that are listed?

7 A. These were previously budgeted, so they would
8 have been ordinary course.

9 Q. And then can you go down to Line 26?

10 A. Line is: "New R&D Work Plan Initiatives."

11 Q. And so what is the description of projects
12 there?

13 A. These are things that are planned that are
14 incremental.

15 Q. Thank you.

16 In response to one of Mr. Douglas' questions,
17 you used the expression "petro buck."

18 A. Yes.

19 Q. I wondering if you would like to elaborate a
20 little more on what you mean by "petro buck."

21 A. It's a nickname the Canadian dollar has
22 earned historically because it tends to move in

05:14:48 1 lock-step with the price of oil. So, if you do a
 2 statistical analysis of the movement in the Canadian
 3 dollar to the price of oil, you find a high degree of
 4 correlation. They're not independent of each other.
 5 So, if you, for instance, try to count them as
 6 separate risks, you'd be double counting the risk.
 7 Q. So, you will know that in Mr. Walck's report,
 8 he describes sensitivity. He says that there are a
 9 number of variables in your model and essentially that
 10 this sensitivity is compounded because there are
 11 multiple elements and they're all variable.
 12 With regard to the price of oil and the
 13 exchange rate, do you share his view, therefore?
 14 A. I do not. If you look at the them
 15 historically over the last, for instance, 10 years and
 16 looked at a chart, you would see that the price of oil
 17 and the price of the Canadian dollar and U.S. dollars
 18 is almost perfectly correlated to the point where the
 19 two lines almost merge.
 20 Q. So, just to be clear, if the price of oil was
 21 to go up, what would happen to the Canadian dollar?
 22 A. The Canadian dollar would appreciate against

05:16:58 1 Monte Carlo simulation because it produces meaningless
 2 results.
 3 Q. Thank you. No further questions.
 4 MR. DOUGLAS: If I may, I did already ask
 5 this question at this time.
 6 RECCROSS-EXAMINATION
 7 BY MR. DOUGLAS:
 8 Q. Between the First and Third Report, the
 9 exchange rate has strengthened; is that correct?
 10 A. That's correct.
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED] If you look at price of oil and the
 21 value of the Canadian dollar, they would have moved in
 22 the same direction.

05:15:53 1 the U.S. dollar.
 2 Q. And if it goes down?
 3 A. It would depreciate against the U.S. dollar.
 4 Q. Mr. Rosen, in Mr. Walck's Second Report, he
 5 undertakes what's described as a Monte Carlo analysis.
 6 Are you familiar broadly with this technique?
 7 A. Yes. Actually, I believe he refers to in all
 8 three of his reports, Monte Carlo simulation analysis,
 9 which he suggests is a superior methodology of
 10 examining multiple, potential outcomes rather than
 11 doing the type of analysis that I did.
 12 Q. And are you familiar with, if you like, the
 13 prerequisites for conducting a Monte Carlo analysis?
 14 A. Yes, I am.
 15 Q. Can you please describe what those
 16 prerequisites are with regard specifically to the
 17 ingredients or inputs that are used.
 18 A. One of the primary things you have to ensure
 19 in a Monte Carlo simulation is that all variables that
 20 are used are independent of each other. So, in the
 21 case of a calculation including the Canadian dollar
 22 and the price of oil, you statistically cannot use a

05:17:46 1 Q. Thank you.
 2 QUESTIONS FROM THE TRIBUNAL
 3 PRESIDENT van HOUTTE: Thank you. I have a
 4 few questions and my colleague probably also have some
 5 questions.
 6 First of all, just to help me out, and it's a
 7 small technical thing, in Slide 3, it is said that the
 8 calculation of damages only goes to 2023, and in
 9 Slide 6, Page 6, last line, you are speaking about
 10 reduction on ordinary course of spending later years.
 11 How are those two compatible with each other?
 12 THE WITNESS: The forecasts go out past that
 13 period of time but because of the reduction, there are
 14 no losses after that period of time.
 15 PRESIDENT van HOUTTE: Because of the
 16 reduction there are no losses--
 17 THE WITNESS: Just because of the actual
 18 volumes, the required spend, there is no loss after
 19 that period of time.
 20 PRESIDENT van HOUTTE: But I have a more
 21 substantial question and, first of all, I have a
 22 remark or question to the legal counsel. I notice

05:18:44 1 that in the Request for Arbitration the Claimants were
2 claiming in their own name and on behalf of Canadian
3 companies, while in the Claimants' Memorial, that on
4 behalf of Canadian companies, it's not formally there
5 anymore. Maybe you should clarify sooner or later
6 what your position is, but it's not necessary to do it
7 now.

8 But let's now assume that the Claimant--that
9 the Claimants, in plural, are American companies. And
10 we know why it is because otherwise they could not
11 invoke NAFTA. Anyway, but that's a fact of life.

12 Now, then the damage compensation goes to the
13 American companies.

14 THE WITNESS: Yes.

15 PRESIDENT van HOUTTE: And I see two
16 questions. The first one is you're saying that the
17 risk-free rate is based on the Canadian bonds, but we
18 are speaking about American companies which are
19 getting the money, and we are speaking about
20 multinational; that may be, but I don't know. Mobil
21 Canada gets more--there is a capital flow from--or
22 money flow from--or cash flow from Canada to the

05:20:57 1 I explained myself wrongly.

2 THE WITNESS: Yeah, yeah.

3 PRESIDENT van HOUTTE: But anyway you have
4 this but is--does it enter into the picture?

5 THE WITNESS: Yes, it does. So let me
6 explain--

7 PRESIDENT van HOUTTE: Those are the two
8 questions.

9 THE WITNESS: Thank you. So let me explain.
10 My goal is to put the companies back in the position,
11 the exact position they would have been but for this
12 measure.

13 PRESIDENT van HOUTTE: Which companies?

14 THE WITNESS: The Canadian entities.

15 PRESIDENT van HOUTTE: No, because the
16 Claimants are the American companies.

17 THE WITNESS: The Investor and the
18 investment, so both.

19 So, my goal is to put the Investor and the
20 investment back in the position they would be but for
21 the measure.

22 PRESIDENT van HOUTTE: And who is the

05:19:58 1 United States, and maybe not vice versa. Therefore,
2 is it really logical to say that an American company
3 which has gotten the compensation in its own name is
4 supposed to invest in Canadian bonds because that's
5 the only risk-free rate which they have and maybe in
6 multinational they are wise know to know exactly which
7 bonds to have to buy to--anyway--is it--

8 THE WITNESS: Yes, so I can address it for
9 you.

10 PRESIDENT van HOUTTE: No, and that's the
11 second, because it's linked. The second thing is
12 exactly the same position is taken with, let's say the
13 gross-up of the money, because there your reasoning is
14 the money has to go first to the United States, it's
15 taxed, then it goes to Canada and it's taxed again,
16 and, therefore, the debtor has to pay for the two
17 taxes.

18 But anyway, that depends on--

19 THE WITNESS: Sorry, it's not two taxes.

20 It's a tax cost into the U.S. and it's a tax benefit
21 back in Canada.

22 PRESIDENT van HOUTTE: Right. No, no, sorry,

05:21:28 1 Investor we are speaking about?

2 THE WITNESS: So, in this case, let's use
3 ExxonMobil as an investor.

4 PRESIDENT van HOUTTE: ExxonMobil.
5 Established where?

6 THE WITNESS: MICI, in the U.S.

7 So ExxonMobil U.S. is the Investor, and
8 ExxonMobil Canada. Okay. So I take the--in my
9 example of the slide, I take the \$100--I could do it
10 without the slides--I take the hundred dollars that
11 they would have received, assuming that you make an
12 award for a hundred dollars, and they only get [REDACTED]
13 So I have to gross it up by [REDACTED] to give them
14 [REDACTED] They take the [REDACTED] and they ship it north.
15 They pay the tax on it, and they're left with [REDACTED]
16 They take the [REDACTED] They ship it north to Canada.
17 ExxonMobil U.S., exactly the same position it would
18 have been but for the measures.

19 PRESIDENT van HOUTTE: But in the beginning
20 you said that because it's Mobil, you do not take a
21 return on equity because they don't--anyway, they have
22 all the money they want and, therefore, they don't

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05:22:33 1 have to invest in a specific project, and therefore
 2 they take the very safe, risk-free rate investments.
 3 THE WITNESS: Right.
 4 PRESIDENT van HOUTTE: Which means that there
 5 is really no need to export it to Canada anymore.
 6 THE WITNESS: Well, again but they--so let me
 7 just finish my line of reasoning.
 8 So, they received [REDACTED] They pay tax at
 9 [REDACTED] They're left with [REDACTED] They take the
 10 [REDACTED] They write a check up to Canada. Canada says my
 11 after-tax cost of complying with this measure is [REDACTED],
 12 so I'm fine. I have no effect. All the dividends
 13 that would have been paid, all the benefits that would
 14 have flowed, north, south, east, west, wherever, are
 15 exactly the same.
 16 So, if they have too much money, they have
 17 too little money, whatever existed before is returned
 18 to them, exactly the way it was but for the measure.
 19 If they had too much money, they still have too much
 20 money. If they had too little money, they still have
 21 too little money. All I'm trying to do is restore
 22 what was there absent the measure.

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05:24:43 1 And then we have some disagreements of
 2 opinion as to what's appropriate. And then we have
 3 some disagreements over what I would say are
 4 black-and-white factual errors, and I've set those out
 5 quite clearly, I think.
 6 So, I think you have a model, and you have
 7 some choices whether or not you are compelled by what
 8 I have said on the opinions side and whether I have
 9 sufficiently explained myself on the errors.
 10 ARBITRATOR JANOW: Okay. Thank you. That's
 11 a helpful comment.
 12 This second question may be unfair, so
 13 counsel will tell me on both sides, I'm sure, but as
 14 an expert, if Mr. Walck was your partner instead of
 15 your adversary, are there any elements of his analysis
 16 that you would perhaps wish to integrate to further
 17 refine your analysis? You pointed out a number of
 18 points that you think he's simply erroneous and others
 19 where you think your points are better taken for
 20 various reasons. But is there anything further you
 21 think is worth reflection?
 22 THE WITNESS: As my thinking and the modeling

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05:23:34 1 PRESIDENT van HOUTTE: Thank you.
 2 ARBITRATOR JANOW: Actually, this has covered
 3 a lot of the specifics that I was trying to put my
 4 mind around. Let me just ask a couple of general--I
 5 mean, you have heard and responded to a variety of
 6 criticisms and comments on your model, and reference
 7 was just made to the Monte Carlo simulation analysis.
 8 In your view, does the--does this Tribunal
 9 have before it an alternative model, or does it have
 10 your model with several elements of which are in
 11 dispute and offer alternative methodologies?
 12 THE WITNESS: One of my first criticisms of
 13 Mr. Walck's response was that it did not offer an
 14 alternative. It only offered criticisms. And in his
 15 Third Report, he actually performs a calculation of
 16 damages. And the calculation--and that's why I put
 17 out areas where, based on that calculation
 18 alone--because he still has many criticisms, but based
 19 on that calculation alone, we have areas where we
 20 agree. So, I would say we have a model based on the
 21 methodology I set out, which is incremental spending
 22 has an effect.

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05:25:53 1 progressed through three different reports, I tried to
 2 incorporate whatever I could learn, and it is my habit
 3 about to listen to other Experts because seldom are
 4 you the smartest person in the room and have all the
 5 answers.
 6 So, where I thought I could learn, I tried to
 7 incorporate that in my analysis, and I've updated the
 8 information as best I can.
 9 I looked at the criticisms and took them
 10 seriously and tried to respond to them. And if I
 11 couldn't respond to them, I would have no choice but
 12 to adopt them.
 13 ARBITRATOR JANOW: Good. Thank you very
 14 much.
 15 PRESIDENT van HOUTTE: Just more to the
 16 counsel than to you. Let's assume a hypothesis that
 17 we have to enter into the compensation phase. We have
 18 two Experts who have made very wise reports, but let's
 19 now assume that we don't take one fully and the other
 20 is an idiot, but that we recognize that both are
 21 telling the truth to some extent. How can we poor
 22 Arbitrators then reconstruct the middle between those

05:27:02 1 two extremes? Do we have to do the calculations
 2 ourselves or--because to some extent you are not
 3 offering the tools to play with all your parameters.
 4 MR. RIVKIN: Mr. President, may I answer that
 5 question?
 6 PRESIDENT van HOUTTE: That was a question to
 7 both counsel.
 8 MR. RIVKIN: I know what I have proposed in
 9 past cases where that situation has arisen is that if
 10 the Tribunal reaches that point and determines--it
 11 determines what the inputs into the model should be,
 12 proper discount rate, what reserve levels, et cetera,
 13 then the Parties would be happy to have the
 14 Tribunal--and I'm speaking without authority down the
 15 line, I'm simply saying this is something I proposed
 16 in the past, but it works. If the panel in those
 17 circumstances said here are the inputs to both sides,
 18 both sides could input them into their model.
 19 Presumably the two numbers that would come back to you
 20 would be pretty close, and the Parties could try to
 21 figure out why there was a difference in the model, if
 22 at all. But the Tribunal would then be in a position

05:29:11 1 parameters which you would consider relevant. Well
 2 anyway, I see this--
 3 (Simultaneous speakers).
 4 MR. RIVKIN: We could talk about it off-line,
 5 but if you wish it wouldn't require that--
 6 PRESIDENT van HOUTTE: Okay, but we do it
 7 off-line.
 8 (Simultaneous speakers.)
 9 MR. RIVKIN: -- you could--could simply
 10 require the Tribunal informing the Parties that they
 11 are considering compensation and they would like to
 12 know what the inputs would be. That wouldn't have to
 13 be in the form of--
 14 PRESIDENT van HOUTTE: We will discuss it
 15 off-line.
 16 MR. DOUGLAS: That works for Canada.
 17 PRESIDENT van HOUTTE: Fine.
 18 I would really like to do as much as possible
 19 today. What will we achieve before the end of the
 20 day? Mr. Walck? But--
 21 MR. DOUGLAS: I believe so. My examination,
 22 I believe, will be approximately a half an hour, and I

05:28:12 1 to have the Experts calculate them based upon the
 2 inputs that you decide are the proper ones.
 3 PRESIDENT van HOUTTE: Mr. Douglas?
 4 MR. DOUGLAS: Before we make any arrangements
 5 to that effect, we should hear from Canada's Expert as
 6 to what his actual opinion is on the valuation, and
 7 then we can make a determination as to how far apart
 8 we actually are, what the disagreements are, and
 9 whether or not the proposed solution works.
 10 I have spoken with our Expert about this
 11 exact thing, and if the case may be, we are willing to
 12 provide a model of some sort which the Tribunal would
 13 be able to sort of plug in the figures and play with
 14 the different figures in different ways and see how
 15 the different elements interact. And should be
 16 compensation find, you know, a reasonable--
 17 PRESIDENT van HOUTTE: Just in a more
 18 abstract way, theoretically, Mr. Rivkin's solution
 19 would imply that the Tribunal renders the first
 20 Partial Award where they already have reached a
 21 certain stage because you cannot before the Award is
 22 rendered indicate to the Experts now all the

05:29:53 1 don't want to speak for the Claimants, but I think
 2 Ms. Lamb has indicated hers is about--half an hour?
 3 MR. RIVKIN: I think what we suggested, we
 4 could see when it's done, would be perhaps she would
 5 do her cross-examination first thing in the morning
 6 tomorrow, before we do the openings.
 7 But before we call Mr. Walck, there was a
 8 substantial factual error in Mr. Douglas' questions.
 9 He may not have realized it, and I could either point
 10 it out, but it might be better for the record if I ask
 11 Paul Phelan to come to the stand for two questions
 12 just so he could clarify that the sum of the numbers
 13 that Mr. Douglas was using when he asked about the
 14 production profile and what the Board approved last
 15 week were erroneous. He was comparing the wrong
 16 numbers in his questions to Mr. Rosen, which Mr. Rosen
 17 being--having not seen those numbers and not being the
 18 Expert in it, wouldn't have realized. And before
 19 Mr. Walck testifies, it would be helpful to have--for
 20 the Tribunal to know what the correct numbers are.
 21 PRESIDENT van HOUTTE: Could Mr. Phelan do
 22 that in two minutes?

05:30:59 1 MR. RIVKIN: Yes.
 2 PRESIDENT van HOUTTE: One minute?
 3 Good. Okay. Let's have a break, and
 4 Mr. Phelan sits there, and then after five minutes we
 5 resume, if that's all right.
 6 MR. RIVKIN: Okay. Thank you.
 7 (Brief recess.)
 8 PAUL PHELAN, CLAIMANTS' WITNESS, RECALLED
 9 DIRECT EXAMINATION
 10 BY MR. RIVKIN:
 11 Q. Mr. Phelan, you know you are still under
 12 oath; correct?
 13 A. Yes.
 14 Q. Mr. Phelan, can you turn to Claimants'
 15 Exhibit 244.
 16 A. I have that in front of me.
 17 Q. This is the recent Board approval of the
 18 Hibernia Development Plan Amendment?
 19 A. Yes, it is.
 20 Q. And if you could turn to Page 31, which is
 21 the production forecast that Mr. Douglas was showing
 22 Mr. Rosen.

05:39:56 1 there is the Ben Nevis Avalon Reservoir, which is in
 2 shallower depth beneath the platform. In essence,
 3 Hibernia's license is to produce from both of those
 4 reservoirs. So, when we look at the R&D Guidelines,
 5 they are applicable to all of the Hibernia North.
 6 So, if I could draw your attention to CE-238,
 7 this was the most recent production profile. It came
 8 from our reservoir manager, Jamie Long, who passed it
 9 along to me, and I, in turn, passed it along to our
 10 Claims Expert.
 11 Q. And just so we are clear, this is the profile
 12 that Mr. Rosen used in his updated damages
 13 calculation; correct?
 14 A. It is.
 15 And what Mr. Long had done is combined the
 16 various areas, BNA, A Pool, Cataline and Cape Ireland
 17 into Hibernia North for purposes of identifying this.
 18 These are the amounts of production that would be
 19 required.
 20 The other distinction I will point--
 21 Q. Wait, just so we are clear, so the [REDACTED]
 22 total under the Hibernia North column is equivalent to

05:38:35 1 A. Yes.
 2 Q. Mr. Douglas asked Mr. Rosen only about the
 3 [REDACTED] figure at the bottom of the second column from
 4 the left, the B Pool. Is that the correct production
 5 figure for the Hibernia Block, absent the HSE and the
 6 AA Blocks?
 7 A. No, it isn't.
 8 For clarity, and to stay within the short
 9 time frame, that just represents the B Pool, [REDACTED] For
 10 Hibernia North, which would be numbers that were
 11 provided by myself to Mr. Rosen relative to production
 12 profile, you have to take the B Pool plus the BNA, A
 13 Pool, Catalina and Cape Island, all of those are
 14 considered part of Hibernia North.
 15 If I could draw your attention to the BNA
 16 column, from the Year 2000 through right to the end of
 17 the field life, we have already been producing from
 18 BNA.
 19 And just to put it in perspective, there are
 20 two reservoirs underneath the Hibernia platform.
 21 There is deeper reservoir called the Hibernia
 22 Reservoir, which is typically the B Pool, and then

05:41:03 1 what number on the production profile in Exhibit 244?
 2 A. So, it would be equivalent, if these were at
 3 the same time--produced at the same time, it would be
 4 the B Pool, the BNA, the A Pool, the Cataline and the
 5 Cape Island.
 6 Q. And those figures add up to [REDACTED] is that
 7 right?
 8 A. Those figures add up to [REDACTED].
 9 Q. So, the 244 profile is [REDACTED]
 10 less than the 238 profile, and is there, in fact, a
 11 timing difference between the two profiles?
 12 A. Well, there is a timing difference, and I
 13 will draw your attention to 2010. When you're looking
 14 at the profile that's in the amendment to the
 15 Development Plan, the one that was presented, the
 16 Year 2010 has [REDACTED] barrels per day. In
 17 the most recent, we've updated it for all of the
 18 latest reservoir information, and for 2010 you will
 19 notice it is [REDACTED] kbd.
 20 ARBITRATOR SANDS: Could I come back half a
 21 second. I'm trying to add up the numbers, and I have
 22 got 244 in front of me. You are saying what we add up

05:42:22 1 is [REDACTED]
 2 THE WITNESS: That's correct.
 3 ARBITRATOR SANDS: And my math is not good,
 4 but I make that [REDACTED]
 5 THE WITNESS: That's about correct.
 6 ARBITRATOR SANDS: Okay. So, it's not
 7 just--it's less.
 8 THE WITNESS: It is less.
 9 ARBITRATOR SANDS: Just to be accurate.
 10 THE WITNESS: To be accurate, the amendment
 11 to the Development Plan is less than our current
 12 estimate that we have which is our most latest update
 13 from our reservoir team.
 14 ARBITRATOR SANDS: It's just [REDACTED]
 [REDACTED] less; is that correct? To give Mr. Douglas
 16 credit, I thought he did mention--I thought he did
 17 mention the BNA, but he did not mention the A Pool, if
 18 that's correct, when he corrected himself.
 19 THE WITNESS: That's correct.
 20 So, Mr. Long provided additional information
 21 to the Board earlier this year, so my last comment,
 22 because I anticipated there was going to be some

05:44:43 1 ARBITRATOR SANDS: Could you just explain,
 2 what is the relationship precisely between Table
 3 4.2.5.2 and Table 4.3.4.1?
 4 THE WITNESS: So, the relationship is if you
 5 took the recoverable reserves, the HMDC column that's
 6 in Table 4.2.5.2, that will relate to Page 31
 7 directly.
 8 ARBITRATOR SANDS: When you say it will
 9 relate to Page 31--
 10 THE WITNESS: I'm sorry.
 11 ARBITRATOR SANDS: For example, B Pool says
 12 [REDACTED] and Hibernia and B Pool is 4.2.5.2 says [REDACTED].
 13 THE WITNESS: I can't comment what the Board
 14 put into the report. I can tell you that HMDC's
 15 numbers that were submitted is this table. The
 16 Board--it may be a transposition error. You look at
 17 [REDACTED] it's the same; [REDACTED] is the same; [REDACTED] is the
 18 same; [REDACTED] is the same.
 19 ARBITRATOR SANDS: Okay. I'm just trying to
 20 get my mind around it.
 21 THE WITNESS: But it's a good point.
 22 HMDC submitted this. This was submitted

05:43:20 1 question as the reconciliation, the latest information
 2 that was provided to the Board, taking into account
 3 that the Board had not even updated its 2010 number,
 4 [REDACTED] that's over [REDACTED]
 5 [REDACTED] right there just in one year versus the two
 6 profiles. So, Page 26 of the amendment to the
 7 Development Plan--
 8 MR. RIVKIN: Exhibit 244.
 9 THE WITNESS: --compares the two numbers.
 10 And if you actually look at the data that Mr. Long had
 11 provided to the Board and look in the difference
 12 column in that table for B Pool, the difference is
 13 [REDACTED]
 14 So, the Board's number, they would anticipate
 15 we should have reported [REDACTED] that was
 16 reported. If you continued down not counting the AA
 17 Block or the HSE unit but go to the BNA total, the
 18 Board indicated an additional [REDACTED] versus what
 19 we reported at the time on the other submission of
 20 [REDACTED], combine those two together, and in essence you
 21 have got about [REDACTED] growth in the Hibernia
 22 North Reservoir.

05:45:50 1 earlier this year, additional information, but again
 2 we also recognized in terms of coming to the Tribunal
 3 with the most recent information that the 2010 data
 4 didn't reflect this year's production.
 5 BY MR. RIVKIN:
 6 Q. And just so I'm clear because I'm now
 7 understanding this better, the right-hand--the middle
 8 column of Table 4.2.5.2 was HMDC's estimate of
 9 reserves, which is what corresponds to the production
 10 profile on the table that Mr. Douglas originally
 11 showed; correct?
 12 A. Yes, that's correct.
 13 Q. But the Table 4.2.5.2 shows that the Board
 14 actually believes that the recoverable reserves total
 15 are [REDACTED] barrels larger than what HMDC had
 16 reported; is that correct?
 17 A. That's correct.
 18 Q. And so if you plugged--if you had just
 19 received this, presumably you will create a new
 20 production profile using the [REDACTED] or you could
 21 produce the additional barrels; is that right?
 22 A. That's right.

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05:46:58 1 Q. So, the Board's estimate of reserves is
2 higher than the estimate that Mr. Rosen used in his
3 calculation of damages?
4 A. It is. The Board's estimate is higher.
5 Q. Thank you.
6 And when Mr. Douglas spoke about what the
7 Board approved, what the Board actually approved is
8 its own calculation of reserves.
9 A. The Board approved the amendment to the
10 Development Plan. The parameters of how much we can
11 produce, we can produce up to [REDACTED] per day,
12 which is a capacity approval.
13 Q. Right. But the Board found the total of
14 [REDACTED] total in the Hibernia field,
15 including the AA Block and the HSE which were not
16 included?
17 A. Yes.
18 Q. Thank you.
19 PRESIDENT van HOUTTE: The two minutes are
20 over.
21 It's now Mr. Walck?
22 MR. DOUGLAS: May I ask a question?

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05:48:50 1 this year our business plan for Hibernia was [REDACTED]
2 [REDACTED] a day. We've updated it since then to reflect
3 what we are currently producing.
4 Q. Do you know what date this production
5 forecast was made, the CE-238?
6 A. I believe we submitted this to Mr. Rosen in
7 the July--late July time frame, after our--we do an
8 annual planning and budgeting cycle each year, so this
9 basically would take into account what we expect to
10 produce for 2011-2012 time frame.
11 Q. And the clarification to the Development Plan
12 that HMDC submitted to the Board was April 2010?
13 A. That's correct, because it--and here is the
14 point--one of the points of clarification: If you
15 actually went back to CE-11, which was the first
16 witness production profile, we actually had
17 [REDACTED] noted for Hibernia Southern
18 Extension. So, if you look at the most recent update
19 based on new data from the Hibernia Southern Extension
20 reservoir teams, the most likely case is now noted at
21 [REDACTED]
22 So, Mr. Long, our Reservoir Manager, was

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05:47:57 1 PRESIDENT van HOUTTE: Yes, please.
2 MR. DOUGLAS: Just very briefly.
3 CROSS-EXAMINATION
4 BY MR. DOUGLAS:
5 Q. Unfortunately, I believe all of my Board
6 members have left to explain, but the Table 4.3.4.1,
7 the heading of the table is "Hibernia Production
8 Forecast For Most Likely Case"; is that correct?
9 A. That is correct.
10 Q. Okay. And this is a part of a Development
11 Plan Application--
12 A. Yes, it is.
13 Q. --that was approved?
14 A. It was approved.
15 Q. Last week?
16 A. Yes, within last week.
17 Q. And CE-238 at the top also says "most likely
18 oil production"?
19 A. This is a more recent production profile.
20 So, the answer to your question, it is most likely oil
21 production updated, so it's the 4.3.4.1 updated. The
22 4.3.4.1 would date back to earlier this year. Earlier

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05:50:05 1 providing updated information not only on Hibernia
2 Southern Extension, but updated information relative
3 to the Hibernia Reservoir as well.
4 Q. So, the [REDACTED] on Page 31 of CE-44 and the [REDACTED]
5 of CE-238, the difference between the time difference
6 was just a couple of months between these two?
7 A. Actually, this would have been tied back to
8 more than a couple of months. The date between when
9 the reservoir team provided me this, which was in late
10 July, versus when this was submitted to the Board, I
11 think the letter that you noted earlier to the Board
12 was April.
13 Q. April. April, May, June, July--three months?
14 A. Well, three months in date, but I could tell
15 you that in terms of the reservoir team, in terms of
16 updating, they probably updated in the March time
17 frame, but since March we've actually had--as I
18 mention in my opening comments, we've had quite a bit
19 of additional production as a result of accelerated
20 drilling.
21 So, the latest CE-238 is our reservoir team's
22 latest production profile life of fields.

05:56:16 1 ARBITRATOR SANDS: Thank you very much,
 2 Mr. Phelan.
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 7 PRESIDENT van HOUTTE: Thank you very much.
 8 Mr. Phelan.
 9 (Witness steps down.)
 10 PRESIDENT van HOUTTE: And now we can move to
 11 Mr. Walck?
 12 MR. DOUGLAS: We can.
 13 My one concern by doing direct and then going
 14 to bed for the night, well, Mr. Walck would then get
 15 to go to bed because I wouldn't be able to speak with
 16 him and I might need to this evening in preparation
 17 for closings tomorrow, and I don't know if there is a
 18 proposed solution to that.
 19 MR. RIVKIN: The problem is--well--we
 20 wouldn't mind if you spoke to him overnight.
 21 MR. DOUGLAS: So, we could do the direct and
 22 then--

05:58:04 1 DIRECT EXAMINATION
 2 BY MR. DOUGLAS:
 3 Q. Good evening, Mr. Walck.
 4 A. Good evening.
 5 Q. You filed three Expert Reports in this
 6 arbitration?
 7 A. Yes, I did.
 8 Q. Do you have any corrections you would like to
 9 make to those reports?
 10 A. Just one minor one. The final report
 11 mentioned a Terra Nova production profile as having
 12 been approved by the Board, and I have been told since
 13 by the Board that it has not been approved by them.
 14 Q. Okay. Could you tell us a little bit about
 15 your background as a Damages Expert.
 16 A. Yes.
 17 I have 33 years of professional experience as
 18 a Certified Public Accountant, Certified Management
 19 Accountant. I'm also certified in financial
 20 management and certified in financial forensics, and
 21 I'm accredited in business valuation. And I have
 22 practiced in litigation and arbitration specifically

05:57:07 1 MR. RIVKIN: Still talk to him.
 2 MR. DOUGLAS: Perfect.
 3 PRESIDENT van HOUTTE: Then we hear Mr. Walck
 4 for, say, half an hour?
 5 MR. DOUGLAS: I think the direct would be
 6 half an hour, yes.
 7 PRESIDENT van HOUTTE: Mr. Walck, please.
 8 RICHARD E. WALCK, RESPONDENT'S WITNESS, CALLED
 9 PRESIDENT van HOUTTE: Good afternoon.
 10 THE WITNESS: Good afternoon, Professor.
 11 PRESIDENT van HOUTTE: Can you just repeat, I
 12 hereby declare upon my conscience and honor...
 13 THE WITNESS: I hereby declare upon my
 14 conscience and honor...
 15 PRESIDENT van HOUTTE: ...that I will make my
 16 statement according to the best my knowledge.
 17 THE WITNESS: ...that I will make my
 18 statement according to the best of my knowledge.
 19 PRESIDENT van HOUTTE: Thank you.
 20 Mr. Douglas, you have the floor.
 21 MR. DOUGLAS: Thank you very much,
 22 Mr. President.

05:58:55 1 in the financial analysis of damages and valuation for
 2 33 years.
 3 Q. Thank you.
 4 Now, you had some concerns about Mr. Rosen's
 5 First Report; is that correct?
 6 A. Yes.
 7 Q. Would you tell us what some of your concerns
 8 were.
 9 A. The principle concern was that I thought it
 10 was premature. We didn't really have much data to
 11 look at that point in time. We had some calculations
 12 of what the required R&D spending was. We had
 13 submissions by the project to the Board for
 14 consideration as eligible expenditures that in the
 15 case of Hibernia were far in excess of what the
 16 required spending was, so it was not clear right from
 17 the getgo whether there would, in fact, be any damage,
 18 whether there would be any incremental spending at
 19 all.
 20 Q. You had some concerns about Mr. Rosen's
 21 assessment of future damages, as well?
 22 A. I did. It seemed to me that he was required

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06:00:10 to make a number of assumptions. And unlike the
 typical calculation where you have lost profits and
 expropriation, whatever the facts that might be, in
 most cases, as the future evolves, you don't get much
 new information to help you with the calculation.

Here, as the future unfolds, we get
 considerable additional information to help with the
 calculation. So, it seemed to me that there was no
 need necessarily to try to estimate so many things
 when, with the passage of time, they would become
 evident.

Q. Now, when it came to Mr. Rosen's Second
 Report and your Second Report, did any of your views
 change?

A. Yes. We had more data to work with. By that
 point in time, we had the Board's determination of
 eligible expenditures. There had been a request by
 Hibernia and the approval by the Board to apply more
 than \$10 million of Development Phase credit against
 its outstanding obligations. There had been the
 successful appeal of certain determinations the Board
 had made for eligibility under the Guidelines that

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06:02:49 1 days of testimony. And so there was still
 2 considerable uncertainty in my mind as to what the
 3 real incremental effect on the Claimants will be.

Q. Did your view change in your Third Report?

A. Well, again we got some more data. We
 started getting some data for 2009. We got some new
 projections of production, new projections of prices,
 new projections of ordinary course spending, exchange
 rates and so forth, and we saw once again considerable
 change in the calculations. When the target moves
 that much in a short period of time, I get concerned.

Q. Whose calculations are you referring to?

A. Mr. Rosen's.

Q. And what sort of changes? Could you
 elaborate just a bit.

A. Well, I think you took him through some of
 the changes. In ordinary course spending, for
 example, the change was very significant. The oil
 production figures have changed significantly.
 Ms. Emerson's predictions of future oil prices have
 changed. The exchange rate forecast has changed.

So, all of the inputs that go into

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06:01:30 1 brought the required or the shortfall down by another
 2 [REDACTED]
 3 And there had been Work Plans proposed for
 4 how the Claimants expected to resolve the remaining
 5 shortfall.

All of that is favorable information to have,
 so I thought we had a much better sense at least as to
 the past calculations of required spending.

And we had some significant differences that
 we were then able to observe between what Mr. Rosen
 had initially calculated and what we now had data to
 document.

Q. Okay. So, despite this better information,
 was it your view that the Claimants' fact of damage
 was reasonably certain?

A. No. I thought there was still considerable
 uncertainty as to that because the Work Plans that
 were provided, as Professor Noreng testified in his
 Witness Statement or Expert Report, appeared to
 include things that might be ordinary course, they
 appeared to be things that would generate benefits for
 the Claimants, as we've heard over the past couple of

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06:04:16 1 calculating the required spending and the incremental
 2 spending have changed significantly over the past
 3 year.

At the same time we haven't really gotten
 much additional information about what the benefits
 and what the ordinary course aspects of the Work Plans
 might be. It seems to me that that's just now sort of
 being fleshed out.

Q. In your view, is the fact that the Claimants
 will suffer any loss reasonably certain?

A. Here is where I struggle with that. When I
 look at "reasonable certainty," I look at it as
 Mr. Rosen does: Within the context of the
 professional standards of my profession. In my case,
 the American Institute of Certified Public Accountants
 has a standard that requires sufficient relevant
 evidentiary support for an opinion. When I look at
 the probabilities that are out there--think in terms
 of the Chorzów Decision trying to establish a
 situation that would in all probability have existed,
 that I think is a similar kind of concept. We are
 trying to construct from data, from documents, from

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06:05:38 1 reliable sources an expectation of what that future
2 will be, and I have conflicting information out there.
3 I have, on the one hand, Claimants saying this is all
4 incremental spending in the Work Plans. On the other
5 hand, I have things in the Work Plans that they are
6 saying they are going to have to do because of

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 And so it's not clear that I have sufficient
12 data with which to support an opinion with reasonable
13 certainty.

14 Q. In Mr. Rosen's Third Report, he filed a new
15 head of damage; is that right?

16 A. Yes.

17 Q. What was that?

18 A. That was his tax gross-up.

19 Q. And in your response, your Third Report, you
20 attempted to respond to the gross-up; is that right?

21 A. I did.

22 Q. Did you have difficulties responding?

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06:08:29 1 number of slides and explained some areas of agreement
2 and disagreement. Would you be able to walk us
3 through some of your thoughts on Mr. Rosen's
4 examination?

5 A. Yes, with the caveat that his something that
6 was done as sort of first impressions. Most of this
7 is brand new, obviously.

8 Q. And again, just for brevity's sake and the
9 hour is late and the damages being the most riveting
10 of topics, as best as possible just to be concise,
11 that would be great.

12 A. In his Slide 3, which is his nice
13 multi-colored chart, I would simply observe that I
14 think there is additional information that should be
15 on the chart that would go down at the bottom of the
16 chart, and that would be with respect to benefits that
17 the Claimants will obtain, whether they be SR&ED
18 credits, royalty credits, or operational benefits,
19 none of which show on his chart.

20 Going over a couple more pages to where he
21 starts the areas of disagreement, with respect to the
22 discount rate, we have what I view as a fundamental

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06:06:53 1 A. Absolutely. I didn't understand what it was
2 he was saying. It was just set out that there will be
3 tax in the U.S. on the award where it had appeared
4 initially that the claim was structured on behalf of
5 the Canadian entities. That's the way he had
6 calculated his first calculation. There was nothing
7 that I saw in his Second Report that caused me to
8 anticipate what we now see as a tax gross-up saying
9 the award really should be made to the U.S. entities.
10 That obviously complicates things a bit. I tried to
11 investigate that. I looked at the Tax Treaty between
12 Canada and the U.S. to see what the provisions were
13 for double taxation.

14 It struck me, as Mr. Rosen testified, that if
15 the award is made to the Canadian entities, there is
16 no need for a tax gross-up, so why would you want the
17 award to be made to the U.S. entities? Why not keep
18 it simple, make it to the Canadian entities, and avoid
19 the transfer of several million dollars additional
20 from the Canadian Treasury to the U.S. Treasury. It's
21 the same to the Claimants either way.

22 Q. Now, in Mr. Rosen's direct he provided a

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06:09:49 1 difference in approach. Mr. Rosen pulls a concept
2 from torte law, and namely the law for personal
3 injury, wrongful death kinds of actions, where public
4 policy concerns for the protection of an injured
5 person require deliberate overcompensation of the
6 plaintiff to take any risk that they might have to
7 invest and take investment risks, to take that away
8 from them and put all of that risk on the defendant.
9 That's not used in a business context that I've seen,
10 and I have been in practice for 33 years and done
11 several hundred litigation and arbitration
12 engagements. I have never seen it before.

13 I've researched that.

14 Mark Kantor, in his book arbitration for
15 valuation, or Valuation for Arbitrators, confirmed
16 that, that it is, in fact, something specific to the
17 personal injury world. It's not used in a business
18 context.

19 So, from my perspective, Mr. Rosen has gotten
20 that one wrong.

21 Q. But did you cite Mr. Kantor in your reports?

22 A. I did.

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06:11:04 1 Q. Okay.
 2 A. With the SR&ED credit, Mr. Rosen acknowledged
 3 in more of his reports that there would likely be tax
 4 benefits. While he uses historic data to help
 5 establish damages, he backs away from it here.
 6 And it's not clear to me that they're
 7 fundamentally all that different. We have
 8 confirmation from the CRA, the Canadian Revenue
 9 Authority, that the types of R&D that are proposed in
 10 the Work Plans would likely include SR&ED-eligible
 11 pieces. Granted, we don't know how much. I do not
 12 have reasonable certainty as to that calculation. I
 13 don't have reasonable certainty with respect to the
 14 entire calculation, and I set that qualification out
 15 in my report.
 16 With the treatment of Income Taxes, as I
 17 mentioned a moment ago, it's essentially a new head of
 18 damage that we just learned here at this hearing what
 19 the basis for it is. The easier way to do things is
 20 pay the award in Canada and avoid having the need for
 21 a gross-up.
 22 The adjustment for the Hibernia South and the

1011

06:14:17 1 adjustment. Nor have I made the adjustment that goes
 2 the other way that actually reduces or that takes out
 3 a low outlier, in Mr. Rosen's words, for Terra Nova.
 4 I have kept the spending in place that was actually
 5 made.
 6 And then finally, the reduction of ordinary
 7 course spending in the later years of the project, in
 8 one of Mr. Rosen's later slides, he compared average
 9 spending for the most recent years versus average
 10 spending if he had gone back further, and it shows
 11 that the average spending has actually gone up
 12 recently.
 13 So, he made some, I think, arbitrary cuts at
 14 reducing spending by 50 percent starting in certain
 15 years. Again, I don't have any data, any documents
 16 that I can go to to ascertain why that was done, to
 17 ascertain that that's the right timing, the right
 18 amount and so forth. And as we will come to at a
 19 later slide, it looks like actually it might be the
 20 reverse, spending might actually go up, which is
 21 consistent with some of what Professor Noreng said as
 22 fields become more difficult and you need new

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06:12:39 1 AA Blocks, which is not one of the larger
 2 disagreements, the R&D and E&T historic spending from
 3 which the projection was developed did not include
 4 anything related to those blocks. And so projecting
 5 forward for a field that excludes those blocks on the
 6 basis of production and spending that excludes those
 7 blocks, which is the way I have done it, seems to me
 8 appropriate.
 9 With his normalized average, moving on to his
 10 FTI Slide 6 now, we both made one major normalization
 11 adjustment for 2006, and I think for 2007 as
 12 well--maybe it's 2005--
 13
 14 Mr. Rosen took that
 15 out. I took that out as well. He went beyond that,
 16 though, and took everything from 2006 out, which,
 17 according to the footnote in his report, was simply
 18 because it was large. He assumed it was an outlier
 19 and took it out.
 20 I'd rather have sufficient relevant data to
 21 support that adjustment. I haven't seen data that
 22 would support that, so I have not made that

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06:15:42 1 technologies in order to extract additional
 2 hydrocarbon.
 3 Slide 7, my apologies, I simply have not had
 4 time to delve into this sensitivity of calculations at
 5 all, so that one will take some time before I can
 6 respond to that, probably not over night either.
 7 Slide 8 is more on the discount rate, but now
 8 we are drilling specifically into his what he calls an
 9 error on my part in looking at the return on equity as
 10 opposed to a cost of equity. Well, cost of equity
 11 would be fine if we were valuing a business. We're
 12 not. What we are looking at is some additional
 13 potential expenses that, in turn, reduce profits in
 14 future years.
 15 So, it's not fundamentally different from a
 16 lost-profits calculation. It's pretty much the same
 17 thing because profits are simply the difference
 18 between revenue and expenses. If you increase
 19 expenses because of additional R&D, you decrease the
 20 profits, and that's what's being asked for here.
 21 So, if you are discounting the project cash
 22 flows or project profits or the project expenses, the

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06:17:07 1 best starting point is what was the expectation for
 2 that investment. And you will recall, Mr. Douglas, I
 3 asked you can we get information about the expected
 4 return on these projects, and we were not successful
 5 in that, so now we have to look at some proxies.
 6 The return on equity--
 7 Q. Sorry, before you go into that detail, have
 8 you received this level of detail of criticism in
 9 Mr. Rosen's previous reports?
 10 A. Not at all.
 11 Q. Okay.
 12 A. All he did was say that I did not understand
 13 the concept of a risk-free fund.
 14 Q. Okay.
 15 A. Which is wrong. I do. It's out of personal
 16 injury.
 17 Q. So, rather than committing ourselves to
 18 anything on the transcript, why don't we perhaps
 19 reserve for a later time to address some of these
 20 concerns.
 21 A. Okay.
 22 Q. We could do it now, but I'm just conscious of

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06:19:21 1 A. No.
 2 Q. Okay.
 3 A. On his slide related to the detail on SR&ED
 4 credits, which is Slide 19, I have done a calculation
 5 that I have set out in my report, admittedly rough,
 6 looking at the historic SR&ED eligibility, and using
 7 that as a way to try to get some sense of what the
 8 impact of the SR&ED credits on the R&D portion of any
 9 future spending, which is broken out in the Work
 10 Plans, what that would be. Mr. Rosen has now for the
 11 first time said, "Well, a more appropriate way to do
 12 that is now to [REDACTED] as
 13 something submitted for SR&ED that was denied and hold
 14 that percentage way down." I disagree with that. I
 15 think the [REDACTED] should be out of the normalization
 16 that we talked about earlier. [REDACTED]
 [REDACTED] It should be out of the estimate for any
 18 SR&ED credit.
 19 Q. And again, did Mr. Rosen do any of this in
 20 any of his reports?
 21 A. No.
 22 The normalized spending we've covered, I

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06:18:02 1 time. And discussing about the details of a discount
 2 rate is not exactly exciting, unfortunately.
 3 Now, is there anything--before we get to some
 4 of the agreements, is there anything you wanted to say
 5 before we got there?
 6 A. Well, if we jump through to the little model
 7 he had on the treatment of Income Taxes where he shows
 8 that if--
 9 Q. Which slide is that, sir?
 10 A. This is Slide 17 that I'm on.
 11 Q. Okay.
 12 A. Actually, it's 17 and 18 where he does his
 13 modeling to show that if you award the money in the
 14 U.S. and gross it up and allow the Claimants to pay
 15 some tax to the U.S. Treasury, then that will still
 16 replace the [REDACTED] that the Canadian entities would be
 17 out of pocket after their tax savings. And you could
 18 just as easily award a hundred dollars instead of [REDACTED]
 19 but award it to the Canadian entities, let them pay
 20 their \$30 in tax, and they would have their [REDACTED]
 21 Q. Again, was this level of detail provided in
 22 any of Mr. Rosen's reports?

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06:20:44 1 think. But I would pause on Page 21 of his report,
 2 and I noticed that--I think the numbering at some
 3 point got off on the paper copy versus the copy that
 4 was up on the screen, so it's the one that starts with
 5 number four "Normalized Spending" and has a table in
 6 it. You notice the figure in Rosen Report, the third
 7 of the bullets, [REDACTED] where he used 2004 through
 8 2008, I believe, in calculating it. If he had
 9 calculated using the earlier Production Phase from
 10 1998 to 2008, that average is lower. So, it's showing
 11 you that the more recent R&D spending has actually
 12 been higher, not lower as he's suggesting when he
 13 takes his 50 percent reductions at various points in
 14 time.
 15 And then finally, with respect to this
 16 reconciliation, once again I apologize to the Tribunal
 17 but I've not had anywhere near enough time to focus on
 18 that.
 19 Q. Nevertheless, you provided a quantification
 20 of damages; is that right?
 21 A. I did provide calculations of a sort of rough
 22 sizing of potential damages.

06:22:27 1 Q. Why did you do that?
 2 A. Because you dragged it out of me, kicking and
 3 screaming.
 4 You asked for it. I told you that I would
 5 prefer not to because I do not have sufficient data to
 6 give you a figure that I can say is my opinion of
 7 damage.
 8 Q. Is your quantification reasonably certain?
 9 A. No. I don't think either of our
 10 quantifications is reasonably certain.
 11 MR. DOUGLAS: I think these are my questions.
 12 PRESIDENT van HOUTTE: If I would suggest we
 13 stop here today and then reconvene tomorrow at 8:30.
 14 Mr. Rivkin, do you have any idea without
 15 further commitment how long your cross-examination
 16 will last, or Ms. Lamb?
 17 MR. RIVKIN: (Off microphone) It's Ms. Lamb
 18 who will be conducting it, and she think it's no
 19 longer than 45 minutes.
 20 PRESIDENT van HOUTTE: Fine. Thank you.
 21 See you tomorrow, 8:30.
 22 Mr. Walck, you know that you have been

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
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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

06:23:41 1 allowed to discuss with counsel things which are
 2 useful for his oral submissions, but maybe not which
 3 is useful for this specific testimony, although maybe
 4 there it's very difficult to draw a line.
 5 MR. DOUGLAS: It is very difficult. And if I
 6 had understood the previous arrangement was that there
 7 wouldn't be a restriction.
 8 MR. RIVKIN: That's fine, but it is our
 9 understanding that the direct examination is closed,
 10 that they're not going to come back with additional
 11 direct testimony, having spoken tonight.
 12 MR. DOUGLAS: That's correct.
 13 PRESIDENT van HOUTTE: Under those
 14 conditions, Mr. Walck, thank you very much, and see
 15 you at 8:30.
 16 THE SECRETARY: Just an update on the timing,
 17 the Parties used roughly the same amount of time:
 18 Claimants six hours and 47 minutes, and Respondent
 19 seven hours and four minutes.
 20 (Whereupon, at 6:24 p.m., the hearing was
 21 adjourned until 8:30 a.m. the following day.)
 22