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1 PCA CASE NO. 2009-04
2 IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF
3 THE NORTH AMERICAN FREE TRADE AGREEMENT
4 AND THE UNCITRAL ARBITRATION RULES

5 B E T W E E N:

6 WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON,
7 DOUGLAS CLAYTON, DANIEL CLAYTON
8 and BILCON OF DELAWARE
9 Investors

10 - and -

11 THE GOVERNMENT OF CANADA
12 Respondent

13 --- CASE MANAGEMENT MEETING ---

14 --- This is a transcript of the proceedings held
15 before the Tribunal on Friday, October 16th, 2009,
16 in the Windsor Room "C", Le Royal Meridien King
17 Edward Hotel, 37 King Street East, Toronto,
18 Ontario, Canada, M5C 1E9, commencing at 10:05 a.m..

19 B E F O R E: Judge Bruno Simma, President

20 Professor Donald McRae

21 Professor Bryan Schwartz

22 REGISTRY: PERMANENT COURT OF ARBITRATION

23 Mr. Dirk Pulkowski

24 COURT REPORTER: Bonnie Lynn van der Meer, CSR

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1 A P P E A R A N C E S:

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3 FOR THE INVESTORS:

4 Per: Barry Appleton, Esq.

5 Also Present: Dr. Alan Alexandroff

6 Martin Endicott

7 Kyle Dickson-Smith

8 David Estrin, Esq. (Expert)

9 Logistical Support:

10 Sue Ki

11 Mona Davies

12 Alan Fraser

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16 FOR THE RESPONDENT:

17 Per: Scott Little, Esq.,

18 Shane Spelliscy, Esq.,

19 & Jean-Francois Hebert, Esq.

20 Also Present: Elizabeth Hrubesz, Paralegal

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I N D E X

P A G E

3 Submissions pertaining to case management.....4

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1 ---Upon commencing at 10:05 a.m.

2 PRESIDENT SIMMA: I think we're ready,

3 right, so let me welcome -- say good morning again

4 and welcome you very much to this case management

5 meeting. After all the paper we looked at in

6 recent month, it's really good to see the people

7 behind the papers and the persons who wrote all
8 that stuff.

9 And I think we already set out in our
10 communications to you that we really regard this as
11 an opportunity to speed up things and get
12 clarifications on points that if we had to attain
13 them by exchanging these letters and this kind of
14 trilateralism, it would take much more time, and so
15 I think it makes a lot of sense.

16 Let me then formally introduce Dirk,
17 Dirk Pulkowski who is our Secretary. And, I mean,
18 you have seen him this morning, but I think he has
19 already done very valuable work and great things
20 are to be expected of him. I think it's also
21 because Dirk was a student of mine -(laughter)- and
22 he's still supposed, besides his work for the PCA,
23 et cetera, to complete his doctoral dissertation.
24 That means his "Doktorvater" shouldn't really
25 employ him, you know, and then stuff like that.

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1 But now he's working for the PCA, and welcome,
2 Dirk.

3 We, of course, discussed and talked
4 about the agenda and we are grateful to both
5 parties for having made suggestions in that regard,
6 what we should do. I think we would like to go
7 about -- oh.

8 First of all, I would say that we very
9 much hope that we will finish around three o'clock.
10 I think that's always in your interest, and I think
11 that will be facilitated because I think we are all
12 ready to have this meeting to be as informal and
13 businesslike as possible; not engage in any, let's
14 say, great presentations to the Tribunal.

15 But really, this is a case management
16 and we should behave like apparently managers do;
17 that is efficient -- efficiency, et cetera.

18 We thought that we should maybe divide
19 up the -- we know or we are aware that the Claimant
20 has suggested that the issues of relevance,
21 materiality, burden and issues of privilege,
22 sensitivity should more or less be dealt with in
23 one phase, in one go.

24 We have given it quite a bit of thought
25 and we thought it would really be the better

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1 solution to divide it up into two steps and, in the
2 first step, deal with or discuss what to do about
3 objections that are made on grounds of lack of
4 relevance, materiality or unreasonable burden,
5 maybe lack of specificity, and also go about this
6 in the further, let's say, proceedings. And then
7 turn to the issue of privilege, Cabinet privilege,
8 legal privilege or political or institutional
9 sensitivity because I think it makes really sense,
10 doesn't it, to first sort out what documents would
11 - let's see - not be necessary anymore because they
12 are seen to be irrelevant, immaterial, really be
13 maybe an unreasonable burden, even though I have
14 the feeling that the element of burden is always
15 latched onto relevance. So I think burden, as
16 such, might not be such a huge problem to deal
17 with.

18 And then see what is left, and only
19 look at what documents are then left and see
20 whether, which of them would be subject to
21 consideration of privilege.

22 I think that makes sense because
23 otherwise, you will have to go into, let's say,
24 observations on privilege on documents which might
25 not be, in the last instance, not on the table

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1 anymore.

2 We are also very, very open to you,
3 maybe in the course of this meeting, seeing a
4 possibility to negotiate between yourselves
5 anything or come to an agreement on a question that
6 is up for debate. So wherever you think it would
7 be good for us to withdraw, we will gladly do so
8 and leave the solution of issues to you. I think
9 we had a good precedent at our first meeting in
10 March in that regard.

11 I think that's more or less all I have
12 to say with regard to the agenda as we see it.

13 And I think with regard to the
14 treatment of relevance, burden attached to it, we

15 will start with issues or questions that relate to
16 the document requests that were made to Canada and
17 followed by problems we have - not "problems"; I
18 mean, issues, questions with regard to requests
19 made to the Investor.

20 We thought that maybe it could be
21 handled in the way that we deal with this until a
22 coffee break which we might have around 11:30 or
23 so, then wind up hopefully this first cluster by
24 lunchtime, about which we are, of course, flexible,
25 but it's probably going to be around one o'clock.

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1 And then maybe the -- and then turn to the meat, to
2 the -- after lunch, unfortunately, which would be
3 the issues related to privilege. But if it turns
4 out that we need less time for the first cluster,
5 the better.

6 So I think a good way... Do you have
7 any, let's say, observations on the way we would
8 like to set out and organize this meeting or would
9 that find your approval? I have been so general
10 - a bit like some of the Document Requests - that
11 there isn't much to disapprove. (Laughter)

12 Is that fine with you, in principle?

13 MR. LITTLE: So far, the process you
14 have suggested is fine to us.

15 PRESIDENT SIMMA: All right. So I
16 would like to... So the first issue would be
17 Documents Requests that were made by the Investor
18 requested to Canada and the issue of relevance.
19 And maybe I'll have Don ask and bring up a few
20 points, followed by Bryan, and then we'll see how
21 it goes. Okay.

22 PROFESSOR McRAE: Thank you very much.
23 I thank the parties both very for coming to the
24 session today.

25 The questions and perhaps comments that

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1 I have are really designed to try and help us move
2 towards narrowing the issues and more precision
3 perhaps in some respects, both in respect of what
4 is being requested and what is being objected to in
5 the Request.

6 I think, as we pointed out in our
7 letter, we did feel that some things were rather
8 broad and we thought this process might help narrow
9 the differences and give more clarity.

10 And so the first point I wanted to turn
11 to - and this is really a question that is for the
12 Investor - it relates to the Paragraphs 6 and 7 of
13 the additional submissions and observations of
14 Canada in respect to Requests 3 and 4.

15 And I must say, I certainly found -- I
16 know the Tribunal found these submissions by both
17 the Investor and the Respondent very helpful in
18 narrowing the issues.

19 PRESIDENT SIMMA: Yeah.

20 PROFESSOR McRAE: But in Paragraph 6
21 and 7, one of the main things that Canada seems to
22 be saying is that documents requested under
23 Requests 3 and 4 are already available, publicly
24 available.

25 And since we haven't had an opportunity
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1 for a response from the Investor on that particular
2 point, I just wondered if there was a response to
3 that particular point; that there are websites in
4 which these documents are available.

5 Are they -- does that narrow the issue
6 or is that really not responsive from the
7 Investors' point of view? So perhaps we could have
8 a little bit of response on that.

9 MR. APPLETON: Sure. I am going to
10 answer your question and then I need to say
11 something that might make it easier to help us
12 today. And, of course, I'm very thankful for
13 having this opportunity today to really practically
14 get this together.

15 I think that's the whole case of case
16 management and arbitration. And our intention
17 today is to treat this not as litigation, but as
18 arbitration and see if we can find some practical
19 and sensible solutions to move this ahead.

20 And so with respect to your question,
21 the answer is, we are not seeking any materials
22 that are publicly available because we could have

23 done that and we would have done that and you can
24 probably rest assured that we have done that.

25 But there are a number of items that

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1 are not publicly available, but I need to unpack
2 this a little bit further.

3 First of all, in the spirit of trying
4 to find solutions, we have brought with us today an
5 expert on Canadian environmental law with
6 considerable experience in Environmental
7 Assessments, David Estrin. Mr. Estrin is over here
8 with us.

9 Mr. Estrin consulted with us
10 specifically to identify the Document Requests, so
11 they would be as specific as possible.

12 So when we made the Document Requests,
13 we went to an outside expert and asked, 'What are
14 the types of documents that we would expect to be
15 able to find? What are the types of documents --
16 can we identify who would have them and what
17 location they would be in? So rather than engaging
18 in a huge fishing expedition, let's be as specific
19 and identify as much as possible.'

20 And so that was the process that we did
21 to try to get us here. And we thought that it
22 would be very practical to have him available. And
23 our suggestion would be that we could ask some
24 questions, that Canada could ask some questions,
25 the Tribunal could ask some questions to try to

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1 identify, is this type of information relevant?

2 And to us, relevancy is the most
3 important principle here because there might be a
4 lot of relevant documents. And it seems to us that
5 the suggestion is, if there's a lot of relevant
6 evidence, that we don't have to produce it because
7 that could be burdensome.

8 And, in fact, if there's a lot of
9 relevant evidence, there just is a lot of relevant
10 evidence. That's a common issue that happens in
11 all types of litigation and we may need some more
12 time to assess it and deal with it. But burden is
13 only an extraordinary situation where you are going

14 to find evidence that might be of low probative
15 value and that is exceedingly difficult to be able
16 to obtain. But burden is not the situation where
17 you have is a lot of material or relevant evidence;
18 that relevancy is therefore the most important
19 task.

20 And so we thought that given it was
21 clear from the letter from the Tribunal that the
22 Tribunal wanted to deal with relevance, and so we
23 had developed a wonderful argumentation for you, if
24 I have to look at relevance and the theoretical
25 elements -- it would be a beautiful dissertation.

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1 And there's not a lot of work in the area of
2 evidence in international law. I like this idea.

3 But we thought, wouldn't it be
4 practical and bring an expert who can answer some
5 questions and say, 'Yes/no/you can make this
6 smaller/this is what you need/they have this in
7 every file/they don't have this.'

8 So we just thought that that would be
9 an easier thing to do. So, in fact, I'm very
10 pleased with what the President suggested because I
11 was going to suggest that we change the order
12 because we have the expert available - I didn't
13 think he would be available; we're very thankful
14 that he is - and deal with those issues first.

15 PRESIDENT SIMMA: You mean he -- okay.
16 I mean, you are dealing with relevance?

17 MR. APPLETON: Yes.

18 PRESIDENT SIMMA: And that is what your
19 expert is here for--

20 MR. APPLETON: Correct.

21 PRESIDENT SIMMA: --where he can help?

22 MR. APPLETON: Correct.

23 PRESIDENT SIMMA: Yeah. Well, that's
24 fine. So would he have an answer already to Don's
25 question about the websites?

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1 MR. APPLETON: Yes. I thought we could
2 ask him. That's why -- I was -- I gave you - sorry
3 - a bigger speech than you wanted.

4 PRESIDENT SIMMA: No, no.

5 MR. APPLETON: I just thought, why
6 don't we just ask him?

7 PRESIDENT SIMMA: Yeah. I mean, you
8 could -- I think you can let the answer come from
9 whoever you want among your, in your team, right,
10 so that's how... And then we'll... Okay.

11 MR. APPLETON: Well, Mr. Estrin, you
12 heard the question.

13 MR. ESTRIN: Yes. Judge Simma, Members
14 of the Tribunal, it's an honour for me to appear in
15 front of you.

16 Questions 3 and 4 are specifically all
17 asking for information, as Mr. Appleton said, is
18 not publicly available, except for Item (a) in each
19 case, which is simply a tag to identify a
20 particular file.

21 Names of files and projects are
22 available on a website. And certainly the Canadian
23 Environmental Assessment Agency and responsible
24 government agencies in Canada do maintain certain
25 documents on a website for projects that go through
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1 the Canadian Environmental Assessment Act. But the
2 items that we have, that are articulated in, say,
3 Paragraph 3(b), -(c), -(d), -(e) and perhaps -(f)
4 and the same in No. 4 are documents that are not
5 available.

6 What is happening here is that under
7 the Canadian Environmental Assessment Act, there is
8 no, there is no automatic trigger for there to be a
9 hearing, let's say, in front of the Review Panel.
10 So a decision as to whether or not a particular
11 project that is subject to assessment goes to any
12 type of a hearing in front of a Review Panel,
13 whether it's a one-jurisdiction Review Panel or, in
14 this case, a Joint Review Panel is a discretionary
15 decision made internally to government actors.

16 And the criteria on which they use and
17 the internal basis for making that decision is
18 something that is not revealed in any public
19 record, except formally, there is usually one
20 formal letter at the end, at the end of government
21 decision-making, internal government

22 decision-making, there is a letter normally from
23 the Minister of Environment, saying, 'I am going to
24 appoint a Panel and here are a couple of reasons.'
25 But they're usually general. They cite the

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1 specific section of the Act and that's it.
2 So what this Request is intended to
3 elicit are, how -- the factors to be applied as to
4 when these decisions are made because this bears on
5 issues that I understand to be relevant to this
6 Tribunal, such as fairness of the process, whether
7 the process was in any way arbitrary or not,
8 whether it was unusual, and which I understand to
9 be issues being raised by the Investors in this
10 case.

11 And all of that -- so, so just to
12 summarize, whether or not a Panel is established in
13 the first place and can be, the factors that go
14 into that are really, end of the day, internal to
15 government and it's only by asking for those
16 records and obtaining these records can we
17 understand why, in one case, a Panel was appointed
18 and in another case, it wasn't.

19 Does that perhaps help?

20 PRESIDENT SIMMA: Yes. So I think the
21 -- Canada -- I mean, that correlates to what you
22 said; that much of the information the Claimant
23 looks for is publicly available. So the way to
24 understand that would be that, let's say, documents
25 that are not publicly available on the website that

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1 don't fall under that much --

2 MR. LITTLE: By all means. We take no
3 issue with what Mr. Estrin has said thus far.

4 I just think it's important to note
5 that leaving aside Paragraphs (a) to (f) in
6 Document Requests 3 and 4, leaving those aside --
7 and we take the issue that some of those paragraphs
8 do request publicly available information like (a).
9 But leaving that aside, this Request would have
10 Canada sifting through 900, over 900 Environmental
11 Assessments between 1995 and today's date.

12 So that's the preliminary issue I think

13 that needs to be dealt with here. And then we
14 don't take issue with any of what Mr. Estrin has
15 said and the fact that there are non-public
16 documents available.

17 Canada's position is that the Investor
18 has to inform itself through reference to publicly
19 available information first, to narrow it down to
20 specific Environmental Assessments. And then, and
21 we can work with the Investors on the specific
22 types of documents that might not be publicly
23 accessible that could be subject to a Document
24 Request.

25 So it's that first issue I think that

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1 we really need to look at closer.

2 MR. APPLETON: Shall we take that on?

3 That's actually the point. If it's all right with
4 you --

5 PROFESSOR McRAE: Before we get to that
6 because it just seems to me, then, we can put aside
7 then this part of your submission that they have to
8 look at the publicly available ones first because
9 they say they're not requesting the publicly
10 available ones, so that's really not the issue
11 anymore.

12 So we are really moving on to the
13 question of the relevance of the non-publicly
14 available and the identification of the
15 non-publicly available.

16 MR. LITTLE: Well, I still think - and
17 maybe I'm missing your point, Professor McRae --
18 that they have to inform themselves on specific
19 Environmental Assessments in order to get to the
20 Request.

21 PROFESSOR McRAE: That's the second
22 part of it, yeah.

23 MR. LITTLE: If they are asking for 900
24 sets of these non-publicly unavailable documents,
25 we have problems with that.

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1 PROFESSOR McRAE: Okay. That comes to
2 Mr. Appleton's...

3 MR. APPLETON: Sure. Well, I think

4 again, the best thing to do is to turn it over to
5 Mr. Estrin and let's ask him because my own sense,
6 from looking at this, is that I think actually, if
7 you read the requests carefully, it actually gives
8 you... I get a different type of math than
9 Mr. Little.

10 My -- but why don't I just turn this
11 over to Mr. Estrin because I don't want to argue.
12 The idea here is not litigate, but to arbitrate.
13 So why don't I just ask somebody who knows
14 something to tell us, and then we can discuss after
15 that information is available, if that's all right.
16 It's a little bit different from our normal
17 process, but I just think it would be very
18 practical today.

19 So can we just -- you heard the
20 conversation, Mr. Estrin, so why don't you tell us
21 what you think?

22 MR. ESTRIN: The number "900" is
23 mentioned in Canada's documents for Environmental
24 Assessments in that period of time related to these
25 kinds of projects.

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1 What has to be understood is that the
2 term "Environmental Assessment" under the Canadian
3 Act refers to any type of Environmental Assessment.
4 There's what's called a "Screening Level
5 Environmental Assessment" and a "Review Panel
6 Environmental Assessment". Those are the two basic
7 kinds.

8 99 per cent of the 900 would be
9 Screening Level Environmental Assessments; i.e.,
10 not Panel Reviews.

11 In Canada, the Canadian Environmental
12 Assessment Act came into effect in January of 1995,
13 so we have about 14 or 15 years of history under
14 it. During that time, there's approximately
15 perhaps 17, only 17 Panel Reviews, Joint Panel
16 Reviews been held. I believe that's the
17 appropriate number. It's not a very large number.

18 So Request No. 3 relates to no more
19 than a total of 17, but that would be for any type
20 of project. And the number would, in fact, be

21 substantially less if one were looking for, in
22 fact, the type of project that was specified, such
23 as quarries and marine terminals and mines.
24 Certainly not all the projects, not all the 17 so
25 far in Canada have related to this type of project.

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1 So it's just a handful probably of 17 that have
2 gone to a Panel review, to start with.

3 MR. APPLETON: If I could just add, I
4 have a list of the 17.

5 PRESIDENT SIMMA: Can I just ask
6 because what I read here in No. 3 is, the cases in
7 which a Panel request -- a hearing or a Panel
8 request was asked or, let's say, a hearing was
9 requested.

10 So you say finally, they ended up with
11 about 17 out of a huge number, to have a Panel or a
12 hearing. But do you have an answer to, let's say,
13 how many requests were made to have a Joint Panel
14 and then it turned out that there wasn't any,
15 because...?

16 MR. ESTRIN: Well, actually, Judge
17 Simma, that is the distinction really between
18 Request No. 3 and Request No. 4.

19 Request No. 3 is only in respect of
20 where there was a Panel established. It says - and
21 the words are underlined, at least in my version of
22 it - No. 3 begins:

23 Documents of the Agency
24 pertaining to mines, quarries and
25 marine terminals where an

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1 Environmental Assessment under seal
2 was triggered and where a Panel
3 Review or Joint Panel Review with
4 another jurisdiction was held.

5 So that request is limited to the cases
6 where a Panel was established. And, as I say, only
7 been 17 in Canada. Probably only a handful
8 actually relate to mines, quarries and marine
9 terminals; whereas, Question 4 is related to,
10 again, Environmental Assessments undertaken in
11 relation to mines, quarries and marine terminals

12 where no Panel Review was triggered.

13 In that case, we're seeking to examine
14 files for projects that were similar, but where no
15 panel was established and to look at the factors
16 that led to that.

17 PRESIDENT SIMMA: What figures are we
18 talking about here?

19 MR. ESTRIN: Well, I haven't done the
20 same research that my friends say when they say
21 there's possibly 900, but I can... It's, I have
22 done a little bit of preliminary work and it would
23 be my view that if you were to look at no more than
24 50 -- there couldn't likely be more than 50
25 projects in Canada that would be similar.

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1 And certainly, we could -- I would
2 recommend that we could work with the Government of
3 Canada to identify those that seem to be, you know,
4 similar for the purposes of this exercise, and it
5 may well be less than 50.

6 PRESIDENT SIMMA: Scott?

7 MR. LITTLE: Maybe if I can assist by
8 directing the Tribunal to Tab 9 of Canada's Book of
9 Documents and Authorities.

10 PRESIDENT SIMMA: Mine is at The Hague,
11 so do...? Thank you. Tab 9.

12 MR. LITTLE: Again... I will wait
13 until everybody is there.

14 MR. APPLETON: We're good. We're just
15 sharing.

16 MR. LITTLE: Again, everything
17 Mr. Estrin is providing the Tribunal is very
18 helpful. I will add some precision, perhaps, to
19 what Mr. Estrin has stated.

20 At Tab 9, what we've done is we have
21 printed out the website page from the CEAA website
22 dealing with all the Review Panels that have been
23 held. It's a little bit more than 17. It's
24 perhaps in the area of 30. So those three pages
25 are the Review Panels that have been held.

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1 The next three pages deal with -- and
2 there was one other level of Environmental

3 Assessment that Mr. Estrin didn't mention. That's
4 the comprehensive study which is a relevant form of
5 Environmental Assessment for the purposes of this
6 case, as well.

7 MR. ESTRIN: Yes.

8 MR. LITTLE: The next three pages of
9 Tab 10 set out all of the comprehensive studies
10 that are Environmental Assessments that have taken
11 place.

12 PRESIDENT SIMMA: This one, Galore
13 Creek gold, silver?

14 MR. LITTLE: Are you on Tab 9? You've
15 got to stay in Tab 9.

16 PRESIDENT SIMMA: Yeah.

17 MR. LITTLE: I'm sorry. The last three
18 pages or the last four pages of Tab 9--

19 PRESIDENT SIMMA: Okay.

20 MR. LITTLE: --set out the
21 comprehensive studies.

22 PROFESSOR McRAE: Construction of
23 LNG --

24 PRESIDENT SIMMA: Ah. The last --
25 okay.

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1 MR. LITTLE: That's the very first one
2 on the list--

3 PRESIDENT SIMMA: Okay.

4 MR. LITTLE: --but it's got the bold
5 heading, Comprehensive Studies.

6 SO Tab 10 basically sets out all Review
7 Panels and comprehensive studies that have taken
8 place under CEAA's jurisdiction up to the present
9 date.

10 And if you... You know, I don't have a
11 number on all the bullets, but there's probably - I
12 would estimate - close to 100 Assessments here.

13 Mr. Estrin is correct, the majority of
14 Assessments in Canada are screenings. In our view,
15 screening aren't really relevant to this case;
16 comprehensive studies and Panels are.

17 So that's what you have there. And
18 these are the links to all of these Environmental
19 Assessments, be they Panels or comprehensive

20 studies on the CEAA website.

21 Now, it might assist the Tribunal if
22 you turn to Tab 10 now of our Book of Documents and
23 Authorities. What we have provided at Tab 10...
24 You've got a page there that says Decision.

25 PRESIDENT SIMMA: Yeah.

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1 MR. LITTLE: This set of documents has
2 to -- it's an excerpt of the documents that are
3 publicly available for one Environmental Assessment
4 that was a comprehensive study, and it's the Galore
5 Creek gold, silver, copper mine.

6 This is the type of information that's
7 available. You've got a decision which is the
8 ultimately decision on the Environmental
9 Assessment.

10 Turning to the next page, you have a
11 page that deals with the scope of factors that were
12 considered. And I note decisions with respect to
13 the scope of factors was one of the areas in the
14 subparagraphs in the Document Request that the
15 Claimants were interested in.

16 So this scope of factors links to a PDF
17 document. That PDF document is the excruciatingly
18 detailed document on the scope of factors that was
19 considered -- are to be considered in the
20 comprehensive study.

21 Turning to the next two pages, that's
22 the actual, I guess the -- skip one page which is
23 the news release. The next page is the document
24 that is the Environmental Assessment Track Report
25 which is the report that sets out which track,

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1 which type of Environmental Assessment this should
2 be, again linked to a PDF document.

3 And then finally, one more page, the
4 Environmental Assessment Report. That's the actual
5 detailed report on the Environmental Assessment or
6 the comprehensive study in this case.

7 So this is the type of information
8 that's all available on the CEAA website that the
9 Claimants can inform themselves of first and then
10 craft specific requests for non-public documents

11 that might relate to identifiable decisions made at
12 some step in the course of Environmental
13 Assessments that are relevant to their claim.

14 So we have kind of got, it's a two-
15 tiered approach here. We think there's got to be
16 some work done by the Claimants in identifying
17 Environmental Assessments of projects that bear
18 some relevance to what we're dealing with here.

19 And secondly, they have to look at the
20 publicly available documents related to those
21 Environmental Assessments to see where it is that
22 they don't have the non-public documents that
23 they're interested in.

24 And we don't dispute that they exist;
25 we just think that the Claimants need to do a

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1 little bit more homework with the publicly
2 available material here to narrow this request
3 down.

4 PRESIDENT SIMMA: A question. Would
5 the other agencies mentioned in questions, or
6 Requests No. 3 and 4 like Environment Canada, DFO,
7 NRC -- NR Canada, Transport Canada; would they have
8 comparable, let's say, websites or would you find
9 everything which relates to Environmental Impact
10 Assessments and the like on the website of the
11 Canadian Environmental Assessment Agency?

12 In other words, could there be a
13 project undertaken by -- well, Transport Canada; is
14 that -- I don't know what it has to do with. Is it
15 railroads or -- I don't even know. But would the
16 environmental aspects of such a project also be,
17 would they also be found on the, let's say, on the
18 website of which you gave us samples?

19 MR. LITTLE: My understand is that this
20 kind of information is maintained on the CEAA
21 website because the CEAA which administers the
22 Environmental Assessment, it is responsible for
23 maintaining a registry of this information. So
24 it's on the CEAA's website.

25 It's not to say that there's

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1 significant involvement by the other departments

2 and agencies, but in terms of acting as the
3 repository of the information, it's on the CEAA
4 website.

5 So there may well be a, for example, a
6 comprehensive study in which the responsible
7 authority is Transport Canada, but that
8 comprehensive study is listed on this page
9 -(indicating)- and all of the documents relating to
10 the comprehensive study are found on this, you
11 know, on the links regarding that study on that
12 page.

13 PRESIDENT SIMMA: Don, wouldn't it be a
14 moment to introduce the second issue that we
15 discussed; you know, the question of overlap
16 because I think my question was really something
17 which had to do with--

18 PROFESSOR McRAE: Okay.

19 PRESIDENT SIMMA: --overlap, and I
20 think we could introduce that.

21 PROFESSOR McRAE: Yeah. We're actually
22 getting into the third category of questions, but
23 let's... Yeah. But let's go to the second
24 question that the President has raised, and that is
25 a number of the things that are said in Canada's

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1 additional submissions are, this would simply
2 require them to produce documents that have already
3 been produced.

4 And what I wanted to get a sense of is,
5 how did you see that -- how do you see this playing
6 out? In other words, you say, 'Well, we have
7 already produced them,' but how do we and the
8 Investor know whether you really have produced
9 them?

10 In other words, to claim that it would
11 be just duplication, you're saying, 'We shouldn't
12 have to produce,' but do you have to indicate what
13 documents you have and then let the Investor know
14 that these are simply duplicates of what have
15 already been produced or is it sufficient to make a
16 simple statement, 'Well, there's no point in
17 looking there because they're just duplicates of
18 what have already been produced'?

19 Is it simply your statement that they
20 have already been produced that we should simply
21 accept or is there more of a process to help
22 identify what documents you have in response to the
23 Investors' Request that are simply duplicates of
24 what you have already produced?

25 MR. LITTLE: Well, first of all, we

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1 don't take the position we produced these
2 documents. They are just publicly available.

3 Secondly, it is part of the process
4 that we're saying they need to engage in. And as
5 Mr. Appleton says, we don't doubt that they have
6 engaged in the process and informed themselves. We
7 just think that process has to somehow play into
8 Requests 3 and 4 in informing them a bit because
9 read literally, we have to sift through - and the
10 count is correct - over 900 Environmental
11 Assessments - CEAA has provided us that number -
12 over 900 Environmental Assessments, to then delve
13 into the documents that they're asking for. And I
14 don't think it's in anyone's interest to have 900
15 Environmental Assessments cited in this case.

16 PROFESSOR McRAE: Let me back up a bit
17 because there are two categories. One is the...
18 It's already publicly available.

19 MR. LITTLE: Mm-hmm.

20 PROFESSOR McRAE: And that, I think the
21 Investor has said, 'We're not asking for those,' so
22 it doesn't seem to me that you have to do anything
23 about those.

24 MR. LITTLE: Right.

25 PROFESSOR McRAE: The other category is

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1 where, under one - and this is not just 3 and 4 -
2 it's under one category, you've produced documents
3 and then in respect of the other category, they
4 say, 'Well, this is an overlap. There's no point
5 in producing documents here because they have
6 already been produced under a different category.'

7 It's just a question of, do we simply
8 settle with that assertion or is there some kind of
9 verification process that can be gone through, so

10 that we know and what the Investor knows that what
11 you have under Request No. 15, for example, has
12 already been produced under Request No. 12?

13 PRESIDENT SIMMA: May I just latch onto
14 it only because I have the same problem, of course?
15 That's problems that we share.

16 First of all, I apologize for maybe
17 confusing things, but I thought, since my -- our
18 latest point had to do with the problem of overlap,
19 I thought, 'Okay. Why don't we introduce it?'

20 So, for instance, you ask for all
21 relevant documents from a number of agencies, all
22 right, and your reply would be, 'Part of these
23 documents, we have already produced.'

24 But intellectually, doesn't that
25 presuppose that first, you make -- you have a

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1 picture of what he is asking for and then you could
2 say, what he's asking for, all relevant documents.

3 And then what would help us very much
4 would be that if a reply given by you would say,
5 'The following documents which we have given you in
6 reply to your Request No. "X", I think we don't
7 needed to present them or produce them anymore.'

8 Do you know what I mean?

9 MR. LITTLE: I do. Maybe I could --
10 and I'm sorry, Professor McRae. I thought we were
11 on 3 and 4 and that's why I perhaps gave you that
12 obtuse response to your question.

13 PROFESSOR McRAE: Yeah. We sort of
14 jumped a bit there, but that's fine.

15 MR. LITTLE: Maybe the easiest way is
16 to look at an example.

17 We consider Request 5 to be a request
18 that basically subsumes all requests. And maybe
19 we're missing something with what the Claimants are
20 asking for in Request 5, but the way we read it,
21 it subsumes the entire case.

22 Now, we have made production pursuant
23 to Requests 6, 7, 8 and 9, for example, which in
24 our view had a point of reference for us to be able
25 to retrieve documents and produce them. There's a

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1 circle of documents there that were produced within
2 6, 7, 8 and 9.

3 No. 5 asks for something far greater
4 and it is a larger circle that subsumes 6, 7, 8 and
5 9. And obviously, there are some documents between
6 the two circles, between the perimeter of 6, 7, 8,
7 9 and the perimeter of 5, and obviously those
8 haven't been produced. But we believe Request 5 to
9 be so broad that we would essentially be producing
10 every single document that relates to the
11 arbitration.

12 So there are other documents out there
13 that haven't been produced - I'm not sure if that
14 answers your question - but I think No. 5 has to be
15 somehow made more narrow and specific, so that we
16 can respond to it and not be put to the
17 unreasonable burden of producing thousands and
18 thousands and thousands of documents in this case.

19 PRESIDENT SIMMA: Well, but I think the
20 way I would have seen a difference between 5 and 6
21 following would be that 5 asks for documents
22 constituting communications between various
23 governmental agencies, whereas 6, you say:

24 All documents related to the
25 process, options and manner.

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1 So my guess would be that that would
2 be, let's say whereas 5 relates to, let's say,
3 communications, you know, going between agencies,
4 that would be also internal stuff that were never
5 communicated to other agencies. So I don't really
6 readily see that 6 eclipses -- sorry -- that 5
7 would eclipse the entire further...

8 MR. LITTLE: We say that 5 subsumes the
9 entire further because it's:

10 All documents constituting
11 communications between the
12 Government of Canada and Nova
13 Scotia.

14 And under both of those headings, there
15 are in the 10s to 20s of departments and there are
16 many different individuals in each of those
17 departments and there are communications crossing

18 between each and every one of them.

19 This -- I don't know how -- we can't
20 read this any more narrowly than to basically be a
21 request for everything in this case because it's
22 pertaining to any way to the project from January
23 2002 to December 31, 2008. I just --

24 PRESIDENT SIMMA: A quick question by
25 something like a civil lawyer half-bred to a common

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1 lawyer. How precisely -- what do you mean by
2 "subsumes" in that?

3 MR. LITTLE: By "subsumes", I mean that
4 we could have responded is 5 and produced
5 everything that exists in this case, and contained
6 in that response would be documents that are
7 responsive to 6 or 7.

8 PROFESSOR McRAE: But if you did that,
9 if you produced everything under 5 and simply said,
10 'In respect of 6, all the documents that are
11 covered under 6 have already been produced under
12 5,' what's your response to that, Mr. Appleton, if
13 that's what you've got in respect of 6?

14 MR. APPLETON: Why don't I just turn
15 this over to Mr. Estrin who has been thinking about
16 the difference between 5 and 6? I have my own
17 views, but I'm very interested to hear what he
18 might say. And then --

19 PROFESSOR McRAE: Okay. But 5 and 6
20 are an example. I also want to hear what you have
21 to say about the duplication issue that we're
22 trying to raise generally here. Is it sufficient
23 to simply say, 'We have already produced those
24 under this other area'?

25 MR. APPLETON: Let's talk about the

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1 principle of duplication generally. I think that's
2 what your question really is.

3 We also may have a situation where
4 there are documents that are duplicate. The way we
5 normally do it would be as follows: We would say
6 that, 'In addition to the following documents that
7 we have produced here, Documents blank, blank,
8 blank and blank which we produced in relation to

9 Document Request whatever number are also
10 relevant.' In other words -- but they would have
11 to be the same document.

12 Now, I only spent three years in
13 government, but I went to many intergovernmental
14 meetings in the three years and where different
15 departments would meet. And generally, they might
16 have the same document, but with lots of
17 annotations on the side that would be very
18 different. And the annotations of the various
19 departments on the same document might be very
20 material.

21 So in my mind, a document with
22 different information is not the same document.
23 But if it's exactly the same -- if it's the agenda
24 for a meeting and the agenda is sent to five
25 departments, there's no reason to have to have five

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1 of them. But if the agenda for the meeting has the
2 annotations and the notes from one of the relevant
3 departments saying, 'This is what took place,' or,
4 'I think this is a problem,' or, 'This is going to
5 be...' We had one case where there were some notes
6 about, 'Minister, we think this violates NAFTA.'
7 That was written on the side. That was very
8 material. We would like to see that. That's not
9 this case. I don't know what's in the file. That
10 was another case.

11 So with respect to that, we would think
12 that would be very relevant evidence, of
13 significant probative weight. So -- but that's not
14 the same.

15 So the question is, what's "the same"?
16 And "the same" is identical. If it's identical, we
17 don't need to see it again; of course not. That
18 would be totally not practical and not sensible,
19 and that's exactly what we're trying not to do.
20 But if it's the same document, you would refer to
21 it.

22 That's why we would have expected to
23 have seen a detailed listing with the documents,
24 which is another issue that you're familiar with,
25 we had some significant problems with because then,

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1 you would be able to say, 'It's the same as that
2 earlier document which we produced here,' and be
3 able to identify it that way.

4 And so that's exactly the way that we
5 respond is, if we have something that's duplicated,
6 we don't send the same document again and again.
7 It would be a terrible waste of resources. We say,
8 'These are the documents that are, in essence,
9 unique to this request. And the following
10 documents are also responsive, which we have
11 already produced, and they are...' It might be the
12 entire response to a Document Request. That's what
13 I mean by "subsumed" in my own lexicon. It means
14 that everything in the other request would be
15 included in that, or it might be specific
16 documents.

17 But I would like to turn on the
18 specific question, if I could, to Mr. Estrin, if
19 that's all right, because I think he knows the
20 specific answer. But on the general question, I
21 can't see how anything else would be anything but
22 impractical. And I just want to find a simple and
23 practical way to resolve these issues, so we know
24 things.

25 Mr. Estrin, I'm sorry, I took us a

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1 little out of the way with my theoretical answer.
2 Do you remember the question that was posed
3 specifically?

4 MR. ESTRIN: Yes.

5 MR. APPLETON: Okay.

6 MR. ESTRIN: It's in relation to --
7 well, the concern of Canada is that 5, as it was
8 said, subsumes everything else. And certainly, it
9 is not intended that that be the case. And, in
10 fact, there is a distinction between 5, say, and
11 requests for other documents.

12 5 is directed to specific
13 communications between those two levels of
14 government over this project as opposed to the
15 specific analysis in files of those governments in
16 regards to this project.

17 In other words -- and that would bear
18 on the issue as to how it came to be that there was
19 a Joint Panel set up in the first place, for
20 example, between Canada and Nova Scotia. And that
21 is what that question, that Request was more
22 specifically aimed at, as opposed to delineating,
23 as I said, each department within those
24 governments, which comes out in other questions.

25 And perhaps it would be helpful just to

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1 refer back to the definition of "government
2 entities" because 5 refers to "government entities"
3 and there is a definition of that in the Document
4 Request. And if you have it, I believe it's this
5 revised draft, dated July the 30th, 2009, that
6 we're working from.

7 PRESIDENT SIMMA: Sorry. Can you
8 repeat the date?

9 MR. ESTRIN: It's the document entitled
10 Investors' Request for Documents from Canada. It's
11 with the Style of Cause. It's dated July 30th,
12 2009, revised.

13 MR. APPLETON: Just pause for a moment,
14 so we can find it. He means the original Document
15 Request, not the Redfern.

16 PRESIDENT SIMMA: Yeah, right.

17 MR. APPLETON: Do you need a copy or do
18 you have one?

19 PROFESSOR McRAE: I've got the July 2nd
20 one in front of me.

21 MR. APPLETON: It would be the same.

22 PROFESSOR McRAE: Okay.

23 MR. ESTRIN: I'm only referring to the
24 definition of "government entities" for this
25 purpose.

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1 MR. APPLETON: Okay.

2 PROFESSOR McRAE: "Government
3 entities". It's on page 2.

4 MR. ESTRIN: Yes.

5 PROFESSOR McRAE: Yes.

6 PRESIDENT SIMMA: July 2nd. Is it --

7 PROFESSOR McRAE: You can look at this

8 one.

9 PRESIDENT SIMMA: Okay. I'll look at
10 that. All right. Okay.

11 MR. ESTRIN: Now, if you were to...
12 You will see that there's a number of bulleted
13 items under that definition, but if you were to...
14 If you were to count up five bullets from the
15 bottom of that list and draw a line, say, just
16 before the words "the offices of the Prime Minister
17 of Canada and Premier of Nova Scotia", the
18 distinction would be this: That other questions
19 have sought government information from everyone
20 above the line, if you like, from specific
21 government entities and departments that would have
22 processed this file, whereas those below that
23 assumed line, the last five bullets, if you like,
24 are offices and personnel at senior levels of
25 government that potentially had involvement with

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1 this project of which we don't have -- which I
2 understand the Investors do not have any specific
3 knowledge.

4 But certainly, you cannot practically
5 have an agreement between the Government of Canada
6 and the Government of Nova Scotia to establish a
7 Joint Review Panel unless you have concurrence at
8 the highest political levels.

9 And so really, Question 5 really
10 relates to those, in essence, those communications
11 between the Governments of Canada and Nova Scotia
12 that relate to this project to the extent that
13 there is any duplication. Certainly, as -- in
14 respect of those last five bullets of governments
15 entities, there would not be any duplication.

16 PRESIDENT SIMMA: So what do you mean
17 by the problem of subsumption - I don't know
18 whether... - that, of course, these guys in the
19 last five bullet points would have gotten a lot of
20 things that came, emanated from and were developed
21 in the, what you have on top of that list.

22 MR. ESTRIN: Exactly, sir.

23 PRESIDENT SIMMA: And, of course, that
24 would not have to be included.

25 What you would be interested in would

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1 be the kind of decision-making that went on from,
2 to the end of the list.

3 MR. ESTRIN: Yes.

4 PRESIDENT SIMMA: Among the higher
5 echelons.

6 MR. ESTRIN: Yes. That's the
7 distinction.

8 PRESIDENT SIMMA: Okay. Please, Mr.
9 Little.

10 MR. LITTLE: Well, first of all, I do
11 think I have to... I disagree with Mr. Estrin on
12 the implementation of 5. It is correct that all
13 documents constituting communications between the
14 Governments of Canada and Nova Scotia and between
15 government entities pertaining in any way to the
16 project. So, to me, there were kind of two prongs
17 to that request; (1), the request between the two,
18 the Provincial and the Federal Government, but
19 also, (2), and between government entities
20 pertaining in any way to the project.

21 And "government entities", as we've
22 seen, covers all of those, you know, provincial,
23 federal, ministerial offices. So that's why we
24 took this request to basically include the whole
25 ball of wax.

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1 Now, if what is being requested here is
2 the first category of documents - communications
3 between the Governments of Canada and Nova Scotia -
4 and, you know, the government entities in the first
5 bullets down to the last five that Mr. Estrin
6 excluded, then I think we're approaching a
7 resolution of this, but that's certainly not how we
8 read this request in the first instance.

9 I would say, also, that it would be
10 very helpful to Canada if the communications
11 between the federal and the provincial levels of
12 the Government were given some type of reference
13 point. What areas are we looking at, in
14 particular? From looking at this case, there was a
15 lot of communication between the two levels of

16 government with respect to the establishment of the
17 Joint Review Panel and the agreement for same.

18 So if there are particular areas of
19 communications between the two levels of
20 government, that would be very helpful to us.

21 PRESIDENT SIMMA: Mr. Appleton, do you
22 have any immediate thing to say on this?

23 MR. APPLETON: I'm thinking about it.

24 PRESIDENT SIMMA: Okay. Yes.

25 MR. APPLETON: That's... Well, I think

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1 we should probably just ask Mr. Estrin. I think
2 that it better to ask someone who does this -- he
3 has 30 years' experience. Let's just...

4 Okay, Mr. Estrin. What do you think?

5 MR. ESTRIN: I appreciate the point
6 that was being made, but I think the answer to it
7 is actually contained in the wording of No. 5. It
8 says:

9 All documents constituting
10 communications between Government of
11 Canada, Nova Scotia and government
12 entities pertaining in any way to
13 the project.

14 In this... It's not like about egg
15 marketing or about Wheat Board or... It's about
16 this project, so how more specific, I guess, can
17 you get?

18 PROFESSOR McRAE: I think that was the
19 question that I was coming on to. I said the third
20 category of questions is, when you talk about "more
21 specificity" - and identifying at one stage later
22 on, you say "categories of documents"; another
23 stage, you say "documents" - what exactly are you
24 asking for in terms of specificity because I think
25 that was one thing we were unclear about when you

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1 asked for specificity because, to some extent,
2 anything relating to the project is a form of
3 specificity. And I suppose, from the Investors'
4 point of view, until they see what, in fact, people
5 were saying, it's a little difficult to identify
6 what they were saying to identify the categories.

7 So perhaps you could clarify, a little
8 bit more specificity.

9 MR. LITTLE: I think there are certain
10 areas - and we have seen it in the Statement of
11 Claim - certain areas along the whole spectrum of
12 this environmental process that they take issue
13 with, and that's basically what we're asking for in
14 terms of specificity.

15 It is a form of specificity pertaining
16 to the project in any way, but there are specific
17 allegations in the Statement of Claim that the
18 Claimants make and that relate to their breaches of
19 NAFTA, and we would have expected to see the
20 request be crafted for areas along the spectrum
21 that relate to those allegations.

22 "The constitution of the JRP"; you
23 know, while that doesn't really -- there's no
24 allegation, I guess -- well, no. There are maybe
25 some allegations related to how it was constituted,

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1 perhaps through the considerations undertaken for
2 its constitution and we wouldn't argue that those,
3 those would be relevant requests.

4 So "pertaining to the constitution of
5 the JRP" is far more specific than "pertaining to
6 the project in any way".

7 PRESIDENT SIMMA: But wouldn't it be a
8 bit difficult for the Investor to really come to
9 a -- let's say, to really find out? I mean, the
10 Investor did this on the basis of the information
11 they had until now.

12 Couldn't it be that out of the
13 information that they would get from you,
14 information on all the, let's say, everything
15 relating to the project, there could arise further,
16 let's say, claims or arguments that the Investor
17 might use because he couldn't really at this stage
18 very well say, 'I can see already from what I have
19 that, that all I need is,' for instance, the
20 document that you, that you gave as an example of
21 the constitution of the JRP.

22 I think... I could imagine that I
23 would need to more to see, 'Okay. What's chaff and

24 what's wheat?'

25 MR. LITTLE: Yeah. You know, I guess I

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1 am repeating myself, but the Statement of Claim is
2 still slightly more specific. We think the
3 Statement of Claim is exceedingly broad, but it is
4 still more specific than what is being requested
5 here.

6 I'm not sure how this request can get
7 any broader; "pertaining to the project in any
8 way". So if specific allegations have been made in
9 the Statement of Claim, certainly those can inform
10 the request.

11 PROFESSOR McRAE: So what you're
12 looking for is a written request that links, when
13 they say 'pertaining to, in any way, the project',
14 links that more to the specific allegations that
15 are made. So if they added on to that, 'that may
16 be relevant to' and then repeated all the Statement
17 of Claim, would that provide the specificity?

18 MR. LITTLE: That would be more.

19 I guess maybe a helpful illustration
20 would be 6. If you look at Document Request 6:

21 Documents related to the process
22 and policy options and the manner of
23 the application of the Act.

24 And then, going down:

25 ...including discretionary

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1 decisions as to the scope of the
2 project to be assessed, the criteria
3 to be used, and the determination of
4 whether the process would be a
5 screening, a comp study or a Panel
6 Review, and the manner in which a
7 Panel Review hearing was to be
8 applied to the project.

9 That was a helpful request for us.

10 That gave us a point of reference.

11 And I guess maybe looking at 5 in
12 another way, there are massive, massive volumes of
13 documents to deal with and this would capture all
14 of them. 6 does not. 6 was helpful.

15 MR. APPLETON: But really, the question
16 has to be, is the request for the types of
17 documents that would be relevant to the issues that
18 are in this case? And if there are a lot of
19 relevant documents, so be it; there are just a lot
20 of relevant documents.

21 For example, I'm not sure if -- you
22 know, by saying, 'Well, we think that...' You
23 know, 'We need these documents because they're
24 relevant to the formation of the Joint Review Panel
25 and they're going to be relevant to the

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1 considerations made by the Joint Review Panel,
2 especially those where new criteria have come
3 without any support in the Act,' which is a very
4 significant issue for us, and so how does that make
5 it easier for Canada when we're asking, 'Are these
6 communications?'

7 I mean, for example, we think it's
8 quite possible that there are communications done
9 at a high political level from various departments
10 that are not involved in the day-to-day handling of
11 the Joint Review Panel, but which affected
12 decisions about the Joint Review Panel. And those
13 are exactly the types of things that we are trying
14 to identify through these types of requests.

15 Now, they would be very troubling if
16 they existed, but we suspect that they might very
17 well exist because of some unusual circumstances
18 and some unusual decisions, so that's why we're
19 asking in this broad way.

20 So it may be that, you know, that right
21 now, for example, the Political Minister for Nova
22 Scotia happens to be the Minister of Defence.
23 Through this period, there's a Political Minister
24 that changes the portfolio in the way that we
25 organize structure of politics in Canada, and so we

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1 have identified the types of requests, as
2 Mr. Estrin said, above and below the line, to
3 identify those things that would be proper and
4 functional - we would expect to see those - and
5 those things that might be a little unusual, but

6 may very well occur, and that's why they're there.
7 And we think that the probative value of such
8 evidence is very, very high and that's why we need
9 to know if it's there.

10 Now, if it's not there, it's not there.

11 We are not saying, you know, 'Make a document,' or
12 -- it's just -- so -- but someone has to have done
13 the search.

14 Now, I don't know how they are any
15 further ahead by saying, 'Well, please link it to
16 the JRP.' It's still the same search to see
17 whether there are documents that would be
18 responsive.

19 PROFESSOR McRAE: And it may be. I
20 take that point. But if you had framed Question
21 5 -- would it limit you, if you had taken Question
22 5 and simply added in the more specific categories
23 that exist in Question 6? Would have that limited,
24 in some way, the request?

25 I mean, arguably if this is a pro forma

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1 process, it doesn't make any difference to the
2 substance by linking it to the Statement of Claim.
3 And I don't know whether it's a pro forma or a
4 substantive question. That's one of the concerns
5 we had in looking at it. But that's why it seems
6 to me...

7 I mean, they've said, 'Look. 6 was
8 helpful to us because it did list these things.'

9 Now, if you listed all those things in
10 respect of 5, would that have limited it or is
11 there something else that you want in 5 that you
12 wouldn't get if you put those factors in that exist
13 in 6?

14 MR. APPLETON: Let's just find a
15 practical answer. I mean, what do we think?

16 MR. ESTRIN: Well, the essence of it is
17 to ask, is to seek those communications that led to
18 the establishment of the Panel. That certainly --
19 like, why is this -- why was this project the
20 subject of a Review Panel, at all?

21 PRESIDENT SIMMA: Yeah. I mean, if you
22 -- in my view, I mean, if you phrased the question

23 as they are now, for instance, wouldn't that leave
24 the, let's say the decisive determination of what
25 is relevant to the other side?

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1 Yeah. Of course, if you say, 'Can you
2 give us everything that has to do with the
3 formation or decision to have a Panel and not one
4 of the other methods,' I think that is clear. But
5 if you say 'all relevant documents', then it would
6 be on Canada's side to decide what is relevant.
7 You would get -- you would not get certain stuff.
8 And then you would have to become more specific,
9 wouldn't you, in the sense like what you said now.

10 So couldn't we -- couldn't time be
11 saved by, let's say, specifying these issues more?
12 That... Yes?

13 MR. LITTLE: And if I may assist, we
14 would be fine with such a request. And, in fact,
15 you know, a majority of that documentation may well
16 have already been produced. But we would be fine
17 with taking that request back and searching for
18 documents responsive to such a request, if that's
19 the essence of it. But it certainly wasn't
20 apparent to us that that was the essence of it.

21 PRESIDENT SIMMA: Mm-hmm.

22 PROFESSOR McRAE: I don't think we need
23 -- we don't need a specific answer now, but it was
24 just to try to get you to thinking about whether or
25 not there was a possibility to provide specificity

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1 here and whether that is limiting, in fact.

2 MR. APPLETON: Well, why don't we --
3 we'll think about that on the break.

4 But, for example, I know that -- I'm
5 attempting to keep track of specifics. I know
6 that, for example, for Document Request No. 3, we
7 know that there are 17 reports that meet that
8 condition. And we actually have identified what
9 they are from Canada's own website. So if you read
10 No. 3, we know the answer of reading the full
11 request because it only leads to 17. That's why we
12 found it very odd when they told us 900.

13 For No. 4, we would say that there

14 should be not more than 50 types of projects. And
15 so what my suggestion would be, that we would come
16 back to you with a list, but of not more than 50.

17 But I think that might take a little bit of time,
18 so I think we would offer to look back and forth.

19 This is just my scorecard. I'm trying
20 to keep track of what's there.

21 For No. 5, I think, or 6, because
22 really this is, I guess, 5. Why don't we think
23 about it? What I'm worried about is that if
24 Mr. Little's view is that we should know the
25 specific type of document that we're asking for,

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1 and we can't know that document because we are not
2 the Government. So we have a very -- we have an
3 idea of the types of documents that would likely
4 exist, but we need to be broad enough to cover the
5 things that here.

6 In this particular case, there are --
7 it is very unusual to have had the resulting
8 environmental process, in our view, that occurred
9 in light of the environmental activity that was
10 being undertaken. And therefore, that raises a
11 number of unusual questions because of the unusual
12 situation. And that's what the purpose that we're
13 trying to find here is about.

14 The unusualness can come with a lot of
15 discretionary acts that some might say are
16 arbitrary, capricious or worse, in seriatim - a
17 series that are ongoing. So that's one type of
18 inquiry.

19 Another type of inquiry are about
20 unusual things that have occurred during the
21 pendency of the Tribunal and the impact of external
22 factors, "ex cathedra" statements, other types of
23 influences that would be unfair to the parties
24 involved in that process.

25 So I just need to ensure that the

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1 request deals with the unusual elements and so the
2 reason why I'm thinking when you ask these
3 questions is, I would like to make this as simple
4 as possible, but I don't want to miss what could be

5 the most important part, and that's my difficulty.

6 But I'm not looking for anything that's
7 on the public website and I'm not looking for a
8 mere reproduction. I mean, in Canada's production
9 to us, they gave us 6,100 documents of which over
10 3,000 were exact duplicates.

11 And that -- I mean, you can see the
12 boxes in there. I mean, we'll talk about that at
13 some point because, well, we think that's -- we
14 need to be practical, to do some things to make
15 sure we don't do it again. But that's not what we
16 want. We want exactly the opposite of just giving
17 us the same documents twice because it's not useful
18 or helpful for anyone.

19 So that's exactly what we are not
20 seeking. We just want to find a very sensible,
21 practical way to go forward. So I'll think about
22 it on the break and I will see if the coffee will
23 help my thinking process.

24 PRESIDENT SIMMA: Shall we -- would
25 that be a reasonable --

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1 MR. LITTLE: Just if I may --

2 PRESIDENT SIMMA: Yes.

3 MR. LITTLE: Just a couple of points.

4 We're a step in the right direction on
5 3 and 4, but I would still say that 17 plus 50, I
6 mean that's 17 Panel Reviews plus 15 comprehensive
7 studies I think Mr. Appleton alluded to; that's
8 still a huge number of EAs and then all the
9 documents that are going to be requested underneath
10 them. So we still do have concerns that, you know,
11 even a portion of those are going to be relevant to
12 what's heard in this -- again, that's one element
13 of the case and if we're going to be addressing
14 close to 70 Environmental Assessments, we are going
15 to be together for a long, long time. So that's
16 one concern we have.

17 With respect to the unusual
18 circumstances, we are not asking him to tell us
19 what the unusual circumstances that he sees exist.
20 We dispute that there are any unusual
21 circumstances, but there are ways to craft requests

22 that get to those documents. And it's not just a
23 question of relevance; it's also a question of
24 narrow and specific, and that's really what we are
25 after here.

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1 Finally, with respect, just to Canada's
2 production, there may well be duplicates, but a lot
3 of those duplicates were, say, attachments to
4 emails. One person may have sent an email to
5 somebody else and somebody else may have sent an
6 email with the same attachment. But we were really
7 hesitant to not produce the attachments to the
8 Claimants, so that -- because there would be a
9 question, basically, about what was in that
10 attachment, even though it may be identical. In
11 some cases, they certainly are.

12 So I'm not sure what is being called a
13 "duplicate" here, but that's one of the reasons why
14 the production is so large.

15 MR. APPLETON: Let's deal with the
16 production issues separately. I don't want us to
17 start on -- we'll deal with this. I promise we
18 will want to deal with this today because that's a
19 very useful thing for a case management meeting,
20 but let's take that away because my own sense of
21 what's there is different and I will show you why.

22 So --

23 PRESIDENT SIMMA: Are you talking about
24 the duplicates now?

25 MR. APPLETON: Yes.

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1 PRESIDENT SIMMA: Yeah. Okay. I think
2 we all have that problem with emails that get
3 thicker and thicker, containing the same stuff.

4 MR. APPLETON: Yes. But that's not
5 actually where the problems are, so I will show
6 you. We don't have to worry about it. My--

7 PRESIDENT SIMMA: All right.

8 MR. APPLETON: --suggestion is--

9 PRESIDENT SIMMA: No. That's what I --

10 MR. APPLETON: --we'll just take that
11 away.

12 PRESIDENT SIMMA: Yeah.

13 MR. APPLETON: All I was trying to
14 suggest is, I want to find a practical way to not
15 deal with duplication, and that was in principle.
16 And it was my mistake to talk about a specific. I
17 should have known better because then, people --
18 but we'll talk about specifics at a specific time.

19 With respect to the other issues, we'll
20 consider some pieces on the break. We don't agree
21 with some of the comments made by Mr. Little, but
22 we don't need to -- I don't want to reargue it.

23 Our sense is what's relevant, help --
24 leads us to where we need to go. If there are a
25 lot of relevant documents, it's our job. But it's

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1 the parties' job, not the Tribunal's job.

2 PRESIDENT SIMMA: All right.

3 MR. APPLETON: The parties need to look
4 through the documents, identify what is relevant.
5 And in any case, we look at a lot of document that
6 will not be relevant at the end of the day, but we
7 need to see them to ensure that we have identified
8 what documents are relevant.

9 PRESIDENT SIMMA: Okay. I think at
10 this stage, what I consider a good idea would be to
11 feed into the rest of the discussion and maybe your
12 food for thought during the coffee break, some
13 other questions that have to do with relevance and
14 then we have them on the table together.

15 MR. APPLETON: Sure.

16 PRESIDENT SIMMA: I think that might
17 help.

18 PROFESSOR McRAE: I think I just have
19 one more and then Bryan may have some--

20 PRESIDENT SIMMA: Yes.

21 PROFESSOR McRAE: --things to say.

22 My other question, it's kind of a
23 specificity and relevance issue, but it relates to
24 the reference to particular individuals. And I
25 think it's Paragraph 16 where you say that, at

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1 Requests 16, 23 and 24, you say:

2 The Claimants made no effort...

3 these individuals appear to be

4 absolutely irrelevant; have to
5 demonstrate a particular individual
6 is relevant to the Claimants'
7 allegations.
8 And you're asking that they establish
9 that the individuals were relevant. I wasn't quite
10 sure what you meant by the relevance of an
11 individual. These, I assume to be individuals who
12 were part of departments which it is argued had
13 some relationship to the Joint Review process or
14 whatever. So what are you asking for in terms of
15 the relevance of particular individuals?

16 MR. LITTLE: Well, just the individuals
17 that aren't relevant, we know they aren't relevant
18 because they've said, 'We have no documents.'

19 We have reached out to some individuals
20 listed just to see because some of the names, we
21 had never seen before. So we identified who the
22 individuals were and they didn't... They were
23 either minimally involved or not involved or didn't
24 have any documents, so we didn't really understand
25 why anything was being asked for from these

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1 individuals.

2 PRESIDENT SIMMA: I think that's a
3 valid, would be a valid response to a Document
4 Request, to say, 'With regard to Mr. "X", he
5 doesn't have anything... We didn't find anything.'

6 MR. LITTLE: In that regard, we could
7 have had that prepared for today's purposes.

8 But then there are other individuals
9 that may well have documents, but we don't
10 understand how they are relevant to any of the
11 allegations in the Statement of Claim.

12 There certainly are then other
13 individuals in that list and they have generated
14 many of the documents that we have produced in
15 response to other requests, so we don't dispute
16 that they're relevant.

17 But there's that lot of individuals on
18 that list that we... Whatever they may have does
19 not appear to bear any relevance with respect to
20 the allegations, the specific allegations being

21 made in the Statement of Claim. It's not a cast of
22 150 characters here.

23 PROFESSOR McRAE: So in this case, this
24 does get a bit to the burden of proof question.
25 You're saying that they have a burden to show

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1 relevance, whereas they're saying these
2 individuals, from their point of view, were
3 involved in the process, whereas then you object to
4 specific individuals on the basis that they were
5 not part of the project.

6 I'm not quite sure how we go about it
7 because you're saying we go back and they then
8 produce a new list of individuals, explaining
9 how -- why they think they're relevant to the
10 process?

11 What do we get out of this in order to
12 move forward? What are you expecting?

13 MR. LITTLE: Maybe it would help if we
14 focus on "specific and narrow", which is one of the
15 requirements of the Document Request. Specifically
16 and narrowly state what are the documents you're
17 seeking from this individual.

18 They must know something about the
19 individual because they have the name, so craft the
20 request specific specifically and narrowly to, for
21 particular documents from.

22 PRESIDENT SIMMA: What --

23 MR. LITTLE: And in that regard - and
24 excuse me, Judge Simma.

25 PRESIDENT SIMMA: Yes.

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1 MR. LITTLE: In that regard, relevance
2 or irrelevance may well be demonstrated.

3 PRESIDENT SIMMA: I'm looking at
4 Question 16, right, there because if you read the
5 Document Request, the first bracket, there, of
6 course, it's a little, let's say, hard:

7 All documents made, kept or...
8 under the control of the following
9 personnel...

10 Like - I don't know- a birth
11 certificate or - I don't know - a bill, I mean. So

12 I think, but the comment makes it clear what
13 documents. It says documents from these people:
14 ...pertaining to the Bilcon
15 Project and the Panel Review
16 process.

17 MR. LITTLE: Well, as a preliminary
18 matter, we didn't read that... We didn't read it
19 that way, with respect, Judge Simma.

20 "Without limiting the generality of the
21 foregoing requests," certainly makes it broader and
22 then it's just an omnibus request for all documents
23 made, kept or under the control of these personnel.

24 PRESIDENT SIMMA: Right.

25 PROFESSOR McRAE: Well, I think when --

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1 and maybe this is the initial response to your
2 objection on documents. We looked at the
3 preliminary statement by the Investor in their
4 request for documents. And several places, they
5 say "request for documents" or "request for
6 documents that are relevant to the process", I
7 think. And you refer to "all documents".

8 We sort of "all documents" as limited
9 by the relevance that's set out in the preliminary
10 part.

11 MR. LITTLE: Well, can we go to the
12 definition, actually? Do you have that?

13 PRESIDENT SIMMA: Where are we going;
14 to the definition of...?

15 PROFESSOR McRAE: Well, what I was
16 referring to specifically was page 1 of the
17 Investors' Request - I have again the July 2nd one
18 - which it says in the third line of the second
19 paragraph:

20 All requests are inclusive of all
21 relevant documents in the possession
22 and control.

23 And in the third paragraph, it says in
24 the third line from the bottom:

25 Whether or not explicitly stated

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1 in each individual general request,
2 every request is for all relevant

3 documents.

4 Then there's a broad statement:

5 Each request for a document...

6 In the next paragraph:

7 ...is for a document or documents

8 that are or may be directly or

9 indirectly relevant and material to

10 the issues arising.

11 And I suppose when we looked at that,

12 we saw all of the subsequent requests be read in

13 the light of that. And so when you referred to

14 "all documents", we weren't sure whether you read

15 it differently and were not using those

16 limitations. And maybe those limitations are not

17 narrow enough from your specification, but we did

18 see them as a form of limitation on all Document

19 Requests later on.

20 MR. LITTLE: We appreciate the Tribunal

21 saw them as a form of limitation, but it goes back

22 to a point that Judge Simma has raised, and that's

23 that it makes Canada the framer of what's relevant.

24 And that puts us into a very difficult position.

25 MR. APPLETON: Well, I think --

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1 MR. LITTLE: An uncomfortable position.

2 MR. APPLETON: Sorry. I think this is

3 where we now have to say something.

4 That is the job of counsel. And, I'm

5 sorry, that's where we have a very fundamental

6 difference with Canada. It is the job of counsel.

7 It is the duty to the Court, so to speak, to look

8 at the documents that have been produced by the

9 clients and to identify what's relevant.

10 That is your job with these documents

11 and our job with our client's documents. That's

12 what you need to do. It's not a nice job. It's

13 just, it comes with the job. And so you have to

14 look to see what's relevant.

15 And we did -- you actually identified

16 for us, Professor McRae, exactly the points we want

17 to take you through because our Request kept

18 saying, all of these requests are for relevant

19 documents and we explained why.

20 And so again and again, Canada's

21 argument to us are, 'We can't give you anything
22 because you won't tell us with any specificity that
23 you want a memo of August 23rd, numbered 10213.'
24 And, of course, we can't tell them that number and
25 they said, 'Well, then you can't have the document

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1 because it's not specific enough.'

2 And, of course, every person in No.,

3 Request 16 is identified and we did that. And I
4 can, of course, turn to Mr. Estrin to explain how
5 they were identified, but they were identified.
6 They had people, so that you didn't have to say,
7 "the Government of Nova Scotia" or "the Government
8 of Canada", but with very specific and narrow spots
9 to identify who would likely have that material,
10 where that material would be, the people who were
11 there at the relevant time.

12 So, for example, I am not interested in
13 the health records of the Honourable Gordon Balser,

14 Nova Scotia Minister of Agriculture and Fisheries;
15 I am interested in the relevant documents with
16 respect to the Whites Point Quarry Environmental
17 Assessment. That's what this is about. And so
18 it's precise, it's identified, it's specific.

19 So if, in fact, there are no documents

20 - and that could be the case - then I would have
21 expected the response from Canada to be, 'We have
22 looked at this and there are no responsive
23 documents.'

24 And that's a very common response

25 because sometimes, there are no responsive

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1 documents because either the question there hadn't
2 been adverted to by the people that were there or
3 maybe they didn't have any documents, at all.
4 Maybe they weren't involved. But, I mean, I think
5 Mr. Estrin should speak to how we identified this
6 list because it wasn't willy-nilly. We didn't take
7 the phone book and say, 'Let's start at "A" and
8 work our way down.' It was very --

9 PRESIDENT SIMMA: The ultimate --

10 MR. APPLETON: Pardon me?

11 PRESIDENT SIMMA: The ultimate arbiter
12 on the relevance would then be Mr., Minister "X"--

13 MR. APPLETON: Yes.

14 PRESIDENT SIMMA: --because you will
15 probably ask him, 'Have you kept documents? Are
16 documents still in your possession on that, on the
17 project?' And then he would kind of say, 'Well, I
18 have the following,' and that would be the end. If
19 he, if he doesn't provide something, then there
20 wouldn't be any further possibly to kind of dig it
21 out, right?

22 MR. APPLETON: Not unless there was
23 some other proof that that was not correct--

24 PRESIDENT SIMMA: Yes.

25 MR. APPLETON: --and that would be such

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1 an extraordinary, unusual situation.

2 That's why I come back and say, it's
3 the job of counsel to, if there's a lot of
4 documents, to sift through what's relevant. And if
5 there are documents, you have to go back and say,
6 'Have you checked your file? This is what we need
7 to do,'--

8 PRESIDENT SIMMA: Okay.

9 MR. APPLETON: --and make those
10 inquiries.

11 PRESIDENT SIMMA: Mr. Appleton, would
12 you mind if we just defer that maybe until after
13 the coffee break--

14 MR. APPLETON: Sure.

15 PRESIDENT SIMMA: --and put the
16 remaining questions or concerns that we have on the
17 table before? And then... So I think, Bryan.

18 PROFESSOR McRAE: Finish with Bryan,
19 maybe.

20 PROFESSOR SCHWARTZ: Yeah. I would
21 like to, just so everything's has been covered. So
22 let me just give you my sense and hopefully, I will
23 make thing more simpler, not more complicated on
24 where we are, just generally.

25 I think we're of the view that it's

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1 reasonable to deal with the questions of relevance

2 and burden first. And while it would have moved
3 things along theoretically more quickly to deal
4 with everything in one swath, practically there's
5 so many potential documents at play, it's
6 reasonable to first do burden and relevance and
7 then people can do their privilege and sensitivity
8 log.

9 With respect, there's two ways that
10 these questions can be resolved. We can ultimately
11 decide or our preference is, with some guidance
12 from us, you folks can work it out first. And
13 we're hoping, during the day, that coffee breaks
14 and something will be an occasion where, given some
15 of the feedback from us, you can may change, reduce
16 or eliminate the number of questions we actually
17 have to definitively settle.

18 One issue seems to be scope and
19 breadth. We are talking about 900; we're talking
20 about 50, right, and those seem to be questions
21 where there's some bona fide miscommunication or
22 haven't fully understand whether we're talking
23 about 900 and 50, and those would seem to be issues
24 that would be worked out without any great
25 questions of principal being decided, just

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1 practically people sitting down and saying, 'Well,
2 how many basalt or how many mining or how many
3 marine projects are we really talking about?'

4 With respect to duplication, I know
5 there has been a big issue about indexes. I don't
6 fully understand it, but what I understand, I
7 think, is the Investor has got one now. I don't
8 know if that has been shared, but maybe that would
9 be useful, if it hasn't been shared, for the -- if
10 the Investor has got an index or folks could work
11 out a common index. So then on duplication
12 questions, you just have to point to index; 'This
13 thing has already been provided.'

14 I understand the Investors' point that
15 a document isn't duplicated if it's got annotations
16 that are unique. It is not a duplicate document.

17 I don't think anybody is in favour of
18 multiple copies of the same document, but working

19 from an index you can agree on or at least one side
20 has produced/the other can accept maybe, with
21 duplication questions you can just -- the
22 appropriate response is identify the document and
23 say you've got it already.

24 With respect to relevance, there seemed
25 to be some misunderstanding here about whether

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1 formulations like "all documents pertaining to"
2 should be taken literally or contextually. I
3 understand from the Investors' response today again
4 that they should all be taken in the context of the
5 request as a whole for only for material documents.

6 But I am not sure that the parties were
7 complete ad idem in their understanding because you
8 could take all documents literally and say "every
9 document pertaining to", which I can certainly
10 understand as being a rather daunting request.

11 Now, within the category of "all
12 material documents", the Investor could take the
13 view, 'Some of them, we can't go any further
14 because some stuff might be missed.'

15 I think the Panel was suggesting at
16 least being open to possibility with very broad
17 questions, of going beyond leaving it to Canada's
18 counsel to narrow it. And there might be a common
19 interest, if you can be more specific, and the
20 common interest is this: Canada's got a more clear
21 sense of what it exactly is you want without having
22 to do the interpretation and you have more
23 assurance you actually get what you want because
24 you haven't left it to the judgment of Canada.

25 So we accept that there's certainly an

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1 arguable position. And at some points, you can't
2 be more specific than you already have, referenced
3 the Statement of Claim, but we also are wondering
4 if there's a common interest in some respects of
5 going a little bit farther than that and trying to
6 provide more direction because it's helpful to both
7 sides.

8 Just another point to make is, most of
9 the discussion so far have been about Investor

10 Requests. I just want to point out, we -- and we
11 had to deal with this earlier with Procedural Order
12 5 because an initial objection was made.

13 At least I think it's... We want to
14 deal with this equally and symmetrically, right. I
15 think with some of the Requests made by Canada -
16 I'm thinking of 35, for example - the same kind of
17 concerns would arise, so whatever we're saying
18 about this would apply equally to some of the
19 broader questions by Canada. I think 35 is one.
20 It's a very broad question about considerations
21 with EIS. We're probably not thinking you wanted
22 to share all of your science and everything, but
23 could you be more clear about what the "materiality
24 and relevance test" is? Can you do what you were
25 asking the Investor to do and go beyond a general

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1 test of relevance and materiality and be more
2 focused? Maybe you can; maybe you can't, but I'm
3 just saying, just want to be clear. Because of the
4 way this arose, we focused almost entirely on
5 Investor Requests, but we would obviously apply, do
6 our best to apply, in a fair and evenhanded way,
7 the same tests and the same considerations, the
8 same prodding to questions by Canada.

9 So anyway, that's the way I understand
10 what's happened so far.

11 MR. APPLETON: Okay.

12 PRESIDENT SIMMA: Okay. Maybe we have
13 -- let's have one exchange on Bryan's additional
14 point and to kind of, what is your meaning that you
15 gave of how we understood these things. And then
16 maybe time will be right for a coffee break.

17 So why don't you start?

18 MR. LITTLE: I actually have no great
19 comment. I take your point, Professor Schwartz,
20 about Canada's Requests. And we, having been
21 informed by, you know, the last hour-and-a-half of
22 talks, will take those back and confer over them,
23 as well.

24 PRESIDENT SIMMA: Mr. Appleton?

25 MR. APPLETON: Well, we will think

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1 about some issues. In principle, I think they are
2 all very useful. I now need to see if we can craft
3 something.

4 It may very well be, though, that the
5 parties are unable to agree and we need the
6 Tribunal to make a decision. And one of the
7 difficulties that we have is that we want to try to
8 get some type of resolution. That may be good for
9 my position or bad for my position. I don't care
10 about my position; I care about finding a practical
11 solution to move this along. And so it may mean I
12 have to put some water in my wine by saying,
13 'Tribunal, we want you to make a decision here.'
14 But we will certainly see, to the extent -- I mean,
15 we have already put out what we think, our answers
16 on some of these.

17 I would like to hear what Canada has to
18 say. We're going to designate somebody who is
19 going to give up caffeine over the break to
20 negotiate with Canada to see if we can already stat
21 to reduce the list because that's a very practical
22 thing to do.

23 To the extent that you would like that,
24 I think that we would like that, so we are going to
25 see how that comes together. And then we will

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1 report back, to the extent that we can find any
2 progress at the end of our brief coffee break.

3 PRESIDENT SIMMA: These people could
4 even have coffee while they negotiate - I don't
5 know - or you need both, both hands? (Laughter)

6 MR. APPLETON: Depends if you read just
7 the requests or you read the chapeau, as well.
8 (Laughter)

9 PRESIDENT SIMMA: Okay. So I think
10 there is a feeling this would be a good moment to
11 have a coffee break. How long are we going to
12 break? What is the usual length of a coffee break
13 in an arbitration; half an hour?

14 Mr. Appleton, do you think half an
15 hour. I mean, if --

16 MR. APPLETON: I think we'll need less.

17 PRESIDENT SIMMA: If you come back and

18 you are really, umm...

19 MR. APPLETON: My sense is, actually,
20 it should be shorter, unless you need a half-hour.
21 And the reason why I suggest that is that we didn't
22 go as far this morning on some of the specific
23 requests as I had hoped, so the principles were
24 very good, but it just took a little longer. So
25 there are still additional Requests that would need

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1 some fleshing out.

2 PRESIDENT SIMMA: Yeah, okay.

3 MR. APPLETON: I am hoping that we can
4 try to get some resolution of where we have already
5 been.

6 PRESIDENT SIMMA: All right.

7 MR. APPLETON: That won't take that
8 long, in my view.

9 PRESIDENT SIMMA: Okay. How about
10 Canada? How long does Canada take to have coffee?
11 Would -- I mean, let's say 15 minutes. If we come
12 back and you seem to be in some kind of
13 negotiation--

14 MR. APPLETON: Then we'll extend --

15 PRESIDENT SIMMA: --we'll gladly
16 withdraw again.

17 MR. APPLETON: Perfect.

18 PRESIDENT SIMMA: And otherwise, we'll
19 continue.

20 MR. PULKOWSKI: If I may offer, I might
21 just come down in 15 minutes--

22 PRESIDENT SIMMA: Okay.

23 MR. PULKOWSKI: --and then inform the
24 Tribunal whether this is a good moment to resume or
25 whether you would like to have another 15 minutes.

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1 MR. APPLETON: Wonderful.

2 MR. LITTLE: All right.

3 PRESIDENT SIMMA: All right.

4 MR. APPLETON: Okay. Perfect. Thank
5 you very much.

6 ---Recess at 11:32 a.m.

7 ---On resuming at 12:43 p.m.

8 PRESIDENT SIMMA: Shall we wait?

9 MR. PULKOWSKI: Fine.

10 PRESIDENT SIMMA: So we are back
11 together again. And considering that it's about 15
12 minutes to the, what we had in mind for lunchtime,
13 we'll have certain choices to make.

14 And I think our preferred approach for
15 you to take would be maybe to inform us very
16 briefly what had happened and whether there was any
17 understanding on any of the issues that we
18 discussed before our coffee break.

19 With regard to the further meeting or
20 the rest of the meeting, I think we are really
21 convinced that we, we want to discuss the
22 privilege/sensitivity issue first thing after the
23 lunch break and only go into matters like looking,
24 for instance, line-by-line within the time that is
25 left afterwards.

00081

1 Maybe that would induce us to be
2 particularly sharp and lean and mean about the
3 issue of the sensitivity or privilege. Would
4 that...? But let -- so that was just an indication
5 of where we want to go, but let's first hear from
6 you, what has happened while we had a good time up
7 there. (Laughter) Okay. Who wants to start?

8 MR. LITTLE: (Indicating).

9 PRESIDENT SIMMA: Okay.

10 MR. APPLETON: Well, two points. I'm
11 just going to reverse the order slightly.

12 PRESIDENT SIMMA: Mm-hmm.

13 MR. APPLETON: With respect to what we
14 can do between now and lunchtime--

15 PRESIDENT SIMMA: Mm-hmm?

16 MR. APPLETON: --I would just have to
17 check about the availability of Mr. Estrin.

18 PRESIDENT SIMMA: Ah.

19 MR. APPLETON: And so he -- we thought
20 that we would be finished earlier in the afternoon
21 with Mr. Estrin, so we'll need to check to see
22 whether we can have him available a little later.

23 I definitely want to make sure we can
24 canvass privilege. There's no question, we can't
25 put that at issue. But I want to see if we can

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1 make some progress on some of the other issues with
2 an expert present. I think it's just a little
3 easier for us. So we'll see what we can do to
4 extend some of his time, as well, and we'll come
5 back on that.

6 And then I am going to turn to
7 Mr. Endicott who is over here on my left, who was
8 in the discussions with Mr. Little and--

9 PRESIDENT SIMMA: Okay.

10 MR. APPLETON: --he can tell you. It
11 didn't go quite as far--

12 PRESIDENT SIMMA: Mm-hmm.

13 MR. APPLETON: --as I had hoped, but I
14 can just leave it here and we can see what we can
15 go from there.

16 PRESIDENT SIMMA: Okay. Okay.

17 Mr. Endicott.

18 MR. ENDICOTT: We were able to reach
19 some agreement in respect of Documents Request 3, 4
20 and 5.

21 In respect to Document Request 3 --

22 PRESIDENT SIMMA: Could you just speak
23 up a little bit?

24 MR. ENDICOTT: In respect of Document
25 Request 3, the Investors offered to identify not

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1 more than 17 cases where a Panel Review or Joint
2 Panel Review with another jurisdiction was held.
3 And Canada agreed that that would be helpful to
4 them and they would be able to proceed with the
5 Document Request on that basis.

6 In respect of the Document Request 4,
7 the Investors offered to identify not more than 50
8 cases in an effort to assist Canada to comply with
9 that Document Request.

10 And we also agreed a narrower wording
11 as regards Document Request 5. I could read that
12 to the Tribunal, if that would assist you or
13 alternatively, we can communicate those words to
14 you in another way, perhaps in an email.

15 MR. APPLETON: I think it's easier with
16 the reporter.

17 PRESIDENT SIMMA: But maybe you could
18 say a quick word on what the essence of your
19 agreement is. And we're going to get the protocol,
20 the...

21 MR. ENDICOTT: Well, we were able to
22 specify some particular types of documents to which
23 Document Request 5 would relate, and the Request
24 now reads, as agreed between the parties:

25 All documents constituting

00084

1 communications between the
2 Governments of Canada and Nova
3 Scotia and between government
4 entries from January the 1st, 2002,
5 to December the 17th, 2007, in which
6 the project is considered relating
7 to means of preventing the project,
8 the establishment of a Panel Review,
9 consideration of and responses to
10 public concerns including media
11 concerns, and possible approaches to
12 these concerns, the appropriateness
13 of Panel Members and terms of
14 reference for the Panel.

15 Those were the Requests on which we
16 were able to make process and that's all I have to
17 report.

18 PRESIDENT SIMMA: Thank you.
19 Mr. Little?

20 MR. LITTLE: Yes. (Clearing throat).
21 Excuse me. I will go in reverse order.

22 We are fine with 5 as presented by
23 Mr. Endicott.

24 With respect to 3 and 4, it's a step in
25 the right direction. We were down from above 900

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1 to 17 Panel Reviews and 50 comprehensive studies,
2 but that's all we are willing to say. I'm not sure
3 that it's accurate to say that we have agreed to
4 that being a request that we would respond to.

5 Quite simply, if you -- the types of
6 documents that are at issue in 6, 7 and 8 are the
7 same kind of documents they're looking for in

8 respect of the Environmental Assessments in 3 and
9 4.

10 So if we use that as a guide, I think
11 we produced well over 1,000 in respect to 6, 7
12 relating to the Whites Point Quarry.

13 If we're looking at comparable or
14 similar Environmental Assessments, Panel Reviews or
15 comprehensive studies, and we are talking about 67,
16 well, you can do the math and you can see how many
17 documents we're potentially looking at here.

18 So we still view this, you know, if
19 we're given a Request relating to 67 different
20 Environmental Assessments, as raising an extremely
21 unreasonable burden. But, you know, beyond raising
22 that as an issue and a concern for timing, we would
23 really need to see the Request, but the first step
24 is there.

25 PRESIDENT SIMMA: Well, I think that
00086

1 was worth the hour spent on it, really.

2 MR. APPLETON: But I'm concerned that
3 we will need to get a deadline to able to get an
4 Order. In other words, we don't seem to have an
5 agreement on 3 and 4, so... And I am not sure if
6 we can get any further, at all.

7 So my concern is, is --

8 PRESIDENT SIMMA: But you have an
9 agreement on the numbers.

10 MR. APPLETON: Well, no. There's no
11 agreement. That's exactly it. I thought there was
12 an agreement, but Mr. Little informs me that
13 there's -- that he's not prepared to agree on
14 saying not more than 17 for Document Request No. 3
15 and not more than 50 for Document Request No. 4.

16 So that's my concern is that he said,
17 'We still think that's unreasonable for us to
18 produce.'

19 Our view is, it's about the relevancy
20 of the documents and so I'm not sure if we can get
21 any agreement. We might need an Order.

22 PROFESSOR McRAE: So we have to rule.

23 MR. APPLETON: That's what I'm saying.
24 That's -- I'm trying to understand that.

25 So when Mr. Endicott said -- I thought

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1 -- he thought there might have been an agreement,
2 Mr. Little says, 'No. I don't think we have an
3 agreement. We are not prepared to agree.' So it
4 would seem to me that we need to rule on 3 and 4.

5 We do have an agreement clearly on
6 No. 5 and that agreement was read into the record
7 and that will make it much easier for everyone.

8 PRESIDENT SIMMA: Mr. Little, is that
9 correct? Because you said, at the beginning, you
10 said, 'I have nothing...' 'I agree,' or, 'I'm...'

11 Or, 'I think that Mr. Endicott --'

12 MR. LITTLE: With respect to 5, Judge
13 Simma.

14 PRESIDENT SIMMA: Oh. Is that 5?

15 MR. LITTLE: That was 5, yes.

16 PRESIDENT SIMMA: Oh, okay. Only 5.

17 MR. LITTLE: With respect to 3 and 4, I
18 mean, right now, we have not more than 67. If it's
19 two, and I'm not saying it has to be two, but if
20 it's two, obviously that's going to be easier for
21 us to deal with.

22 PRESIDENT SIMMA: Oh.

23 MR. LITTLE: If it's 65, we're -- it's
24 going to be that there will be an incredible burden
25 placed upon Canada to respond to such a Request

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1 and, as I said, we don't know until we see the
2 Request.

3 PRESIDENT SIMMA: Right. But the
4 figure "17" wasn't just taken because it's a nice
5 figure; it was that 17, let's say, comparable --

6 MR. LITTLE: Yes. But I believe that
7 there were 17 Panel or Joint Panel Reviews, 50
8 comprehensive studies that could be -- that
9 compromise (sic) this potential pool.

10 PRESIDENT SIMMA: Okay. I mean, if
11 there is no further agreement, we will have to bite
12 the bullet and decide.

13 So now it's ten to. Should we extend?
14 Let's say, just have lunch at one-thirty in case
15 something fruitful comes out because we have had a

16 break; you haven't, so let's see how it goes.

17 Now, Mr. Appleton, when you said you
18 would have further things to raise with regard to
19 relevance, did you mean that line items would be
20 taken up, other line items here remaining--

21 MR. APPLETON: Oh. I assume --

22 PRESIDENT SIMMA: --or more general
23 issues?

24 MR. APPLETON: Oh, no. No. I assumed
25 that we would address other line items.

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1 PRESIDENT SIMMA: But then I think,
2 that, we really think, should happen after we deal
3 with the, umm, privilege/sensitivity point which we
4 consider very important. Maybe it will not take
5 that much time, but I think it will have to have a
6 due, get due treatment here.

7 MR. APPLETON: All right.

8 PRESIDENT SIMMA: So --

9 MR. APPLETON: Would you like to start
10 on that now? I mean, we're in your hands.

11 PRESIDENT SIMMA: How do you feel about
12 the lunch? I mean, there's human rights in the
13 room. (Laughter) If you think you can take
14 another half-hour or so and we could have a first
15 exchange on privilege, that will be fine with us.
16 I mean, we are the more relaxed group in here.

17 MR. APPLETON: Is that all right with
18 you?

19 THE COURT REPORTER: (Nodding head.)

20 MR. APPLETON: Yeah. If it's fine with
21 the court reporter and the Tribunal --

22 PRESIDENT SIMMA: How about you?

23 MR. LITTLE: We're good with that.

24 PRESIDENT SIMMA: Okay. Good. Please.

25 Should we just introduce where our main

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1 concerns are or, let's say, our -- issues?

2 I think the -- of course, the privilege
3 question brings up certain general issues or
4 questions. Maybe, Bryan, you could, because I
5 think it was your special concern. Why don't you
6 set that out?

7 PROFESSOR SCHWARTZ: And my colleagues
8 will correct me if I am incorrect about anything.

9 I think our broad sense is that with
10 respect to procedure for privilege and sensitivity
11 issues, there's a fairly consistent line of recent
12 NAFTA cases. And unless there's some compelling
13 reason to go, we are not at this stage inclined to
14 depart from that. And that procedure, I think as
15 far as we can figure out, the parties are actually
16 in agreed on. You have a log, you explain --
17 identify a document, you give the reasons why it's
18 privileged, and that would take place after we rule
19 on relevance, to the extent that the parties can't
20 agree.

21 With respect to the principles, there
22 seems to be a sense between the two briefs that
23 there's a lot of disagreement.

24 We are not actually sure the parties
25 are very apart on the principles that apply to

00091

1 privilege and sensitivity either. I mean, there
2 are -- again, there's a consistent line of recent
3 cases and there seems to be a sense that it might
4 be disagreement about, for example, whether
5 domestic privilege can trump or whether you have to
6 apply everything under the international standards.

7 But on closer examination, we are not
8 sure there's actually disagreement between the
9 parties on that either; that there seems to
10 actually - maybe we're missing something here -
11 seems to be pretty broad agreement it's an
12 international standard and you just can't
13 unilaterally claim a domestic standard. And all
14 this has been litigated before. We are not sure
15 the parties are that far apart on that.

16 There's a question of when you want us
17 to rule and our inclination is, is produce -- we
18 rule on relevance to the extent you haven't sorted
19 it out, come with your logs, then we rule in the
20 presence of concrete claims and we don't make an
21 abstract ruling in advance.

22 With respect to... So we don't see
23 today as having necessarily to spend a whole lot of

24 time dealing with privilege because we're not sure
25 you're that far apart. And to the extent that we
00092

1 spend time on it, maybe you could just indicate
2 where actual disagreements exist because we don't
3 -- can't actually see there's a whole lot on that.
4 There is one specific issue that is
5 interesting which is the status of the Joint Review
6 Panel. And we have several questions here. Maybe
7 they can be clarified today; maybe in further
8 submissions.

9 There doesn't seem to be a lot of
10 clear-cut precedence because you have a body here.
11 Is it more like a judicial body? Is it more like,
12 just another part of the administrative apparatus
13 of government? Would you apply the same concepts
14 you would apply to privilege within a judicial body
15 to this particular body or is it again more like
16 internal communications within a bureaucracy?

17 And with respect to litigation
18 privilege, we're wondering, is the claim by the
19 Investor, is part of the claim of litigation
20 privilege going to be that when you - and this
21 relates to Question 35 again - when you were
22 preparing your EIS, you were preparing that for the
23 Joint Review Panel and for the purposes of
24 litigation privilege, you're going to claim that
25 all the work you did to prepare to present to them
00093

1 should be considered as though you were going to
2 court?

3 And we're asking that because we want,
4 whatever we come out, we want to be internally
5 consistent by the... Because the judicial or
6 non-judicial status of that body would be relevant
7 to the question of whether there's privilege in
8 their internal communications and it would also be
9 relevant to the question, whether there's work
10 product privilege.

11 We don't know which way we're going
12 here, but we just think that they're related
13 questions and we want to decide them consistently.

14 It seems that some of the Judicial

15 Review Panels potentially could be a very high
16 level of materiality, but Canada says that there's
17 a compelling case about maintaining confidentiality
18 of those deliberations. So it seems like an issue
19 which potentially is consequential in which the
20 principles to be applied aren't clear, aren't well
21 settled by earlier cases.

22 So whether that's sorted out today or
23 by further, more detailed submissions or some
24 combination of them, that's one particular issue
25 that we're concerned about.

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1 I can just go back to the... I haven't
2 consulted my colleagues about that, but if you
3 folks can solve the formulation, the breadth of
4 Question 5, that seems to me actually rather a
5 major achievement. I just wondering why it
6 wouldn't be possible to build on that and apply
7 that to some of the other questions.

8 I can appreciate, with 3 and 4, you're
9 approaching agreement on the numbers, but there's
10 still a difference of opinion on -- within those
11 numbers about how broad or narrow the question is.

12 But I'm just wondering - just a
13 question - is whether you can't build on what you
14 did with 5 and apply it to some of the other
15 questions because it looks, to me, like 5 was a
16 really hard one and you managed to settle it.

17 I don't know if my colleagues view it
18 the same way, but that's just the way it struck me.

19 MR. APPLETON: Would you like a comment
20 on the...? Let's start with your last observation
21 first.

22 Sometimes it's -- well, let's go back
23 by saying I am not a very good farmer. I am not a
24 particularly good person in the garden, but I am
25 told that sometimes it's a lot easier to plant

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1 things when the fields have been ploughed before
2 you start to plant than if you have to do it
3 yourself.

4 My sense as to why we were able to get
5 some resolution on No. 5 was because of the very

6 thorough and sometimes uncomfortable levels of
7 questions raised by the Tribunal initially in
8 preparing the fields, so that we could plant the
9 seeds.

10 My concern - and I am prepared to take
11 some time over lunch to again, to see if we can get
12 any further - is that I would be happy to explore
13 through the scheduled lunchtime to see if we can
14 get any further. That would be wonderful. I would
15 have no problem.

16 But if it's a choice of not being able
17 to get a resolution, then I would rather be in a
18 position to talk about them and have you help us
19 with some of the heavy ploughing.

20 On the other hand, I am happy. I have
21 tried before and will try again to try to see how
22 far we can get ourselves, but I think we have to
23 put some limits on it.

24 PRESIDENT SIMMA: Mm-hmm.

25 MR. APPLETON: I think maybe we should

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1 hear Mr. Little's views on that first before we
2 go... Professor Schwartz raised some very
3 interesting points. I would like to see how we
4 could address those, but I think we should decide
5 if we can use lunch in that way; a practical
6 exchange between the parties.

7 PRESIDENT SIMMA: Looks like a very
8 frugal day for both sides, so how about this
9 question that you could use the lunch break for
10 some further exploration?

11 MR. LITTLE: I have no problem with
12 that. I do agree with what Mr. Appleton has said,
13 though, in his general comments, but we have no, no
14 issue with working over lunch.

15 PRESIDENT SIMMA: Okay. So,
16 Mr. Appleton, could you -- I mean you're latching
17 on these remarks to what Professor Schwartz said?

18 MR. APPLETON: Oh. No. I was just --
19 I was going to suggest that we use the lunch period
20 to see --

21 PRESIDENT SIMMA: No, no. That is --
22 but you had --

23 MR. APPLETON: -- with respect to line
24 items, yes.

25 PRESIDENT SIMMA: You said, 'Let's see
00097

1 whether we agree on that and then I'll have some
2 further --'

3 MR. APPLETON: Oh, yes. Oh. I think
4 we should comment on some of the points raised by
5 Professor Schwartz.

6 PRESIDENT SIMMA: That's what I
7 thought.

8 MR. APPLETON: Right.

9 PROFESSOR McRAE: On privilege.

10 MR. APPLETON: On privilege.

11 PRESIDENT SIMMA: On privilege.

12 MR. APPLETON: But I just thought that
13 with respect to that last point which -- I think
14 it's very practical, but I needed to know whether
15 or not Canada would be interested in doing that and
16 giving up their lunch.

17 PRESIDENT SIMMA: And they are --

18 MR. APPLETON: But you can eat and
19 negotiate at the same time.

20 PRESIDENT SIMMA: Okay.

21 MR. APPLETON: We established that
22 earlier today with coffee.

23 With respect to the issue of privilege,
24 I think that Professor Schwartz is potentially
25 correct. And the reason why I say "potentially" is

00098

1 that when I read the Pleadings between the parties,
2 I'm not entirely certain of a couple of facts. And
3 maybe Canada can answer them and then we might
4 actually be very close together.

5 It seems to me that I agree that on the
6 issue of the Joint Review Panel, that merits some
7 discussion. I think we are probably going to need
8 a ruling on it because it's going to be an issue of
9 first impression. But I -- and I think we should
10 be prepared to talk about that today. I certainly
11 am and I think that's a very important issue.

12 With respect to the issue of privilege
13 itself on the process, I agree with what Professor

14 Schwartz has found in terms of there's a general
15 approach, there's a general way it's done. There's
16 no question between the parties, it's very clear
17 the parties have both admitted that if you want to
18 invoke privilege, you have the burden of
19 establishing it.

20 We were surprised as we would have
21 expected already to have seen some of that. We'll
22 deal with that in that process. We'll get to that
23 process, no doubt, by the end of today, so we don't
24 have to worry about that either.

25 So where are the parties apart? The

00099

1 first issue is, we cannot tell clearly from
2 Canada's materials and their most recent decision
3 to file some new documents whether or not they are
4 maintaining arguments with respect to institutional
5 and political sensitivity privilege or not.

6 I believe, after a careful reading,
7 that they have maintained this as a..., that there
8 is a privilege and they have documents that would
9 be responsive or potentially responsive to that
10 privilege. And there are some specific paragraphs
11 that would lend that as a view, but I'm not sure.

12 So I think that's a question that factually, we
13 should determine.

14 If there are no claims of that
15 privilege, then we don't have to worry about that
16 privilege. We have not invoked that privilege, so
17 it's just a very interesting theoretical exercise.
18 It's completely unnecessary to determine. And my
19 view is that we only have to determine those things
20 that practically and sensibly we need to do. So
21 that's the first question.

22 The second point is if, in fact, there
23 are claims about privilege, then it appears to us
24 that Canada has equated the IBA 9.2(f) political
25 and institutional privilege with Section 39 of the

00100

1 Canada Evidence Act. And we have a lot of
2 difficulty with that position which we think is
3 incorrect, inconsistent with some very
4 well-considered decisions on this point and, to be

5 very honest, we think it's actually dangerous.

6 So if we do have to go there, where we
7 think the parties are not "ad idem" is specifically
8 on that point, more than anything else. So I
9 thought it would be best just to flag what I
10 thought is live.

11 PRESIDENT SIMMA: Mm-hmm.

12 MR. APPLETON: Now, it may very well be
13 that Canada has not agreed with Professor
14 Schwartz's consolidation, in which case there might
15 be some more comments. But in the event that they
16 do, then those are the two issues that I think we
17 could resolve and focus on.

18 PRESIDENT SIMMA: Okay. Thank you.

19 MR. LITTLE: Subject to any comments
20 that the Tribunal might have on what Mr. Appleton
21 has just stated, we don't see there being any issue
22 with the process that he set out in terms of the
23 two issues that he has just canvassed. So we're --
24 if you want to break into those right now, we're
25 prepared do so.

00101

1 PRESIDENT SIMMA: Yeah. I think the
2 first was actually a question.

3 MR. APPLETON: It was a question.

4 PRESIDENT SIMMA: Have all the
5 reliances or, let's say, to privilege been actually
6 removed now?

7 MR. LITTLE: And for that this area,
8 I'm going to turn it over to my colleague,
9 Mr. Spelliscy.

10 PRESIDENT SIMMA: Yes.

11 MR. SPELLISCY: Thank you. And we're
12 happy to sort of address this. This goes back to
13 sort of our understanding of the Statement of Claim
14 and what is really relevant and material to this
15 allegation.

16 If we sort of step back, when we did
17 first principles on what's relevant and material,
18 probative of the issue in dispute. And when we
19 look at the Statement of Claim, what we find is the
20 allegations really begin with some references to
21 the 3.9-hectare quarry in 2002, and they stretched

22 through the process all the way up until the
23 recommendation of the Joint Review Panel.

24 To understand some of the process that
25 Canada went through, when we got the Document
00102

1 Requests, we identified a large number of documents
2 that may have been subject to this
3 political-institutional sensitivity. We submitted
4 them to the appropriate authorities.

5 Just, it was either last work or
6 shortly before we produced these documents at the
7 beginning of this week, we had the answer back from
8 government authorities that with respect to the
9 time period where the measures seemed to be
10 challenged, all those documents could be produced.
11 And that is what we produced to the Claimants on,
12 well, the beginning of this week; Monday or
13 Tuesday. Tuesday, I guess.

14 MR. APPLETON: Just to make sure that
15 we're clear, though, you've said, 'We've produced
16 those documents in that period,' but my question
17 was, just to make sure we are not unclear, are
18 these all the documents that you say are responsive
19 in that period?

20 See, there's a difference between
21 saying, 'These are some documents that are
22 responsive in that period,' and, 'These are all the
23 documents that are responsive in that period.'

24 That's -- I'm just trying to
25 understand.

00103

1 MR. SPELLISCY: These are all the
2 documents in that period that we were withholding
3 on the basis of special political-institutional
4 sensitivity other than the Tribunal, the, the
5 deliberative documents that we will talk about
6 separately.

7 MR. APPLETON: Okay. So we just want
8 to flag that we believe that those documents
9 indicate that there are other documents in
10 existence and so we have an issue then, a subissue
11 that we'll need to get to, some point in this
12 process. Okay. But that's a good answer. So at

13 least we know.

14 So the second part of that question
15 then was: Do you still maintain this IBA Article
16 9.2(f) privilege with respect to other documents?

17 MR. SPELLISCY: Well, with respect to
18 the deliberation documents of the JRP, yes.

19 MR. APPLETON: And outside of those?

20 MR. SPELLISCY: Outside of those, there
21 are -- as we noted in our papers, there are
22 documents generally related to Bilcon. But they
23 are not actually relevant to the allegations in the
24 Statement of Claim. They fall outside of the
25 period that we have been discussing, and so for

00104

1 those, those aren't relevant. We don't feel we
2 need to actually make a 9.2 --

3 PRESIDENT SIMMA: Just a quick
4 question. On the period, there was agreement?

5 MR. APPLETON: No. No. That's going
6 to be now, another item we need to discuss. There
7 was no agreement. Canada picked a period and we do
8 not have agreement.

9 PRESIDENT SIMMA: Oh.

10 MR. APPLETON: We did agree, though, on
11 a period in, in Paragraph 5 or Document Request 5
12 and we would actually suggest that that's going to
13 be closer to the period.

14 The period that Canada has asserted
15 ends earlier than the period that we believe would
16 be relevant. And so that's why there's... That's
17 why we're trying to understand exactly.

18 PRESIDENT SIMMA: So there's an overlap
19 that you agree on, time-wise, but Canada says --

20 MR. APPLETON: Canada shortened the
21 period, in our view.

22 Our view is that the decision of the
23 JRP, which is in October, very beginning of
24 October--

25 PRESIDENT SIMMA: Yeah.

00105

1 MR. APPLETON: --is -- does not end
2 that process because there's still the
3 deliberative--

4 PRESIDENT SIMMA: Yeah.

5 MR. APPLETON: --documents and other
6 things around. Canada has said that's the end of
7 that process. We think it has to continue a little
8 longer thereafter.

9 PRESIDENT SIMMA: And the starting, the
10 starting point?

11 MR. APPLETON: I think we have agreed
12 on the starting point, yes.

13 PRESIDENT SIMMA: Yes.

14 MR. APPLETON: We have agreed on the
15 start. It's just, we believe the most important
16 documents--

17 PRESIDENT SIMMA: Yeah, yeah.

18 MR. APPLETON: --could very well be at
19 the end, and that's why we are very concerned about
20 cutting those off.

21 PRESIDENT SIMMA: And so what you were
22 saying was, I mean you were choosing - what is it -
23 end of 2007 as the end of the period and said with
24 regard to the stuff that we have on these matters,
25 we -- there is no problem with sensitivity or
00106

1 privilege?

2 MR. SPELLISCY: It's not exactly the
3 end of 2007. I think Mr. Appleton has actually
4 pointed out a disagreement here.

5 When we look at the Statement of Claim,
6 it's not that we chose this date. When we looked
7 at the Statement of Claim, the allegations seem to
8 end at the -- of a breach of NAFTA end at the
9 recommendation of the Joint Review Panel.

10 MR. APPLETON: That's not correct, so
11 just -- we'll flag that, but that's not correct.

12 MR. SPELLISCY: This is -- in terms of
13 a back-and-forth discussion, maybe you could point
14 us to the allegation in the Statement of Claim that
15 goes beyond that.

16 I mean, we looked through the Statement
17 of Claim and tried to figure out a relevant end
18 date for when we could say that there isn't a need
19 to go beyond this.

20 What we found was that the JRP

21 recommendation was the end. If Mr. Appleton can go
22 and show us in the Statement of Claim where the
23 allegation of breach is made, we would be happy to
24 talk about this further. And then we would be
25 maintaining claims of, of special privilege.

00107

1 MR. APPLETON: We can just deal with
2 the fact that Canada's own defence deals with the
3 fact that the Joint Review Panel does not make any
4 decisions because it doesn't. It's not an
5 adjudicative body.

6 PRESIDENT SIMMA: Maybe it's --

7 MR. APPLETON: The decisions are made
8 by the Ministers. There are two Ministers that are
9 involved. One is a Federal Minister and one is a
10 Provincial Minister. And those decisions have to
11 be made after the Joint Review Panel makes its
12 decision. And so the decisions that would be
13 involved here and the date could not be when the
14 Joint Review Panel deals with issues because
15 there's still an opportunity for Ministers to deal
16 with the problems that are involved.

17 And, in fact, there were
18 representations made specifically by the Investors
19 in this matter to the Ministers because they said
20 there were problems with the record of factual
21 errors and other questions. And so that would
22 continue past that point.

23 And so we do not agree with
24 Mr. Spelliscy on his analysis with respect to the
25 Claim and with respect to the Defence because it

00108

1 could not be possible to have a Claim about
2 governmental action about a governmental entity
3 that's not capable of making an action.

4 And Canada's own Pleadings say that
5 it's the Government that has to make the action
6 because that's the form of government that's here.
7 It's the Ministers that make a decision based on
8 the recommendation from that decision-making or
9 advisory body which is the Joint Review Panel,
10 unless I have misspoken.

11 MR. ESTRIN: No. It is simply an

12 advisory body. It makes no decision.

13 MR. APPLETON: So that's why that
14 cannot be correct and that they could not be
15 correct.

16 And so -- but it's not that we're far
17 apart; it's just that it's a very material
18 difference under the legal regime that's relevant
19 here; that's all.

20 PRESIDENT SIMMA: Okay. Yes.

21 MR. SPELLISCY: It appears that we're
22 actually -- I mean, none of those facts are
23 actually disputed. I mean, it is the government
24 bodies that make the decision.

25 PRESIDENT SIMMA: Yes. But just --

00109

1 MR. SPELLISCY: Our understanding of
2 the allegations were, though, that what was -- and
3 if you look at the Statement of Claim, when we
4 found that the allegations ended was at the JRP
5 recommendation, not beyond that.

6 The facts of -- the fact that the
7 Government has made a decision on a certain date or
8 accepted the Panel recommendation on a certain date
9 is clearly part of the factual panache (phoen.) of
10 things, but it is not a disputed fact.

11 And so what would... This is where we
12 sort of drew the line when we were thinking about
13 this. What would documents past the JRP actually
14 be relevant to? It is not anything beyond that
15 recommendation that is being challenged, in our
16 understanding of the SOC. Maybe we're wrong.

17 PRESIDENT SIMMA: Now, in light of
18 Mr. Appleton's, let's say, statement or
19 clarification that, for him, it's also interesting
20 what followed, would you have a problem of
21 extending the time period with regard to which you
22 say, 'We don't see any problem of privilege and
23 sensitivity'?

24 MR. SPELLISCY: Well, yes, we would.
25 We would have -- if we extended the time period

00110

1 obviously until the end of the federal decisions,
2 if Mr. Appleton is saying that it was his intent to

3 include those claims in the Statement of Claim and
4 we have just misunderstood, then we would have
5 existing claims for documents on
6 political-institutional sensitivity.

7 And we can talk about that this
8 afternoon, but in terms of that, one of the things
9 that we have struggled with is we are trying to
10 deal with the Statement of Claim.

11 In our view, it's not particularly
12 clear. And so when we made efforts to figure out
13 when was the exact last measure that is being
14 challenged, it seems that the Investors had decided
15 that they were going to stop at the JRP
16 recommendation and that that was the governmental
17 measure that they were actually challenging, not
18 the decisions of the government, the actual
19 governments to accept that recommendation.

20 PRESIDENT SIMMA: Mm-hmm. Because for
21 me, the question arises, I mean, let's say we're
22 going to have briefs. At some stage in history,
23 we're going to have memorial and counter-memorial.
24 And if, let's say, you are the -- Mr. Appleton,
25 Bilcon makes a case out of subsequent developments

00111

1 after the, let's say "decision" of the, of the
2 Panel, there -- I mean, this could be the case,
3 right? And Mr. Appleton could make additional
4 requests at that stage, right. He could make
5 requests and there might be the possibility that on
6 the part of Canada, the answer will be, 'We claim
7 institutional privilege.'

8 MR. SPELLISCY: Right.

9 PRESIDENT SIMMA: And then we would
10 have to decide --

11 MR. APPLETON: We would have a terrible
12 problem.

13 PRESIDENT SIMMA: We would have a
14 problem.

15 MR. APPLETON: We would have a serious
16 problem. Let's be very clear. We'll go back and
17 show you. We believe the Pleadings make it clear
18 that we're dealing with decisions because that's
19 part of the government measures at issue here.

20 We'll look at that at lunch and we'll

21 come back and deal with that. But our Claim deals
22 not only with, with the way that the Joint Review
23 Panel was done and the way that the Joint Review
24 Panel was established by ministerial action before,
25 but also by the ministerial action that was taken

00112

1 that had the effects of denying the project because
2 without that, it would make no sense to be able to
3 deal with the issue of governmental measures since
4 the Joint Review Panel is not an adjudicative body.

5 PRESIDENT SIMMA: So would you say --
6 because I don't have the wording of the Statement
7 of Claims ready--

8 MR. APPLETON: Right.

9 PRESIDENT SIMMA: --but would you say
10 that Canada kind of misinterpreted --

11 MR. APPLETON: That would be our --

12 PRESIDENT SIMMA: Or read -- not
13 "misinterpreted"; just had a wrong impression of
14 where your, the Claims ended, in a sense?

15 MR. APPLETON: Yes. We believe that
16 for whatever reason - and we'll try and get that
17 clarified over lunch - that where Canada believes
18 this process or this dispute ends is different from
19 our view. And so there are a few documents; we'll
20 look at them at lunch and see if we can deal with
21 it. And if that needs to be an amendment, maybe
22 that may be something. I doubt that, though. I
23 believe that it's there. But since already, we've
24 had some differences on how to interpret the same
25 documents, it seems to be in that same view, there

00113

1 are some differences as to how we're interpreting
2 the same documents.

3 But to be absolutely, totally clear, in
4 our view, this Claim involves, in particular,
5 ministerial action and our Document Requests relate
6 to ministerial action--

7 PRESIDENT SIMMA: Right.

8 MR. APPLETON: --and that therefore, we
9 need and would expect to have responses from
10 Canada.

11 So Canada's decision to, to truncate
12 this before ministerial action is highly
13 problematic from the perspective of having proper
14 and relevant production of documents.

15 PRESIDENT SIMMA: No. I don't think we
16 have a doubt on that, but --

17 PROFESSOR McRAE: Well, I just want to
18 get clear, what exactly... I mean, is the issue
19 simply, okay, Canada interpreted it this way, but
20 your request is bigger; therefore, we're dealing
21 with an issue of privilege claim or is Canada
22 saying, 'That's your Statement of Claim. If you
23 want to amend your Statement of Claim, then we'll
24 get into it'?

25 Are we into a question of whether you

00114

1 can amend the Statement of Claim or want to amend
2 the Statement of Claim or are we just dealing with,
3 okay, you made the document -- you disclosed
4 documents up to this point, we really were
5 requesting a longer point, and therefore we have to
6 deal with the issue of privilege which we thought
7 we didn't have to deal with? Is this a small issue
8 or a big issue or --

9 PRESIDENT SIMMA: Just a time issue.
10 Yes?

11 MR. SPELLISCY: I would say that, yes,
12 we want this to be resolved sooner, obviously,
13 because we need clarity going forward.

14 Our understanding, of course, of the
15 Statement of Claim -- we have been proceeding on
16 that understanding now and if it means something
17 than we thought it meant, we need clarity going
18 forward.

19 Now, I offered, you know, Mr. Appleton
20 before, maybe he can point us to the paragraph that
21 he thinks covers this. But regardless of how that
22 clarity is achieved, he has stated clearly on the
23 record anyways that this is his intent.

24 We think that the document should
25 reflect that. If that requires an amendment or if

00115

1 he can show us in a place, to our satisfaction

2 where we think it's clear. Maybe the statements on
3 the record are clear enough at this point, so we
4 know what we're defending against--

5 MR. APPLETON: But --

6 MR. SPELLISCY: --but from our
7 perspective, the key is, we have to know what we're
8 defending against.

9 PRESIDENT SIMMA: Okay.

10 MR. APPLETON: Let me assist Mr.
11 Spelliscy specifically.

12 PRESIDENT SIMMA: Are you -- did you
13 finish your statement?

14 MR. SPELLISCY: Please.

15 MR. APPLETON: Oh. No, no. Just, if
16 that's -- if you would like that. But if you have
17 more, I'm happy to wait. I'm sorry. Just... If
18 you'd like, I could show you the record --

19 PRESIDENT SIMMA: Yeah. That's what --

20 MR. APPLETON: --if that's what you
21 want.

22 MR. SPELLISCY: If you could point us
23 to the paragraph and we can talk about it --

24 MR. APPLETON: Very good.

25 MR. SPELLISCY: But I think that's it

00116

1 not... You know, if we understand their intention,
2 it's a different intention than we've understood--

3 PRESIDENT SIMMA: Okay.

4 MR. SPELLISCY: --for this entire
5 process up and to this point, and we're fairly far
6 along at this point in this process right now, and
7 it's important for us to actually get some clarity
8 as to exactly what we have --

9 PRESIDENT SIMMA: You said something,
10 that you might have an exchange during the
11 so-called lunch period?

12 MR. APPLETON: Judge Simma, I think we
13 can answer it right now on the spot. I think this
14 is a very material issue. The only thing I have a
15 difference is --

16 PRESIDENT SIMMA: So what paragraph in
17 the...?

18 MR. APPLETON: I believe we should look

19 at the Notice of Arbitration. That is the
20 initiating document of this process. Do you have
21 the Notice of Arbitration with you?

22 PRESIDENT SIMMA: I think this makes a
23 movement of --

24 MR. PULKOWSKI: I'm afraid I only have
25 the Statement of Claim here.

00117

1 MR. LITTLE: We do have the Notice of
2 Arbitration.

3 MR. APPLETON: I have it in front of
4 me.

5 PRESIDENT SIMMA: Is it -- I don't know
6 how long that paragraph would be; if you could...
7 Or the, the relevant, let's say, text would be.

8 MR. APPLETON: Yes. It's short.
9 Perhaps I should just read it--

10 PRESIDENT SIMMA: Yeah.

11 MR. APPLETON: --if you would like.

12 PRESIDENT SIMMA: Yeah, yeah.

13 PROFESSOR McRAE: Which paragraph? I
14 have it in front of me. Which paragraph?

15 MR. APPLETON: Yes.

16 PRESIDENT SIMMA: Oh. You have it.

17 MR. APPLETON: There are two
18 paragraphs. Paragraph 29, but even more
19 particularly, Paragraph 32. Let me read Paragraph
20 32. It's one line. 32 says:

21 The federal response to the Joint
22 Review Panel report failed to pay
23 due regard to the legal framework of
24 the CEAA and was therefore also
25 fundamentally arbitrary and unfair.

00118

1 That's the description of the
2 government measure that's at issue.

3 And Paragraph 29, which is longer, also
4 reviews specifically the issues of Federal and
5 Provincial Ministers, then discusses the failure of
6 the Federal Minister and other federal
7 decision-makers to follow terms of Section 37 of
8 the Canadian Environmental Assessment Act, CEAA,
9 and it details through that.

10 Now, it seems to us that it cannot be
11 any misunderstanding that in the Notice of
12 Arbitration, that this is an issue that is here
13 with respect to the parties.

14 And there have been a number of
15 decisions now under the NAFTA about what you need
16 to have with respect to your Claim and with respect
17 to the issues between the parties. And the
18 decisions are uniform in terms of the finding that
19 if you raise it in your Notice of Arbitration, it's
20 an issue that's between the parties.

21 And here, we tried to be as clear as we
22 could at this point as to what was the issues that
23 were raised between the parties. And we
24 specifically dealt with it, so we take issue when
25 Canada says it has no notice whatsoever.

00119

1 We don't believe there's any
2 requirement to amend and, of course, the UNCITRAL
3 Rules permit us to seek an amendment if that's
4 necessary. We don't believe it's necessary, at
5 all.

6 PRESIDENT SIMMA: Just a quick
7 question. Section 37 of the CEAA; is that what
8 follows?

9 Under the CEAA, a federal
10 decision-maker has two options, "A"
11 and "B".

12 Is that 37?

13 MR. APPLETON: Yes.

14 So under 37, what happens is a report
15 is made by the Review Panel and then, because the
16 report of the Review Panel is merely advisory, it
17 is Ministers who must make decisions.

18 And in this case, one of the things
19 that were relevant is that the Investors wrote to
20 the Provincial and to the Federal Minister, saying,
21 'We would like to be heard because we believe that
22 there are errors.'

23 And there was a process that could have
24 ensued and we don't know what took place in that.
25 We do know that they never had that opportunity,

00120

1 and so that is a very material and real part of
2 this process.

3 PRESIDENT SIMMA: Which you don't say,
4 here, right--

5 MR. APPLETON: Well --

6 PRESIDENT SIMMA: --because it just
7 says --

8 MR. APPLETON: Well, because that's
9 evidence. That's evidence that would come and we
10 say, where the Ministry -- once the Minister makes
11 a decision, then the process is finished.

12 So we dealt with the decision and then
13 the issue with respect to the fairness will be
14 evidence that we will have to bring to this
15 Tribunal to look at when we file a memorial.

16 PRESIDENT SIMMA: Because the text, as
17 I kind of browsed it, seems to say there is, after
18 the Panel presents its report to the Ministry, the
19 Ministry has two options; either approve or refuse.

20 And then the rest of what you have in
21 there just says, 'And we think that the, that the
22 Panel report was based on wrong premises and the
23 Ministry made the wrong decision,' but you don't
24 say here... You don't, you don't refer to the
25 process that you said; that, 'We went to the
00121

1 Ministry and said we would like to have a -- to be
2 heard and apparently that was refused,' or...

3 MR. APPLETON: But that's for a
4 memorial. In our view, that's the type of thing
5 that we would discuss in a memorial, rather than in
6 the initial Pleadings.

7 PRESIDENT SIMMA: So we have a
8 situation where Canada thinks the Statement of
9 Claims demarcates the line to which we have to
10 present Document Requests are, let's say,
11 permissible..., permissible or adequate and if you
12 want to go beyond, you will have to amend the
13 Statement of Claims.

14 MR. APPLETON: And we say Section 32
15 says --

16 PRESIDENT SIMMA: If you don't want to
17 raise it at a later stage --

18 MR. APPLETON: Correct. But we say
19 Section 32 of--

20 PRESIDENT SIMMA: Section --

21 MR. APPLETON: --the Notice of
22 Arbitration makes it very clear. That was the last
23 step, just so that -- as we just go back to the
24 piece. First the Provincial Minister took a step,
25 then the Federal Minister. That's the end of that

00122

1 process.

2 PRESIDENT SIMMA: Yes.

3 MR. APPLETON: Is it in there, too?

4 PRESIDENT SIMMA: Oh, yeah. But all
5 you say about the federal response is that it was
6 wrong and against the law, so which, to me, is not
7 a fact; it's a legal qualification.

8 MR. APPLETON: We said it was arbitrary
9 and unfair, which is a violation of Article 1105--

10 PRESIDENT SIMMA: Yeah, yeah.

11 MR. APPLETON: --of the NAFTA.

12 MR. LITTLE: May we make just a brief
13 comment on kind of a threshold issue?

14 Throughout the whole document
15 production process, we have considered that the
16 Statement of Claim which, under Article 19(2) of
17 the UNCITRAL Rules, is the only Pleading containing
18 the allegations that Canada has to respond to and
19 it's the only relevant Pleading for the purposes of
20 document production. And we made this clear to
21 Mr. Appleton on July 2nd when we served our
22 Document Production Request.

23 We noted to Mr. Appleton that we had
24 confined our Request to the allegations in the
25 Statement of Claim and that any allegations that

00123

1 had been made in the Notice of Intent or the Notice
2 of Arbitration, because I had seen both of those
3 documents referenced in his Redfern schedule.

4 Any of those allegations that weren't
5 referenced in the Statement of Claim have been
6 abandoned. We sent Mr. Appleton that letter on
7 July 2nd, and we've never heard anything back from
8 him.

9 We also note from the Tribunal's
10 Procedural Order, when you gave us the invitation
11 to interpret the Claimants' requests in light of
12 the disputing party's previous submissions, you
13 made particular reference to the Statement of
14 Claim.

15 So Canada created all of its objections
16 and it prepared all of its subsequent submissions
17 in support of its objections on the basis of the
18 allegations only in the Statement of Claim. And,
19 quite frankly, all the Requests that Canada came up
20 with were based on the allegations in the Statement
21 of Claim, as well.

22 So given the requirements of the
23 UNCITRAL Rules, the conduct of the parties, and
24 even the Tribunal's direction, we don't consider
25 that any of the statements referred into the -- in
00124

1 the Notice of Intent or the Notice of Arbitration
2 to even be relevant for the purposes of document
3 production.

4 And if they are, then again, as
5 Mr. Spelliscy has said, we need certainty on what
6 is going to be the allegation that Canada is being
7 faced with. Right now, they're floating around in
8 three separate documents, it appears, and they need
9 to be crystallized in one because the Statement of
10 Claim is the only one that we are supposed to
11 respond to in the Statement of Defence, which is
12 what we have done.

13 MR. APPLETON: I would like to point
14 out, though, to Mr. Little's point, that first of
15 all, the settled ICSID arbitration practice which
16 deals with a Notice of Investment Dispute and then
17 the provision of a secondary type of pleading that
18 would be involved. It was also clear that what you
19 would have in the equivalent of the Notice of
20 Arbitration is relevant for this.

21 The NAFTA jurisprudence on this point
22 is also clear; that Mr. Little fails to give any
23 credence to the settled jurisprudence on this
24 issue. Mr. Little's letter is merely a unilateral
25 attempt to narrow what he would have to respond to.

00125

1 But the process under NAFTA is that
2 there is a meaningful document that must be done
3 with respect to a Claim under NAFTA Article 1119
4 and that requires a Notice of Intent. And, in
5 fact, the Free Trade Commission has gone so far as
6 to provide its own set of guidelines which are not
7 binding, but they've gone so far as to go and give
8 all types of meaning and focus to that. They're
9 not binding because they're not, they're not
10 necessary to interpret as part of the NAFTA.

11 But the fact of the matter is, is that
12 Ministers under this process have focused on how
13 important this is. And now, for the first time
14 I've ever heard a NAFTA Party government say, the
15 Notice of Arbitration that is -- well, the first
16 piece, the Notice of Intent, is not important.

17 And with all due respect, it is
18 important. It's a mandated part of the process to
19 commence the arbitration and it's specifically
20 called for. And, in fact, the failure to file it
21 would mean that it would be impossible to actually
22 have an arbitration.

23 And in another case, in the Ethyl case,
24 Canada brought an objection specifically saying
25 there was not enough time between one and the other

00126

1 by one day; that the Claim was brought one day
2 early, and the Tribunal had to rule on that Claim.

3 So obviously, to Canada in the past,
4 the Notice of Intent has been a very important
5 document, something that they would have to pay due
6 regard to. And the fact that they have decided not
7 to take it into account in any way - and he has
8 just admitted that - is not, in our view, an
9 appropriate way to go.

10 But it doesn't -- but at the end of the
11 day, it's very simple. We don't have to sit and
12 get involved in litigation. We can be involved in
13 arbitration. It's clear to everyone in this room,
14 I would imagine by now, that our Claim is to cover
15 the decisions made by Ministers.

16 And it's also clear, from what I can

17 tell now, that Canada has not asserted its Claims
18 with respect to political-institutional sensitivity
19 privilege with respect to its consideration of
20 those matters.

21 And it's also clear to us that we
22 haven't received any documents with respect to
23 those matters, and those are questions that will
24 certainly be, in our view, before this Tribunal.

25 PRESIDENT SIMMA: That's what I --

00127

1 MR. APPLETON: So practically, I would
2 like us, rather than sitting and saying which side
3 of the pinhead the angels are on, to say, 'Well,
4 what do we need to do to be able to deal with
5 this?'

6 It is clear that there was a decision
7 by a Provincial Minister and a decision by a
8 Federal Minister, as required to be able to deal
9 with this, and it's clear to us that they're going
10 to be covered. And we believe that they're exactly
11 the types of issues that we are going to need to
12 address.

13 PRESIDENT SIMMA: Yeah. What is clear
14 to me is that if there is no further, let's say,
15 narrowing of disagreement or agreement, that is a
16 question we'll simply have to worry about.

17 Is the, let's say, the cut, you know
18 the cut -- I mean the, the delimitation in time in
19 the Statement of Claims or in any other of the
20 documents determinative for the Tribunal for the
21 admission of, let's say, documents?

22 I think that's -- that is a nice legal
23 question, actually. Could we take into
24 consideration things that are later in time than
25 the point at which Canada regarded the, let's say,

00128

1 the as meant in either Statement of Claim or Notice
2 of Arbitration?

3 That's how I see the remaining
4 question, right.

5 MR. APPLETON: Well, there's an answer
6 to that by another Tribunal, if you would like it.

7 PRESIDENT SIMMA: Yeah, yeah.

8 MR. APPLETON: Pope & Talbot --

9 PRESIDENT SIMMA: No. We'll look

10 into -- of course, the Tribunal will look in --

11 MR. APPLETON: Yeah. Pope & Talbot

12 looked at that. Also--

13 PRESIDENT SIMMA: We'll look into the

14 jurisprudence.

15 MR. APPLETON: --my colleague has

16 pointed out to me - Mr. Endicott, who knows more

17 about most things than I do - that in the Statement

18 of Claim, if we look at Paragraph 29, that it says

19 specifically, the very last line:

20 The Environmental Assessment

21 review process was unusually and

22 unduly lengthy, and did not come to

23 an end until the last of the

24 relevant governmental authorities

25 finally rejected the project in

00129

1 December 2007.

2 So, yet again, in the Statement of

3 Claim, which Canada says that it was responding to,

4 it's very clear that we have said this process

5 ended with the last decision.

6 And one of the reasons we had some

7 problems is that it was very unclear as to whether

8 or not the Federal Minister actually ever made the

9 decision he was required to do under the Act.

10 And arguably, it's possible that he did

11 so by way of a press release, which was not what we

12 would normally expect, perhaps in January of 2008.

13 So one of the things we're trying to

14 actually know is, how did the Federal Minister deal

15 with his obligation under the CEAA Act?

16 PRESIDENT SIMMA: Yeah. I mean, that

17 is really, I mean, obviously an interesting

18 question and so on, so but the question to me is

19 really this thing: If, for instance, in a

20 Statement of -- is this the Statement of Claim?

21 PROFESSOR McRAE: Yes.

22 PRESIDENT SIMMA: If, in a Statement of

23 Claims, the facts are described and a development

24 which extends beyond the, let's say this cut-off by

25 the presentation of the report is mentioned

00130

1 therein, does that extend the time frame for
2 Document Production Requests or not?

3 And I think that's something we don't
4 have to spend a lot of time on because we are
5 simply going to decide it, I mean as I see it
6 because I think here, we're really kind of bumping
7 into each other and there doesn't seem to be much
8 movement on that particular point.

9 Let's see. I think that might be a
10 good time to break. Let me just say two things or
11 one thing. I mean, if we... With regard to the
12 continuation of the process on claims of privilege
13 and sensitivity, I mean, one, one possibility which
14 we haven't mentioned yet, but which was used in an
15 instance or two was, of course, that the response
16 or the reaction of the Tribunal would not be that
17 we say, 'All right. We are not going to go further
18 into this matter. If the Government doesn't want
19 to disclose these things, we'll just apply - what
20 is it - 9(2), 9 para 2, and draw our own
21 conclusions from that.'

22 One possibility would also be for the
23 Tribunal to appoint a, let's say, an independent
24 third person, however, which would -- in case the
25 Tribunal gets, let's say, summaries of the

00131

1 documents, and we have the impression, well, the
2 summaries are not really conclusive as to whether
3 the thing could be relevant or not, that that third
4 person could be mandated to look into the matter
5 and report, report back to the Tribunal and say,
6 'With regard to our case, you don't have to see
7 this document.'

8 I think that would be a possibility. I
9 mean, we don't have a firm, any firm view on that.
10 I just wanted to, to kind of flag this. This would
11 also be a possibility, to get a little further with
12 regard to the matter of sensitivity and privilege.

13 MR. APPLETON: We gave you some
14 submissions on adverse inference. That's the way
15 that it generally has been addressed in the past.

16 Does not mean that the other suggestions you have
17 are not available; just giving you some context.
18 So our position on that is already before you.

19 PRESIDENT SIMMA: Yeah.

20 MR. APPLETON: I also want to point out
21 that with respect to the time period that
22 Mr. Endicott has pointed out to me, that the actual
23 Document Request itself on page 3, Paragraph (d)
24 under the term "document" specifically give a date
25 ending on December 31, 2007.

00132

1 ----(Court reporter appeals.)

2 MR. APPLETON: Paragraph (d), page 3 on
3 the definition of "document".

4 And so our dispute with Canada is that
5 Canada unilaterally, without our consent and in
6 opposition to our specific Document Requests,
7 picked an earlier date.

8 We were concerned that this might be a
9 possibility, but we didn't know why. We now know
10 why. We don't agree that this is appropriate, but
11 that, we'd leave with you.

12 And so, well, we're prepared to see
13 what we can get by over lunch. I assume that we
14 will be able to talk then about the Joint Review
15 Panel, the JRP--

16 PRESIDENT SIMMA: Yes.

17 MR. APPLETON: --when we come back.

18 PRESIDENT SIMMA: Mm-hmm.

19 MR. APPLETON: We do have that issue
20 that we think now will need to be addressed, as
21 well, though, about equating Section 39 of the
22 Canada Evidence Act with IBA Article 9.2(f).

23 I don't know if you want argument or
24 not. Our view is that the case law is very clear
25 that Canada is not entitled to that, but that

00133

1 Canada's own federal cabinet privilege is not the
2 international privilege; it's an international
3 standard and there are things that need to be
4 proved.

5 There were a lot of discussion about
6 this with the Pope & Talbot Tribunal, in

7 particular, how they found that would be a
8 violation, potentially, of some the equality
9 provisions that are inside the NAFTA.

10 I don't want to go there if we don't
11 have to be there. I've had to argue that several
12 times now for various cases. The Tribunals have
13 been very consistent in their views. So I'm very
14 happy to argue it if we need to go there--

15 PRESIDENT SIMMA: Well, I think if the
16 case law --

17 MR. APPLETON: --but I hope it's
18 settled now.

19 PRESIDENT SIMMA: If the case law is
20 settled, I don't think we --

21 MR. APPLETON: Canada has now raised it
22 because the IBA Rules, which are a new entry, the
23 IBA Rules have a title; the political sensitivity
24 and institutional..., whatever 9.2(f) is.

25 PRESIDENT SIMMA: Well, they date from
00134

1 the year 2000, so they are not that terribly
2 recent, right?

3 MR. APPLETON: But they haven't been
4 used by Tribunals until recently. And they are now
5 suggesting that maybe the earlier findings now need
6 to be changed.

7 I don't think it was really argued in
8 the same extent. Here, we think it would need to
9 be because we think that it cannot be a finding
10 that says that under NAFTA, you can't use Section
11 39. It doesn't apply. But under the IBA, it
12 applies and you don't have to disclose, you don't
13 have to prove, you don't have to discuss. The
14 Tribunal is not allowed to look at anything.

15 Furthermore, we also point out that
16 there are two different standards because there's
17 the Nova Scotia standard which uses a balancing
18 process which many provinces use for executive
19 privilege, and that's very difficult than the
20 Canadian federal process which says, 'If we
21 designate it, you can't look at it.'

22 PRESIDENT SIMMA: Right.

23 MR. APPLETON: 'We don't have to

24 disclose; you don't need to know.'

25 And so if we need to go there, we

00135

1 obviously want to be able to argue about it because
2 we think it's important. But if we don't need to
3 go there, we would be very happy to not have to go
4 there. But to the extent that that's live, we need
5 to make sure we have some time for that.

6 PRESIDENT SIMMA: All right. Since you
7 raised this problem, I think I want to ask the
8 counsel for Canada whether they want to reply to
9 the 9.2 versus 39 issue now or whether we should...
10 At this stage, I mean, all that Mr. Appleton said
11 was, he very much wanted not to have to say
12 anything about what he said for about the last five
13 minutes, so if -- do you -- what is your reaction?

14 MR. LITTLE: Mr. Hebert will address
15 the point.

16 MR. HEBERT: Yeah. Thank you, Judge
17 Simma. Yeah. I think there's general agreement
18 between the parties on the process for claiming the
19 privilege under 9, Paragraph 2(f).

20 The... I'm not quite sure if I
21 understand counsel for the Claimants' position on
22 privilege logs and if a privilege log would satisfy
23 most of your concerns under 9.2 --

24 PRESIDENT SIMMA: Would you just speak
25 up a bit, please?

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1 MR. HEBERT: Yeah. I just wanted to
2 ask counsel of the Claimants--

3 PRESIDENT SIMMA: Yeah.

4 MR. HEBERT: --a question on what would
5 satisfy his position under 9.2(f) because if we can
6 agree on privilege logs for claiming that
7 privilege, I think we can make significant process
8 (sic) in -- progress in resolving this
9 disagreement.

10 MR. APPLETON: Well, the question
11 before that is, if you're saying you're not going
12 to follow Section 39; in other words, do we get a
13 letter from the clerk, saying, 'There may or may
14 not be documents of the type you were seeking and

15 you may not inquire further,' that's the Section 39
16 letter--

17 MR. HEBERT: Well, I mean, you can't --

18 MR. APPLETON: --and so if --

19 PRESIDENT SIMMA: Yeah, yeah.

20 MR. APPLETON: -- if that's not going

21 to apply, then we can talk about lots of things.

22 PRESIDENT SIMMA: All right. So --

23 MR. APPLETON: That's what I need to

24 understand.

25 MR. HEBERT: Well, I mean, I think our

00137

1 position is, is made quite clear in our additional
2 submissions that we filed on Tuesday.

3 Our position is that Section 39(2) of
4 the Canada Evidence Act is not binding on this
5 Tribunal. It's merely illustrative of the type of
6 documents that could be withheld under --

7 PRESIDENT SIMMA: All right. That
8 seems to be --

9 MR. HEBERT: -- under the IBA Rules.

10 It's merely an illustration; nothing more.

11 PRESIDENT SIMMA: Right. Okay.

12 MR. APPLETON: Fine. So then, we don't
13 have to work about this.

14 PRESIDENT SIMMA: Yes. No. I mean no.

15 MR. APPLETON: I would be happy to not
16 have to worry about this.

17 PRESIDENT SIMMA: Yeah.

18 MR. APPLETON: We'll worry about the
19 modalities when we talk about all the other things,
20 though. It's a good way, if you want to break for
21 lunch.

22 PRESIDENT SIMMA: Yes, I think. So
23 let's break with that optimistic, positive note.

24 (Laughter)

25 MR. HEBERT: Yeah.

00138

1 PRESIDENT SIMMA: And lunch --

2 MR. APPLETON: Forty-five minutes?

3 PRESIDENT SIMMA: Actually, yeah.

4 Let's say -- let's -- can we start at two-thirty

5 sharp?

6 MR. LITTLE: Yes.

7 PRESIDENT SIMMA: Sharp? Okay. Thank
8 you very much.

9 ---Luncheon recess at 1:44 p.m.

10 ---On resuming at 2:40 p.m.

11 PRESIDENT SIMMA: So I hope you had a
12 good lunch. Of course, looking at our watches, we
13 realize that maybe three o'clock cutoff time is not
14 really feasible, but let us try to, not to go too
15 far into the rest of the day.

16 We had the... If there is anything
17 you, any results of, let's say, lunch debates, if
18 you don't have to announce any of that, I think our
19 view is that with regard to the issue of the
20 sensitivity-privilege debate, we have had a good
21 exchange on the, on the principal part, on the
22 general part, so the only thing would actually
23 remain would be the issue of the Panel, the nature
24 of the Panel and the consequences for the, let's
25 say, the disclosure of documents emanating from the

00139

1 Panel, referring to the Panel.

2 But let me ask first if there is
3 anything that you have to announce, that you
4 further narrowed down any of the things that we
5 discussed? Is there anything, is there anything
6 coming out from --

7 MR. APPLETON: No. I'm told there was
8 no agreement on any topic.

9 PRESIDENT SIMMA: Oh. But you had a
10 good lunch? (Laughter)

11 MR. APPLETON: We should say because
12 it's actually thanks to the secretary, a wonderful
13 lunch, thank you.

14 PRESIDENT SIMMA: Okay. Super.

15 PROFESSOR McRAE: Agreed on one thing.

16 PRESIDENT SIMMA: So there is agreement
17 on this. (Laughter)

18 MR. LITTLE: We agree. (Laughter)

19 PRESIDENT SIMMA: Thank you. Okay.

20 So with regard to the Joint Review
21 Panel, do you think that you could further
22 enlighten us right here, while we are here, or

23 would we rather get something in writing on that
24 matter?

25 I think you made a remark in the

00140

1 morning that you would be in a position to give
2 some information, even now. I don't know. Is that
3 okay?

4 MR. LITTLE: Yes, by all means.

5 PRESIDENT SIMMA: All right. So why
6 don't...? May I ask you to, to start maybe this?

7 MR. LITTLE: Canada would be happy to
8 and I will turn the floor over to Mr. Hebert again
9 on--

10 PRESIDENT SIMMA: Yes.

11 MR. LITTLE: --this topic. Thank you.

12 MR. HEBERT: Well, thanks. Thank you
13 very much, Scott.

14 Well, I will try not to make, turn this
15 into Groundhog Day for Mr. Appleton, but I will
16 need to, to refer to a couple of decisions of
17 previous Chapter 11 arbitrations that have
18 recognized that deliberational documents do fall
19 within the type -- the category, the type of
20 documents that can be withheld under Rule 9.2(f) of
21 the IBA Rules. And this is particularly made clear
22 in the UPS arbitration that you will find at Tab 19
23 of our Book of Documents and Authorities.

24 PRESIDENT SIMMA: Would this relate to
25 the Panel or...?

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1 MR. HEBERT: Well, I mean, it relates
2 to deliberational documents. And the JRP, it is
3 important to note, did deliberate.

4 As you are aware, the Joint Review
5 Panel was constituted by, of three persons, three
6 university professors from Dalhousie University
7 that were named to sit on this Joint Review Panel
8 to assess the facts of the Environmental
9 Assessment, to review the evidence, to gather
10 public comments, which is an important function of
11 Joint -- of Review Panels and ultimately make a
12 recommendation to the relevant Ministers, in this
13 case, the Environment Minister federally and the

14 Minister for Nova Scotia.

15 In reaching their recommendation, these
16 individuals did deliberate among themselves to
17 reach collegially an ultimate conclusion on the
18 recommendation -- on the proper recommendation to
19 governments.

20 The process of Environmental
21 Assessments in Canada does rely on such unbiased
22 and fair recommendations from these
23 non-governmental advisory bodies and it is Canada's
24 position that should these deliberational
25 documents, these documents in the possession of

00142

1 these private parties be made subject to
2 disclosure, either to foreign investors or to
3 arbitral tribunals, there is a risk, a serious risk
4 that the necessary exchange of ideas on these
5 Panels could be stymied...

6 --- (Court reporter appeals.)

7 SPEAKER: You mean "stymied".

8 MR. SPELLISCY: ...stymied - sorry
9 about that. I apologize.

10 SPEAKER: It's okay.

11 MR. SPELLISCY: ...if, you know, the
12 searchlights were full on, onto these
13 deliberations.

14 I want to stress also that it's
15 important to note that the JRP is, by no means, a
16 black box. The JRP conducted extensive public
17 hearings in this case, and I think the CEAA
18 record -- I mean, you have the transcripts of not
19 only the scoping hearings, but also the hearings
20 on, on the review of the project itself, that, you
21 know, takes up thousands of pages. It also
22 collected the views -- I mean, the Claimants in
23 this case here were active participants in this
24 process and still had and still do have full access
25 to all the documents before this Joint Review

00143

1 Panel.

2 The Joint Review Panel also issued an
3 extensive report in October 2007 that runs into 147
4 pages, I think, and so our position, Canada's

5 position is that the institutional interest in
6 protecting these deliberational documents from
7 disclosure is significant because governments
8 should be able to take into account, should be able
9 to take into account, in their final decisions,
10 recommendations that are made freely and openly
11 discussed amongst the Joint Review Panel Members,
12 and that this institutional interest in the
13 confidentiality of this, of these deliberations
14 cannot be outweighed in a situation where the
15 proponents, the Claimants have access to a lot of
16 evidence to challenge any action, any specific
17 action of, of the JRP -- the Joint Review Panel.
18 Sorry.

19 I think Professor Schwartz raised this
20 earlier and we view that that position is entirely
21 consistent with our argument that we have, that we
22 have raised in our Statement of Defence that, as a
23 non-governmental advisory body, the actions of the
24 JRP cannot be attributable to Canada.

25 There is no inconsistency, in our view,

00144

1 that, you know, protecting these, the deliberation
2 of the Joint Review Panel Members is a separate
3 issue, if you like, from the issue of
4 responsibility.

5 We believe the case law or the
6 decisions under NAFTA Chapter 11 - and I refer
7 specifically to UPS, Merrill & Ring and the Glamis
8 Gold decision - amply make out a case for this type
9 of deliberational documents to be protected under
10 Rule 9.2(f) of the IBA Rules.

11 Now, if the Tribunal has any further,
12 more specific questions on our objections relating
13 to these documents, I will be happy to answer them.

14 PRESIDENT SIMMA: Maybe we should have
15 Mr. Appleton first on this matter and then...

16 Okay. Mr. Appleton or whoever.

17 MR. APPLETON: Sure. My submissions
18 will be quite, quite brief and very much to the
19 point.

20 The first point is, the Joint Review
21 Panel is an apparatus of government. We have filed

22 materials to help you see why it would be covered
23 and why the actions of the Joint Review Panel are
24 attributable to the Government of Canada under
25 International Law, are clearly proper subject

00145

1 matter for this case.

2 We do not agree that they are private
3 individuals without some connection to government
4 or some governmental type of function that's
5 involved and you would have to find that if you
6 were going to agree with Mr. Hebert's argument that
7 they are not in the control of Canada.

8 But in any event, when we talk about
9 documents which should be within the control of
10 Canada in any event while they were conducting
11 this, this advisory job for the Government, they
12 had various powers. We have laid this out in our
13 materials. I don't need to repeat it. It can't be
14 a controversial point because it's set out in the
15 regulations and the CEEA Act.

16 Being an apparatus of government,
17 though, doesn't mean that you are involved in
18 judicial or quasi-judicial decision-making and as
19 is made abundantly clear by counsel for Canada,
20 both in the written submissions and now again, they
21 do not have the type of power to make a binding
22 recommendation or effect. That's why Ministers
23 have to make the decision based on the
24 recommendation of the Panel.

25 Now, in this case, something clearly

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1 seems to have not gone right. It is absolutely
2 correct that our clients were there during the
3 deliberations as they were the proponents of this
4 matter. Of course, they were there. They know
5 what took place in public.

6 Their concerns are about what has
7 occurred in private. Why? Well, for example, the
8 Panel appears to have failed to have taken into
9 account certain relevant considerations in coming
10 to their report, but, more particularly, took into
11 account irrelevant and, in some situations, rather
12 unusual considerations in their report.

13 There's a real question as to where
14 those considerations came from and whether, in
15 fact, the process was unbiased and fair, as
16 Mr. Hebert says, or whether it was not.

17 There's also a very real risk that
18 there were "ex cathedra" statements, statements
19 done by persons who didn't put the information in
20 with respect to the public process which we
21 attended, of which we have transcripts and which we
22 have reviewed, but in an outside way, in an
23 inappropriate way.

24 And those types of information, that
25 type of exchange could take place with contacts

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1 with government or with parties who appeared before
2 them. Those are exactly the types of documents
3 that we are seeking to be able to obtain.

4 So then there is the question of, well,
5 would this destroy the ability of these advisory
6 panels to be able to do their job in a proper
7 fashion? And, of course, the answer there is no.
8 It doesn't destroy their ability. It does mean, if
9 they exceed the scope of what they're supposed to
10 do, there would be an opportunity to have review.
11 And we would suggest that if there's concern about
12 that, that those documents could be made
13 confidential so that they would have a very limited
14 review.

15 I think that it would be a very
16 appropriate place, so that they could be seen and
17 used inside this arbitration, but not otherwise
18 there.

19 There may be nothing to hide. We just
20 don't know until we're able to see. But this is
21 not like we're looking for the deliberations of the
22 Supreme Court of Canada or of any court. We're
23 looking at the fairness. We're looking at the
24 arbitrariness. We might be looking at the issues
25 involving national treatment with respect to a body

00148

1 who is advising the Government and whose
2 recommendation, at least one of them and the one
3 that's most important about this particular

4 project, was adopted by Ministers of the Province
5 of Nova Scotia and the Government of Canada, and so
6 we think it's fair.

7 That's why we wanted to be able to deal
8 with this. We gave a lot of consideration to
9 Canada's argument about this, but it is not -- it
10 is the type of body that can make decisions and
11 deal with governmental types of things, but that is
12 at a lower level than we would ever have, not just
13 for judicial, but for quasi-judicial.

14 I also point out that this Joint Review
15 Panel, for some reason, decided to retain a NAFTA
16 expert. That, in itself, has some questions as to
17 why and what purpose and what was there.

18 And so there are a variety of issues
19 that just raise some question that we think would
20 need to be able to be produced. And we're prepared
21 to have some type of safeguards to be able to deal
22 with it, so it's for a limited purpose. But we
23 think that that is at the very heart of what this
24 case is about and that the probative value of this
25 information is exceptionally high, as is its

00149

1 materiality, and that's why it fundamentally needs
2 to be produced.

3 I think that's all we really have to
4 say on this. I guess I could... Well, you know
5 that we have Mr. Estrin, if you have any questions
6 about particularities about the Joint Review Panel,
7 but I don't think it's about the mechanisms of the
8 Joint Review Panel. I think the question is about
9 should we or should we not, (a), consider that
10 they're part of the Government of Canada, however
11 that would be as the term "measure" is defined and
12 the term "government" would be understood under The
13 International Law Commission Articles on State
14 Responsibility.

15 I think the answer there is quite clear
16 that they do fit. They get their income from,
17 they're paid for, they have various powers that are
18 governmental. They're there for a specific
19 purpose. So I don't think that's really a real
20 issue.

21 The question then is, should you be
22 interfering? Should we be looking at this? And
23 our view is, it would be impossible to be able to
24 properly consider the issues here without being
25 able to do that, and that's why.

00150

1 PRESIDENT SIMMA: Okay.

2 ---(Discussion off the record.)

3 PROFESSOR SCHWARTZ: Just, we know
4 we're running very short on time, so just want to
5 flag this. It may be that both sides want to make
6 written submissions on the whole issue later when
7 logs come out and so on.

8 But the control issue; originally, I
9 think Canada might have suggested that
10 intra-tribunal correspondence was not within their
11 control. Then I think there was a footprint saying
12 that some stuff is routinely cc'd to the
13 Secretariat. So I just thought, if you want to
14 now, just briefly, if you can tell us anything
15 about the control point.

16 Investor, are you looking for just
17 stuff that Canada would still have because it was
18 cc'd to the Secretariat or are you looking for,
19 there might have been emails, exchanges and so on
20 that didn't go to the Secretariat, but how would
21 that be within the control of Canada?

22 We're really short of time, so we don't
23 want to open up a huge debate on this one right
24 now. I just wanted to flag it, in case you have
25 anything you want to say now. It may be you have

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1 to take it up later in written submissions.

2 MR. LITTLE: Mr. Spelliscy can quickly
3 address it from Canada's perspective.

4 MR. SPELLISCY: Yes. I'll try and be
5 very brief. And what we are talking about is a
6 very small set of documents and it would be those
7 documents such as the panelists' personal notes,
8 things they wouldn't have cc'd to the Secretariat.
9 These are the sort of things that are not typically
10 shared outside of the Panel in any way, and that
11 allows for their deliberations.

12 I think the key point to think about
13 here is, the Claimants have talked a lot about
14 responsibility and attribution. Obviously, that's
15 a very thorny issue and is going to require
16 briefing. And we are fundamentally in disagreement
17 with the Claimants on whether the JRP is, in fact,
18 a body of Canada.

19 But you don't have to decide that
20 thorny issue at this point because the duty to
21 produce documents is entirely separate from what a
22 state is responsible for in International Law.
23 They're just -- the concept of the duty to produce
24 extends only to those that you control; whereas, a
25 state is liable at International Law for a much

00152

1 broader range of actions, including actions that it
2 after the fact adopts or acknowledges. We can go
3 to the ILC draft articles on this.

4 So these two things are certainly not
5 co-extensive. And when you think about what is in
6 Canada's actual possession, custody or control, it
7 because a sort of practical matter. What do we the
8 ability to actually compel the production of? Can
9 we go to the -- if we go to these individuals, we
10 are going to private citizens who have no
11 relationship at this point with the Government of
12 Canada. We cannot compel them to participate in
13 this arbitration. They are third parties to this
14 arbitration.

15 Whether or not Canada is responsible
16 for them in International Law is just an entirely
17 distinct question that actually doesn't bear
18 relevance on the document production aspects of
19 this.

20 PRESIDENT SIMMA: Yes. Thank you.

21 Did you want to say something because
22 you were...?

23 MR. HEBERT: Yeah. I wanted to come
24 back to a point Mr. Appleton was making.

25 It's important also to note, concerning

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1 the JRP, the documents in possession of the JRP, I
2 mean, the Claimants are alleging essentially a

3 breach of national treatment and a breach of the
4 minimum standard of treatment which is objective
5 tests.

6 The decision of the JRP and the way the
7 Claimants were treated by the JRP is made clear
8 already on the record. So if objectively, this
9 Tribunal determines that the Claimants were not
10 discriminated against and that the conduct, itself,
11 the objective conduct of the JRP does not
12 constitute a breach of the minimum standard of
13 treatment, there is no reason for this Tribunal to
14 delve into the subjective opinion or the subjective
15 beliefs of the panelists.

16 It is only if the Tribunal has some
17 doubt into, you know, the objective measures that
18 the JRP took, that it may, in certain circumstance,
19 be relevant to look into what are the subjective
20 beliefs of the JRP members, which would be
21 evidenced in their private notes and private
22 deliberations.

23 PRESIDENT SIMMA: For me, this is the
24 problem of - I don't know the metaphor is in
25 English - putting the cart before the horse, or
00154

1 something. I think that's it, right? I mean, how
2 would we know at that stage whether...? So I
3 think, really, that's the main problem. We have to
4 see the stuff in order to see whether they...

5 MR. HEBERT: Well, I mean, you can
6 definitely look at the measures or the treatment
7 that --

8 PRESIDENT SIMMA: Also the, let's say
9 the internal processes.

10 MR. HEBERT: Well, the subjective
11 element, I mean, really comes into play if the
12 Tribunal has any doubt that the measures actually
13 applied by the JRP to, to the Investors raises a
14 doubt of discriminatory conduct or conduct so
15 egregious that it would breach the minimum standard
16 of treatment.

17 Then, in certain circumstances, it may
18 be relevant to delve into the subjective beliefs
19 of... But Canada's position is that the subjective

20 beliefs of the JRP Members is not relevant.

21 PRESIDENT SIMMA: I think I have the
22 impression that we agree. I mean, there is some
23 argument now put before us that the question would
24 be, would you, let's say, opt for providing us some
25 more stuff in writing? I think the issue is now

00155

1 pretty clear and I think we have to introduce the
2 exciter, really jump at Nova Scotia and, and decide
3 the issue.

4 So is there -- do you think -- do you
5 feel like providing us with some further, let's
6 say, reasoning in writing or do you think that
7 everything is said?

8 MR. APPLETON: Well, there's some new
9 information that Canada has just raised. I would
10 like to make a short comment on that, but other
11 than that, I think everything is before you.

12 I see that there's no -- this was a
13 question raised and pleaded between the parties
14 already. I don't think we're going to be any
15 further ahead and I do have a comment, though,
16 particularly about one new point raised by
17 Mr. Spelliscy and one short point raised Mr. Hebert
18 which I think are incorrect.

19 But I -- so I just -- other than to
20 correct them, I have no other comments, I think,
21 that need to be done at this time. I think the
22 Tribunal has everything before it--

23 PRESIDENT SIMMA: Right.

24 MR. APPLETON: --that it needs to make
25 this determination.

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1 MR. LITTLE: We would agree with that
2 assertion by Mr. Appleton. But if, if there are
3 specific points that the Tribunal would like
4 further clarified or addressed, we would be happy
5 to do that in writing, but we are in your hands in
6 that regard.

7 PRESIDENT SIMMA: At this stage, Bryan,
8 do you want...?

9 PROFESSOR SCHWARTZ: I'm still a
10 little, in my own mind, still confused about the

11 control point, but...

12 MR. APPLETON: Well, if I could just
13 address that briefly.

14 PRESIDENT SIMMA: Sorry?

15 MR. APPLETON: I would like to --
16 that's the point I would like to address, raised by
17 my friends.

18 PRESIDENT SIMMA: I was -- of course, I
19 am always... I like to hear about the ILC because
20 I was there when the -- the second reading was
21 prepared. But for the moment -- well, okay. I
22 mean, this is a point. I think that a difference
23 has to be made between responsibility of a state
24 for some agency out there, Article 8 and so on, and
25 the question relevant in our context.

00157

1 So would you please not go into giving
2 us our views as to how the ILC means that to be
3 because you are sitting on the ILC right now. I
4 spent six years of my life there. So that is -- I
5 think -- we can figure out ourselves.

6 MR. APPLETON: I will not be commenting
7 on the ILC.

8 PRESIDENT SIMMA: Except that...

9 MR. APPLETON: No. I would like to
10 comment -- (Laughter).

11 No. My, my comment was that, first of
12 all, that this Tribunal can request that Canada
13 produce those documents.

14 Canada may very well have an ongoing
15 relationship. Several of these members --
16 certainly, the Chairman of this Panel had been the
17 Chairman of an earlier Panel and so they may very
18 well just request it and obtain it that way.

19 Furthermore, I point out that this
20 Tribunal can request the assistance of the local
21 courts here in Canada who have been, in the past,
22 prepared to assist arbitral tribunals to seek an
23 order to obtain that information.

24 I don't think the information is
25 particularly difficult to be able to obtain, so

00158

1 either it could be produced voluntarily or it could

2 be subpoenaed. That would be the first piece, I
3 think.

4 The second point... Well, actually,
5 maybe we'll just leave it at that. I just think
6 that there's a process which arbitral tribunals use
7 all the time to deal with evidence that could be by
8 non-parties before then.

9 To the extent that these persons are no
10 longer within the control of Canada, there's a very
11 well-established process to be able to obtain that
12 information. And I think that it's important to
13 not leave the record as if you don't have that
14 power because, in fact, you certainly do.

15 I know that you are aware, it's one of
16 the things you considered when you decided that
17 this would be a good place for arbitration.

18 PRESIDENT SIMMA: So let's see what we
19 decide, let's see how parties will react to that
20 decision, and then we will get to that point. But
21 I think we don't have to pursue that further.

22 So I think now, we might have a little
23 time left to go back to the Requests, if that is
24 agreed, and I think you would also like us to do
25 that. So we would turn to your, to the revised

00159

1 final Document Request set--

2 MR. APPLETON: Yes.

3 PRESIDENT SIMMA: --and move through
4 the...?

5 MR. APPLETON: Well, I wonder--

6 PRESIDENT SIMMA: Yes?

7 MR. APPLETON: --if it would be
8 possible to just get one or two of the items that
9 had been requested by the Investor, to just see if
10 we could get those on the agenda before we finish
11 today because we have been dealing with requests of
12 -- no, sorry. I mean that requests that have
13 come...

14 Well, which one --

15 PRESIDENT SIMMA: Requests by the
16 Investor? Is that...?

17 MR. APPLETON: Yeah. I guess we'll do
18 them in order.

19 ----(Discussion off the record.)

20 MR. APPLETON: We'll go wherever you
21 would like to go.

22 PRESIDENT SIMMA: Oh.

23 MR. APPLETON: All right. That's fine.

24 PRESIDENT SIMMA: Mmm. So I mean, we
25 have to... I mean, the -- I think it was mentioned

00160

1 that the document, your Document Requests have
2 gotten considerable attention, which I'm sure they
3 deserve, right.

4 Now that -- maybe, could we ask the,
5 about the other Documentary Requests; that is, your
6 requests to Canada and Canada's problems with them,
7 and maybe go through that, or is that the way that
8 you wouldn't like?

9 MR. LITTLE: When you first started
10 speaking, I thought you were talking about the
11 requests of Canada, being the, the Claimants',
12 because we did focus on the Claimants' Requests
13 earlier today that we're objecting --

14 PRESIDENT SIMMA: That's what I, that's
15 what I meant.

16 MR. LITTLE: Okay. Okay. That's fine
17 by me.

18 PRESIDENT SIMMA: Okay. So we are
19 dealing with the Document Requests made by Canada--

20 MR. LITTLE: Yes.

21 PRESIDENT SIMMA: --vis-a-vis the
22 Investor; your objections to them; and --

23 MR. APPLETON: I thought -- I remember
24 you raised that you were interested perhaps to talk
25 about No. 35.

00161

1 PRESIDENT SIMMA: Thirty-five.

2 MR. APPLETON: Yes. I thought you
3 might want to discuss that. And then we think it
4 would be very useful if we were to go back to the
5 other requests because I think we can make some
6 progress if we had a brief discussion about some of
7 the items--

8 PRESIDENT SIMMA: All right.

9 MR. APPLETON: --unless the Tribunal

10 feels it has enough information on the other ones.

11 PRESIDENT SIMMA: Okay. 35.

12 MR. LITTLE: Well, also, if I may, too,
13 just to--

14 PRESIDENT SIMMA: Yeah.

15 MR. LITTLE: --to narrow things. At
16 Tab 8 of our Book Documents and Authorities--

17 PRESIDENT SIMMA: Oh. Some of them...

18 MR. LITTLE: --we withdrew some, so--

19 PRESIDENT SIMMA: Yes.

20 MR. LITTLE: --if you want to look at
21 the most narrowed down, smallest document, which is
22 probably in everyone's interest, this is at Tab 8.

23 PRESIDENT SIMMA: So we tried to just
24 trace -- let me see because we did a little study
25 in the morning and I just wanted to check.

00162

1 I think, Dirk, you've got the numbers
2 ready. The ones that were...

3 MR. PULKOWSKI: There seemed to be
4 possibly a little bit of confusion because in the
5 cover letter, Canada noted that it had withdrawn
6 four Requests.

7 MR. LITTLE: Yes.

8 MR. PULKOWSKI: But on counting the,
9 and comparing the relevant tabs, it seemed there
10 might have been five.

11 MR. LITTLE: Well --

12 MR. PULKOWSKI: -- we could confirm
13 that.

14 MR. LITTLE: And that goes back to the
15 request that was perhaps added to a version of the
16 Redfern that the Tribunal received, which was
17 Request 19, which was the request that Canada had
18 withdrawn some time ago, that was added back into
19 the Redfern.

20 In our view, it didn't need to be added
21 back because we had withdrawn it, so we're content
22 in our Requests with the document at Tab 8. It is
23 inclusive of all, all of the Requests that are
24 still outstanding for Canada.

25 PRESIDENT SIMMA: In the TBA?

00163

1 MR. LITTLE: In the BDA of Canada for
2 the Case Management Hearing.

3 PRESIDENT SIMMA: Okay.

4 MR. APPLETON: Sorry. I think we might
5 have a misunderstanding. I just need to clarify
6 this.

7 My understanding, from the letter, was
8 that Request 19 wasn't..., that you hadn't
9 withdrawn 19; you withdrew objections about 19.
10 Did I misunderstand that?

11 MR. LITTLE: Well, it's our Request,
12 so --

13 MR. APPLETON: So it's your Request,
14 although you withdrew --

15 MR. LITTLE: We weren't objecting to
16 it.

17 MR. APPLETON: 19 is gone?

18 MR. LITTLE: 19 is gone.

19 PRESIDENT SIMMA: 19 is gone.

20 MR. LITTLE: But it was physically
21 added back into a former Redfern Schedule.

22 PRESIDENT SIMMA: Okay. So --

23 MR. LITTLE: But if you look at -- this
24 is the latest and greatest in the BDA, at Tab 8.
25 And it doesn't include 19--

00164

1 PRESIDENT SIMMA: Okay.

2 MR. LITTLE: --and it doesn't include
3 the other four that Canada has pulled.

4 PRESIDENT SIMMA: Right.

5 MR. LITTLE: Now --

6 PRESIDENT SIMMA: So maybe just for,
7 let's say, for our sake because I'm used to work
8 with this big stuff now and I'm not so familiar
9 with the, the book.

10 So 19 is gone?

11 MR. LITTLE: Yes.

12 PRESIDENT SIMMA: Then --

13 MR. LITTLE: It's tough for me to do
14 because I only know what's left.

15 PRESIDENT SIMMA: All right. Okay.

16 MR. PULKOWSKI: I tried to do the work.
17 Maybe you could compare that with, against the

18 schedule to see whether... Is that too --

19 MR. LITTLE: Yeah. But I have one
20 added treat and that is that in the ones that are
21 left, there are some that are only objected to on
22 the grounds of privilege by the Claimants. Those
23 don't require anyone's attention today.

24 PRESIDENT SIMMA: Okay.

25 MR. LITTLE: So maybe what I can do is,

00165

1 I can list out the following requests that--

2 PRESIDENT SIMMA: That are still...

3 MR. LITTLE: --need to be addressed--

4 PRESIDENT SIMMA: All right.

5 MR. LITTLE: --because there are a
6 number from our remaining ones that are
7 privileged-based objections. But subject to them
8 being in a log, we don't really have... We can't
9 really say any more about them.

10 PRESIDENT SIMMA: All right.

11 MR. LITTLE: The remaining ones, then,
12 are 7, 18, 29, 35, 42, 43... I'm sorry.

13 PRESIDENT SIMMA: 35.

14 MR. LITTLE: After 35, it was 42, 43
15 and 44.

16 PRESIDENT SIMMA: Okay. So 49 and 50
17 are gone--

18 MR. LITTLE: Yes.

19 PRESIDENT SIMMA: --apparently.

20 PROFESSOR McRAE: They're not being
21 considered now.

22 PRESIDENT SIMMA: No. They're out.

23 And then you don't want to consider the
24 ones which rely on attorney-client privilege or
25 what is it?

00166

1 MR. LITTLE: Well, we certainly haven't
2 withdrawn those, but--

3 PRESIDENT SIMMA: No. But --

4 MR. LITTLE: --all Canada is saying is
5 that they don't require the Tribunal's attention,
6 so long as they --

7 PRESIDENT SIMMA: Right. Okay. So you
8 are going to speak about the rest.

9 MR. LITTLE: Yes.

10 MR. APPLETON: Perhaps -- I would
11 suggest that perhaps we should find out if the
12 Tribunal wants to address any of those, in
13 particular, they might address those first of the
14 remaining numbers. Then we can decide how we want
15 to go.

16 MR. LITTLE: Yeah. Professor Schwartz
17 mentioned No. 35. I'm in your hands as to which
18 order you want to go in.

19 PRESIDENT SIMMA: Okay. Why not, why
20 not talk about 35 because it was taken up before
21 lunch.

22 PROFESSOR McRAE: Yes.

23 PRESIDENT SIMMA: Yes.

24 MR. LITTLE: Okay. We take the
25 comments into account on the Request in 35.

00167

1 What 35 is really getting at there is
2 what the Claimants' expectations was and
3 understanding of the process was.

4 So perhaps a way of, of refining that
5 request would be to make it date-specific, so that
6 really, we're only... You know, there was a point
7 in time at which the Claimants were faced with
8 requirements of the Environmental Impact Statement
9 and there was a point in time at which that
10 Statement was filed. And perhaps if we could
11 confine it to a time period, that might assist the
12 Claimants in responding to that Request.

13 We would be willing to reformulate it--

14 PRESIDENT SIMMA: Yeah.

15 MR. LITTLE: --in a short delay, and
16 I'm not sure what the process would be after that,
17 but...

18 PRESIDENT SIMMA: Probably wouldn't
19 make a big difference, but relatively easy to do
20 it, as I see it, right. We are referring to 35.

21 Do you want to --

22 MR. APPLETON: My colleague,
23 Mr. Dickson-Smith --

24 PRESIDENT SIMMA: So let's just
25 exchange. Yes, okay.

00168

1 MR. DICKSON-SMITH: Thank you, Judge
2 Simma.
3 Our concerns aren't so much the dates
4 here. The documents that Canada is seeking are the
5 background scientific documents, for example. And
6 in the words of, sorry, Mr. Hebert who said in a
7 different argument about the subjective beliefs,
8 the same logic as what Mr. Hebert applied is what
9 applies in this regard.

10 And this is the general theme with
11 Canada's Document Requests. It's not the
12 background documents from the Investors that are
13 relevant and at issue in this dispute; it is the
14 end product, the final draft. So changing the
15 dates by Canada would not still achieve anything.
16 Our objection will still stand.

17 The final documents, the EIS, the
18 Environmental Impact Study that was submitted to
19 the Panel is the basis for what, the measures that
20 were taken by Canada, as alleged.

21 Again, going through thousands of --
22 well, I don't know the number offhand, but going
23 through many documents on a fishing expedition to
24 find documents, scientific documents and so forth,
25 we still would not -- I do not see, foresee how

00169

1 that would be relevant.

2 And again, that's a general theme where
3 Canada has requested documents that go beyond what
4 was delivered to the JRP, to the other government
5 entities; the Department of Fisheries and Oceans
6 and the Department of Transport, for example.

7 ---(Discussion off the record.)

8 MR. DICKSON-SMITH: That's right.
9 There's... There wouldn't be any, any value or
10 probative value in, for Canada in achieving -- in
11 having those documents.

12 MR. LITTLE: First of all, I think
13 Canada should be able to decide that.

14 Second of all, there's another... We
15 are not just looking at science here and previous
16 drafts of what ultimately might have become final

17 documents. We're looking at documents generated by
18 or within or by the Claimants' representative or
19 representatives who ran the Environmental
20 Assessment as to what was required of the
21 Environmental Impact Statement and the JRP process
22 in general.

23 There's allegations about no notice
24 being given to the Claimants in the Statement of
25 Claim with respect to certain criteria that were

00170

1 taken into account in the JRP decision. And that
2 allegation being made, we're interested in what it
3 was that the Claimants knew, their representatives
4 knew about what was expected of them in the
5 Environmental Assessment.

6 Now, this raises an issue that we have
7 raised in correspondence and it's where we have a
8 bigger problem with the scant production that we
9 have received thus far.

10 The process -- we are talking about a
11 five-year process here, multiple steps, multiple
12 phases dealing with many different government
13 departments. And in light of this, what we have
14 received is one reporting letter from the
15 Claimants' representatives in Nova Scotia to the
16 Claimants and one internal email. And we find this
17 to be incredulous and we find these kinds of
18 documents - these are really what we're interested
19 in - to be the kind of documents that should have
20 been produced in response to this type of a
21 Request. We think it warrants an explanation as to
22 why one reporting letter and one internal email.

23 PRESIDENT SIMMA: If I may, in between,
24 I think this relates to both sides. I mean, I
25 think we had a certain problem which was that the

00171

1 objections and maybe also the objections were
2 somehow kind of, in a way, just a series of formula
3 that were repeated time and again, and more or less
4 taken from the, from the wording maybe of the IBA,
5 which don't really give us much clarity. For
6 instance, if I may look there, it says:

7 Request lacks sufficient

8 relevance or reality.

9 All right. So that's, that's the
10 problem. But, I mean, it's difficult for us. I
11 mean, we might have our own view, might a document
12 which has to do with the way you prepared each
13 statement be relevant to us? Yeah, it might. It
14 might.

15 So to get the reply, 'Request lacks
16 sufficient relevance,' is not really a
17 productive..., or, 'The document contains
18 privileged information.' That is the method, or,
19 'The Request seeks documents already in Canada's
20 possession,' and needs to be clarified. I mean, to
21 say you have two documents...

22 What this seems to mean there aren't
23 any more and that is an issue on which we can't say
24 anything anyway. So, I mean, we are a little
25 helpless in presence of the formula which are

00172

1 repeated, more or less, time and again with regard
2 to these documents.

3 MR. APPLETON: Well, let me help you.
4 I think that that's a fair question and a fair
5 comment.

6 So in this particular case, these are
7 Claimants that tend to not use email. So Canada
8 keeps saying, 'Why are there no emails?'

9 Now, the Government uses emails all the
10 time. That's how they operate. These people
11 didn't use emails.

12 PRESIDENT SIMMA: You mean the members
13 of the...?

14 MR. APPLETON: The Investors.

15 PRESIDENT SIMMA: Oh. The Investors.

16 Sorry.

17 MR. APPLETON: The Claimants didn't use
18 emails because that's just not the way they
19 communicated. They would usually pick up the phone
20 and talk to the each other.

21 So when we're told, 'Well, there --
22 this can't be right because there aren't a lot of
23 emails,' the answer is back, 'That's not what they
24 did.'

25 Even today, they very rarely use

00173

1 emails, but one of them doesn't like to type and he
2 gets somebody to type it and send it to somebody
3 else to get to him. It's... That's just how it
4 works.

5 So it's just, it's the file. We have
6 made sure that we have reviewed carefully to ensure
7 that all documents that would be responsive were
8 reviewed and dealt with. If we have documents that
9 are subject to privilege, we produced a privilege
10 log because that was our obligation to produce a
11 privilege log. We didn't have a lot of items that
12 actually needed to be in a privilege log, but those
13 that were - I believe there were six; is that...?
14 Six. Those are the items that are in our log.

15 And so that's just what's there.
16 That's... You know, so unfortunately, Canada isn't
17 happen with that.

18 Then, so the next question is, well,
19 this is a question about what was produced to the
20 public hearing. And our view on this would be, if
21 we're thinking about something, that it may be
22 really irrelevant. In fact, I'm not sure if there
23 was anything that is, in fact, there that are
24 drafts of it. But it would be irrelevant because
25 what's relevant in this case is what was produced

00174

1 to the public hearing because then, they made
2 comments with respect to the report or with respect
3 to what's there.

4 That is -- we would say, that is what
5 is the only thing that's relevant here. It's not a
6 question of our intent or our intention. That's
7 not what the case deals with. It's...

8 PRESIDENT SIMMA: But aren't you then
9 contradicting a bit what you demanded or said about
10 the JRP?

11 MR. APPLETON: Well, because -- we're
12 saying that the JRP specifically has engaged in
13 arbitrary and unfair actions. That's why it's so
14 probative and relevant.

15 Nobody is saying... There's no

16 Counterclaim. There's no Claim that says that
17 somehow the Investors are part of a conspiracy.

18 If that's what the allegation was, then
19 it might be relevant, but in general it has no
20 relevance or any salience of any form.

21 And then finally the question is,
22 'Well, did they get notice of various things?'

23 Notice is something either the
24 Government or the Members of the JRP gave notice
25 for something or they didn't. But how would the

00175

1 report or a draft of the report ever help us with
2 that issue?

3 So it's just... We are happy to
4 provide materials that make sense, that are
5 relevant, that are related in any way. And we have
6 been trying to be as encompassing, actually, as we
7 can because we would like Canada to be
8 encompassing, and we think it's also practical and
9 otherwise, it's just a bad practice.

10 So we're trying to be helpful and
11 practical and move it ahead, so we have no interest
12 in not having documents that are relevant. But we
13 can't conceive of how this could be relevant in any
14 way, how they could be material in any way, and how
15 they could be probative in any way. And that's the
16 difficulty.

17 And then, when we're met with, 'Well,
18 there aren't a lot of emails...' Well, they just
19 couldn't use email. Not everybody uses email.

20 I use email a lot. If you wanted to
21 ask for my materials, you would get a lot of
22 emails. It's just, you've got to take the facts as
23 they are.

24 PROFESSOR McRAE: I think one of the
25 difficulties I have, and I think I had it this

00176

1 morning, as well, is that when we look at this, we
2 see one thing and it doesn't seem very clear. When
3 we hear you explain, suddenly what we saw before
4 comes clear.

5 And as we saw this morning, when you
6 both articulate a little more the meaning of the

7 Request and the meaning of the Objection, and I
8 mention it now because it came up again here. I
9 mean, some of what you're saying is, there isn't
10 any. Certain categories of documents, there aren't
11 any.

12 Others, if there are any - and there
13 may be some like drafts of things that were
14 submitted - they're not relevant. But the whole
15 objection was relevance and we were sort of sitting
16 there, not knowing, partly because we don't
17 think -- well, I didn't think that the 35 was very
18 descriptive, itself, in the Request. But then the
19 blanket Objection to it is difficult.

20 So I don't know. Maybe it's too late,
21 but I would hope and encourage you, if you can do
22 anything to these, to make both the Requests more
23 understandable to us, let alone to each other, and
24 the Objections more understandable because I think
25 right now, I understand the two categories, I

00177

1 understand that much better now. But there aren't
2 any of these things and there are others that...
3 Now I understand why you're saying it's not
4 relevant. It just didn't appear to me from this,
5 this document here.

6 MR. APPLETON: That's why I think it's
7 actually so useful to have this structured
8 conversation because when we get one thing, we
9 respond on the same type of thing, back and forth.

10 That's why I thought, if we were able
11 to discuss some of it here in this more structured
12 way, we would get a lot more movement. It's
13 exactly that because, (1), we have nothing to hide;
14 (2), we know the material, so we can discuss it;
15 (3), we're prepared to discuss everything as we
16 came here today, so that's why I'm hoping that we
17 can get some progress there. It's exactly for that
18 reason.

19 PRESIDENT SIMMA: Are we -- is that --
20 I think that's as far as on 35 as we can probably
21 get to now, so I... Mr. Little, if you --

22 MR. LITTLE: If you would like, I can
23 just go through them in order, the remaining.

24 Request 7 requests all documents
25 relating to the Claimants' knowledge of loss or
00178

1 damages suffered prior to June 17, 2005.

2 Now, the Claimants have rejected -- or,
3 sorry, objected to that on the grounds of
4 sufficient relevance and materiality again, and on
5 the ground that it seeks documents which go to
6 damages, which aren't part of this phase of the
7 arbitration.

8 We dispute the fact that it's not
9 relevant material or producible at this stage
10 because Canada has asserted in its Statement of
11 Defence that the Investors are time-barred from
12 asserting a Claim in respect of certain alleged
13 "measures". And in particular, relevant to that,
14 that defence is the Claimants' knowledge of loss
15 arising from these measures.

16 So they obviously claim now that the
17 measures caused them loss because they brought the
18 actual arbitration. Canada is entitled to know, as
19 part of its Defence, when they came to this
20 realization in order to make those arguments under
21 Article 1116. So that that's why we say those
22 documents are relevant.

23 ---(Court reporter appeals.)

24 MR. LITTLE: 1116(2).

25 PRESIDENT SIMMA: Yes. A comment?

00179

1 Please, as succinct as possible.

2 MR. APPLETON: Succinct. This is a
3 question that really was covered by the
4 bifurcation. Once this Tribunal decided to
5 bifurcate the issues of damages, the issues related
6 to damages, that's the phase they properly belong
7 to.

8 There is the issue, of course, as to
9 how you need to establish some, the question of
10 some damage and that is, in essence, the question,
11 how much of that becomes a merits issue.

12 That's why generally, we try not to
13 bifurcate now in the NAFTA context because
14 invariably, we get this objection: Well, we're

15 going to bifurcate on damage, but we want you to
16 start providing damage information, so we know when
17 the loss or damage began as part of the merits.

18 In our view, you can't suck and blow at
19 the same time. Canada moved specifically to not
20 have to put this information in with respect to
21 damage. They wanted it; we didn't. They got the
22 request that they wanted to have.

23 Now, do we need to prove some issues
24 with respect to a three-year period? Yes, we will,
25 but we don't need to deal with all issues of damage

00180

1 and all issues of loss and all--

2 PRESIDENT SIMMA: No. That's --

3 MR. APPLETON: --the other pieces that
4 go with it. And so it seems to me, and that's
5 always been our problem with No. 7 is that Canada
6 would like to have the situation where they're able
7 to get, I will call a "sneak peek" at all types of
8 damages now. And we don't think that that's
9 appropriate if we're going to bifurcate because we
10 will not be using the issues with the valuator,
11 all the process that goes with it, and it's not a
12 fair basis.

13 We specifically avoided those issues in
14 terms of our request and that's why we think
15 fundamentally, this shouldn't be here. And no
16 matter how you want to rename it, it's just a rose
17 is a rose is a rose.

18 --- (Discussion off the record.)

19 PRESIDENT SIMMA: Okay. So would you
20 have anything to add to that --

21 MR. LITTLE: Certainly, we have no
22 desire to delve into damages. This is not about
23 quantum of damages; it's about timing of knowledge
24 of loss, and nothing more.

25 PRESIDENT SIMMA: Okay. All right. So

00181

1 I think we're finished with this one.

2 Let's move to the next one. Which?

3 MR. LITTLE: ...which is 18.

4 We simply wanted -- the Request is for
5 documents related to the Claimants' tendering of an

6 offer to the Nova Scotia Department of Transport
7 and Public Works regarding the purchase of a road.

8 Now, the Claimants have alleged in
9 Paragraph 36(b) of their Claim that the Nova Scotia
10 Department failed to act reasonably in tendering
11 offers from the Investors to purchase the White's
12 Cove right-of-way.

13 Canada doesn't have any records that
14 such an offer was ever tendered by the Claimants,
15 so we want to know, we want to see documents,
16 basically, that relate to such, such an offer. And
17 I guess a quick way to resolving this Request was,
18 was such an offer made; yes or no?

19 PRESIDENT SIMMA: Okay. Thank you.

20 We have got your written objections
21 here which is the same; sufficient clarity, not
22 reality, et cetera.

23 So would you like to just give that
24 answer or, or you don't have to.

25 MR. DICKSON-SMITH: I think, Judge

00182

1 Simma, the answer is basically an interpretation of
2 what a tendering offer was. And the -- from what I
3 understand - I will try to be as brief as I can -
4 from what I understand, Canada is looking for this
5 whole where tenders were switched.

6 From my understanding, there was an
7 offer to purchase. We have produced those
8 documents or to the extent that we haven't produced
9 those, they would be the subject of privilege,
10 which we have claimed.

11 And otherwise, again I would say,
12 anything beyond that would, falling into my
13 argument I said previously, was that the documents
14 -- anything behind-the-scenes is not to be tested
15 by Canada. It's... It's just again - yes - it's
16 just not an issue. Doesn't add any probative
17 value, any documents that we have internally about
18 this offering process.

19 But I can say again, there... For the
20 sake of clarity, my understanding of this case is
21 there was no formal tendering process.

22 MR. LITTLE: So I'm clear --

23 PRESIDENT SIMMA: Is that why you put
24 it into quotation marks, "tendering an offer"?

25 MR. LITTLE: Is that a "no" then? No

00183

1 offer was tendered to Nova Scotia?

2 MR. DICKSON-SMITH: Again, it's the
3 interpretation. Umm. I will say no.

4 MR. LITTLE: I suppose if there's
5 documents relevant to the interpretation, it's our
6 position that we're entitled to see those and the
7 Request stands.

8 MR. DICKSON-SMITH: Judge Simma, if
9 there's going to be any argument, I think, again,
10 this is the trouble with Canada's Document Request.
11 It seems to be formulaic and a copy-and-paste from
12 the Statement -- or our Statement of Claim.

13 Any arguments that we will make in
14 terms of the tendering offer process, I foresee
15 there to be not many documents in relation to that.
16 But any arguments we have in relation to that,
17 we'll put that in our Memorial at a later stage.

18 PROFESSOR McRAE: Where does the quote
19 "tendering of an offer" come from? You have it in
20 quotation marks in the Request.

21 MR. DICKSON-SMITH: I believe it's from
22 the Statement of Claim.

23 PROFESSOR McRAE: From... Okay.

24 PRESIDENT SIMMA: Okay. But I think
25 you would agree that it would have helped if you

00184

1 had gotten something along the lines that you just
2 said instead of this kind of, 'Lacks sufficient
3 relevance, materiality, already in possession of
4 Canada, privileged information,' which is just kind
5 of like a rosary in the Catholic Church. You
6 repeat and repeat it, but you don't... (Laughter).

7 I mean, let me just make that as a --
8 because with this, we weren't helped much, so we
9 chose -- now we know more and we are grateful for
10 that.

11 Okay. I think with this, let's move on
12 to the next.

13 MR. LITTLE: Okay. The next one is 29.

14 And 29, we can really kind of roll it into 35, as
15 well. 29 requests all documents relating to the
16 Claimants' knowledge and understanding of the EA
17 process, of the proposal to develop a quarry and
18 the 152-hectare quarry and grain terminal.

19 We are willing to -- we can narrow
20 that. Basically, we can narrow it to the
21 Claimants' knowledge and understanding of what was
22 expected through the Joint Review Panel process,
23 which really is what you have in 35. It's kind of
24 the first phase of 35 which is what was expected of
25 the Environmental Impact Statement.

00185

1 29, I guess, could, to use the word
2 that we used earlier, subsume 35 and basically be
3 what was expected -- their knowledge and
4 understanding of what was expected during the EIS
5 process, preparation of the Environmental Impact
6 Statement, and during the Panel Review process.

7 MR. APPLETON: So how would 35 be
8 different from 29 now? It seems to me that 35 is
9 well written to cover what's there and it would be
10 much easier to just withdraw 29.

11 MR. LITTLE: 35 related to just the
12 EIS, okay. 29 is far broader originally. What
13 we're doing now is, is maybe we can confine the two
14 to the EIS and the JRP process. Again, it relates
15 to the subjective notice that the Claimants had
16 with respect to the process with which they were
17 faced, which we say is relevant material, given the
18 allegations in the Claim.

19 PRESIDENT SIMMA: All right. Just,
20 whether I get you right. Here it says -- okay.
21 So:

22 Documents relating the Claimants'
23 knowledge and understanding of the
24 Environmental Assessment process of
25 the proposal to develop...

00186

1 Blah, blah, blah. Would that be
2 regarding the proposal; with regard to or...?

3 MR. LITTLE: Why don't we -- we can
4 scratch 29. Look at 35 and confine 35 to the

5 preparation of the EIS and the Joint Review Panel
6 hearing.

7 And again, the focus there, what we're
8 primarily interested in is the notice that the
9 Claimants had and received with respect to what was
10 expected of them throughout the process. That's a
11 relevant issue in this Claim.

12 PRESIDENT SIMMA: So when you say
13 "scratch 29", means that would be - what's the word
14 - subsumed?

15 MR. LITTLE: Withdrawn.

16 PRESIDENT SIMMA: Withdrawn. Oh, okay.
17 So because it's now within 35.

18 MR. LITTLE: Yes.

19 PRESIDENT SIMMA: Okay.

20 PROFESSOR McRAE: Can we hear from the
21 Investor, what they think of 35 now it's been
22 reworded? Does your objection to 35 remain in the
23 light of the new rewording of 35?

24 MR. DICKSON-SMITH: I have a question
25 with the way it was worded. But either way,

00187

1 Professor McRae, the documents that Canada are
2 requesting, once again, are whether it's the
3 knowledge and understanding or whether it's the
4 preparation of the EIS or the proposals to do so.

5 Those documents again are not in issue.
6 Any motivational documents or evidence in documents
7 that Canada are seeking don't have any bearing in
8 terms, in terms of our allegations. They don't add
9 probative value, once again.

10 I think what Canada is seeking by these
11 documents is either solicitor-client privileged
12 documents or work product privilege documents,
13 documents that arose after fact - and we have
14 placed the privilege objection in there, as well -
15 in terms of our case strategy.

16 --- (Court reporter appeals.)

17 MR. DICKSON-SMITH: ...our case
18 strategy.

19 PRESIDENT SIMMA: So is it what you're
20 saying - just, I want to follow what's going on
21 here - you say that, of course, you claim, let's

22 say, a discriminatory, let's say, element in the,
23 in the process. Okay.

24 And you say, 'Therefore, we need to
25 look into the entries into these, let's say, JRP,

00188

1 et cetera.'

2 MR. DICKSON-SMITH: Mm-hmm.

3 PRESIDENT SIMMA: We... There is no
4 allegation that we did something wrong. Let's say
5 there was an intent to discriminate or whatever,
6 and so it's not your business. I mean, it's not
7 relevant for you what made us..., what went in
8 these, in the preparation of the, the EIS and the
9 preparing, preparation of the hearing.

10 Is that, is that actually what you are
11 saying?

12 MR. APPLETON: I will take this.

13 Yes. The answer is, that's correct.
14 If there was a question that -- you know, if there
15 was a question that somehow, we had engaged in
16 something that was wrongful, inappropriate or had
17 done something that would be harmful or
18 deleterious, then that would make a lot of sense.

19 But, (1), it's completely irrelevant;
20 (2), any documents that would be there in light of
21 this revised matter would really be the types of
22 things that would be covered by legal privilege,
23 whether attorney-client or attorney work product
24 privilege, and so we don't think it would be
25 appropriate.

00189

1 We can identify any documents there. I
2 think we may have actually already done so because
3 we have issued a privilege log. I don't think
4 there's a lot of documents, in any event. But to
5 the extent that you want to see what our strategy
6 was about litigation, we don't think that's
7 appropriate and it's certainly not relevant.

8 What is relevant is, is did we go to a
9 process? Did we submit things in the process? Did
10 we submit things that were responsive to what was
11 requested in the process?

12 None of that is being sought in any of

13 these issues. And by the way, all of it, all of
14 those matters are available on the CEAA website and
15 are clearly already in the record between the
16 parties.

17 So I'm trying to understand, what do
18 you gain by knowing about, you know, was there a
19 draft of a report on hydrology or some other
20 subject, rather than the final report that's filed?
21 Why would that be relevant or what do we gain by
22 looking at what the Investors thought about in the
23 process of, you know, having it moved from a
24 comprehensive study to the Joint Review Panel?

25 The Investors' thinking doesn't seem to

00190

1 be relevant there. They were ordered. They
2 followed what was there. They followed the pieces
3 that had to be done. They attended the hearings.
4 They did the submissions.

5 The question may be then: Did you
6 submit what you were asked to do? That's fair, but
7 that's not these questions in any way, shape or
8 form.

9 PROFESSOR McRAE: But I thought I heard
10 earlier - maybe it was from Mr. Little - that they
11 were interested in the expectations of the process.

12 Now, let's say that it turns out that
13 your claim is that they changed the rules on you.
14 You thought that you were going into Process "A".
15 Turns out they've got rules that turned it into
16 Process "B". But if there are documents that
17 indicated that you understood and the Investor
18 understood it was going to be Process "B" all
19 along, surely that would be relevant, wouldn't it?

20 I mean, maybe no such documents exist
21 and --

22 MR. APPLETON: I don't think we take
23 issue with that, but I don't think such documents
24 exist because I think, like most people in a
25 regulated stated, when the state tells you you're

00191

1 going to follow this adjudicative process, rather
2 than that adjudicative process,' whether it's
3 advisory or non-advisory, whatever - when you're

4 involved in the process, you don't really know the
5 difference unless you're a lawyer - you comply and
6 you just assume that things are going to be done in
7 a fair and proper manner.

8 And so do I believe that there is a
9 document that says, 'This is an unfair process?'
10 No. I know these documents in this area. I don't
11 believe there's anything like that, but you -- it's
12 not what you would expect. You would say, 'Okay.
13 We follow in this process,' and they start doing
14 the process.

15 But I'm not sure why it would be
16 relevant -- so I'm -- I think we're happy to take
17 that as the request. If that's the request, I
18 think we're happy to deal with that, though my own
19 belief, from looking at these documents, is nothing
20 is going to be responsive.

21 PRESIDENT SIMMA: Okay. I think you
22 really wanted to say something, so --

23 MR. LITTLE: Well, I'm just concerned
24 that if there are documents that are responsive to
25 this, as a preliminary matter, they have been
00192

1 objected to on the grounds of relevance. And I
2 think that's for the Tribunal perhaps to decide on
3 whether they are or are not relevant. And then
4 we'll either see them produced or in a privilege
5 log or dealt with some other way.

6 I am mindful of the time here. I am
7 thinking that what we could do is, in 42 and 43,
8 they are really quite similar to what is at issue
9 in 35, and we would be happy to reformulate 35 that
10 basically rolls in the ones that we have discussed
11 in addition to 42 and 43 and try to narrow that as
12 much as we can. And...

13 ---(Discussion off the record.)

14 MR. LITTLE: Yeah. The issue with 44;
15 it's tougher to roll into the question, the
16 questions that we can roll 42, 43, 35 and 29 into,
17 so, I mean, 44 stands right now.

18 PRESIDENT SIMMA: Mm-hmm.

19 MR. LITTLE: And we would simply seek a
20 ruling from the Tribunal on 44. And then that's...

21 That does it for Canada's Requests.

22 PRESIDENT SIMMA: Okay. All right. On
23 this proposal to make 35 kind of all-inclusive?

24 MR. APPLETON: I don't know what
25 they're proposing, so that's part of my difficulty.

00193

1 But I'm happy for anything--

2 PRESIDENT SIMMA: Yeah.

3 MR. APPLETON: --that we could look at
4 on that. We could speak briefly on 44. I'm still
5 hopeful we could go and turn to some of the other
6 issues that are still outstanding on the list.

7 PRESIDENT SIMMA: On...?

8 MR. APPLETON: On our --

9 PRESIDENT SIMMA: On the list...?

10 MR. APPLETON: ...of our Request to
11 Canada, yes.

12 PRESIDENT SIMMA: On your list to...,
13 yeah, yeah.

14 MR. APPLETON: Right. So I don't want
15 to belabor it.

16 Do we have something to say on 44?

17 That's a 'yes' or a 'no', not a...

18 MR. DICKSON-SMITH: Yes.

19 MR. APPLETON: Yes. Okay. So we have
20 something to say on 44--

21 PRESIDENT SIMMA: Okay.

22 MR. APPLETON: --if you would like to
23 go there.

24 PRESIDENT SIMMA: Well, I mean, you
25 said, 'At the moment, it would be difficult for us

00194

1 to say anything more on 44,' so let --

2 MR. LITTLE: Forty-four stands.

3 PRESIDENT SIMMA: Forty-four stands.

4 And probably stands even after you have taken the
5 floor. And is...? Okay. Can you be extremely
6 brief and then let it just... Then let's see

7 whether you can say just, 'No,' or, 'Stands.'

8 Okay.

9 MR. DICKSON-SMITH: Extremely brief,
10 Justice Simma, yes.

11 In the Investors' opinion, it's in a

12 fishing expedition. They're looking for documents
13 that were not provided to the JRP, which even is an
14 extension where my earlier arguments that it's,
15 it's not a finished product that was before any
16 government entity, including the JRP.

17 PRESIDENT SIMMA: Okay. Which means
18 that you might have gotten them, so the idea would
19 be, you might have gotten some advice which you
20 didn't forward to the government because the advice
21 was to the effect that, 'No. That's something
22 problematic,' et cetera, et cetera.

23 MR. LITTLE: Exactly. It's relevant to
24 what they didn't include -- what they understood
25 they had to include.

00195

1 PRESIDENT SIMMA: Yes. And you say
2 this is immaterial. Like, say, the Bilcon is
3 something like a black box and only what comes out
4 is, is what counts. Is that...?

5 MR. DICKSON-SMITH: That's right.
6 That's what Canada responded to--

7 PRESIDENT SIMMA: ...responded. Okay.

8 MR. DICKSON-SMITH: --and made those
9 measures.

10 PRESIDENT SIMMA: I think that's fine.
11 So that finishes the list, --

12 MR. LITTLE: Yes.

13 PRESIDENT SIMMA: -- Canadian list?
14 Great. So the other list is a little bigger. So
15 we move to the Bilcon list.

16 Let me just -- maybe I will make a
17 remark on, on Request No. 1, the NAFTA, umm,
18 things. And I think I am entitled to kind of
19 pronounce a little, present the view that maybe you
20 shouldn't spend time on further making this point
21 or expounding here because I think we already have
22 some pretty firm view on that and, rather,
23 concentrate your efforts on the rest, okay. Is
24 that...?

25 MR. APPLETON: Okay.

00196

1 PRESIDENT SIMMA: That's helped you...?

2 MR. APPLETON: Sure. You just thought

3 what I was going to say and I will just have more
4 time with an expert--

5 PRESIDENT SIMMA: Okay.

6 MR. APPLETON: --so that's very
7 effective. (Laughter)

8 So I thought we might proceed just by
9 following the..., Canada's issues, the next one I
10 have on the list, then, would be No. 10.

11 PRESIDENT SIMMA: All right.

12 MR. APPLETON: I will leave it to
13 Mr. Endicott. He's going to start, okay?

14 PRESIDENT SIMMA: On 10?

15 MR. APPLETON: Ten.

16 PRESIDENT SIMMA: Okay.

17 MR. ENDICOTT: I'm actually just going
18 to pose a question to Mr. Estrin which is about,
19 Mr. Estrin, could you explain to the Tribunal why
20 these Requests are relevant to the issues in this
21 arbitration?

22 MR. ESTRIN: Talking about 10 now?

23 MR. ENDICOTT: Ten, 11 and 12.

24 MR. ESTRIN: Well, it bears on the
25 issue, it seems to me, of fairness again; whether
00197

1 the Joint Review Panel -- 10 relates to
2 communications from government and government
3 entities potentially with the Joint Review Panel
4 Members, staff and consultants.

5 So it's a simple issue. Did they
6 obtain -- did they receive communications about,
7 about their decision-making or regulatory process;
8 not about their salaries, but obviously the issues
9 that are of concern to the Investors.

10 Mr. Appleton mentioned a sort of "ex
11 cathedra" possibility or some suggestion of what
12 the outcome ought to be or perhaps what criteria
13 should be taken into account. Again, it's simply,
14 you know, did they or did they not receive such
15 communications and, if so, they ought to be
16 produced, it would seem to me.

17 Second, No. 11 is the one that I think
18 the Panel, this Tribunal had some discussion about
19 a few minutes ago; that is, communications amongst

20 the Panel Members.

21 And then 12 is related to the fact that
22 the Panel, as I saw what they had done, had their
23 own staff, to some extent; certainly had retained
24 advisors, to some extent, on one issue which was
25 NAFTA. And again, the question is, to what extent

00198

1 they might have obtained information or that
2 perhaps wasn't disclosed as part of their
3 decision-making. That's what that was a
4 descriptive of. That's all.

5 PRESIDENT SIMMA: So, of course, the
6 Panel was set up specially for the case of the
7 Bilcon project. So when you read "all documents of
8 the Joint Review Panel", later on you say in your
9 reply to Canada's objections, "all relevant and
10 material documents", so it's to be read in that
11 sense, right?

12 MR. APPLETON: In every case, it should
13 be read in. That's why we put it at the beginning
14 or the chapeau of all of the requests. But to be
15 absolutely clear, that should always be there.

16 PRESIDENT SIMMA: Okay.

17 MR. LITTLE: I will be as previous as
18 possible.

19 These are requests, once again, for all
20 documents. The Claimants have made an allegation
21 in their Statement of Claim, Paragraph 36(d), that:

22 The JRP's recommendation was
23 based on criteria not properly
24 included as part of Environmental
25 Assessments.

00199

1 If that's their allegation, then the
2 Document Request that we would have expected would
3 ask for documents that somehow relate to the
4 criteria. That's all we're asking for; the point
5 of reference, rather than all documents.

6 Now, another point just on the form of
7 the request, which I'm assuming the Tribunal will
8 be making an Order on these requests, is to note
9 the nature of the overlap between the two and how
10 they do, in many ways, request the same documents,

11 which is a point of difficulty for Canada. In, to
12 use the word of the day, "subsumed" -- in our view,
13 Document Request 12 subsumes Document Request 11.

14 So we are not sure if we're missing
15 something there in terms of a distinction between
16 the two, but that's the way it seems to work. So
17 it would greatly assist Canada in any ruling if
18 that is noted in what it is that Canada has to
19 respond to.

20 MR. APPLETON: When we address
21 procedure, we'll want to talk about the need to
22 have a listing which will help avoid these types of
23 problems going forward, an index of the documents
24 that are produced.

25 My suggestion would be, to the extent

00200

1 that any documents in one request are produced in
2 another, we merely make reference, say, as, you
3 know, what they were, which is... Often Document
4 Requests may have some overlap in coverage. It's
5 is very common. It's not an unusual circumstance.

6 It's just much easier to say, you know,
7 'Will you provide the following documents,' and the
8 -- you know, which you list. And then the other
9 documents that may be duplicates, you say, 'And the
10 following documents which were already produced.'
11 You do not produce them twice. There's no need.

12 PRESIDENT SIMMA: I have to confess
13 that I don't see the overlap because 10 says,
14 'Documents, communications of governmental entities
15 with the JRP,' and 11 is...

16 MR. LITTLE: No.

17 PRESIDENT SIMMA: Sorry. Oh. You mean
18 11 and 12?

19 MR. LITTLE: 12 subsumes 11--

20 PRESIDENT SIMMA: Oh. Sorry.

21 MR. LITTLE: --in Canada's view.

22 PRESIDENT SIMMA: Oh. Let's see 12. I
23 see. Oh, right. Okay. Sorry.

24 MR. ESTRIN: Judge Simma, perhaps I can
25 help you -- help. On that No. 12, if perhaps you

00201

1 removed the word or didn't read the word "members",

2 so, 'All documents of Joint Review Panel members in
3 respect of their staff, consultants and advisors,'
4 it's not inter... It's not as between the Members
5 of the Panel themselves; it's really as between
6 their staff, their consultants and advisors;
7 whereas, 11 is the communications between the
8 Members themselves.

9 PRESIDENT SIMMA: So it would read, 12
10 would read...?

11 MR. ESTRIN: Well, 12 would... There's
12 no extra word, really. It's simply that it's
13 perhaps awkwardly worded. It's meant to say, 'The
14 documents of the Joint Review Panel...' You can
15 take out the word "members", if you'd like. '...of
16 the Joint Review Panel in respect of their staff,
17 consultants and advisors.'

18 MR. APPLETON: So just remove the word
19 "Members" and replacing it with "in respect of
20 their". And then that way, it's very clear that 12
21 is about a different class of persons than 11.

22 PRESIDENT SIMMA: All right. Yeah.

23 MR. LITTLE: That assists immensely.

24 PRESIDENT SIMMA: Beg your pardon?

25 MR. LITTLE: That assists immensely.

00202

1 MR. APPLETON: Great. So maybe we can
2 do some more.

3 PRESIDENT SIMMA: Yeah.

4 MR. APPLETON: Can we try 13?

5 PRESIDENT SIMMA: Yes. Fine.

6 MR. APPLETON: Okay.

7 MR. ENDICOTT: Turning to Document
8 Request 13, 15, 20 and 22, we might say a few words
9 about the background to those requests.

10 MR. ESTRIN: Well, again, first of all,
11 they're generally with respect to documents that
12 Nova Scotia would have or their files or their
13 employees would have.

14 Two things about those. First of all,
15 the names of the various offices and departments
16 and officials named, for example; say in No. 14
17 where you start listing a number of specific
18 branches of Nova Scotia Department of Environmental

19 Labour and the same with the Department of Natural
20 Resources. And the very fact that Nova Scotia
21 Transportation was named or Tourism; all of these
22 came from my Examination of the records that were
23 available following the hearing; that is, these,
24 these departments had officials who took part in
25 the process leading up to the recommendation of the
00203

1 Joint Review Panel. What their exact role is, we
2 don't know.

3 Obviously, we have... The request is
4 not for anything that's already been made public.
5 We have some public documents and that's where
6 these names and officials came from. We do know
7 that they, in some respects, were involved in the
8 process.

9 How significantly they were involved,
10 we don't know. And that is why -- but these names,
11 these file numbers, these people were all
12 identified as a result of documents that were in
13 the public record, and that's one point.

14 The second point is that although the
15 request for materials is all in relation to the
16 project and to the Joint Panel Review. That's made
17 clear, for example, by the last words of Paragraph
18 13:

19 All documents...
20 Et cetera, et cetera.
21 ...pertaining to the Investors,
22 the Investors' representatives, the
23 project and the Joint Panel Review.
24 It's not a... It's directly related to
25 this process.

00204

1 PRESIDENT SIMMA: I have a question. I
2 have a problem with the understanding of Canada's
3 objections.

4 So you are saying Canada has produced
5 all documents responsive to the, to 14 with
6 clarifications, which mean there is more in this
7 file than is relevant. And then you say:

8 All documents relating to the
9 Claimant and their Project that

10 reside in this file have been
11 produced.
12 And you're saying the same thing of the
13 other file. And then you say:

14 To the extent that documents that
15 were asked for in 14 are subject to
16 solicitor-client privilege...

17 Et cetera, et cetera.

18 ...Canada objects.

19 Now, on the one side, you say, 'We have
20 looked through these files and the one that are
21 relevant, you have already received.'

22 MR. LITTLE: In their entirety.

23 PRESIDENT SIMMA: In their entirety?

24 MR. LITTLE: Yes.

25 PRESIDENT SIMMA: 'And to the extent

00205

1 that these documents are subject to matters of
2 privilege, we object to their production '?

3 MR. LITTLE: Yes. And they could be
4 logged.

5 PRESIDENT SIMMA: Maybe I'll have a
6 blank spot, but --

7 --- (Court reporter appeals.)

8 MR. LITTLE: And they can be logged.

9 PRESIDENT SIMMA: That means they have
10 not been produced?

11 MR. LITTLE: That means they have not
12 been produced, yes.

13 PRESIDENT SIMMA: But you're saying,
14 'All documents relating to the issue have been
15 produced.'

16 MR. LITTLE: We do say, 'Canada has
17 produced all documents responsive --'

18 PRESIDENT SIMMA: Oh. Would that
19 relate to the other files; that -- not these two
20 files that you single out?

21 MR. LITTLE: Well...

22 PRESIDENT SIMMA: Because with regard
23 to those two files, what you're saying is,
24 'Everything relevant has been produced.'

25 MR. LITTLE: Yes. With regard to those

00206

1 two files, I think --

2 PRESIDENT SIMMA: Those two files.

3 MR. LITTLE: I guess, I guess the
4 problem with those two files was that they weren't
5 specific files. They are kind of general -- our
6 understanding from Nova Scotia is they are general
7 files numbers assigned to a wide variety of
8 matters.

9 The search was conducted for matters
10 that related to Whites Point Quarry within these
11 files. All of those documents that resided in that
12 general file number pertaining to Whites Point
13 Quarry were --

14 PRESIDENT SIMMA: So that means the
15 reservation you made with regard to privilege
16 relate to stuff that might -- is for the other in
17 the remaining files on, on Bilcon's request, right,
18 because there, you have many more files?

19 MR. LITTLE: Yeah. I can't answer
20 right now if there were privileged documents that
21 have been withheld from the two files in the bullet
22 points in the Redfern for 14. But basically, any
23 documents that were privileged and withheld on
24 grounds of privilege from the totality of the files
25 requested have been, they have been held back--
00207

1 PRESIDENT SIMMA: Right.

2 MR. LITTLE: --and would be something
3 that would be addressed in a privilege log.

4 It may well include documents that were
5 responsive to the two general files that are
6 described in the bullet points.

7 PRESIDENT SIMMA: Okay. Then I don't
8 understand how you can say that they have all been
9 produced.

10 MR. LITTLE: Subject to the following
11 clarifications.

12 PRESIDENT SIMMA: Oh. Subject to...

13 MR. LITTLE: Yes.

14 PRESIDENT SIMMA: Oh, okay. Subject
15 to...

16 MR. LITTLE: Yes.

17 PRESIDENT SIMMA: Thank you.

18 MR. LITTLE: Okay.

19 PRESIDENT SIMMA: Is that...?

20 MR. ENDICOTT: Moving on, in that case,
21 to Document Requests 16, 23 and 24, we would just
22 like to say a few words to explain the background
23 of those requests.

24 MR. ESTRIN: It's similar in the sense
25 that we thought we were -- it would be helpful to

00208

1 identify the specific individuals whose names
2 appeared in the publicly available correspondence.
3 It was correspondence that Bilcon had received and,
4 except -- and that is the case in respect of most
5 of the individuals named; however, at a certain
6 point, there were... This include 23 and 24. So
7 that's the case for everybody up to 24.

8 And then, 24 are simply names of
9 Ministers and Deputy Ministers in the Federal and
10 Provincial Government at the relevant times because
11 it is clear that in making decisions about how a
12 Panel should be appointed, terms of reference and
13 that type of thing, that these would all have to be
14 processed through Assistant Deputy Ministers and
15 Ministers. And without -- and so that is the
16 reason for super-adding those people, as well.

17 And, in fact, I think some of the
18 documents just provided in the last days, as I
19 quickly looked at them, indeed included some memos
20 from some Assistant Deputy Ministers, Assistant
21 Deputy Ministers. So it certainly appears that
22 that confirms the relevancy of making those
23 requests, as well.

24 PRESIDENT SIMMA: Okay. And the names
25 in 23? It would be the same category as what --

00209

1 MR. ESTRIN: Yes. These are all --

2 PRESIDENT SIMMA: Sixteen?

3 MR. ESTRIN: Yes. These are all people
4 whose names appear in documents already in the
5 public record who had some involvement in the
6 process or were copied or were at meetings. We
7 don't know, in all cases, how far their involvement
8 extends, but they were all seemingly involved in

9 the process.

10 MR. LITTLE: We made the point this
11 morning and we didn't have a chance to respond to
12 the previous category of documents relating to the
13 departments, but the response in respect of the
14 individuals that I'll make right now applies
15 equally.

16 Mr. Estrin referred to, you know, they
17 were involved in decisions to refer, to refer to --
18 to have the matter referred to the Review Panel,
19 for example. That's the type of specific
20 information that will assist Canada and will limit
21 the burden on Canada in responding to these
22 requests. And that's why we provided the two
23 schedules at the end of our submissions with
24 respect to a column that could be populated to
25 provide that information.

00210

1 Another point. A lot of the people in
2 the lists in Document Requests 16, 23 and 24 have
3 generated thousands of documents that have already
4 been produced. And they were produced because they
5 were produced in response to requests that we found
6 far more helpful to respond to; namely, Requests 6,
7 7, 8 and 9.

8 So again, that's simply what Canada is
9 requesting here; that some specificity be given to
10 what we're looking for in respect of each of these
11 individuals; otherwise, we're chasing after
12 documents of 150 individuals and you get into...
13 It's not even the concern about the volume of the
14 documents they may have, but the unreasonable
15 burden in tracking down all of these individuals.

16 MR. APPLETON: I'm just lost again. It
17 is not an unreasonable burden to produce evidence
18 that is specific and relevant, and this is relevant
19 material.

20 So, for example, if one person only
21 attended one meeting and their name is on the file
22 and the attendance list of that meeting, they come
23 to represent their Ministry, the Ministry of
24 Transportation. We have already heard that there
25 could be something relevant about roads and

00211

1 transportation.

2 How difficult can it be to ask them to
3 provide their materials about the Whites Point
4 Quarry file? It's all about what's relevant to
5 that file.

6 And so it may be that Mr. Little has to
7 send 150 letters out or maybe he has to make phone
8 calls. That's what we do, as lawyers, when we have
9 to find something, but that's not unreasonable. If
10 it's probative and relevant, we have to do it.

11 And so it's not that somebody from the
12 Department of Transportation is going to have
13 17,000 documents, I would expect, with respect to
14 this. They're probably going to have one or two or
15 maybe they're going to have none. But you have to
16 making the attempt.

17 This was a request made on July the
18 2nd. We are near the end of October and it's just
19 not appropriate, in our view, to say that that's an
20 unreasonable burden.

21 That is appropriate for the type of
22 complex litigation that we are involved in. It's a
23 complicated regulatory scheme. That's how that
24 works.

25 And so I just -- our difficulty is, is

00212

1 that it's not, in our view, very compelling to say
2 that that's unreasonable. Yes, there's work for
3 both sides. That's what we have to do.

4 And we don't want anything that we
5 don't need because we have to review it all. So we
6 are not interested in reviewing things that are
7 going to be irrelevant, but if we feel we need it
8 and we have a reason why we believe these people
9 could be involved, it would not be appropriate for
10 us not to seek that information.

11 And to the extent that, you know,
12 there's no response with respect to this, we don't
13 think that's appropriate.

14 I just thought I had to underscore this
15 because this seemed to be, from my briefing, the
16 problem that we had in the lunch negotiation is a

17 difference really of what each side believes is
18 reasonable burden.

19 And to the extent that we can break
20 through that, I think we can resolve most of these
21 outstanding issues, though I do understand there's
22 only one more after this, No. 2, which is probably
23 the best news I can give anybody.

24 MR. LITTLE: If I may, just quickly.
25 If the Investors -- Claimants are required to

00213

1 demonstrate why -- demonstrate specificity and
2 narrowness why these people are specific, are
3 specifically related to something in the Claimants'
4 Claim, that may well demonstrate irrelevance and
5 eliminate burden on Canada.

6 MR. APPLETON: But you just heard
7 the --

8 PRESIDENT SIMMA: But isn't, isn't the
9 remark made that all these people, all the names
10 were taken from documents which showed that they
11 had a role to play; they signed a document, they
12 were making a presentation at a hearing, et cetera,
13 et cetera? That's how I understood you. So the
14 names are names of people who have played a certain
15 role.

16 And what you're asking for is, of
17 course, which becomes clear the further right on
18 that paper we move, but of course what you have in
19 mind is simply the stuff that specifically relates
20 to the, to the Claim.

21 MR. LITTLE: Yes. The allegations in
22 the Statement of Claim. Far more specificity can
23 be drawn than "all documents".

24 MR. APPLETON: Okay. Sorry. Did we
25 say the Claim. Submission of the Claim is

00214

1 submission of the Notice of Arbitration, the Notice
2 of Intent, just so -- before we get ourselves
3 caught up again--

4 PRESIDENT SIMMA: No, no.

5 MR. APPLETON: --but what I'll call the
6 "live issues" in this arbitration.

7 PRESIDENT SIMMA: The what?

8 MR. APPLETON: The "live issues" in
9 this arbitration, just so that we don't come up
10 with some type of an agreement that's not really an
11 agreement between the parties.

12 PRESIDENT SIMMA: Yeah. Do colleagues
13 have anything to say about this point? I think
14 the --

15 PROFESSOR McRAE: No.

16 PRESIDENT SIMMA: You have made your
17 position clear. We'll have to decide. Do you want
18 to move on to...?

19 MR. APPLETON: ...to No. 2.

20 PRESIDENT SIMMA: ...No. 2, okay.

21 MR. ENDICOTT: Yes. Just a few words
22 about Document Request No. 2.

23 PRESIDENT SIMMA: Are you already
24 starting on No. -- oh. Internal.

25 MR. APPLETON: No. We're going to ask

00215

1 Mr. Estrin if he would comment on Document Request
2 No. 2, if we're ready, if we're finished with the
3 other discussion.

4 PRESIDENT SIMMA: I think we are ready.
5 We are ready.

6 MR. APPLETON: Okay.

7 MR. ESTRIN: Well, Document Request No.
8 2 is specifically:

9 Unpublished documents of the
10 Agency and other Federal Government
11 agencies that relate to or discuss
12 political considerations,
13 considerations of fairness, like
14 treatment or other criteria for the
15 making of these discretionary
16 decisions with respect to the scope
17 and manner of the application of the
18 Canadian Environmental Assessment
19 Act.

20 So it's -- this, in my view, would get
21 to some of the essence of the issue that's coming
22 before the Tribunal. Does, in fact, the Government
23 have a criteria/policies/advice on these very
24 issues that they haven't published, but, in fact,

25 use.

00216

1 And if they have them, it would be
2 helpful to know, I believe, for the Tribunal to see
3 them because if they exist, you will get some
4 comfort either that they are, in fact, fair and
5 appropriate or perhaps they're not fair and
6 appropriate or if they don't have them, at all,
7 that says something else to you perhaps.

8 PRESIDENT SIMMA: And what would be the
9 scope that you would say you want to see these
10 things concerning the scope and manner of
11 application to projects? Are we hearing the
12 presence of a huge number again?

13 MR. ESTRIN: Well, no. Not -- this is
14 not to a whole category of projects. These are
15 simply general documents.

16 If the Government of Canada has --

17 PRESIDENT SIMMA: Oh. General
18 document.

19 MR. ESTRIN: Yes. They have to make a
20 decision about how they apply the Canada
21 Environmental Act, when they should go to a Review
22 Hearing, how broad they should make it; in general,
23 do they have guidelines and if they do, let's have
24 them.

25 PRESIDENT SIMMA: Okay. Mr. Little?

00217

1 MR. LITTLE: If I may, I'm not sure if
2 it was missed, but what Mr. Estrin hasn't said,
3 that we've produced final versions of guidelines,
4 manuals, policies, operating procedures pursuant to
5 Request 2 and we have done it for two federal
6 government agencies that made the decisions in this
7 case, and that's CEAA, Canadian Environmental
8 Assessment Agency, and the Department of Fisheries.
9 So we have produced documents pursuant to this
10 request.

11 What we haven't produced is documents
12 relating to Environment Canada, Transport Canada or
13 Natural Resources Canada because, really, there's
14 no particulars regarding measures of these, these
15 government entities in the Statement of Claim.

16 There's no allegations really made, other than it's
17 just baldly stating that they were subject to
18 measures.

19 So in the absence of any allegations --
20 and the fact is, they didn't really make any
21 decisions that I think are at issue in this
22 arbitration. We don't view those federal
23 departments as being of any relevance, as would DFO
24 or Fisheries.

25 Now --

00218

1 MR. APPLETON: Well --

2 MR. LITTLE: Excuse me just one minute,
3 Mr. Appleton.

4 MR. APPLETON: Sorry. Sorry. My --

5 MR. LITTLE: Secondly, the Claimants
6 have asserted that draft policies are material
7 because the Request is also for draft policies, not
8 just the final policies. And they say that they're
9 material to determine whether those selected
10 government entities influenced or contributed to
11 the manner and the application of CEAA.

12 Now, we have a problem with
13 understanding how draft policies that never see the
14 light of day as a working policy can be material to
15 any potential claim in this case because draft
16 policies don't guide governmental decision-making.
17 So it's really not appropriate to measure any
18 governmental conduct in this case by way of a draft
19 policy.

20 PRESIDENT SIMMA: Since you're talking
21 about general...

22 MR. ESTRIN: Yes. And I could just
23 offer some quick comments.

24 First of all, I -- the documents which
25 I believe you produced recently in respect of this

00219

1 general policy-making and approach are all
2 documents that are available online, as far as I
3 have seen.

4 I can't claim to have had the
5 opportunity - nor can anybody, I believe, on this
6 side of the table - to go through the documents you

7 have produced. But the ones that I, in any
8 detailed way -- because of the way in which they
9 came, as I understand it.

10 But the ones that I have looked at
11 quickly appear to be ones that have been in use for
12 several years and are not what I have suggested
13 would be of use to us and to the Tribunal; that is,
14 unpublished material. So if it's on the Web, if
15 it's in -- you know, been out there, that's not
16 what we're seeking. That's the first distinction
17 of clarification.

18 And the other thing, Mr. Little
19 references, 'Why would draft policies be of any
20 relevance?' Well, I can tell the Tribunal that in
21 a previous matter, the only policy that existed was
22 a draft policy.

23 PRESIDENT SIMMA: What does that mean?

24 MR. ESTRIN: Well, they never bothered
25 to finalize. They never published anything -- they

00220

1 never made anything public. The only policy they
2 had was labelled "draft" and it was only obtained
3 because of a legal process. So that what my
4 experience is, is that they often operate using
5 unofficial policies which they never publish, but
6 are called "draft". That's the reason for asking
7 for draft policies.

8 PRESIDENT SIMMA: I think it would be
9 interesting to hear something from Mr. Little or
10 his team.

11 MR. LITTLE: I guess I have no response
12 to that; that, you know, we have not come across
13 draft policies that have been used. There -- or
14 that are in use by, by officials in CEAA or
15 Department of Fisheries. I mean, that's just
16 conjecture on if one exists. We haven't come
17 across any and I don't understand why a draft
18 policy would be used to implement actual government
19 action.

20 MR. APPLETON: The answer is simple.
21 Quite often, governments do things not in the
22 proper way. They have a policy, they do a draft,
23 and that's exactly what Mr. Estrin just gave you an

24 example of. And that would be exactly the type of
25 thing that would be relevant here.

00221

1 And it could also very well be the case
2 when you're dealing with something that's a little
3 unusual, which is what you get when you get joint
4 process, unlike the federal process alone or the
5 provincial process alone. So there's a whole
6 variety of reasons.

7 But I want to clarify the reason
8 before, I thought you had finished your comment. I
9 just want to make sure that -- because there's no,
10 there's no transcript here.

11 MR. LITTLE: Well -- I mean, I'm not
12 sure why a draft policy would be relevant if
13 there's a final version of that draft policy.

14 PRESIDENT SIMMA: If there is a final
15 version.

16 MR. LITTLE: I guess that was my point.

17 PRESIDENT SIMMA: Okay. If there's a
18 final version. Then we had the argument that in
19 some instances, at some time, there were no final
20 versions--

21 MR. ESTRIN: Right.

22 PRESIDENT SIMMA: --in order to --

23 MR. ESTRIN: That's the concern, simply
24 that they never published a final version.

25 MR. LITTLE: And just to clarify any

00222

1 misunderstanding, these were produced back in
2 August, our response --

3 MR. APPLETON: Yeah. Allow me to try
4 to clarify this--

5 MR. LITTLE: Okay.

6 MR. APPLETON: --because I think that
7 Mr. Estrin has not been able to see the documents
8 produced in August. And, in fact, no one has been
9 able to properly see the documents produced in
10 August. And we will produce some material for the
11 Tribunal specifically on that. And the reason is
12 simple; that they were incomprehensible.

13 We have -- Sue, would you just --

14 MR. LITTLE: I have a real problem with

15 documents being called "incomprehensible".

16 MR. APPLETON: Why don't you allow me
17 to --

18 MR. LITTLE: It's a misrepresentation
19 --

20 MR. APPLETON: It is not a
21 misrepresentation. Why don't you allow me to
22 finish. Then you will have full opportunity to
23 have comments.

24 And so, with all due respect, one of
25 the difficulties that we have - and it's the

00223

1 process to go forward which is why I think it's
2 quite important to raise - is that documents that
3 have been produced have not been produced in such a
4 way that they can be assessed, they can be
5 understood, they could even be separated. And --

6 PRESIDENT SIMMA: And it's technically
7 incomprehensible, legibility --

8 MR. APPLETON: Sue, could you please?

9 I have asked Ms. Ki to provide to the
10 Members of the Tribunal and to Canada a binder with
11 some examples specifically flagging what we are
12 talking about because, for example, Mr. Estrin, who
13 is an expert looking at some of these issues has
14 been unable to he see them.

15 The reason that Mr. Estrin was --
16 actually gave a, a misstatement in his answer is
17 that he was able to see, if you might turn to
18 Tab -- the Tab, the front of "A", for example, or
19 at "B", you will see just some examples - we have a
20 brief on the front - of how documents that say
21 they're one item or several, they're different
22 things, they're supposed to be one document when
23 they're many. Things are missing. You can see in
24 front of Tab "D", things, you know -- I mean, there
25 are a variety of problems.

00224

1 And, Sue, did you give them the summary
2 that came in the 138 documents, the indexes?

3 MS. KI: No.

4 MR. APPLETON: Okay. There's a second
5 piece.

6 What came this week was a set of
7 documents with a listing. We'll provide you the
8 listing that came from Canada. Then we had our
9 team work over the evenings to be able to actually
10 produce a proper index, to be able to see some
11 documents.

12 So Mr. Estrin was able to see some of
13 the 138 documents that just arrived. But I'm just
14 going to provide you with what Canada produced and
15 what we had to do.

16 Now, in order to be able to identify
17 the index to this red-covered binder that you have,
18 it took over five-and-a-half weeks with a team of
19 six or seven people plus an external team just to
20 separate and to identify and then de-duplicate the
21 documents, to be able to start to understand what
22 came in --

23 PRESIDENT SIMMA: Mr. Appleton, can I
24 interrupt you? I think these are two different
25 issues.

00225

1 You asked for unpublished documents,
2 right? This is, this is on the unpublished
3 documents.

4 MR. APPLETON: Yeah. No, I'm just
5 trying to explain why Mr. Estrin was answering when
6 he gave his answer about documents that were
7 recently produced--

8 PRESIDENT SIMMA: Yes.

9 MR. APPLETON: --and Mr. Little said,
10 'No. These are documents that had come in, in
11 August.' And I wanted to explain why Mr. Estrin
12 hasn't actually seen the documents from August.

13 PRESIDENT SIMMA: No, no. That, we
14 understand.

15 MR. APPLETON: Yes. That's why --

16 PRESIDENT SIMMA: The reason given was,
17 you said they were incomprehensible.

18 Now you asked the Canadian Government
19 to produce unpublished documents and that's
20 probably what they found; just this handwritten
21 stuff. So what would you expect the Canadian
22 Government to do; to give a commentary and make

23 them comprehensible?

24 MR. APPLETON: No. Judge Simma, could
25 I ask you to just look at the index which we just

00226

1 handed out? There are two documents. One is...

2 One says 'Bilcon of Delaware versus Government of
3 Canada, Investors' Corrected Supplemental
4 Document'. Do you see that?

5 PRESIDENT SIMMA: Yes.

6 MR. APPLETON: The other one is a
7 document which says 'Bilcon Production'.

8 PRESIDENT SIMMA: So this relates to
9 the things that are in this --

10 MR. APPLETON: No. This is -- what we
11 have is the document that relates to the first --
12 the red binder came with no real index.

13 To produce an index from it was, was
14 something -- it was exceptionally large, had to be
15 produced because it just had documents like you
16 will see in this first index. This is in relation
17 to the production done this week by Canada. And
18 you will say it says page numbers responsive to
19 certain Document Requests. Didn't tell us what the
20 document is, where it is or things like that.

21 This is, by the way, much better than
22 the first production that we received. It was
23 significantly better.

24 What we suggest it should have looked
25 like, though, is the second document which is what

00227

1 we would have expected to receive. And exactly
2 those type of document that would have been able to
3 identify duplicates and things that parties would
4 do; what we would normally receive and what we
5 always have received in the past, not just from
6 Canada, but from Canada and from any other party
7 that's involved in an investor-state arbitration.

8 And this way, when we want to have any
9 questions about production, we're able to know
10 what's there.

11 PRESIDENT SIMMA: Hmm.

12 MR. APPLETON: And so what we're saying
13 is that we had such an extensive interruption and

14 interference with the ability to be able to
15 appreciate what's there and such a tremendous cost
16 to be able to go through it because it's already
17 produced; the documents were produced double-sided.
18 They weren't separated. They weren't identified.
19 It was just basically thrown into a box, some of it
20 not in order. Caused tremendous amounts of
21 difficulty.

22 And since you are going to make some
23 orders with respect to the next phase and since we
24 just saw an example right now of how even our own
25 experts can get lost in this process, I wanted to

00228

1 just file this material. I didn't want to make any
2 other argument about it, but it would be a very
3 serious impairment going forward if we just didn't
4 follow the normal and ordinary course.

5 PRESIDENT SIMMA: Mm-hmm.

6 MR. LITTLE: I don't have much to say.
7 We weren't bound to provide an index. We provided
8 an index to Mr. Appleton after he requested one,
9 out of courtesy.

10 Mr. Appleton's description of these
11 documents as "incomprehensible" is a
12 misrepresentation because when you look at them,
13 you can certainly read them and that's going to be
14 the job of counsel in this case.

15 And if Mr. Appleton has a problem with
16 respect to a missing attachment, he can certainly
17 request of us, of Canada, with reference to the
18 document, that it's missing attachments and we
19 might look into it.

20 I didn't appreciate the way that it was
21 dealt with in the context of the hearings. We have
22 never seen any of this information before.

23 MR. APPLETON: I'm sorry. Mr. Little
24 provided the information. We wrote to Mr. Little
25 with respect to this and it exactly -- the only

00229

1 point I can agree with is that it was not in the
2 Order.

3 And that is exactly the point that we
4 really want to underscore, is that we would ask

5 that all future Orders deal with this because in
6 every other case, it's always produced when it
7 wasn't in the Order because that's how generally
8 counsel deal with each other and to assist the
9 Tribunal. And so we're asking, we're Pleading
10 that, in fact, all future production have to be
11 accompanied with respect to an index that
12 identifies the specific document, identifies it in
13 the similar type of form that we have, to enable
14 parties to be able to try to resolve issues as much
15 as possible.

16 PRESIDENT SIMMA: I mean, I don't know
17 about my colleagues, but I have only read the
18 correspondence relating to the index, that it's
19 insufficient and so on. I've never seen anything
20 about the index --

21 MR. APPLETON: Well, we brought the
22 documents. You can see them.

23 PRESIDENT SIMMA: No, no, no. I mean,
24 I don't particularly like to go into this. But I
25 mean, you gave -- and here, we see the kind of,

00230

1 your corrected or improved version. This is what
2 we have here, right?

3 MR. APPLETON: Oh, yes.

4 PRESIDENT SIMMA: It says, 'Investors'
5 Corrected Supplemental Document --'

6 MR. APPLETON: Yes. What --

7 PRESIDENT SIMMA: '-- from Canada'.

8 MR. APPLETON: Yes. But that's --

9 PRESIDENT SIMMA: "From" means that
10 it's --

11 MR. APPLETON: That means the documents
12 we've received from Canada, and this is just the
13 documents that came this week, the 138 documents.

14 PRESIDENT SIMMA: But there wasn't a
15 listing from Canada that you improved?

16 MR. APPLETON: Well, the other
17 document, the other one that you have is what we
18 received from Canada.

19 PRESIDENT SIMMA: This? (Indicating).

20 MR. APPLETON: Yes. And again, we
21 reiterate, that is significantly better than what

22 we received before.

23 Before, we couldn't differentiate where
24 one document started and where one began because
25 the physical production didn't do that. It just

00231

1 listed them. And we brought the boxes so you could
2 see for yourself. We had never seen anything like
3 it. That's what caused us to write a letter out of
4 such concern.

5 PRESIDENT SIMMA: Would you --
6 Mr. Little, would you mind just explaining to me
7 what this is? I have never seen this before. What
8 does it mean? What does it...? What is it meant
9 to -- because what I see is, there is one page
10 after the other and all the pages get a count.

11 Oh. And this relates to the, "006"
12 would be No. 6?

13 MR. LITTLE: Document Request 6 --

14 PRESIDENT SIMMA: Ah. Right.

15 MR. LITTLE: -- 4, Document Request 7.

16 Now, this one is probably -- it's
17 simpler, obviously, because the subsequent
18 production was obviously dealing with less Document
19 Requests. But when you got into the first
20 production that we did in August, I mean, some of
21 these documents were responsive to up to five
22 Requests.

23 PRESIDENT SIMMA: Okay.

24 MR. LITTLE: If I may, one other point.
25 This is very easy to prepare when you're producing

00232

1 44 documents. When you're producing 6,000
2 documents in the span of 30 days, it's impossible.
3 So if there is a request for an index and an Order
4 in that regard, then timing has to be taken into
5 account, as well.

6 MR. APPLETON: Though I do point out
7 that, (a), it's not impossible; (2), clients and
8 counsel do it all the time; (3) for example, in the
9 UPS case, Canada did it, and in other cases. It's
10 just a question of being organized and putting
11 things together, but it's not an unusual type of
12 thing.

13 What was unusual was to receive
14 production without having documents separated and
15 to add, make it worse, by taking them and
16 double-siding the document production so you
17 couldn't tell where documents started and ended.

18 And then without an index, it is just--

19 PRESIDENT SIMMA: All right.

20 MR. APPLETON: --not comprehensible.

21 PRESIDENT SIMMA: So all of this
22 started when you said that your expert was not able
23 to really read this stuff.

24 MR. APPLETON: He got confused with
25 respect to which--

00233

1 PRESIDENT SIMMA: Yes.

2 MR. APPLETON: --piece. And then the
3 question was --

4 PRESIDENT SIMMA: Maybe, could we
5 return to No. 2--

6 MR. APPLETON: Yes.

7 PRESIDENT SIMMA: --because this is,
8 this is something that you criticize. You
9 explained what your situation was and I think there
10 isn't much that we are..., we can do now, right. I
11 mean now, there is an index.

12 MR. LITTLE: Yeah. I can explain it.
13 I could do it myself. We provided an index that
14 has the listing of all the Document Requests to
15 which our 18,000 pages are responsive to.

16 That index that a list of the Document
17 Request numbers to which a document is responsive
18 to. All Mr. Estrin had to do was go down that
19 column and see "Document Request 2", look at the
20 Bates page ranges and pull those documents. It
21 didn't take much to do.

22 And I note we don't have before us the
23 index showing Document Request 2 having been set
24 out. That might have assisted.

25 PRESIDENT SIMMA: Okay. So can we

00234

1 return to the, to -- I think it's, we are still in

2 No. 2.

3 MR. APPLETON: Yes. I believe, though,

4 Mr. Estrin was not commenting on No. 2. I thought
5 he was commenting on Number..., on the one before
6 that.

7 MS. MAHER: No.

8 MR. APPLETON: Oh. It was No. 2? All
9 right.

10 Now, do we have anything else to say
11 about No. 2? Well, if you have something to
12 comment, you might as well say it.

13 MR. ESTRIN: What I did see was some
14 type of an index.

15 PRESIDENT SIMMA: Can we -- I think
16 this is... In a sense, it's over, right?

17 MR. ESTRIN: And all I'm saying is, the
18 documents that I did have a chance to be able to
19 read in the index struck me as documents that had
20 been previously made available publicly and were
21 not responsive to Request No. 2. All right.

22 But I can't say that I have gone
23 through the 3,000 documents or 6,000 or whatever
24 they are.

25 MR. APPLETON: 3,000.

00235

1 PRESIDENT SIMMA: Okay. But there was
2 no time limit -- let's say time deadline breach to
3 anything. I think we don't have to discuss this
4 further. I mean, we note that and it has been duly
5 written about in the exchanges in the summer and so
6 I think we should move on.

7 MR. APPLETON: Correct. And we just
8 wanted to...

9 PRESIDENT SIMMA: Yeah, yeah.

10 MR. APPLETON: Right.

11 PRESIDENT SIMMA: So you want to go to
12 where now?

13 MR. APPLETON: No. I believe that's
14 it.

15 PRESIDENT SIMMA: With regard to...?
16 You mean with regard to...?

17 MR. APPLETON: I believe that that was
18 the last number that was... Yes. And since you
19 didn't want to discuss our Request No. 1 about the
20 "travaux preparatoires" --

21 --- (Court reporter appeals.)

22 MR. APPLETON: Oh. "Travaux" - I'll
23 write it for you - "preparatoires", umm, there's -
24 which is fine - it means that I believe that we
25 have canvassed all of the outstanding questions

00236

1 today.

2 PRESIDENT SIMMA: Boy. That is
3 surprisingly good news. Let's see whether my
4 colleagues have anything to...

5 PROFESSOR SCHWARTZ: How long does it
6 typically take to get the transcript?

7 MR. APPLETON: How -- what did we
8 order?

9 THE COURT REPORTER: Regular.

10 MR. APPLETON: Regular. We --

11 THE COURT REPORTER: Ten business days.

12 MR. APPLETON: We should have ordered a
13 faster service. Can we get a faster service?

14 (Laughter)

15 PROFESSOR SCHWARTZ: I'll just tell you
16 why I'm asking. I'll just say this very briefly,
17 just to try and move things in a more positive note
18 as we get here.

19 If we roll back the tape about an hour,
20 there was a series of exchanges about what Canada
21 was looking for from the Investor where I thought,
22 actually, the parties were pretty close to an
23 agreement and I am just anxious that that not be
24 lost sight of. And the exchange was basically
25 Mr. Little saying that, 'We're looking for

00237

1 expectations,' and Professor Foster (sic) said,
2 'Yeah. We're not talking about impugning your
3 behaviour, but if you..., you're saying you had the
4 rug pulled out from underneath you, but in fact,
5 you understood all along that community values were
6 relevant.' Then that would be immaterial.

7 I think you didn't have a problem with
8 that, Mr. Appleton. So I think if you go to that
9 part of the discussion, you're actually pretty
10 close to being in agreement on a way to narrow
11 those requests that is satisfactory all round.

12 Just hoping we wouldn't lose sight of that at the
13 end of the meeting; that's all.

14 MR. APPLETON: My recollection and my
15 notes on that was that there was going to be a
16 revised document; that 35 was going to stay, I
17 believe 29 was going to be withdrawn, then there
18 were three around of them around 43 - we have the
19 numbers here on the side. I just put those notes
20 away.

21 MR. LITTLE: We were going to try to
22 narrow the four of them into one with some very
23 specific criteria for the one. That's what Canada
24 was going to do.

25 MR. APPLETON: Yes. 42--

00238

1 MR. LITTLE: And it was 42--

2 MR. APPLETON: --43...

3 MR. LITTLE: --43, 29 and 35 were, we
4 were going to narrow that into one.

5 PRESIDENT SIMMA: And will the, sorry,
6 the entries that we now have - you know, what I
7 called the "formulas" that are in the objection
8 part be specified or are we to rely on the
9 transcript of today? You know what I mean?

10 MR. APPLETON: Well, I guess since we
11 don't know what the new Request will look like,
12 we'll have to write something from that.

13 But what's very clear for everyone, I'm
14 sure, is that the Request, I'm sure, will be as
15 clear as possible in light of what's there. And I
16 think if there are objections, they will not pay
17 attention to the IBA Rule wording and perhaps might
18 give some other wording that might assist, if
19 there's still any problem.

20 I am hoping that there should be no
21 problem. Depends how broad or narrow the revised
22 Request is.

23 PRESIDENT SIMMA: But I think both
24 sides are now, let's say, convinced that we have
25 really talked about all the, let's say the

00239

1 arguments made in the, both in the Requests and the
2 objections that the Tribunal needs to know more

3 about because you said, 'I think we are through.'

4 That's how I understand.

5 MR. APPLETON: Yes.

6 PRESIDENT SIMMA: Great. So what
7 remains to be done?

8 MR. LITTLE: Procedure.

9 MR. APPLETON: Yeah.

10 PRESIDENT SIMMA: Procedure?

11 MR. LITTLE: Procedure and timetable.

12 PRESIDENT SIMMA: Timetable?

13 And there, I think we had a specific
14 proposal by Canada which I think, is that towards
15 the end of your - what is it - additional brief or
16 13 October brief. Let's see whether this is --

17 --- (Court reporter appeals.)

18 MR. APPLETON: ...additional proposal
19 of the 13th of October.

20 PRESIDENT SIMMA: Okay. So this is --

21 3(2). 3 para 2 -- oh. That's our internal...

22 Page 16?

23 SPEAKER: Paragraph 60.

24 PRESIDENT SIMMA: Paragraph 60 which
25 would be on page 18 into 19.

00240

1 SPEAKER: That's correct.

2 PRESIDENT SIMMA: And since we decided
3 that we decided that we would do it - and I think
4 you agreed that this was a reasonable way of doing
5 it - in two steps with regard to relevancy first
6 and then see what remains to be dealt with some --

7 MR. SPELLISCY: That's correct.

8 PRESIDENT SIMMA: -- some privilege.

9 Let us -- if, if you could have a look at this
10 timetable and see whether you find it agreeable or
11 if you want --

12 MR. SPELLISCY: Could I raise one
13 question of clarification on this? The production
14 of all documents pursuant to the Tribunal's Date
15 "A" decision, Canada has originally proposed 30
16 days.

17 Obviously, if -- that will depend
18 somewhat on the actual decision on what documents
19 are relevant and we may have to revisit that. I

20 mean, if we're ordered to produce documents from 67
21 Environmental Assessments, it's going to take us a
22 lot longer than 30 days to do so.

23 PRESIDENT SIMMA: Yes. Right. So
24 stage number or let's say the bracket or whatever,
25 Production of -- No. 3, 'Production of all

00241

1 documents,' the 30 days would depend a bit on
2 what...

3 MR. SPELLISCY: ...we are ordered to
4 produce.

5 PRESIDENT SIMMA: ...what the -- yes.

6 --- (Court reporter appeals.)

7 MR. SPELLISCY: The 30 days would
8 depend on what we are ordered to produce.

9 PROFESSOR SCHWARTZ: Mr. Chairman?

10 PRESIDENT SIMMA: Yes.

11 PROFESSOR SCHWARTZ: There's an
12 intermediate step here, I think, which is before
13 Date "A", parties submit their revised Redfern
14 Schedules, right, so we need a date for that.

15 MR. APPLETON: Let's go back as to
16 whether... There's two steps; that's the problem.
17 The first step is that there are going to be some
18 revised Document Requests. I would suggest that we
19 do those fairly soon.

20 Do you think we could do that in seven
21 days--

22 MR. SPELLISCY: Seven days?

23 MR. APPLETON: --from today?

24 PRESIDENT SIMMA: So that would be, we
25 would kind of put this in between, right, the--

00242

1 MR. SPELLISCY: Insert it in case
2 management.

3 PRESIDENT SIMMA: --case management,
4 and then there would be, did you say seven days?

5 MR. SPELLISCY: If they are agreeable
6 to seven days, we are agreeable to seven days.

7 PROFESSOR SCHWARTZ: Is that seven
8 calendar days or business days?

9 PRESIDENT SIMMA: Ah. Yeah. We have
10 that problem all the time.

11 MR. SPELLISCY: One week from today.

12 MR. APPLETON: I'm going to say a week
13 today. Today is Friday; next Friday.

14 PRESIDENT SIMMA: Okay. So let's just
15 -- I think because we had this before, so we agree
16 that in all future, it would be calendar days and
17 not exclude Saturdays and Sundays?

18 MR. APPLETON: Correct. The UNCITRAL
19 Rules normally say if it falls on a Saturday or
20 Sunday, you take it to the next business day. If
21 you have a statutory holiday, you take it to the
22 next day -- the next business day. And we can
23 argue about holidays at a later process, if you'd
24 like.

25 MR. PULKOWSKI: I think there was

00243

1 actually communication from the Tribunal that
2 clarified--

3 MR. APPLETON: Yes. I thought so.

4 MR. PULKOWSKI: --Canada's holidays in
5 Ontario, Canada were decisive.

6 MR. APPLETON: Right. So --

7 PRESIDENT SIMMA: Yeah. The
8 Thanksgiving week?

9 --- (Discussion off the record.)

10 PRESIDENT SIMMA: All right.

11 MR. APPLETON: So... But I would
12 suggest that seven days would be right to put the
13 revised Requests in.

14 MR. SPELLISCY: I think the next step
15 would be, then, when are the revised Objections to
16 those Requests?

17 PRESIDENT SIMMA: Objections.

18 MR. APPLETON: Well, it's going to be a
19 bit... I'm just trying -- I want to short-circuit
20 this because it should be very quick.

21 So do you want objections and then
22 another Redfern? Is that particularly helpful?
23 What is it that you would like? It's really a
24 question of what best --

25 PRESIDENT SIMMA: You're talking about

00244

1 the form? The form?

2 MR. APPLETON: Yes. Like, what do you
3 want? Now we have been through all this, what's
4 best for you because I'd like -- what I would like
5 is to have everybody agree and start producing.

6 PRESIDENT SIMMA: Yeah, yeah.

7 MR. APPLETON: But assuming that
8 there's not going to be some production, and we
9 know there's going to be some issues about
10 litigation privilege. And by that point, you are
11 going to have a wonderful Order with respect to
12 that. And there's going to be some issues about
13 perhaps cabinet privilege - whatever we want to
14 call it - and by that time, you'll have another
15 wonderful Order about what the process would look
16 like or something else. So we are not going to
17 worry about that. I assume that that's going to
18 happen at some point.

19 What would be best? And my view is,
20 we'll give what you is best.

21 PRESIDENT SIMMA: What does that mean?

22 MR. APPLETON: Well, what do you want?
23 That's what I'm asking.

24 PRESIDENT SIMMA: All right. Okay. So
25 you're back to us.

00245

1 ----(Discussion off the record.)

2 PRESIDENT SIMMA: I think Redfern.

3 MR. APPLETON: You want Redfern?

4 PRESIDENT SIMMA: We prefer Redfern.

5 MR. APPLETON: Fine. Then you get
6 Redfern.

7 PRESIDENT SIMMA: Because by now, I see
8 Redfern Schedules in my dreams, so... (Laughter)
9 Okay. Bad dreams.

10 PROFESSOR McRAE: How many days?

11 MR. APPLETON: I would say that
12 Objections should be within three days because they
13 should know them. Well, I guess it's -- sorry.
14 Let's say the Wednesday. Five days would include
15 the weekend. Sorry. All right. So we'll -- the
16 Objections will be on the Wednesday and how about
17 the Redfern the following...?

18 PRESIDENT SIMMA: So Wednesday would be

19 the 4th, November?

20 MR. APPLETON: Yes. My staff will tell
21 me if I'm saying -- we have a hearing that's
22 following, so I just have to make sure that we
23 don't interrupt the hearing schedule.

24 PROFESSOR SCHWARTZ: I am directed by
25 high authority to ask this question. Are we

00246

1 talking about one Redfern Schedule or each are
2 going to submit one? Joint one or, or --

3 MR. APPLETON: Well, it seems to be a
4 problem getting a joint anything.

5 PROFESSOR SCHWARTZ: Okay.

6 MR. APPLETON: My recommendation is
7 each will file their own because we've tried that.

8 It didn't seem to go...

9 PROFESSOR SCHWARTZ: Okay.

10 MR. APPLETON: Sorry.

11 PRESIDENT SIMMA: Okay.

12 MR. APPLETON: When is the date, just

13 to make sure -- I don't want to put it in the
14 middle of the hearing... I'm sorry. The person

15 with my schedule has walked out--

16 PRESIDENT SIMMA: Yeah, yeah.

17 MR. APPLETON: --so...

18 PRESIDENT SIMMA: Oh.

19 MR. APPLETON: A week today is 23. Now

20 we're saying 28 and a week from that is going to be
21 seven; the 4th. What's wrong with that?

22 Okay. So could I give you some
23 specific dates?

24 PRESIDENT SIMMA: Yeah, yeah.

25 MR. APPLETON: Okay. I would suggest

00247

1 that the revised Requests are due on Friday,
2 October 23rd; that revised Objections or refusals,
3 whatever you want to call them, will be due on
4 Wednesday, October the 28th.

5 PRESIDENT SIMMA: Okay.

6 MR. APPLETON: And that seven days
7 after that, which will be Wednesday, November the
8 4th, that we would be in a position to file a third
9 version Redfern, whatever they want to call it; and

10 then we would have to determine what time you would
11 like to have document production.

12 It would seem to me, the document
13 production would be key to the date that the
14 Request was made because if it's not refused, then
15 you would produce from that. And I would say a
16 working title of 30 days is fine.

17 If you would like to do 45, we can do
18 that; whatever you want. The real issue there is
19 each side should be going back to their own clients
20 to start segregating documents that could be
21 potentially produced at this point, so that --

22 PROFESSOR McRAE: Could we just
23 distinguish for a moment? We've got the Redfern
24 and then you are suggesting that where it's
25 agreed--

00248

1 MR. APPLETON: Yes.

2 PROFESSOR McRAE: --a time be set?

3 MR. APPLETON: Yes.

4 PROFESSOR McRAE: Then we have the
5 Tribunal making the decision on the non-agreed, and
6 we set a different date for those. Is that --

7 MR. APPLETON: Yes, because you will
8 need more time for that. But generally, we would
9 make that a shorter period of time. So I'd say
10 from the first day, we'd make it 45 days; perhaps
11 from the second point, make it 30 days because each
12 side knows that there's a risk they're going to
13 have to produce. They should be contacting people
14 to get whatever materials that could be relevant
15 and start collecting.

16 PRESIDENT SIMMA: Canada has a problem
17 with that?

18 MR. SPELLISCY: Yeah. We're a little
19 bit -- I'm a little bit confused at the schedule in
20 terms of what it is. We can clarify that.

21 But again, considering our objections
22 on relevance and burden, I think that that second
23 period that Mr. Appleton is talking about, from the
24 date of the Tribunal's decision; that's the one
25 that we need in the square brackets because it's

00249

1 really going to depend upon how much we're ordered
2 to produce and what that Tribunal's Order comes
3 out.

4 PRESIDENT SIMMA: I mean, could we
5 leave that or could you leave that to the Tribunal?

6 MR. SPELLISCY: I think that's
7 appropriate.

8 PRESIDENT SIMMA: It's just, we would
9 say it would in no case be less than, well, 30
10 days, right? But in light of what we are going to
11 see and in light of the difficulties that we might
12 be able to assess, we would then set a date which
13 might be --

14 MR. APPLETON: Sure.

15 PRESIDENT SIMMA: -- go beyond the 30
16 days. Would that be --

17 MR. APPLETON: Yes. Let's do
18 whatever --

19 PRESIDENT SIMMA: And that wouldn't
20 cost us too much time; just have a phone conference
21 and then... Don't you think that would be a
22 feasible way?

23 PROFESSOR McRAE: Yeah. I think so
24 because the first question, when we get the
25 Redferns, we'll discover that there's agreement,

00250

1 hopefully, on all of them. (Laughter) And if
2 there is agreement on all of them, then 30 days
3 from that point.

4 Now, the ones--

5 PRESIDENT SIMMA: Right.

6 PRESIDENT McRAE: --that we have to
7 decide, we'll set -- we will bracket that and we
8 will set the time from the date we decide, and then
9 that allows us to take into account whether we're
10 deciding in a way that will maximize or minimize
11 the document production.

12 PRESIDENT SIMMA: So the non-agreed--

13 PROFESSOR McRAE: The non-agreed.

14 PRESIDENT SIMMA: --issues.

15 PROFESSOR McRAE: Yeah.

16 PRESIDENT SIMMA: But they are all
17 going to be in one Redfern or...?

18 MR. APPLETON: I think we'll each
19 have... I'll tell you what. We'll each do a
20 Redfern, but we will undertake to take both
21 Redferns and put them together, if you like.

22 I get the impression you would like one
23 document.

24 PRESIDENT SIMMA: Yes.

25 MR. APPLETON: Yes. Just, we haven't

00251

1 been able to agree in the past, on being able to
2 get one document and there are some deadlines. So
3 why don't we each file what we need to with the
4 secretary and then we will agree to work with the
5 secretary to create a joint document. And Canada
6 will be able to confirm that that is proper in form
7 and in content, and then everybody can have that
8 within a day?

9 MR. SPELLISCY: I think that is, if
10 we're going to leave it to the PCA, really, to join
11 these two Redferns together, we're, we're sort of
12 fine doing that.

13 PRESIDENT SIMMA: In...

14 MR. SPELLISCY: If it's really just a
15 matter of pasting one after the other, so that you
16 have, in fact, one document, if the secretary -- if
17 the PCA is acceptable and amenable to doing that.

18 PRESIDENT SIMMA: That means -- but if
19 I understand you correctly, would say, let Dirk,
20 let the PCA do this and we don't need the input at
21 this, at this stage of Mr. Appleton's team?

22 MR. SPELLISCY: I think that if it's
23 really just a matter of putting them together -- we
24 can, of course, work with, with Dirk and the PCA to
25 make sure it's done right, but it seems to be an

00252

1 administrative task.

2 MR. APPLETON: So, Dirk, you must tell
3 us, then, what form because the parties use two
4 different forms.

5 MR. PULKOWSKI: I realized there was
6 some--

7 MR. APPLETON: Yes.

8 MR. PULKOWSKI: --slight variation,

9 artistic variation.

10 MR. APPLETON: Well, it wasn't
11 artistic. There's an extra column in Canada's.

12 We just followed what was in the
13 Procedural Order form, but Canada has put an extra
14 column in it, so I leave it to you --

15 MR. PULKOWSKI: I think, on instruction
16 of the President, I will be happy to work with the
17 parties--

18 MR. APPLETON: Fine.

19 MR. PULKOWSKI: --on these technical
20 issues--

21 MR. APPLETON: Very good.

22 MR. PULKOWSKI: --and also get
23 agreement, basically, that each party's Objections
24 are cut and pasted, one to one, into the respective
25 column and no further changes have been made. I'm

00253

1 happy to undertake that, if that's comfortable for
2 the parties--

3 MR. APPLETON: We are --

4 MR. PULKOWSKI: --and that's helpful.

5 MR. APPLETON: We are thankful to the
6 good offices of the Permanent Court of Arbitration
7 yet again.

8 PRESIDENT SIMMA: Okay.

9 MR. PULKOWSKI: You're very welcome.

10 MR. SPELLISCY: Now, can I go back just
11 a little bit to a question on the schedule because
12 I didn't quite follow what was being proposed by
13 Mr. Appleton?

14 We have revised Requests within seven
15 days, Objections within five days, and then we have
16 seven days to do a Redfern or is that the -- or is
17 there -- are you proposing a time for replies, as
18 in the previous one, or are we cutting that stage
19 out? And if --

20 MR. APPLETON: Just go to the Redfern.

21 PRESIDENT SIMMA: It's just to
22 finalize the...

23 MR. SPELLISCY: So why the -- why do we
24 need seven days to prepare a Redfern once we've got
25 the Objections down?

00254

1 MR. APPLETON: Because I am hopeful
2 that we will all think carefully and give very
3 substantial answers, rather than formulaic answers
4 about what fits into the IBA Rules.

5 We're going to have done some review,
6 looked at the documents and said, 'This is very
7 good, but unfortunately we didn't do it because, in
8 fact, there are no documents,' or, 'We have no
9 problem, but you should know there are no
10 documents,' or, 'This is fine, but this is no
11 longer within our control'; something that would be
12 a little bit more substantive than what we've
13 produced in the past because the Tribunal has made
14 it pretty clear that they would expect it at this
15 point.

16 But if you don't want to do that, I
17 leave it to the Tribunal Members to...

18 MR. SPELLISCY: I am confused. That
19 would be the Objections, would it not?

20 PROFESSOR McRAE: No. Reply to the
21 Objections.

22 MR. SPELLISCY: Oh. There is going to
23 be a reply.

24 MR. APPLETON: This is the Redfern.

25 PRESIDENT SIMMA: So can we just leave

00255

1 it with a week? I mean, I -- we appreciate the
2 work experience that comes, that lies behind your
3 statement, but I think in case of what Mr. Appleton
4 said, I think a week is okay, right? I mean...

5 MR. SPELLISCY: So the Redfern with the
6 reply is, one week from the 28th--

7 PRESIDENT SIMMA: Right. Correct.

8 MR. SPELLISCY: --we will send a
9 Redfern with the reply column filled in to the PCA.

10 PRESIDENT SIMMA: Yes. And then we
11 will, let's say, bifurcate in a sense. The
12 non-agreed stuff will have a longer...

13 PROFESSOR McRAE: Then from that date,
14 presumably what do you need for production of what
15 is agreed; 30 days?

16 MR. APPLETON: To be honest, this is

17 not what you will be expecting me to say. I think
18 we should wait and let each side say what they
19 think they are going to require because it may very
20 well be that Canada has to produce a lot and that
21 Canada may say, 'We're going to need some more time
22 to produce it.'

23 And if they make a reasonable proposal,
24 we'll be inclined to agree with it. And if they
25 make a proposal that's completely unreasonable that

00256

1 will delay the process unfairly or unduly, then you
2 will hear from us.

3 PRESIDENT SIMMA: So that means you
4 could come to us on the basis of an agreement and
5 say, 'We agreed that we would like to have 30 days
6 for that.' Is that what you're saying?

7 MR. APPLETON: Yeah. Maybe -- I would
8 say the norm could be 30, but if there's a
9 compelling reason why, it might take 60 days
10 because they have to produce 50 files with respect
11 to Document Request No. 4 and they say, 'It's going
12 to take a long time; that maybe they might need 45
13 or 60 days.'

14 If it's a question that is, it's
15 something that's already available -- see, my
16 problem is, is that I believe that these Requests
17 had basically been made in July. They've had lots
18 of time to find it. But if Canada says it's
19 complicated, I'm happy to take what they're saying
20 at face value and give enough time to be reasonable
21 and sensible--

22 PRESIDENT SIMMA: Right.

23 MR. APPLETON: --to be able to do it.

24 PRESIDENT SIMMA: So we would not get,
25 let's say, letters or emails, saying that you

00257

1 consider that much too long and then we will have
2 to decide again, right? You say --

3 MR. APPLETON: Well--

4 PRESIDENT SIMMA: I understood you were
5 saying--

6 MR. APPLETON: --if it was reasonable.

7 PRESIDENT SIMMA: --you would more or

8 less agree to everything that you would propose as
9 long as it is reasonable. And I think the term
10 "reasonableness" has always been particularly
11 clear. (Laughter)

12 PROFESSOR McRAE: Common lawyers use it
13 all the time.

14 Aren't we creating --

15 PROFESSOR SCHWARTZ: Are we being --

16 PRESIDENT McRAE: Oh. Sorry, Bryan.

17 PROFESSOR SCHWARTZ: I was just going

18 to -- are we being asked at this stage to make any,

19 give any direction, as a Panel, on this indexing

20 and format issues?

21 MR. APPLETON: I'm asking that you make

22 all future Orders subject to that because I believe

23 that it makes it very difficult for the parties to

24 function without it. And it's a standard type of

25 thing, but since it was not ordered in the past, I

00258

1 am now suggesting that it become part of your

2 ongoing Order.

3 PRESIDENT SIMMA: So you expect all

4 these that we are now agreeing on, all the dates -

5 28 October, 4 November - to, to get back to you in

6 the form of an Order?

7 MR. APPLETON: I think that would

8 normally be the way that we would do this. We can

9 confirm it on the record now, if you like. That's

10 another way. Mark Hunter likes to do that. He

11 doesn't like to type an Order; he likes to dictate

12 it into the record. You could do that.

13 PRESIDENT SIMMA: I think, could we

14 regard what we had -- I think there seems to be

15 agreement on 16 - or seven days after today. That

16 would mean that the, let's say, revised Redfern

17 Schedule would be done until the 23rd, October

18 23rd. Then the Objections on the, would have to be

19 exchanged or made until October 28. And the

20 replies to the Objections would find their way into

21 a Redfern Schedule that would reach the PCA on

22 November 4.

23 MR. APPLETON: Correct.

24 PRESIDENT SIMMA: It might not be a

25 beautiful dictation, but I think that will be in
00259

1 the record and could be regarded as an Order
2 because I think -- I'm saying this because I'll
3 really have a problem of organizing, even staying
4 in touch with Dirk during the next days. And since
5 we only have seven days after tonight, I am
6 afraid -- I mean, you could get a beautiful Order,
7 but it might reach you...

8 MR. APPLETON: I'm sure this will be
9 fine on the record.

10 PRESIDENT SIMMA: Would you -- would
11 that be sufficient for you?

12 MR. SPELLISCY: That's sufficient for
13 us.

14 PRESIDENT SIMMA: Okay. And then --
15 okay.

16 PROFESSOR McRAE: The question that now
17 is not clear to me yet is Mr. Appleton's proposal.

18 With those replies also comes a
19 proposal for the amount of time needed to produce.
20 And would it be simpler to say 30 days, but if you
21 need longer, you can request it?

22 MR. APPLETON: Correct. I think that's
23 a much better idea.

24 PROFESSOR SCHWARTZ: Yes.

25 PRESIDENT SIMMA: So that is part of

00260

1 the dictation, right. The time limit for the
2 production would be 30 days, except in cases in
3 which a longer period of time would be requested.

4 MR. APPLETON: And then the only part
5 that we would ask you to consider is whether or not
6 you are going to make it a requirement that for
7 future production, an index--

8 PRESIDENT SIMMA: Oh. The --

9 MR. APPLETON: --be produced with the
10 production. You -- we'll leave that to you, if you
11 would like to reserve on it or...

12 MR. LITTLE: We have serious concerns
13 about the index, or maybe it's more about the form
14 of the index because when we are talking about
15 6,000 documents, it's a huge undertaking,

16 especially given the fact that, as counsel, we have
17 to look at the documents ourselves.

18 I'm not really sure the purpose that
19 the index serves. If you can somehow label the
20 documents as to what Request they're responsive to.

21 PRESIDENT SIMMA: You mean, in --

22 MR. LITTLE: You have to go through
23 every the document in any event.

24 PRESIDENT SIMMA: In the way it was, it
25 has happened here?

00261

1 MR. LITTLE: No. I'm talking about
2 having a footer on the document, which is what
3 Canada also did, showing the Document Request to
4 which the document itself is responsive; not an
5 index. Having it on --

6 PRESIDENT SIMMA: Yeah. But that's
7 with you find here, right?

8 MR. LITTLE: Oh. That index, yes. We
9 have no issue with that. It's the index that we
10 saw as a sample, the "To", "From", and all the rest
11 of the descriptions; it would be a massive
12 undertaking to do that, given the volume of
13 documents that we have produced thus far and that
14 we anticipate will be produced.

15 MR. APPLETON: But that's the normal
16 type of index. You would have to have a listing of
17 every document you have anyways, so you know what
18 you're producing.

19 MR. LITTLE: It's very easy to say when
20 you've produced 44 documents, but --

21 MR. APPLETON: Excuse me, Mr. Little.
22 We have produced hundreds of thousands of documents
23 in other cases and, with all due respect, we know
24 exactly what it takes to deal with this. And you
25 see our small staff here that are quite capable of

00262

1 dealing with it and have done it. And so --

2 PRESIDENT SIMMA: I think the problem I
3 see in the present case -- sorry.

4 MR. APPLETON: No. I just - sorry -
5 just, we find that to be very objectionable, that,
6 you know, it's basically the obligation of counsel

7 to not only review the document, provide it with an
8 index, so then we can very easily be able to
9 address what's there.

10 And then you know whether the document
11 is, in fact, correct, is not correct, is responsive
12 to what's there. You can deal with it.

13 There's all types of issues that
14 otherwise arise. It is not a subjective coding;
15 it's an objective coding. There are lots of
16 companies that will do it for you, if you are not
17 prepared to do it yourself in-house. There are
18 lots of ways of dealing with it. I do not
19 understand what is so difficult about it.

20 This is the only time we have had this
21 problem with the Government of Canada. We have
22 never had this problem with many other countries,
23 including a number of developing companies.

24 PRESIDENT SIMMA: Okay.

25 MR. APPLETON: They can all get it.

00263

1 PRESIDENT SIMMA: So you're taking the
2 view that --

3 MR. APPLETON: That's not sufficient.

4 PRESIDENT SIMMA: -- that this is not
5 sufficient.

6 MR. APPLETON: Correct. I'm sorry.
7 It's just very difficult. It impairs of the amount
8 of time necessary to be able to review, to be able
9 to go through the documents, to identify whether
10 the production is in fact correct, to deal with the
11 issue of duplication.

12 To receive a document production with
13 almost 50 per cent of the documents to be
14 duplicates is incredibly disruptive and, in our
15 view, is really quite improper. But without the
16 description, it's virtually impossible to be able
17 to deal with that.

18 PRESIDENT SIMMA: All right, Mr.
19 Appleton. You have made your point.

20 MR. APPLETON: Thank you.

21 MR. LITTLE: I guess if we're going
22 down the road of an index, we need to know how many
23 documents are being produced. And then what Canada

24 requests is that we be able to make representation
25 on how long we think that index is going to take.

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1 PRESIDENT SIMMA: That is, you would --
2 we would get a Redfern and you would add a letter,
3 saying that...?

4 MR. LITTLE: Well, I really think that
5 this becomes... It only becomes operative after we
6 have got a production ready to go or we at least
7 know what it is that we have to produce. It's
8 difficult to say, I think, at the Redfern stage
9 because we would have an outstanding objection at
10 that point.

11 PRESIDENT SIMMA: And at that point, we
12 would simply have to make a decision. I think the
13 arrangement that could possibly be made, like you
14 have made, Mr. Appleton. Just... So, or -- so do
15 we need to...?

16 PROFESSOR McRAE: Well, we need to do
17 one thing, though, and that is if we're going to
18 say there's a 30-day production period on agreed
19 matters, we want to know what you're doing with
20 those documents.

21 Now, maybe... I guess this is
22 speculation, but I suspect that to the extent that
23 there's agreement, there will be agreement on
24 issues on which there are a narrow range of
25 documents being produced. So maybe the indexing

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1 will not be such a problem for that 30, first
2 30-day period.

3 The real issue will arise if, as a
4 result of our Order, the number of documents are
5 substantial. Then the indexing issue becomes a
6 much more complicated matter.

7 So maybe we can leave it until our
8 decision on what should be produced and we will
9 decide then on indexing.

10 And if, when you agree at the Redfern
11 Schedule stage to produce and you have a problem
12 with the amount of time it would take to produce
13 the index or whatever index, then you can request
14 an extension beyond the 30-day period. Then that

15 way, that period can be resolved.

16 PRESIDENT SIMMA: I don't have a clear
17 view as to whether there will be a correlation
18 between, let's say, the agreement on the documents
19 and the, the number of the documents. That, I am
20 not able to see at the moment. So, you know what I
21 mean?

22 PROFESSOR McRAE: Right. That was my
23 speculation.

24 PRESIDENT SIMMA: Oh. That's
25 speculation. So let's, let's phrase it in the more

00266

1 general way that you put it, so that we will, we
2 will get indications from the parties as to the
3 time frame they consider necessary for the
4 production of the documents, full stop, and not
5 really whether agreed or controversial.

6 --- (Court reporter appeals.)

7 PRESIDENT SIMMA: ...controversial.

8 Sorry.

9 PROFESSOR McRAE: We won't know that
10 until we --

11 PRESIDENT SIMMA: We won't know that.

12 PROFESSOR McRAE: Yeah, until we
13 decide, how controversial it is.

14 PRESIDENT SIMMA: Okay. So we'll just
15 wait and see what we get.

16 PROFESSOR McRAE: (Nodding head).

17 PRESIDENT SIMMA: Does that sound
18 agreeable?

19 MR. APPLETON: Yes.

20 MR. LITTLE: It sounds reasonable at
21 this point.

22 PRESIDENT SIMMA: Is there any other
23 issue that we need to take care of?

24 MR. APPLETON: Well, you had discussed
25 the issue of the privilege log as a concept. Did

00267

1 you want to flag what you meant by that or --

2 PRESIDENT SIMMA: Sorry?

3 MR. APPLETON: The privilege log--

4 PRESIDENT SIMMA: Oh. The privilege
5 log.

6 MR. APPLETON: --as a concept. Did you
7 want to...? Do you have any views as to what will
8 be in a privilege log?

9 I mean, for example, we have already
10 produced a privilege log. Is that the type of form
11 that you would be looking for or shall we just
12 leave it to whatever you may want to Order?

13 I am just thinking that if you are
14 going to make an Order, you might want to think
15 about what you want, so there's no
16 misunderstanding. We want to have a minimum of
17 misunderstanding, a maximum of efficiency and
18 production.

19 PROFESSOR SCHWARTZ: Is there a format
20 like the Redfern Schedule that has typically been
21 used in the last three or four NAFTA cases for
22 privilege logs?

23 MR. APPLETON: No.

24 PROFESSOR SCHWARTZ: No.

25 MR. APPLETON: But what we've done is

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1 we filed a privilege log that we think is a basic
2 common privilege log used generally. Not every
3 NAFTA case requires with a privilege log. We're
4 saying there are some issues that deal with the
5 matters of privilege. It's done often on a "sui
6 generis" basis. Sometimes they just discuss it and
7 they say, 'Fine. We agree, that's privileged.' So
8 it's been handled a variety of different ways.

9 PRESIDENT SIMMA: So you say you have
10 already provided one.

11 MR. APPLETON: Oh, yes. We have
12 provided one with our production -- sorry -- with
13 our...

14 SPEAKER: September 18.

15 MR. APPLETON: Yes. Thank you.

16 --- (Court reporter appeals.)

17 MR. APPLETON: Oh, sorry. With our
18 September, is it 13th?

19 SPEAKER: 18th or 13th.

20 MR. APPLETON: With our September
21 filing.

22 PROFESSOR SCHWARTZ: But the case law

23 has established the basics, hasn't it? You have to
24 identify each individual document. You have to
25 give the..., state the nature and the kind of

00269

1 privilege and explain why it's justified on the
2 facts in the document, right? That's not really
3 controversial, is it?

4 MR. SPELLISCY: I actually don't think
5 that it's controversial. And when we look at
6 Mr. Appleton's privilege log, we don't think that
7 we have much of an issue with that privilege log.

8 I do note that the privilege log is a
9 little bit different than what he requests in his
10 submission. It doesn't include all the same
11 information, but if that's the sort of privilege
12 log we are talking about... We think it could be
13 more usefully broken down into further columns.
14 Instead of including all the information about the
15 recipient in the centre in the "description" field,
16 it might be more useful to have separate columns
17 for that, but that's really more a matter of form
18 than of substance.

19 MR. APPLETON: The log indicates
20 various things. It gives a number to the document
21 so it can be identified. It describes the document
22 in such a way so there's some specificity, so that
23 the trier of fact can decide what this document is,
24 and then it sets out a reason as to why the
25 privilege would be supported.

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1 The description of the document, in our
2 view, sets out the information why it would be
3 relevant, such as it's a letter that was drafted by
4 counsel or sent to counsel or some other basis to
5 be able to substantiate what's there, plus we give
6 a date, so that we can be very precise to describe
7 the nature of the document. I think it makes
8 little difference whether that's a separate column
9 or if all that information is contained in one
10 column as long as all that information is there, so
11 that a Tribunal and the other Disputing Party is in
12 a position to be able to look at it and say, 'Yes.
13 That definitely looks like it is legal privilege,'

14 or not.

15 PRESIDENT SIMMA: I understand that you
16 were just saying that, okay, there might be a point
17 to break it up into more. But then you said you're
18 perfectly fine with the, let's say, brackets or
19 whatever of the Redfern -- of, sorry, of the
20 privilege log that you supplied, and so let's
21 follow that.

22 MR. APPLETON: Sure.

23 MR. SPELLISCY: If we want to use that
24 as a model, that's fine.

25 MR. APPLETON: Great. I love

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1 agreement.

2 PRESIDENT SIMMA: Okay. So there is
3 some further agreement.

4 PROFESSOR McRAE: Better stop quickly.
5 (Laughter)

6 PRESIDENT SIMMA: Yeah, yeah. Okay.
7 So if that is all, I would like to thank... The
8 time has come, right, except to say - oh, we forgot
9 an important point - to thank you very much. I
10 think we are really convinced, the longer that
11 took, we are really convinced it was a good idea to
12 have the case management meeting because woods, I
13 think forests would have been sacrificed to kind of
14 slap that out in written form, and so I would like
15 to thank both parties. We look forward to the same
16 type of, let's say, good faith and friendly
17 cooperation in this case. So thank you very much
18 for coming and we will be in touch, as they say,
19 right. And thanks to the..., to you, the court
20 reporter, and everybody who has just supported that
21 meeting. Thank you. And have a good flight home,
22 a safe flight home.

23 MR. APPLETON: Thank you very much.

24 MR. LITTLE: Thank you.

25 --- [Ending time: 5:02 p.m.]

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1 REPORTER'S CERTIFICATE

2

3 I, BONNIE LYNN VAN DER MEER, C.S.R.,
4 Certified Shorthand Reporter, hereby certify;

5 That the foregoing proceedings were
6 taken before me at the time and place therein set
7 forth;

8 That the proceedings were recorded
9 stenographically by me and were thereafter
10 transcribed by me;

11 That the foregoing is a true and
12 correct transcript of my shorthand notes so taken.

13
14
15 Dated this 19th day of October, 2009.

16
17
18 -----
19 NEESON & ASSOCIATES COURT REPORTING
20 AND CAPTIONING, INC.
21 per: BONNIE LYNN VAN DER MEER, C.S.R.

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