
PCA Case No. 2013-22

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER
ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 2010 UNCITRAL ARBITRATION RULES
BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

- and -

GOVERNMENT OF CANADA

Respondent

TRANSCRIPT OF PROCEEDINGS
held at the offices of Arbitration Place,
333 Bay Street, Suite 900, Toronto, Ontario,
on Friday, February 26, 2016 at 8:01 a.m.

FULL TRANSCRIPT
(including confidential information)

VOLUME 10 - REVISED MAY 12, 2016
CONDENSED TRANSCRIPT WITH INDEX

BEFORE:

Dr. Veijo Heiskanen (President)

Mr. R. Doak Bishop

Dr. Bernardo Cremades

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APPEARANCES :

John Terry for the Claimant
Myriam Seers
Nick Kennedy
Emily Sherkey

Also present:

Various parties Deloitte
Client representative, David Mars

Sylvie Tabet for the Respondent
Shane Spelliscy
Rodney Neufeld
Heather Squires
Susanna Kam
Jenna Wates
Valantina Amalraj
Melissa Perrault
Darian Parsons

Also present:

Various parties, Berkeley Research Group,
URS, Ministry of Citizenship, Immigration and
International Trade/Ministry of Economic
Development, Employment and Infrastructure, Ministry
of the Attorney General, Crown Law Office - Civil,
Ministry of Energy, Ministry of Natural Resources
and Forestry, Ministry of the Environment and
Climate Change, Independent Electricity System
Operator (Formerly the Ontario Power Authority)

Teresa Forbes Court Reporter
Lisa M. Barrett Court Reporter

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1 Toronto, Ontario
2 -- Upon resuming on Friday, February 26, 2016
3 at 8:01 a.m.
4 PRESIDENT: Good morning, all. And 08:00:56
5 we have finally arrived at the last day of the 08:01:01
6 hearing, the closing statements. Are there any 08:01:06
7 housekeeping or admin issues to be raised by either 08:01:10
8 party? Mr. Terry? 08:01:12
9 MR. TERRY: Nothing from us. 08:01:16
10 PRESIDENT: And Respondent? 08:01:19
11 MR. NEUFELD: Nothing, although you 08:01:21
12 did ask about the post-hearing submissions, so I 08:01:22
13 think that's the one outstanding issue we have. 08:01:24
14 PRESIDENT: Yes. Yeah. Maybe we can 08:01:26
15 discuss that at the end of the day. 08:01:27
16 MR. NEUFELD: Sure. 08:01:29
17 PRESIDENT: Okay. So just to remind 08:01:30
18 the parties of the agreement: Each party has 08:01:31
19 reserved up to three hours for the closing 08:01:33
20 statement, of which up to 30 minutes can be left for 08:01:36
21 rebuttal. So it is for the parties to decide how 08:01:40
22 they -- how they want to allocate that time. 08:01:44
23 If there is nothing further, Mr. 08:01:47
24 Terry, please. 08:01:49
25 CLOSING SUBMISSIONS BY MR. TERRY: 08:01:50

1 And then we start with some questions 08:03:22
2 that Ian Baines, in particular, asked about the 08:03:26
3 moratorium. So I'd ask for it to be run now. And 08:03:28
4 we set out in the screen here the participants in 08:03:31
5 the call. You'll recognize the names on the 08:03:33
6 Windstream side, and on the Government side is Craig 08:03:37
7 MacLennan, Chief of Staff, Minister of Energy; 08:03:41
8 Brenda Lucas from the Ministry of the Environment; 08:03:45
9 Andrew Mitchell, Ministry of Energy; Richard Linley; 08:03:47
10 and then Mr. Cecchini from the OPA. 08:03:49
11 And what we've done is -- is, while 08:03:52
12 the particular people are speaking, we'll flash up 08:03:54
13 on the screen who is speaking so that -- you'll 08:03:56
14 know, I think, from the transcript, but it will be 08:03:58
15 an additional indicator. So if we could roll that, 08:04:01
16 please. 08:04:05
17 [Reporter's note: Audio recording played of conference 08:04:06
18 call held February 11, 2011.] 08:04:12
19 MR. TERRY: The reason that I wanted 08:04:14
20 to take some of our opening time to play that 08:16:02
21 recording is I listened to it a couple of days ago, 08:16:05
22 having, you know, been through the hearing the last 08:16:07
23 couple of weeks, and what struck me was the 08:16:10
24 consistency of what's been discussed there at that 08:16:12
25 particular time with, in our respectful submission, 08:16:16

1 MR. TERRY: Mr. President, Tribunal 08:02:05
2 Members, you'll recall that, when we opened this 08:02:06
3 hearing almost two weeks ago, although it seems like 08:02:10
4 longer for some reason, I noted that it was pretty 08:02:15
5 much exactly five years since the date when the 08:02:19
6 moratorium had been announced, February 11th of that 08:02:23
7 year. 08:02:27
8 And on that date, government officials 08:02:29
9 had a conference call with Windstream and its 08:02:32
10 government relations adviser, and at which, as you 08:02:35
11 know, our position is that they -- they promised 08:02:39
12 to -- that with respect to the moratorium, that 08:02:42
13 Windstream's project would be frozen. 08:02:46
14 As the Tribunal knows, there's a 08:02:50
15 transcript of that conversation as well as an audio 08:02:52
16 recording, both of which are in the record. And the 08:02:55
17 audio recording is about 20 minutes, but we've -- 08:02:58
18 we've excerpted a portion that we are going to play 08:03:00
19 now. 08:03:04
20 And this audio recording starts after the -- the 08:03:04
21 conversation starts -- we have the transcript in 08:03:10
22 front of you, flagged where it starts. There's been 08:03:11
23 a discussion from the Government side as to what 08:03:15
24 their intentions are, the rationale for the 08:03:18
25 moratorium. 08:03:21

1 the evidence that you've heard this week from the 08:16:19
2 Claimant's witnesses, a consistency and credibility, 08:16:24
3 in my submission, that you have heard from our fact 08:16:28
4 witnesses, and a consistency and credibility from 08:16:32
5 the expert witnesses, who, again, in our respectful 08:16:34
6 submission, are well qualified and well experienced 08:16:39
7 in these specific issues that -- or with respect to 08:16:42
8 offshore wind, developing offshore wind projects, 08:16:47
9 and with respect to providing the evidence that you 08:16:50
10 need to consider both the -- the issues with respect 08:16:53
11 to liability and the issues with respect to damages 08:16:57
12 in this case. 08:16:59
13 And what I'd like to -- to do in the 08:17:00
14 next -- in the remaining time, in our opening, and 08:17:04
15 together with Ms. Seers, who will argue part of the 08:17:08
16 damages argument, is take you through, of course, 08:17:12
17 the evidence that you've heard. And we have, you'll 08:17:17
18 see, a number of transcript references to which 08:17:21
19 she'll refer you to. I don't want to go over it 08:17:23
20 except with some limited exceptions to documentary 08:17:26
21 evidence that we went through in our opening 08:17:28
22 argument and that you've seen, of course, during the 08:17:30
23 hearing, and also, of course, put it into legal 08:17:33
24 context, which although we are dealing with, you 08:17:36
25 know, investment treaty provisions of some 08:17:40

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1 complexity, in my submission, as applied to the 08:17:43
2 facts today and in terms of the onus we have to make 08:17:46
3 out, I don't believe are particularly complex on the 08:17:49
4 liability side. 08:17:56
5 On the damages side, as you'll hear, 08:17:57
6 and -- you know, we, I think, like all counsel here, 08:18:00
7 have struggled to put the particular dates in the 08:18:03
8 context of an appropriate but-for analysis. And we 08:18:06
9 have come up with our -- our perspective as to how 08:18:09
10 the -- the appropriate way is to -- is to value and 08:18:12
11 measure that, together with the Deloitte damages 08:18:15
12 experts, and we'll talk about that. 08:18:17
13 But certainly, on liability, we don't 08:18:19
14 see this as a complex case in terms of -- of legal 08:18:21
15 issues, bearing in mind, of course, that there are 08:18:24
16 particular issues with respect to 1105. They have 08:18:26
17 particular interest to the Government of Canada, but 08:18:32
18 in our case, we'll be saying we don't think it's 08:18:34
19 necessary to decide our case to necessarily decide 08:18:37
20 those -- those other issues. 08:18:38
21 So I'd like to start with this -- this 08:18:44
22 slide, again, to -- to reinforce our assessment of 08:18:46
23 the particular stages of this case that lead to the 08:18:51
24 breach. 08:18:54
25 We have the moratorium of February 08:18:55

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1 1103 arguments, we're going to rely on our written 08:20:10
2 submissions. 08:20:13
3 This slide, of course, sets out the 08:20:16
4 familiar 1110 statement under the NAFTA, similar to 08:20:19
5 the expropriation clause in many other bilateral 08:20:25
6 investment treaties. And the steps, which I believe 08:20:28
7 my friends of Canada agree with, to determine 08:20:33
8 whether there has been a breach are: Is there an 08:20:35
9 investment capable of being expropriated? Has the 08:20:38
10 investment been expropriated? And was the 08:20:41
11 expropriation unlawful? And I should just, in terms 08:20:44
12 of foreshadowing (c), we don't have much to say 08:20:47
13 there because our understanding is that Canada 08:20:51
14 agrees that, if expropriation has occurred in this 08:20:52
15 case, it's an unlawful expropriation. 08:20:55
16 We talked in our opening about the 08:20:59
17 investment that we say was expropriated here, 08:21:01
18 Windstream Wolfe Island Shoals Inc., the project, 08:21:06
19 and everything related to the project and, of 08:21:10
20 course, the FIT contract which has been a focus of 08:21:13
21 much of the evidence in this -- in this hearing. 08:21:16
22 And we start with the argument that's 08:21:20
23 been made by Canada that the FIT contract is not an 08:21:24
24 investment capable of expropriation. And, in our 08:21:28
25 submission, this -- this argument has no validity 08:21:32

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1 11th. We have the promise to freeze, as articulated 08:18:56
2 in that phone call. We have the force majeure time 08:19:01
3 that gets used up, and we have the point on May 22, 08:19:03
4 2012 when the project becomes worthless. 08:19:07
5 So it's the combination of the 08:19:10
6 moratorium and the failure of the promise to freeze 08:19:13
7 which caused the breach, which caused, both with 08:19:15
8 respect to Windstream, the expropriation, and which 08:19:19
9 caused, also with respect to Windstream, the 08:19:23
10 violation of fair and equitable treatment, because 08:19:26
11 you'll hear from that conversation, what was 08:19:28
12 communicated to Windstream at the date of the 08:19:30
13 moratorium was that: You're in a special 08:19:32
14 circumstance. You're unique. You have a FIT 08:19:34
15 contract, and, therefore, we're going to freeze you. 08:19:37
16 The breach does not occur then with 08:19:39
17 respect to Windstream, although it's certainly 08:19:41
18 relevant in determining whether a breach has 08:19:44
19 occurred to look at the moratorium and the bona 08:19:46
20 fides and the reason it was put into place, but the 08:19:49
21 breach occurs in May -- date of breach: May 22nd, 08:19:51
22 when the project becomes worthless. 08:19:56
23 Now, this is the structure of our 08:20:00
24 closing argument. We're going to go through 1110, 08:20:02
25 1105, and damages. With respect to the 1102 and 08:20:06

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1 whatsoever. And it's important to recall here that 08:21:38
2 Windstream has never claimed that its investments 08:21:42
3 included an operational wind farm that would, of 08:21:45
4 course, would generate guaranteed income from the 08:21:48
5 sale of its electricity. If we had, our damages, as 08:21:51
6 you had seen in Mr. Low's presentation, would be 08:21:55
7 much higher. We would be valuing an operational 08:21:58
8 wind farm. 08:22:02
9 And we've never -- we've never made 08:22:02
10 the claim -- and you heard this, this week -- that 08:22:04
11 there was, you know, a guarantee on the part of the 08:22:06
12 FIT contract that there would be an operational wind 08:22:10
13 farm. We understand there was a regulatory process 08:22:13
14 that had to be proceeded through, and we have 08:22:14
15 provided a great deal of evidence as to -- as to 08:22:17
16 what we think, more likely than not, would've 08:22:20
17 happened if we had been able to proceed through 08:22:23
18 there. 08:22:25
19 Now, Canada relies on the Emmis v. 08:22:26
20 Hungary case, and they've relied on it in their 08:22:28
21 submissions, both in writing and orally, but it's 08:22:32
22 important to keep in mind that, in that particular 08:22:36
23 case, the Tribunal applied Hungarian law because 08:22:38
24 it's a domestic law question as to whether -- as to 08:22:44
25 whether the investment is a -- is a proprietary 08:22:46

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1 interest; it's capable of expropriation, and held in 08:22:50
2 that case -- and this was actually -- there was a 08:22:54
3 jurisdictional ruling in that case. The question 08:22:57
4 was whether there was an investment under the 08:22:58
5 Convention and held that the investors in that case 08:23:00
6 had no proprietary rights. Their broadcasting 08:23:04
7 licence had expired. And what they were actually 08:23:08
8 effectively trying to do was to bring an FET claim 08:23:11
9 on the basis of expropriation, because that 08:23:14
10 particular treaty did not include FET claims as 08:23:16
11 within the investor -- investment dispute 08:23:18
12 provisions, only expropriation claims. 08:23:21
13 So that case does not have any application to our 08:23:23
14 case because, as you heard from a number of 08:23:27
15 witnesses, the FIT contract itself is a valuable 08:23:31
16 asset and constitutes personal property under 08:23:34
17 Ontario law. 08:23:37
18 And we have, for example, the evidence 08:23:38
19 of Sarah Powell. You'll recall that she testified 08:23:43
20 last week, and you will recall her -- her expertise 08:23:46
21 as an Ontario lawyer who practises in this area, 08:23:50
22 both the environmental permitting side and also the 08:23:52
23 advising lenders. She, of course, is the only 08:23:55
24 expert Ontario lawyer called by either party in this 08:23:59
25 case, and she says here, as we've highlighted, that: 08:24:02

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1 contract for offshore wind. And he talks about the 08:25:02
2 fact that 20 years is good. It's good tariff. 08:25:06
3 Between 15 and 20 is better for the investors so you 08:25:10
4 can have a lower tariff to make it work, and both 08:25:14
5 are fully bankable. 08:25:17
6 And we also have the testimony of 08:25:19
7 Robert Low, the expert from Deloitte. And, again, 08:25:20
8 he mentions the point here that: 08:25:25
9 "The development of these FIT 08:25:26
10 contracts and the offering of 08:25:28
11 them and securing of them 08:25:29
12 created value to the 08:25:30
13 acquirers of those. Those 08:25:31
14 companies that applied and 08:25:33
15 received a FIT program, I 08:25:34
16 think, received something of 08:25:36
17 value on the day they got 08:25:37
18 them." 08:25:38
19 And, finally, Remo Bucci also: 08:25:38
20 "The investment community in 08:25:43
21 Ontario viewed FIT contracts 08:25:44
22 extremely favourably. They 08:25:46
23 created volume certainty; 08:25:49
24 created off-take certainty." 08:25:50
25 So we have, in my submission, clear 08:25:51

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1 "It's a scarce and valuable 08:24:06
2 commodity. It allows for 08:24:08
3 assignment. It allows for 08:24:09
4 change of control. FIT 08:24:10
5 contracts may also be 08:24:12
6 mortgaged, and they 08:24:13
7 constitute not only a 08:24:14
8 valuable asset, but personal 08:24:15
9 property." 08:24:17
10 That's -- that is the evidence, the 08:24:17
11 sum and total of the evidence with respect to 08:24:20
12 Ontario law with respect to how the FIT contract is 08:24:22
13 treated. And, in my view, it's persuasive evidence 08:24:25
14 that, if you, like the Tribunal did in *Emmis v.* 08:24:29
15 *Hungary*, and which is appropriate, you look to 08:24:31
16 domestic law to make the determination, and the 08:24:35
17 evidence is clear that it is a propriety interest, 08:24:36
18 capable of being expropriated. The FIT contract is 08:24:40
19 an asset and fulfils the requirements under 08:24:41
20 expropriation provision. 08:24:46
21 Now, we note here, from the other 08:24:47
22 side, a recognition from Mr. Guillet of the Green 08:24:49
23 Giraffe that it was also a very good contract for 08:24:54
24 offshore wind. He has no problem saying that. It's 08:24:57
25 a very good -- it would have been a very good 08:25:00

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1 and convincing evidence, frankly, not refuted at all 08:25:57
2 from the other side. It is a matter of Ontario law. 08:26:00
3 The FIT contract was an investment, a proprietary 08:26:04
4 interest capable of being expropriated. 08:26:09
5 So we move on to the next step: Has 08:26:11
6 the investment been expropriated? We rely on two 08:26:13
7 leading cases, *Burlington Resources* and *Quiborax*, 08:26:17
8 both of whom had very well-regarded Tribunal 08:26:23
9 Members, and the test that's set out here with: 08:26:25
10 "The measure constitutes an 08:26:32
11 appropriation if the measure 08:26:34
12 deprives the investor of his 08:26:37
13 investment; the deprivation 08:26:38
14 is permanent; and the 08:26:39
15 deprivation finds no 08:26:41
16 justification under the 08:26:42
17 Police Powers Doctrine." 08:26:42
18 So the test, in our submission, at 08:26:44
19 this stage, is solely -- is to look solely at the 08:26:50
20 effects of the deprivation, not at the purpose, at 08:26:54
21 this point, of the test: 08:26:58
22 "The measure must 08:26:58
23 substantially deprive the 08:27:00
24 investor of all or most of 08:27:02
25 the benefits of the 08:27:03

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1 investment. The focus is on 08:27:04
2 the loss of the economic 08:27:05
3 value or economic viability." 08:27:06
4 And we make the point, as made in 08:27:08
5 Burlington here, that this doesn't necessarily mean 08:27:10
6 a loss of management and control. Obviously, as you 08:27:12
7 know, in this case, we still have management and 08:27:15
8 control. What matters is the capacity to earn a 08:27:17
9 commercial return. 08:27:19
10 And, again, as I had said when I 08:27:23
11 started, I don't think this is complicated law. 08:27:26
12 This is well-established law under investment treaty 08:27:28
13 jurisprudence. 08:27:32
14 So we have the moratorium announced on 08:27:35
15 February 11, 2011. And, of course, the rationale 08:27:37
16 set out: 08:27:43
17 "Ontario is not proceeding 08:27:43
18 with any development of 08:27:45
19 offshore wind projects until 08:27:46
20 the necessary scientific 08:27:47
21 research is completed and an 08:27:48
22 adequately informed policy 08:27:50
23 framework can be developed." 08:27:51
24 We then have the conference call that 08:27:52
25 we just heard from and acknowledgement that the 08:27:54

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1 while the moratorium was 08:28:56
2 ongoing." 08:28:57
3 And, again, we don't disagree. We 08:28:58
4 weren't asking -- we aren't suggesting there was a 08:28:58
5 promise to have a guarantee to have an operational 08:29:00
6 wind farm. What there was, was a promise to be able 08:29:02
7 to go through the regulatory process. 08:29:05
8 And Mr. Cecchini is asked about 08:29:10
9 whether this decision reflects an OPA decision or a 08:29:11
10 Government decision, because, as you know, our 08:29:14
11 submission is that this is a Government decision, as 08:29:16
12 communicated on behalf of the Government by the 08:29:20
13 Ministry of Energy, to keep the project frozen. 08:29:22
14 He is asked -- he says: 08:29:25
15 "It's not an OPA decision." 08:29:27
16 Or question: 08:29:29
17 "It's not an OPA decision?" 08:29:29
18 He confirms it's not an OPA decision: 08:29:29
19 "At this point, we were not 08:29:32
20 -- we were not aware of the 08:29:34
21 decision." 08:29:36
22 So -- so he is agreeing, as -- as in 08:29:37
23 the question asked above, that this reflects a 08:29:38
24 government-level consideration. And you will 08:29:40
25 recall, on the record, there's a number of e-mails 08:29:42

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1 project is unique, a statement from the Ministry of 08:27:58
2 Energy, from the Government that the OPA is going to 08:28:03
3 sit down and negotiate. And you heard this on the 08:28:06
4 call, Chris Benedetti summing up what he understood, 08:28:10
5 what the Ministry understood the Government to be 08:28:16
6 promising, and you heard the emphatic "Yes" from 08:28:18
7 Craig MacLennan from the Ministry of Energy's 08:28:22
8 office. 08:28:24
9 And then we hear -- we heard also from 08:28:25
10 Perry Cecchini last week, and I want to quickly run 08:28:28
11 through what his evidence was. So, first of all, 08:28:31
12 he's asked -- he's talking about when a supplier 08:28:36
13 gets a FIT contract: 08:28:39
14 "I don't see it as they get a 08:28:40
15 guarantee. They're being 08:28:42
16 given an opportunity to 08:28:43
17 develop a project." 08:28:44
18 He says: 08:28:45
19 "So it was our understanding 08:28:45
20 that, when the moratorium 08:28:47
21 came in place, the Government 08:28:48
22 wanted Windstream to have 08:28:52
23 that opportunity kept in 08:28:53
24 place. It was just keeping 08:28:54
25 that opportunity in place 08:28:55

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1 that -- where the Government is discussing whether 08:29:45
2 or not Windstream should be kept whole. There's a 08:29:48
3 determination it should be kept whole, as expressed 08:29:50
4 in the conversation that the project would be 08:29:53
5 frozen. 08:29:56
6 And so then we have -- of course, 08:29:58
7 Canada's argument is it was all Windstream's fault; 08:30:00
8 that we were ready to keep the contract frozen, but 08:30:05
9 you behaved unreasonably in not agreeing to the 08:30:08
10 offer we made, which was a five-year offer. 08:30:11
11 And here is Mr. Cecchini: 08:30:14
12 "So your final and best 08:30:15
13 offer, Mr. Cecchini, was to 08:30:17
14 extend the MCOB for the FIT 08:30:19
15 contract to five years past 08:30:22
16 the original MCOB. Is that 08:30:22
17 right? 08:30:23
18 "Yes." 08:30:23
19 So he confirms that was the final and 08:30:23
20 best offer of OPA. 08:30:26
21 "QUESTION: There needed to 08:30:27
22 be an end date, even if there 08:30:29
23 wasn't an end date to the 08:30:30
24 moratorium? 08:30:32
25 "Even if there wasn't, there 08:30:32

1 needed to be an end date." 08:30:34
2 That is the OPA's perspective. And 08:30:36
3 you know, of course, that, from our client's 08:30:38
4 perspective, what they wanted was something 08:30:40
5 extendable, because they were very concerned -- and 08:30:41
6 it turns out were right to be concerned -- that five 08:30:46
7 years would go by. They wouldn't be able to develop 08:30:48
8 the project because the Government wouldn't have 08:30:51
9 lifted the moratorium, and they would have no right; 08:30:53
10 that the contract at that point would be terminated, 08:30:56
11 because you'll recall in the evidence there was -- 08:30:58
12 in addition to the five years, there was a 08:30:59
13 particular termination right that would -- that gave 08:31:02
14 the OPA an additional right to terminate on the 08:31:04
15 basis of the five years expiring. 08:31:06
16 And Mr. Cecchini recognizes, when 08:31:10
17 asked what's the case now: 08:31:13
18 "QUESTION: The contract is? 08:31:14
19 "ANSWER: The contract 08:31:17
20 remains as it was when it was 08:31:19
21 signed. 08:31:20
22 "And it is not frozen?" 08:31:20
23 He agrees: 08:31:23
24 "It is not frozen." 08:31:24
25 He is also asked about whether anyone 08:31:28

1 class, Class 5 wind turbines, that there could be 08:32:37
2 some sort of extension that would accommodate the 08:32:41
3 science being done and allow them to be kept frozen, 08:32:44
4 kept whole, to develop the project. 08:32:48
5 So it's clear, in our submission, on 08:32:51
6 the evidence that the OPA would've complied with the 08:32:52
7 Minister's direction. It's, frankly, totally 08:32:56
8 consistent with the legal framework in which, also 08:32:59
9 in the evidence, as to how the Ministry of Energy 08:33:01
10 interacts with the OPA. 08:33:03
11 So in terms of the actual deprivation, 08:33:10
12 and I will just -- we've been through this before a 08:33:14
13 number of times, so I'll be brief about it. This is 08:33:17
14 how -- this is how the -- the May 4, 2017 08:33:20
15 termination date works: 08:33:27
16 Once you have the expiry of the 24 08:33:30
17 months of force majeure and as the project would 08:33:33
18 move past its original COD, the termination would 08:33:36
19 occur on May 4, 2017. 08:33:39
20 And this is what gets you to the 08:33:42
21 evidence of Mr. Bucci and others that Windstream was 08:33:44
22 substantially deprived of its investments as of -- 08:33:47
23 as of May 22, 2012. As he says, the project could 08:33:50
24 no longer achieve commercial operation at that 08:33:53
25 point. It was unfinanceable because, of course, 08:33:56

1 in the government ever asked the OPA to grant an 08:31:30
2 extendable force majeure; i.e., to his knowledge, 08:31:32
3 did the Government ever take any steps to try to 08:31:35
4 cause the OPA to grant an extendable force majeure: 08:31:37
5 "ANSWER: I'm not aware of 08:31:41
6 that. I'm not aware of 08:31:42
7 that." 08:31:44
8 But he does confirm that: 08:31:44
9 "The OPA always complies with 08:31:47
10 the Minister's directions." 08:31:49
11 And we have set out, both in the -- in 08:31:51
12 our written submissions, and, you know also, in the 08:31:55
13 witness statement of Mr. Smitherman, the evidence is 08:31:58
14 set out that establishes that the Ministry of Energy 08:32:04
15 has authority to grant -- a broad authority to grant 08:32:07
16 directives to the OPA. 08:32:10
17 And as you may recall, Mr. Cecchini 08:32:12
18 talked about directives that were granted in some 08:32:14
19 respects to certain classes. He talked about the 08:32:18
20 one-year extension given to particular classes of 08:32:21
21 wind projects, and certainly it was open to the OPA 08:32:24
22 prima facie if they wanted to. Among other ways 08:32:28
23 that they could have given a direction would be to 08:32:31
24 give a direction that all classes of wind turbine -- 08:32:33
25 of offshore wind turbines, which is a particular 08:32:34

1 there was no more force majeure time left at that 08:33:58
2 point to be able to, other than the six months 08:34:02
3 available for the REA appeal process, to allow the 08:34:06
4 project to meet its timelines. And you also hear 08:34:10
5 that -- see that evidence from Mr. Low. 08:34:14
6 And Mr. Cecchini says: 08:34:20
7 "So we know the moratorium 08:34:24
8 won't be lifted tomorrow, but 08:34:25
9 even assuming it were --" 08:34:27
10 This is the question. 08:34:27
11 "-- you can't disagree with 08:34:28
12 me, sir, that it's impossible 08:34:30
13 for Windstream to go through 08:34:31
14 the permitting process, 08:34:32
15 achieve NTP, or get REA, 08:34:33
16 achieve NTP, build the 08:34:35
17 project, and have it plugged 08:34:36
18 into the grid by May 4, 08:34:38
19 2017?" 08:34:39
20 He says: 08:34:40
21 "I would. I would. Yes, I 08:34:40
22 have to agree." 08:34:43
23 So he agreed after some prodding that 08:34:44
24 Windstream cannot build the project by May 4, 2017. 08:34:46
25 So our submission with respect to the 08:34:54

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1 law, which, again, I would argue is not complicated 08:34:57
2 on this issue, is that Windstream was permanently 08:34:59
3 deprived of its investments, and we cite, again, the 08:35:03
4 case law going back to the seminal case of 08:35:08
5 Burlington Resources. You focus on the nature of 08:35:12
6 the deprivation. You don't focus on the duration of 08:35:14
7 the measure. So you can have a temporary measure, 08:35:19
8 and if it causes a substantial deprivation, as we 08:35:22
9 argue it does in this case, that's sufficient. 08:35:26
10 Now, of course, in this particular 08:35:29
11 case, we know, from what Canada told us in its 08:35:31
12 opening, that it's not going to go ahead, in any 08:35:34
13 event, with the science; that there is no future for 08:35:37
14 Windstream. So the moratorium is effectively 08:35:41
15 indefinite when it comes to Windstream. 08:35:44
16 But whether or not you were to find 08:35:46
17 that the moratorium was temporary or was indefinite, 08:35:47
18 in our submission, we have the elements of 08:35:53
19 substantial deprivation here because we have the 08:35:55
20 evidence clearly from the witnesses, at May 22, 08:35:57
21 2012, the project became substantially worthless. 08:36:00
22 And, of course, as I mentioned, we 08:36:08
23 have the statement in Canada's -- and there's a lot 08:36:09
24 -- and you hear -- you heard evidence about science. 08:36:11
25 There's been a lot of submissions in the -- in the 08:36:14

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1 materials, the written materials, about scientific 08:36:17
2 studies and what was done and wasn't done. The 08:36:19
3 evidence, in our submission, shows that there were 08:36:22
4 some sporadic attempts to start scientific studies, 08:36:25
5 never followed through on, and, you know, the 08:36:29
6 confirmation now is that Ontario says it's not 08:36:31
7 planning to commence further scientific studies in 08:36:33
8 the near term to address areas initially set out in 08:36:35
9 its earlier plans. And that's from the Government 08:36:39
10 of Canada on behalf of Ontario. 08:36:42
11 Now, as I understand it, although 08:36:47
12 we're not completely clear on the basis for it, 08:36:49
13 there's -- Canada appears to be arguing that -- that 08:36:53
14 there is some sort of public purpose exception to 08:36:55
15 expropriation that would apply in this case. In our 08:36:59
16 submission, the case law establishes that there 08:37:03
17 isn't such a broad public purpose exception. There 08:37:06
18 is the narrower Police Powers Doctrine. 08:37:08
19 And we have set -- we describe the 08:37:11
20 case law here, and you could -- you could, in 08:37:15
21 reviewing the authorities later, consider this. The 08:37:18
22 Tecmed case is a leading case in describing that the 08:37:22
23 Police Powers Doctrine has no application when the 08:37:25
24 measures, in effect, are disproportionate to its 08:37:30
25 stated public policy rationale. So if you're going 08:37:32

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1 to engage the Police Powers Doctrine, you have to 08:37:34
2 engage in a proportionality exercise. 08:37:36
3 And from the ADM case, an 08:37:40
4 acknowledgement there that the Tribunal not only has 08:37:42
5 to determine proportionality and whether the 08:37:45
6 particular measure is necessary for a legitimate 08:37:48
7 purpose, so necessity, proportionality, but is also 08:37:50
8 entitled to consider whether it interfered with the 08:37:55
9 investor's legitimate expectations when the 08:37:58
10 investment was made. 08:38:00
11 And -- and it's important for us to 08:38:01
12 note -- and we set it out in the last bullet here -- 08:38:03
13 contrary to what Canada appears to have suggested in 08:38:07
14 its -- its materials, it's only at this stage in and 08:38:09
15 considering whether a Police Powers Doctrine applies 08:38:12
16 or not and considering the proportionality analysis 08:38:16
17 that you can consider the character of the measure 08:38:20
18 and the investor's reasonable expectations, because 08:38:22
19 Canada appears in their written materials to be 08:38:25
20 focusing in its expropriation argument on the 08:38:26
21 question as to whether the investor had legitimate 08:38:31
22 expectations, reasonable investment-backed 08:38:34
23 expectations. 08:38:38
24 In our submission, this only becomes 08:38:38
25 relevant if you engage in the Police Powers 08:38:40

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1 Doctrine. If you're not, that issue is not relevant 08:38:41
2 whatsoever. You look at the sole effects of the 08:38:45
3 measure to determine whether there has been 08:38:48
4 expropriation. 08:38:50
5 Now, we say the Police Powers Doctrine 08:38:51
6 does not apply in this case. And, again, we 08:38:52
7 emphasize that it's not a broad doctrine. It's a 08:38:57
8 narrow doctrine. And we say the moratorium and the 08:39:00
9 failure to freeze -- and you have to look at them 08:39:03
10 together -- are not proportionate or necessary for 08:39:05
11 legitimate public purpose. 08:39:08
12 And, of course, we -- we set out the 08:39:08
13 purpose of the moratorium as articulated, at least, 08:39:10
14 in what appears to be the primary decision-making 08:39:13
15 document to "kill" offshore wind projects; that 08:39:16
16 there is no end in sight to the moratorium; with 08:39:20
17 respect to the freeze, that Ontario could have 08:39:23
18 frozen the FIT contract, as they promised they 08:39:28
19 would, while research was conducted. 08:39:30
20 So in terms of proportionality, there's an obvious 08:39:32
21 alternative that could have been chosen if Canada 08:39:35
22 wanted to do the science and simply freeze this 08:39:39
23 project. There is no basis, looking at the police 08:39:41
24 powers in terms of necessity and proportionality, to 08:39:45
25 say that Ontario was obliged, Canada was obliged to 08:39:47

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1 both have the moratorium and to fail to freeze this 08:39:52
2 project. 08:39:56
3 And, of course, we emphasize, as we 08:39:58
4 have throughout this proceeding, that Windstream was 08:40:00
5 already required to conduct site-specific 08:40:03
6 environmental studies. That was the whole basis of 08:40:05
7 the regime that had been placed -- that had been put 08:40:08
8 in place, both under the REA regulation and under 08:40:11
9 the Ministry of Natural Resources' approval and 08:40:15
10 permitting requirements. 08:40:19
11 And there were, as we have discussed, under the REA 08:40:20
12 regulations, certain prescriptive elements, like the 08:40:26
13 550-metre setback, that were prescribed. But for 08:40:29
14 the most part, as the evidence established, we were 08:40:32
15 dealing with a regime that was very consistent with 08:40:37
16 the way in which Ontario had always carried out 08:40:39
17 environmental assessments, where the proponent does 08:40:42
18 a multiple number of studies, very thorough studies, 08:40:44
19 covering a number of different areas, and then 08:40:47
20 provides those to the appropriate regulatory 08:40:49
21 authorities, Ministry of the Environment, Ministry 08:40:51
22 of Natural Resources. And then those are evaluated 08:40:55
23 by them to ensure that the project is not going to 08:40:57
24 cause environmental concerns and is completely 08:41:00
25 compliant. 08:41:03

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1 "Following up on our 08:42:11
2 teleconference, I received 08:42:14
3 further direction from the 08:42:15
4 MO, Minister's Office; PO, 08:42:16
5 Premier's Office; Deputy 08:42:16
6 Minister's office on this 08:42:19
7 file. The --" 08:42:20
8 And that is Deputy Minister of this -- 08:42:21
9 this is Sue Lo from the Ministry of Energy. 08:42:23
10 "-- the communications that 08:42:25
11 will be developed will focus 08:42:27
12 on the preferred option of 08:42:28
13 being moratorium in offshore 08:42:28
14 wind for the next three to 08:42:29
15 five years to provide time to 08:42:31
16 develop the science and 08:42:32
17 create the uniform rules and 08:42:35
18 policies in collaboration 08:42:35
19 with the Great Lakes states. 08:42:35
20 The preferred option will 08:42:35
21 also involve discussions with 08:42:37
22 the developer of the Wolfe 08:42:38
23 Island Shoals project such 08:42:39
24 that the project won't 08:42:41
25 proceed until the science and 08:42:43

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1 So that's already in place, and, of 08:41:04
2 course, in considering any proportionality and 08:41:06
3 necessity, you have to consider that that was 08:41:08
4 already in place in considering whether or not the 08:41:10
5 Police Powers Doctrine can properly be applied. 08:41:12
6 Now, what do we hear in the evidence 08:41:17
7 about how the decision was made? 08:41:22
8 This, in our submission -- and it took 08:41:28
9 a lot of work in this case to obtain all the 08:41:30
10 documents and the relevant e-mails, but eventually 08:41:33
11 this was provided, and this is -- this is the 08:41:37
12 statement responding to a draft communications plan 08:41:42
13 from the Chief of Staff of the Premier's Office: 08:41:45
14 "Sorry, folks. This isn't 08:41:49
15 good enough. The purpose of 08:41:51
16 this release is to kill all 08:41:52
17 projects, except the Kingston 08:41:54
18 one, not suck and blow. 08:41:55
19 Please turn this around so it 08:41:57
20 kills the projects, not 08:41:59
21 sounds like we're in favour 08:42:00
22 of offshore wind." 08:42:01
23 And then we have the communication of 08:42:04
24 this to the other officials who we've seen were 08:42:08
25 working on this: 08:42:10

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1 uniform rules and policies 08:42:45
2 have been developed." 08:42:46
3 So, in our submission, the -- the 08:42:47
4 timeline in the communications, what we've seen in 08:42:48
5 terms of the documents show a decision being made by 08:42:50
6 the Premier's Office, a communication to the staff, 08:42:53
7 the science rationale, but, again, consistent with 08:42:55
8 the Government's intention to freeze the project, 08:42:59
9 discussions with respect to Wolfe Island Shoals in a 08:43:02
10 recognition that it is in a separate category than 08:43:04
11 other projects. 08:43:08
12 Now, of course, Canada has described, 08:43:11
13 both in its written materials and its opening 08:43:14
14 statement, that we're spinning a complicated tale, 08:43:16
15 sort of a conspiracy theory, and we're ignoring the 08:43:20
16 vast quantity of evidence disproving our theory, and 08:43:23
17 we're ignoring the documents and evidence, what they 08:43:27
18 say on their face, adopting a grand conspiracy 08:43:28
19 theory. 08:43:30
20 I would resist very strongly that submission. Our 08:43:31
21 case is based on the evidence, and what we have 08:43:33
22 tried to do in the last two weeks is provide the 08:43:35
23 evidence to you to establish -- and, of course, it's 08:43:38
24 always very difficult, I would recognize, for an 08:43:41
25 outside Claimant dealing with government e-mails to 08:43:43

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1 establish exactly what -- what the pattern of 08:43:46
2 decision-making was within the Ontario Government. 08:43:50
3 But we have accomplished much through the repeated 08:43:52
4 requests, and we have information that we can rely 08:43:56
5 on. And beyond that we have marshalled evidence 08:43:58
6 from experts, and this is, really, the only -- and 08:44:00
7 when we go through this, you'll see that, in terms 08:44:06
8 of the Claimant's expert materials, that this is the 08:44:08
9 expert advice you have, for example, on things like 08:44:11
10 drinking water and whether or not the drinking water 08:44:14
11 issue was a real issue that drove this -- this 08:44:16
12 thing. 08:44:19
13 So that's what Canada says. 08:44:20
14 And, of course, we all recall the 08:44:22
15 testimony of Mr. Wilkinson last week. He explained 08:44:25
16 that his rationale -- that he said he made the 08:44:30
17 decision. He said his Deputy Minister and Brenda 08:44:32
18 Lucas from his office couldn't answer basic 08:44:39
19 questions about the consequence of construction in 08:44:40
20 regard to drinking water. He talked about his 08:44:43
21 concerns about the Walkerton. 08:44:45
22 And he says: 08:44:47
23 "Because these questions 08:44:48
24 weren't answered, I felt we 08:44:49
25 should not proceed on a path 08:44:51

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1 occurred around that particular date, but we don't 08:45:52
2 see a reference to that decision being made. 08:45:54
3 And we explored this with Marcia 08:46:01
4 Wallace the next day, again trying to forensically 08:46:03
5 go through all the various communications and find 08:46:06
6 out whether she was aware, because she -- she 08:46:10
7 indicated very clearly that she was the official who 08:46:12
8 had been running this policy as a director. She was 08:46:15
9 in charge of the renewable energy policy. She was 08:46:18
10 very much involved and certainly was of the view, as 08:46:22
11 she expressed it, that this was her file that she 08:46:27
12 was working through over this period. 08:46:30
13 And she is asked, you know: 08:46:32
14 "Were you aware on January 08:46:34
15 13th of a decision that your 08:46:35
16 Minister had already made to 08:46:37
17 defer offshore wind?" 08:46:38
18 And she had -- we had tried several 08:46:40
19 times to get her answer, yes or no. She says: 08:46:41
20 "Not specifically." 08:46:44
21 And then a follow-up question from Mr. 08:46:45
22 Bishop: 08:46:48
23 "When did you learn of the 08:46:48
24 decision of the moratorium 08:46:49
25 from the Minister? 08:46:50

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1 that I thought was flawed." 08:44:52
2 And you will recall he was very -- he 08:44:53
3 -- he very much stated that this was his decision, 08:44:59
4 his decision alone that he took on behalf of the 08:45:02
5 Government. 08:45:05
6 And you'll recall, Mr. President, that 08:45:07
7 -- the question you asked him at the end of his 08:45:09
8 testimony in establishing exactly when the meeting 08:45:11
9 took place, because, again, he said he had a very 08:45:14
10 definite recollection the meeting took place on the 08:45:17
11 7th or 8th. He talked about coming back in the 08:45:20
12 evening and having this briefing. 08:45:23
13 And you see your question: 08:45:25
14 "As far as you are concerned, 08:45:26
15 your testimony is that the 08:45:28
16 decision was taken on that 08:45:29
17 day on the spot, after your 08:45:31
18 briefing, after your meeting 08:45:33
19 with your Deputy? 08:45:34
20 "Oh, yes, I was very clear." 08:45:35
21 Now, I just wanted to pause for a 08:45:39
22 moment to note that we don't see that decision 08:45:40
23 appearing at all in the parties' joint chronology. 08:45:43
24 We see a number of other decisions that were made 08:45:46
25 around that particular -- or communications that 08:45:49

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1 "I never heard it from the 08:46:50
2 Minister. I -- I -- as the 08:46:53
3 witness statement indicates 08:46:54
4 and we went over a bit, it 08:46:55
5 was left with them. A lot of 08:46:58
6 what was hanging on the 08:46:59
7 moratorium was how it was 08:47:00
8 going to be implemented and 08:47:01
9 how Windstream would be 08:47:03
10 treated in a moratorium. I 08:47:04
11 was not directly a part of 08:47:05
12 the conversations because 08:47:06
13 that wasn't core to what I 08:47:07
14 needed to do." 08:47:09
15 And, you know, transcripts can never 08:47:09
16 speak or provide a sense of what was -- of how the 08:47:14
17 evidence came out last week, but in our -- again, in 08:47:18
18 our respectful submission, it's clear to us that, if 08:47:21
19 the Minister did, as he said, make a decision with 08:47:26
20 his Deputy Minister and with his Chief of Staff on 08:47:29
21 the day he says he did, his -- the main individual 08:47:32
22 who was working on this policy within -- within the 08:47:37
23 Ministry of the Environment had not heard about it. 08:47:42
24 And this is consistent also with the 08:47:46
25 evidence, sir, of Rosalyn Lawrence, which again 08:47:47

1 would suggest that Mr. Wilkinson's testimony is 08:47:52
2 inconsistent; that she also had not learned of any 08:47:54
3 moratorium decision from Mr. Wilkinson or anyone 08:47:57
4 else at the MOE. 08:48:01
5 We heard some testimony from others 08:48:06
6 with respect to how this decision -- as to Mr. 08:48:07
7 Wilkinson's evidence as to how this decision was 08:48:12
8 made. You heard, you'll remember, former cabinet 08:48:14
9 Minister George Smitherman. He says: 08:48:18
10 "With the exception of the 08:48:20
11 Attorney General, who's in a 08:48:22
12 special case with respect to 08:48:23
13 having to be independent of 08:48:24
14 government in some cases, you 08:48:25
15 don't have Ministers that 08:48:27
16 have the authority to go on 08:48:28
17 and take a significant 08:48:30
18 initiative like this without 08:48:32
19 -- without the backing of the 08:48:32
20 government." 08:48:36
21 And you heard from Sarah Powell who 08:48:38
22 said, this was -- she found it. She was here to 08:48:39
23 hear Mr. Wilkinson's explanation and to hear Marcia 08:48:43
24 Wallace. And she says, I think in answer to a 08:48:46
25 question from one of the Tribunal members, that she 08:48:49

1 "It's an unfortunate 08:49:51
2 comparison to Walkerton. In 08:49:53
3 my opinion, the two are so 08:49:54
4 different that I just had to 08:49:55
5 highlight some elements of 08:49:57
6 it." 08:49:58
7 And you heard, of course, in 08:49:58
8 Walkerton, that was the case about -- about 08:49:59
9 negligent employees not protecting the water source, 08:50:03
10 E. coli resulting, and seven or eight people dying. 08:50:06
11 In a completely different world than issues of 08:50:10
12 sediment from an offshore wind turbine 5 kilometres 08:50:13
13 off the shores of Lake Ontario and closest, if 08:50:16
14 anything, to an uninhabited peninsula. 08:50:20
15 So, in our submission, the Police 08:50:26
16 Powers Doctrine cannot, by any stretch of the 08:50:27
17 imagination, be applied to this case. Even if you 08:50:31
18 could find there was a valid environmental purpose, 08:50:33
19 the moratorium was not proportionate. And I 08:50:36
20 emphasize that Canada has not provided any, any 08:50:38
21 credible evidence of harm to the environment and, of 08:50:42
22 course, could have avoided the breach through 08:50:45
23 following up with the freeze. 08:50:47
24 And this case can be distinguished, among other 08:50:48
25 things, from the Methanex and Chemtura cases which 08:50:52

1 found this perplexing, and she doesn't have insider 08:48:52
2 information, but for one Deputy Minister and one 08:48:55
3 Minister to sit in a room and make such an important 08:48:57
4 decision, relying on one person's information, when 08:49:00
5 the Ministry of Natural Resources that has more 08:49:01
6 expertise had already got comfortable, she doesn't 08:49:04
7 understand that. 08:49:07
8 So she says: 08:49:10
9 "What I was perplexed about, 08:49:11
10 and I continue to be 08:49:13
11 perplexed about, is the 08:49:14
12 concept of the use of the 08:49:15
13 precautionary principle." 08:49:17
14 Because you'll remember that 08:49:17
15 Mr. Wilkinson spoke about that, and she didn't 08:49:19
16 understand how she could justify his decision. 08:49:21
17 And Mr. Kolberg, from Baird, who has 08:49:24
18 expertise in terms of how sediment affects drinking 08:49:29
19 water in the lake, who has substantial experience 08:49:32
20 for many, many years working on various projects in 08:49:34
21 Lake Ontario, including major industrial projects, 08:49:37
22 who was from the same company that was retained by 08:49:41
23 the Ontario Government in 2010 to look at the whole 08:49:43
24 issue of offshore wind turbines on the Great Lakes, 08:49:46
25 he says: 08:49:51

1 applied a Police Powers Doctrine, and in those 08:50:57
2 particular cases, the Respondent, the responding 08:50:59
3 Government submitted expert evidence illustrating 08:51:01
4 proven harm. 08:51:05
5 We do not have that expert evidence in this case. 08:51:05
6 What we have in fact with respect to the rationale 08:51:08
7 that the Minister provided on drinking water is, 08:51:14
8 again, from Sarah Powell. She says it wasn't aware 08:51:17
9 of any: 08:51:19
10 "There wasn't any credible 08:51:19
11 scientific evidence of a 08:51:21
12 significant threat or 08:51:22
13 irreversible threat that 08:51:23
14 would have triggered the 08:51:25
15 precautionary principle." 08:51:27
16 We have Mark Kolberg: 08:51:28
17 "These sediments would 08:51:29
18 actually not pose a problem 08:51:31
19 for or cause a threat to 08:51:32
20 drinking water. They're 08:51:34
21 low-level contaminants." 08:51:35
22 And he's an expert on the effect of -- 08:51:36
23 of construction on the lake on drinking water and 08:51:38
24 has provided, obviously, as you know, expert witness 08:51:42
25 testimony on this. 08:51:45

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1 And we have the experts from the other 08:51:46
2 side, from URS, asked about this drinking water 08:51:50
3 issue. And Mr. Clarke here says: 08:51:54
4 "Drinking water, we 08:51:58
5 identified as a low risk. 08:52:00
6 Yes, that was our 08:52:02
7 conclusion." 08:52:03
8 So what does the expert evidence say 08:52:03
9 on both sides? It says there's no threat to 08:52:07
10 drinking water. Completely the opposite of the 08:52:10
11 evidence that was put forward to the Tribunals in 08:52:13
12 the cases of Methanex or Chemtura. No scientific 08:52:16
13 evidence whatsoever to justify the purported 08:52:20
14 rationale of the Minister who says he made the 08:52:23
15 decision in this case. 08:52:25
16 Now, as I indicated, if you find 08:52:31
17 expropriation has occurred -- and Canada, as we set 08:52:33
18 out here, has confirmed and agrees that it would be 08:52:35
19 an unlawful expropriation, and, of course, that has 08:52:37
20 -- that has consequences for damages and for 08:52:40
21 valuation date. 08:52:44
22 And before I leave expropriation, one 08:52:50
23 other remark which -- which applies really to -- to 08:52:51
24 all of the breaches that are alleged in our case and 08:52:56
25 your approach to them: Canada submits, as it has in 08:53:00

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1 Kaufmann-Kohler, among others, has said in article, 08:54:10
2 there are -- there is a certain problem where you 08:54:15
3 have a treaty that's granting rights to non-state 08:54:21
4 parties to assume that the views of the three state 08:54:23
5 parties should somehow be given greater weight in 08:54:28
6 the interpretive process than the views of other 08:54:31
7 Claimants. 08:54:34
8 Now to move on to 1105 and the breaches here. And 08:54:35
9 this is -- this is the section where we'll talk more 08:54:43
10 about -- about the representations made and, in our 08:54:45
11 view, reasonable reliance on them. 08:54:50
12 So in starting with 1105, we have, of 08:54:53
13 course, the -- the statement in 1105 of: 08:54:56
14 "Each party shall accord to 08:55:00
15 investments of investors of 08:55:04
16 another Party treatment in 08:55:05
17 accordance with international 08:55:06
18 law, including fair and 08:55:07
19 equitable and treatment and 08:55:09
20 full protection and 08:55:11
21 security." 08:55:12
22 So the FET clearly included with 08:55:12
23 treatment in accordance with international law. 08:55:16
24 We then have the FTC Note of 08:55:18
25 Interpretation, stating that: 08:55:20

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1 other cases, that under 31(3) of the Vienna 08:53:03
2 Convention, that to the extent you have an alignment 08:53:07
3 of the litigation positions of the NAFTA parties, 08:53:10
4 because, of course, there's an entitlement for 08:53:13
5 Mexico and U.S. To make 1128 submissions in the 08:53:16
6 case, that that should be taken as subsequent 08:53:19
7 practice. And they state that the Tribunal should 08:53:21
8 give considerable weight. 08:53:24
9 And we just briefly submit here 08:53:25
10 that -- that to the extent that this Article 08:53:27
11 applies, it would only require the Tribunal to take 08:53:31
12 into account subsequent practice. There's no 08:53:34
13 requirement to give it considerable weight. There's 08:53:36
14 already a mechanism of -- which Canada has already 08:53:38
15 used, of course, the free trade -- for Canada and 08:53:39
16 the other parties, the Free Trade Commission to 08:53:42
17 issue interpretations under Article 2001(2)(c). 08:53:43
18 And with respect to that issue, I 08:53:50
19 would -- I would respectfully submit that this 08:53:51
20 Tribunal should take the same approach that other 08:53:54
21 NAFTA Tribunals have when this argument has been 08:53:56
22 made for it and not to give the fact that all three 08:53:59
23 States may have the same perspective any additional 08:54:02
24 weight other than taking it into account. 08:54:06
25 And, again, there is, as Gabrielle 08:54:08

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1 "Article 1105(1) prescribes 08:55:21
2 the customary international 08:55:26
3 law minimum standard of 08:55:26
4 treatment of aliens as the 08:55:28
5 minimum standard of treatment 08:55:28
6 to be afforded to investments 08:55:29
7 of investors of another 08:55:30
8 Party." 08:55:31
9 The second phrase: 08:55:32
10 "The concepts of 'fair and 08:55:33
11 equitable treatment' and 08:55:34
12 'full protection and 08:55:35
13 security' do not require 08:55:36
14 treatment in addition to or 08:55:37
15 beyond that which is required 08:55:38
16 by customary international 08:55:39
17 law minimum standard of 08:55:40
18 treatment of aliens." 08:55:42
19 And then the statement which isn't 08:55:45
20 relevant to our case, I don't believe, that: 08:55:46
21 "A determination that there 08:55:50
22 has been a breach of another 08:55:51
23 provision of the NAFTA, or of 08:55:52
24 a separate international 08:55:53
25 agreement, does not establish 08:55:54

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1 that there has been a breach 08:55:55
2 of Article 1105(1)." 08:55:57
3 And, of course, there's been a lot of 08:55:59
4 ink spilled and a lot of -- a lot of arguments in 08:56:01
5 many cases about what the effect of this FTC 08:56:03
6 interpretation note is with respect to 1105 and -- 08:56:05
7 and how it should be interpreted under the NAFTA. 08:56:08
8 And I wanted to set out our -- our 08:56:10
9 view quite concisely on this issue. First of all, 08:56:13
10 the MST, minimum standard of treatment, it's a rule 08:56:19
11 of customary international law. It's the floor of 08:56:22
12 treatment protected under Article 1105. And as 08:56:25
13 Canada, I believe, agrees, it's an umbrella concept, 08:56:29
14 which, itself, incorporates different elements. 08:56:32
15 And we've referred to the Dumberry. 08:56:35
16 He -- my friends have referred to him as well. He 08:56:38
17 certainly is someone who has written much in this 08:56:40
18 area, and he agrees that MST is an umbrella concept, 08:56:44
19 and -- and our submission is that the content of the 08:56:50
20 standard is not static, but rather evolves over time 08:56:53
21 with the development of customary international law. 08:56:56
22 08:56:58
23 Now, the FET standard -- and this is really a matter 08:56:58
24 of textual interpretation, and you'll see that this 08:57:06
25 is supported by Dumberry as well: 08:57:08

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1 respect to deciding whether or not, you know, 08:58:09
2 evidence -- there's evidence of customary 08:58:10
3 international law in this case. And Mr. Bishop had 08:58:12
4 asked Ms. Tabet some questions about this during the 08:58:14
5 opening. 08:58:17
6 And our -- our position is that, with 08:58:17
7 respect to -- no question that, when it comes to 08:58:20
8 proving the breach, that we, the Claimants, have the 08:58:23
9 burden of proof. But in terms of proving what the 08:58:27
10 legal standard is, there's an equal burden on either 08:58:30
11 side to the extent to which they want to say that 08:58:33
12 the customary -- that there is evidence of customary 08:58:35
13 law, you know, state practice, opinio juris of a 08:58:38
14 particular standard. Both parties -- each party 08:58:42
15 would bear their own independent burden of proof to 08:58:45
16 try to establish that. And, of course, if such 08:58:48
17 evidence was put in front of the Tribunal by either 08:58:50
18 party, the Tribunal would then have to consider 08:58:53
19 whether that was appropriate evidence of customary 08:58:55
20 international law and see whether that establishes a 08:58:57
21 particular threshold. 08:58:59
22 What's happened, if you read the 08:59:02
23 cases, though, in my submission, is you don't have 08:59:04
24 either party coming forward and putting forward this 08:59:08
25 sort of evidence of state practice. What you have 08:59:11

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1 "Under Article 1105, the FET 08:57:10
2 standard must be considered 08:57:13
3 as one of the elements 08:57:14
4 included in the umbrella 08:57:15
5 concept of the minimum 08:57:17
6 standard of treatment." 08:57:17
7 And, as we say, this is clear from the 08:57:17
8 language of 1105, which requires the NAFTA parties 08:57:19
9 to provide treatment in accordance with 08:57:22
10 international law, including FET. 08:57:24
11 So interpretive note is making clear 08:57:26
12 that you're in the overall umbrella of MST, but also 08:57:28
13 making clear that, with respect to the Provision 08:57:32
14 1105, that it includes FET. And as Pope and Talbot 08:57:35
15 said, any other reading would require "including" to 08:57:38
16 be read as excluding. So that approach has been -- 08:57:41
17 was rejected in Pope and Talbot and has -- has 08:57:44
18 never, of course, been accepted. 08:57:46
19 And the United States, you'll see, in 08:57:48
20 their Article 1128 submissions stated this, and we 08:57:49
21 have mentioned a number of the multiple NAFTA 08:57:54
22 tribunals where -- that have recognized this. 08:57:57
23 Now, there's been questions from the 08:58:00
24 Tribunal about the burden of proof and the question 08:58:01
25 as to who has -- who bears the burden of proof with 08:58:04

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1 in this particular case is you have more of an 08:59:14
2 interpretive process that's going on where you start 08:59:18
3 with the premise that minimum standard of treatment, 08:59:21
4 under 1105, includes FET. So there's got to be some 08:59:26
5 -- we're not working with a vacuum. There's got to 08:59:28
6 be some content to FET. 08:59:31
7 And then you look to international sources of law, 08:59:33
8 which, of course, you're entitled to do. You're 08:59:36
9 interpreting the NAFTA under international law. You 08:59:38
10 look to international sources, which include 08:59:38
11 judicial decisions, arbitral decisions, to make a 08:59:40
12 determination as to what that means. 08:59:43
13 And what you see in the case law is 08:59:44
14 you see the NAFTA Tribunals consistently in case 08:59:46
15 after case, and they may articulate it in different 08:59:49
16 ways and say it in different ways, but you see them 08:59:52
17 all coming up, all referring to previous Tribunals. 08:59:54
18 You see the parties, of course, whether it's Canada 08:59:59
19 or the Claimants, arguing these particular cases, 09:00:01
20 and you see the reliance on them by Tribunals to 09:00:05
21 decide what particular approach they should take to 09:00:08
22 1105 in these cases. And we've got a chart here 09:00:12
23 that illustrates this. 09:00:15
24 All these NAFTA cases, have they been determined -- 09:00:17
25 determine Article 1105 through jurisprudence, 09:00:21

1 through reference to jurisprudence. And you can see 09:00:24
2 the line of yeses all the way down because that's 09:00:27
3 the approach that has been taken in the case law. 09:00:30
4 And in this respect, I note that 09:00:32
5 Canada equally has failed to show any evidence of 09:00:36
6 state practice and opinio juris that FET, under MST, 09:00:40
7 requires conduct that is outrageous or egregious. 09:00:43
8 And if you look back to the start of 09:00:47
9 this, the standards established, of course, in the 09:00:49
10 Neer decision, that case involved issues of physical 09:00:51
11 security of an alien and the -- the question as to 09:00:54
12 whether the Mexican authorities had properly 09:00:57
13 investigated murder. It had nothing to do with 09:00:59
14 economic issues and the fair and equitable treatment 09:01:01
15 of the investment or foreign investor. 09:01:03
16 And as stated in the Railroad 09:01:04
17 Development case, the mixed commission in Neer 09:01:08
18 case -- this was a mixed U.S.-Mexican arbitral 09:01:09
19 Tribunal -- did not formulate the minimum standard 09:01:13
20 of treatment after an analysis of state practice. 09:01:16
21 So, as they say there: 09:01:18
22 "By the strict standards of 09:01:19
23 proof of customary 09:01:19
24 international law applied in 09:01:19
25 Glamis Gold, Neer would fail 09:01:19

1 State and harmful to the 09:02:08
2 claimant if the conduct is 09:02:08
3 arbitrary, grossly unfair, 09:02:08
4 unjust or idiosyncratic, is 09:02:08
5 discriminatory and exposes 09:02:08
6 the claimant to sectional or 09:02:08
7 racial prejudice, or involves 09:02:08
8 a lack of due process leading 09:02:08
9 to an outcome which offends 09:02:08
10 judicial propriety -- as 09:02:08
11 might be the case with a 09:02:08
12 manifest failure of natural 09:02:08
13 justice in judicial 09:02:08
14 proceedings or a complete 09:02:08
15 lack of transparency and 09:02:08
16 candour in an administrative 09:02:08
17 process." 09:02:08
18 And they also say: 09:02:08
19 "In applying this standard it 09:02:40
20 is relevant that the 09:02:40
21 treatment is in breach of 09:02:40
22 representations made by the 09:02:40
23 host State which were 09:02:40
24 reasonably relied on by the 09:02:40
25 claimant." 09:02:40

1 to prove its famous 09:01:19
2 statement...to be an 09:01:19
3 expression of customary 09:01:27
4 international law." 09:01:27
5 So if we go back to the source and try 09:01:28
6 to see what's going on, we see, even at the source 09:01:30
7 of this -- you know, Neer was not a case where the 09:01:32
8 parties on either side put forward evidence of, you 09:01:35
9 know, consistent practice, et cetera, and opinio 09:01:39
10 juris. 09:01:41
11 And we also point out that with 09:01:45
12 respect to the Neer standard, it's been rejected by 09:01:47
13 all Tribunals with exception of the Glamis Gold 09:01:52
14 case. 09:01:55
15 So what have NAFTA Tribunals done? 09:01:57
16 They have -- there's a convergence around the 09:02:00
17 approach that was taken initially in the Waste 09:02:04
18 Management II. And you can see there: 09:02:06
19 "Taken together, the S.D. 09:02:08
20 Myers, Mondev, ADF and Loewen 09:02:08
21 cases suggest that the 09:02:08
22 minimum standard of treatment 09:02:08
23 of fair and equitable 09:02:08
24 treatment is infringed by 09:02:08
25 conduct attributable to the 09:02:08

1 All right? So legitimate expectations 09:02:40
2 is an element in considering or not whether this 09:02:53
3 test has been breached. And I want to emphasize in 09:02:56
4 this case we're not arguing -- and there may have 09:02:58
5 been some confusion at some point. We're not 09:03:00
6 arguing that there is a customary -- you know, at 09:03:02
7 least our primary argument is not that there is a 09:03:05
8 customary international law principle under fair and 09:03:07
9 equitable of legitimate expectations that is sort of 09:03:11
10 independent and standalone. 09:03:14
11 What we argue and what is consistent 09:03:14
12 with what Dumberry has said as well is it's part of 09:03:17
13 the set of elements and factors that you look at in 09:03:19
14 determining whether a breach of FET has occurred. 09:03:23
15 So together with elements of arbitrariness of 09:03:26
16 conduct or whatever else is involved, it's relevant 09:03:29
17 and appropriate to examine whether or not this has 09:03:33
18 been a breach of legitimate expectations. It's a 09:03:36
19 factor. 09:03:39
20 And I also -- in this next slide, we 09:03:39
21 point out the fact that, if you look at the 09:03:41
22 difference between Waste Management and Glamis Gold, 09:03:45
23 you know, how important really is this debate in 09:03:48
24 terms of actual decision-making? And, again, it's 09:03:52
25 -- I have no -- no beef with scholars who want to 09:03:54

1 interpret which approach is appropriate or not. 09:04:02
2 It's a very interesting and difficult question. 09:04:04
3 But when you come to the actual case 09:04:07
4 law and how Tribunals have applied it, the Waste 09:04:08
5 Management, you've got arbitrariness that's 09:04:12
6 included. Glamis gold manifests arbitrariness. 09:04:14
7 Waste Management, gross unfairness. Glamis Gold, 09:04:17
8 blatant unfairness. Waste Management, unjust or 09:04:21
9 idiosyncratic conduct, discrimination, evident 09:04:23
10 discrimination, lack of due process, complete lack 09:04:27
11 of due process, manifest lack of reasons. 09:04:29
12 Bad faith is a determinative factor 09:04:32
13 under both thresholds. Legitimate expectations are 09:04:35
14 a relevant factor under both, because Glamis Gold, 09:04:38
15 of course, considered the legitimate expectations as 09:04:41
16 well. 09:04:44
17 So, you know, is there really a 09:04:45
18 material difference, and particularly in this case, 09:04:46
19 between the two standards? We would say that, with 09:04:50
20 respect to the -- to the unfairness and 09:04:53
21 arbitrariness that's occurred in this case, that it 09:04:58
22 meets either test. 09:05:00
23 And we highlight here the Glamis Gold 09:05:04
24 and the Dumberry discussion here that, as Dumberry 09:05:07
25 says: 09:05:11

1 the treatment is made against 09:06:04
2 the background of. 09:06:06
3 "(i) clear and explicit 09:06:06
4 representations made by or 09:06:06
5 attributable to the NAFTA 09:06:06
6 host State in order to induce 09:06:08
7 the investment, and 09:06:09
8 "(ii) were by reference to an 09:06:11
9 objective standard, 09:06:12
10 reasonably relied on by the 09:06:13
11 investor, and 09:06:14
12 "(iii) were subsequently 09:06:14
13 repudiated by the NAFTA host 09:06:16
14 State." 09:06:17
15 Which, in our submission, the evidence 09:06:18
16 establishes in our case representations objectively 09:06:20
17 relied on, subsequently repudiated. 09:06:24
18 And you'll see Glamis Gold again, and 09:06:26
19 this is important and really makes the point as to 09:06:32
20 what are we exactly arguing about between the 09:06:34
21 difference of these standards. They say: 09:06:37
22 "Legitimate expectations 09:06:38
23 relate to an examination 09:06:38
24 under Article 1105(i) in such 09:06:42
25 situations 'where a 09:06:44

1 "The Glamis Tribunal added 09:05:12
2 that what is considered today 09:05:15
3 as 'egregious' and 'shocking' 09:05:16
4 has changed since the 1920s." 09:05:17
5 Thus, the state conduct that would 09:05:19
6 have certainly not been considered a breach of the 09:05:20
7 minimum standard of treatment at the time may, 09:05:22
8 depending on each Tribunal, be deemed a violation of 09:05:24
9 the standard today. At the end of the day, the 09:05:27
10 practical differences between the reasoning adopted 09:05:28
11 by the Glamis Tribunal and that of others may be 09:05:30
12 more apparent than real. 09:05:33
13 And that, in my respectful submission, 09:05:35
14 seems to be consistent with our reading of the NAFTA 09:05:37
15 case law. 09:05:40
16 So with respect to representations, we 09:05:46
17 have several cases here which, in interpreting 1105, 09:05:47
18 note the fact that the -- that, as we say, that 09:05:51
19 breach of representations is part of the FET 09:05:54
20 analysis. 09:05:57
21 So this is the Mobil case, paragraph 09:05:58
22 3: 09:06:01
23 "In determining whether the 09:06:01
24 standard has been violated it 09:06:02
25 will be a relevant fact that 09:06:03

1 Contracting Party's conduct 09:06:45
2 creates reasonable and 09:06:46
3 justifiable expectations on 09:06:48
4 the part of an investor (or 09:06:49
5 investment) to act in 09:06:51
6 reliance on said conduct." 09:06:52
7 So whether we're under the 09:06:53
8 egregiousness test, you know, the Neer test as 09:06:55
9 applied through Glamis gold, whether we're under the 09:06:58
10 Waste Management test, which are -- which are the 09:07:01
11 only two tests that NAFTA parties -- NAFTA Tribunals 09:07:04
12 have applied, with, of course, the vast majority 09:07:07
13 applying the Waste Management test, you're looking 09:07:09
14 and entitled to take into account whether legitimate 09:07:12
15 -- whether representations were made that were 09:07:15
16 reasonably relied on and where there is repudiation 09:07:18
17 of that as part of the overall context of 09:07:22
18 determining whether there's an FET violation and in 09:07:24
19 considering whether it's -- it's arbitrary and 09:07:28
20 unfair. 09:07:30
21 And, again, Dumberry accepts this, as 09:07:30
22 he said: 09:07:33
23 "In the present author's 09:07:33
24 view, the Mobil Tribunal as 09:07:35
25 well as Waste Management and 09:07:37

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1 Cargill Tribunals adopted a 09:07:38
2 more convincing approach." 09:07:39
3 So they have held that the host 09:07:41
4 State's failure to respect an investor's legitimate 09:07:42
5 expectation does not constitute a breach of the FET 09:07:45
6 standard, but is, rather, a factor to be taken into 09:07:47
7 account when assessing whether or not 09:07:51
8 well-established elements of the standard have been 09:07:53
9 breached. So he recognizes that it's a factor in 09:07:54
10 these tests. 09:07:57
11 Now, the Tribunal has asked about the 09:07:58
12 evidence of all the various bits, some close to 09:08:00
13 3,000, that have been entered into by state parties, 09:08:02
14 you know, as well as a multilateral energy charter 09:08:06
15 treaty and various other -- other treaties, some of 09:08:09
16 which, of course, are going through the ratification 09:08:12
17 process right now. 09:08:14
18 And there was an expert opinion of 09:08:15
19 Professor Dolzer that we filed as part of this case. 09:08:18
20 And he concludes -- he carries out a survey with 09:08:22
21 respect to, as he described, 2,800 bilateral 09:08:26
22 investment treaties at the time. And his conclusion 09:08:28
23 is that customary international law requires states 09:08:31
24 to grant FET to foreign investors. 09:08:33
25 He looks at this from the customary 09:08:36

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1 law test perspective of the uniformity and 09:08:38
2 representativeness of the state practice. He -- 09:08:43
3 you'll see in his opinion he looks at a survey of 09:08:44
4 bilateral investment treaty language and finds that 09:08:46
5 almost 94 percent of the BITs he surveyed contained 09:08:49
6 FET provisions that are not linked to MST. 09:08:53
7 He also reaches the opinion that, in 09:08:54
8 the context of these treaties, that States are 09:08:57
9 acting out of a sense of obligation as to how they 09:08:59
10 are required to treat investors under customary law. 09:09:02
11 Now, I just want to be very clear as 09:09:06
12 to what our position is. As I say, our position is 09:09:08
13 that -- is that Canada's conduct, Ontario's conduct 09:09:10
14 is sufficiently egregious to meet either of the 09:09:14
15 Waste Management or Glamis Gold standards. So, in 09:09:17
16 our submission, we're not asking you or requiring 09:09:19
17 you to go further and find that somehow there has 09:09:21
18 been a legitimate expectations doctrine or anything 09:09:24
19 else that's developed under customary law. 09:09:28
20 But we nevertheless support Professor 09:09:30
21 Dolzer's opinion, and as we say here, like the MST 09:09:33
22 requirement which, of course, has had a traditional 09:09:39
23 focus on physical security, if you look back to the 09:09:41
24 Neer standard, a requirement that aliens and alien 09:09:44
25 corporations be treated fairly and equitably in 09:09:47

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1 relation to business and investment has reached the 09:09:49
2 stage of becoming sufficiently part of a widespread 09:09:51
3 and consistent practice so as to constitute a 09:09:55
4 standard of customary international law with the 09:09:57
5 requisite opinio juris. And, of course, we're 09:10:00
6 picking up the language of Judge Schwebel in terms 09:10:02
7 of what he had stated there. 09:10:06
8 And I -- listen, I fully appreciate 09:10:06
9 that -- that the issue of determining whether or not 09:10:09
10 something has become a custom is a complicated 09:10:11
11 issue. You know, there are questions as to how much 09:10:13
12 time has been past. There are questions as to the 09:10:15
13 uniformity and consistency. 09:10:18
14 Dumbery, for example, the best I 09:10:20
15 understand it, he makes -- from his assessment, he 09:10:25
16 finds that you don't have the consistency, because 09:10:28
17 he looks at the variability of some of the bit 09:10:30
18 language. 09:10:33
19 And I appreciate all of that, and to 09:10:33
20 be frank, we're not requiring you to make that 09:10:35
21 determination, which I think is a complicated 09:10:38
22 determination to make, but we do support the view of 09:10:40
23 Professor Dolzer. He's provided an expert opinion 09:10:43
24 here that there is sufficient evidence, as Judge 09:10:47
25 Schwebel has also said, to be able to come to a 09:10:50

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1 conclusion. Should you decide you need to determine 09:10:54
2 this issue, that there is sufficient evidence from 09:10:56
3 the state practice, you know, supported by the other 09:11:00
4 references, because Professor Dolzer also refers to 09:11:05
5 other state practice in his opinion to come to the 09:11:08
6 conclusion and then, with respect to that, from that 09:11:11
7 conclusion, as to what that means for FET as it 09:11:16
8 might be applied in the context of the NAFTA. 09:11:21
9 But, listen, that's all I want to say 09:11:23
10 on the -- the legal issue of 1105. And I want to 09:11:25
11 focus really on the facts because our case, as we 09:11:29
12 have tried to say all along, is based on the facts, 09:11:31
13 and it's an evidence-based case. 09:11:34
14 So in terms of the representations 09:11:39
15 that were made, I spent a lot of time on this in our 09:11:41
16 opening statement, and I'll be fairly brief in 09:11:43
17 running through the evidence here. Of course, the 09:11:45
18 purpose of my closing is not to repeat what we said 09:11:48
19 in our opening, but to -- to show how, in our view, 09:11:50
20 the evidence that came out through this hearing 09:11:53
21 supports what we said. 09:11:56
22 We've got this speech Minister 09:11:58
23 Smitherman made in introducing this into legislature 09:12:01
24 and the focus on certainty and creating this 09:12:04
25 attractive investment climate, of certainty that 09:12:07

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1 power would be purchased at a fair price, 09:12:09
2 certainty that, wherever feasible, the power would 09:12:12
3 be connected to the grid, certainty that Government 09:12:13
4 would issues permits in a timely way. And that's 09:12:16
5 really where -- I mean, we have the lifting of the 09:12:18
6 moratorium before that, which starts in terms of 09:12:19
7 representations made, but this is where their 09:12:22
8 representations really hit the road and become very, 09:12:25
9 very powerful from the Government of Ontario. Come 09:12:27
10 and invest in Ontario. Come and apply for a FIT 09:12:31
11 contract, and we'll give you certainty, certainty, 09:12:36
12 certainty, certainty, which, of course, if you're an 09:12:39
13 investor hearing this, these are words you like to 09:12:43
14 hear. 09:12:45
15 Now, what does Sarah Powell say? And 09:12:46
16 this is going through the oral evidence. She says 09:12:49
17 it was intended to turbocharge. And that -- she 09:12:52
18 says: 09:12:56
19 "That's the word the 09:12:56
20 Government used, and I think 09:12:56
21 it did accomplish that goal, 09:12:58
22 and it did turbocharge the 09:12:59
23 creation of renewable energy 09:13:01
24 in Ontario." 09:13:02
25 And she talked about the fact of her 09:13:02

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1 very strong signal that they 09:14:08
2 were moving forward with the 09:14:09
3 implementation of more 09:14:10
4 renewable energy, including 09:14:12
5 offshore wind." 09:14:13
6 And he said: 09:14:14
7 "It creates a reasonable 09:14:15
8 expectation among developers 09:14:17
9 that they should look at such 09:14:18
10 opportunities guided by the 09:14:19
11 information they had." 09:14:20
12 And in his witness statement, of 09:14:21
13 course, he said specifically -- and this is 09:14:23
14 important -- that he, in making these statements, 09:14:26
15 intended for investors to rely on them, because how 09:14:30
16 often do we get cases such as this, investment 09:14:35
17 arbitration cases, where we actually have someone 09:14:39
18 who was there in the government at the time in a 09:14:41
19 very senior position bringing forth this 09:14:43
20 legislation, making it clear that, not only did he 09:14:45
21 make these representations, but he intended 09:14:48
22 investors to rely on them, which I think is an 09:14:50
23 important factor for you to take into account in 09:14:53
24 determining the objective test as to whether the 09:14:55
25 investors did reasonably rely on these 09:14:57

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1 involvement in the industry at that time and the 09:13:04
2 important effect that this had in terms of bringing 09:13:07
3 investment and creating the industry. 09:13:09
4 She says that it represented 09:13:12
5 unparalleled commitment to this process. She 09:13:13
6 described it as a legislative sea change. And, 09:13:15
7 again, for those of us who lived through this 09:13:19
8 period, this was a fundamental -- this was not just 09:13:21
9 some sort of -- you know, one of 10 policies of the 09:13:24
10 Government of Ontario. This was their policy, both 09:13:27
11 to move away from coal burning. This was their 09:13:30
12 climate change policy. This was their industrial 09:13:32
13 policy to revive the Ontario economy which had 09:13:36
14 suffered so much from the financial crisis. 09:13:40
15 There was complete support. This 09:13:42
16 wasn't a rogue initiative of Minister Smitherman. 09:13:44
17 This was complete support, as he says in his witness 09:13:46
18 statement, at the central level, with the Premier by 09:13:49
19 his side, in supporting this legislative agenda. 09:13:51
20 Absolutely supported by the Government. 09:13:55
21 The pace of change, as Ms. Powell 09:13:56
22 says, was fast and furious. 09:13:58
23 And Smitherman says, former Minister 09:14:02
24 Smitherman: 09:14:05
25 "Ontario had sent a very, 09:14:05

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1 representations. 09:14:59
2 Rosalyn Lawrence, at the time, you'll 09:15:02
3 recall, she was the MNR official who testified. She 09:15:04
4 is talking here about the required REA, the 09:15:08
5 Renewable Energy Approval: 09:15:10
6 "Did it apply to wind 09:15:10
7 projects? 09:15:15
8 "Yes, it would. 09:15:15
9 "It applied to onshore wind? 09:15:15
10 "Yes, it would. 09:15:16
11 "And offshore wind? 09:15:16
12 "Yes, it did." 09:15:17
13 Uwe Roper, and this is -- this is all 09:15:22
14 the sense that there were rules in place at this 09:15:24
15 time for offshore wind. We weren't dealing -- and 09:15:26
16 I'm talking here about the period before Windstream 09:15:27
17 is offered the FIT contract when they're deciding 09:15:32
18 whether or not to apply for the FIT contract and 09:15:35
19 what they're relying upon. 09:15:37
20 So, from their perspective, the rules are in place. 09:15:38
21 From the Government's perspective, as you heard from 09:15:41
22 Ms. Rosalyn Lawrence, she -- her testimony there, 09:15:43
23 from her perspective, the rules were in place. 09:15:46
24 Uwe Roper, you will recall the 09:15:50
25 engineer who was advising -- from Ortech, who was 09:15:52

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1 advising Windstream at the time. He's very clear in 09:15:55
2 saying: 09:15:58
3 "I'm not talking about the 09:15:58
4 framework, because we believe 09:16:00
5 the framework is fully 09:16:01
6 established." 09:16:02
7 He's saying: 09:16:02
8 "I think it was established 09:16:02
9 that although traditionally 09:16:05
10 permitting was done on the 09:16:07
11 Environmental Assessment Act, 09:16:07
12 permitting would not be done 09:16:07
13 as approvals under the 09:16:11
14 Approval Act, but under the 09:16:11
15 Act, the regulations had been 09:16:12
16 put out, which are the REA 09:16:13
17 regulations." 09:16:15
18 And then he was talking about specific 09:16:16
19 guidance for models to use, what setbacks to use had 09:16:18
20 not been published, so, therefore, we need to 09:16:21
21 develop that. 09:16:23
22 So he, you'll recall -- and I suggest 09:16:24
23 you read his evidence very carefully -- was making a 09:16:26
24 distinction between rules and guidelines and 09:16:30
25 understood that there were additional guidelines to 09:16:33

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1 submission of the objective -- objectively as to 09:17:40
2 whether Windstream would've properly relied on this 09:17:44
3 evidence in terms of making their -- or the 09:17:47
4 framework at that time in terms of making their 09:17:50
5 investment. 09:17:51
6 And we have specifically the testimony 09:17:52
7 of David Mars, asked what he -- what representations 09:17:55
8 he has relied on, and he said: 09:18:01
9 "This includes Minister 09:18:02
10 Cansfield's announcement that 09:18:04
11 Ontario was open for business 09:18:05
12 for offshore wind, numerous 09:18:07
13 speeches by the members of 09:18:08
14 the Ontario Government, 09:18:09
15 positive investment climate 09:18:10
16 created by Green Energy Act, 09:18:12
17 inclusion of offshore wind in 09:18:13
18 the FIT program, Minister 09:18:14
19 Cansfield's letter 09:18:16
20 encouraging Crown land 09:18:17
21 applicants to apply for a FIT 09:18:18
22 contract and streamline 09:18:20
23 regulatory regime." 09:18:21
24 That these were all elements that he 09:18:22
25 relied on. 09:18:24

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1 come, but the basic rules -- and we took some time 09:16:35
2 going through all the REA regulations that were in 09:16:38
3 place and all the MNR regulations that were in 09:16:41
4 place. Those rules were available for the project 09:16:43
5 to move forward. 09:16:45
6 And Mr. Guillet, certainly he 09:16:47
7 indicated that he had been -- he had made some trips 09:16:51
8 over to Ontario at the time; was very interested in 09:16:54
9 it. He was one of the international players looking 09:16:57
10 at it. And he can confirm that, at that time, it 09:16:59
11 was looking like an attractive market for offshore 09:17:01
12 wind. And if the moratorium hadn't played, it would 09:17:04
13 probably be a good place to do offshore wind with 09:17:06
14 the FIT tariff, with these policy steps to make 09:17:09
15 these projects doable. 09:17:10
16 And you'll see when you review his -- 09:17:11
17 his evidence, he did confirm that it was a good 09:17:13
18 contract, a very good contract. The 20 years was 09:17:15
19 very good. The inflation indexing was very good. 09:17:18
20 The full guaranteed off-take was very good. And we 09:17:21
21 can see in his statements here a confirmation 09:17:24
22 again -- this isn't a but-for analysis, but in the 09:17:27
23 real world -- that he, as an individual working in 09:17:30
24 the offshore wind space, found this an attractive 09:17:33
25 market for offshore wind, again supporting our 09:17:37

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1 And William Ziegler, the senior 09:18:26
2 business person, who really was putting his money 09:18:31
3 behind the project, says -- and this may have been a 09:18:34
4 response -- I can't recall right now -- to a 09:18:41
5 question from -- from Dr. Cremades. I can't recall 09:18:43
6 exactly. One of the Tribunal members asked about 09:18:48
7 risk. 09:18:50
8 "I don't like risk." 09:18:50
9 He says: 09:18:51
10 "Risk is what keeps you up at 09:18:51
11 night." 09:18:55
12 And he talks about prudent investors 09:18:55
13 trying to anticipate what can be thrown at them as 09:18:57
14 they go through the process and mitigate those risks 09:18:59
15 in any way possible: 09:19:03
16 "The Government risk or a 09:19:04
17 political risk is very hard 09:19:05
18 to understand or appraise if 09:19:06
19 you're not part of that 09:19:07
20 world. And, you know, for 09:19:08
21 this project, we hired people 09:19:08
22 that would help us try to 09:19:10
23 understand what was happening 09:19:11
24 in the province. And from 09:19:13
25 everything we saw, it was 09:19:14

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1 embracing wind energy and 09:19:16
2 embracing, in particular, 09:19:17
3 offshore wind. It had a 09:19:18
4 moratorium in effect in the 09:19:20
5 province, and they erased it 09:19:21
6 and said, 'Come on up' --" 09:19:23
7 That's the moratorium that had been 09:19:24
8 the MNR moratorium. 09:19:26
9 "-- and we were very 09:19:27
10 attracted to that." 09:19:29
11 And, in my submission, his evidence 09:19:30
12 was very, very credible on that point. 09:19:32
13 Now, Canada says that, at this point 09:19:41
14 in time, before we applied for the FIT contract, the 09:19:43
15 Claimant was well aware of the regulatory 09:19:46
16 uncertainty. And this is, of course, the theme of 09:19:48
17 Canada: Regulatory uncertainty. Our clients were 09:19:51
18 absolutely crazy. We were gamblers to try to move 09:19:53
19 forward with this project. It should've been clear 09:19:57
20 to us from the very first day that this project 09:20:00
21 wasn't going to go anywhere. Too much regulatory 09:20:03
22 uncertainty. 09:20:07
23 And a document which came up again and 09:20:07
24 again with respect to this was from Canada's side, 09:20:11
25 was a statement that was made in September 24 2009, 09:20:15

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1 although there was an onshore standard for noise, 09:21:03
2 550 metres, there was not yet an offshore standard 09:21:06
3 for noise. And we, of course, took you to a 09:21:08
4 document that showed at the time that what the 09:21:11
5 Ministry of Environment was communicating was, until 09:21:12
6 that standard was developed, you worked with the 09:21:16
7 40-decibel level, because that had been the basis 09:21:18
8 for determining the 550-metre onshore standard. 09:21:21
9 Now, so there's a discussion about 09:21:25
10 continuing to work, and there's a discussion about 09:21:27
11 minimum separation distance standards for noise. 09:21:30
12 And I -- it is fair to say on that 09:21:33
13 basis that someone carefully reading the document 09:21:36
14 would see that there would be -- that there was 09:21:38
15 something going on between the Ministries with 09:21:41
16 respect to province-wide minimum separation distance 09:21:42
17 standards for noise. 09:21:45
18 Now, does that mean that there's going 09:21:47
19 to be a 5-kilometre exclusion justified on -- 09:21:50
20 apparently on various bases other than noise? Does 09:21:56
21 that mean there is going to be a moratorium put in 09:21:58
22 place at some point? 09:22:00
23 I mean, I would say that's not what an 09:22:02
24 investor reading this provision at the time would 09:22:06
25 think. And it's very much more consistent with the 09:22:08

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1 an EBR posting, which is describing there are 09:20:20
2 special rules for wind facilities that include 09:20:24
3 turbines in contact with surface water other than 09:20:26
4 wetlands, so the statement that there are special 09:20:28
5 rules in place. These facilities require a REA and 09:20:31
6 are required to submit an offshore wind facility 09:20:34
7 report as part of the application. 09:20:36
8 And you'll recall, sirs, that we went 09:20:38
9 through the description again of everything that was 09:20:40
10 in the REA and everything that was in the MNR 09:20:42
11 documents and all that was required for the offshore 09:20:45
12 wind facility report. So, indeed, there were rules 09:20:47
13 in place. 09:20:49
14 And then there was this next statement 09:20:50
15 here: 09:20:52
16 "The Ministry of the 09:20:52
17 Environment and the Ministry 09:20:52
18 of Natural Resources continue 09:20:54
19 to work on a coordinated 09:20:54
20 approach to offshore wind 09:20:56
21 facilities which would 09:20:58
22 include province-wide minimum 09:20:58
23 separation distance standards 09:21:00
24 for noise." 09:21:02
25 And, indeed, it's the case that, 09:21:02

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1 evidence of the Claimant's witnesses, Mr. Roeper and 09:22:11
2 others, that certainly there were additional issues 09:22:14
3 to be worked out. There were particular guidelines. 09:22:16
4 There was this noise issue that had to be resolved, 09:22:19
5 but we had a regulatory framework in place. 09:22:22
6 And it's interesting in this respect 09:22:25
7 to note the testimony of Rosalyn Lawrence, who was 09:22:26
8 asked about this. And I asked her specifically 09:22:29
9 about this statement: 09:22:31
10 "Do you have any recollection 09:22:32
11 in June of 2009 as to what 09:22:33
12 work you were doing with the 09:22:35
13 Ministry to coordinate your 09:22:36
14 approach in determining 09:22:37
15 separation distances? I 09:22:38
16 asked because I see a 09:22:40
17 discussion occurring about a 09:22:41
18 year later, but I don't see 09:22:43
19 anything in June of 2009. 09:22:44
20 And: 09:22:45
21 "ANSWER: I don't have any 09:22:45
22 recollection of such 09:22:47
23 discussions, and it would be 09:22:48
24 unlikely that we would be 09:22:50
25 involved in discussions on 09:22:50

1 noise setbacks. It's not our 09:22:51
2 line of business." 09:22:53
3 So I don't know exactly what was meant 09:22:54
4 by, 09:22:57
5 "There were continuing 09:22:57
6 discussions between the MNR 09:22:59
7 and MOE on this." 09:23:00
8 In our submission, when you look at 09:23:02
9 the evidence, I think you'll find that both MOE and 09:23:04
10 MNR had -- as Ms. Wallace and Ms. Dumais candidly 09:23:06
11 admitted, were putting offshore wind on kind of a 09:23:13
12 back burner. They were focusing on other issues. 09:23:15
13 They didn't expect there to be a FIT contract for 09:23:18
14 offshore wind. They didn't appear to be 09:23:20
15 particularly aware that the MNR was requiring those 09:23:22
16 applying for a site release to apply into the FIT 09:23:25
17 program or else lose their site release. 09:23:29
18 So although the statement was there, I 09:23:32
19 don't think we have seen any evidence to suggest 09:23:34
20 that such discussions were actually going on at the 09:23:36
21 time. 09:23:38
22 So -- and what can we take from that 09:23:40
23 in terms of what representations were made? 09:23:42
24 Certainly, from Mr. Baines, his 09:23:45
25 perspective, is that the offshore regulations said 09:23:48

1 resolve the issue, and the 09:24:53
2 approach is detailed in noise 09:24:53
3 modelling as opposed to 09:24:55
4 following a standard 09:24:58
5 setback." 09:24:59
6 Sarah Powell, asked about this: 09:25:00
7 "They would have had to come 09:25:02
8 up with their own modelling 09:25:03
9 to confirm that the noise 09:25:03
10 receptors onshore would have 09:25:06
11 satisfied the 40 decibels." 09:25:08
12 So the proponents come up with that 09:25:09
13 modelling in her perspective. 09:25:10
14 "The industry understood that 09:25:12
15 offshore setbacks would be 09:25:13
16 determined on a site-by-site 09:25:15
17 basis." 09:25:16
18 And she is talking very involved with 09:25:17
19 the industry at the time. 09:25:18
20 Rosalyn Lawrence, she was very firm in 09:25:20
21 her evidence, in emphasizing that MNR's perspective. 09:25:25
22 And, remember, that MNR has a very significant role 09:25:28
23 in actually going out and ensuring that these 09:25:31
24 regulations are imposed. They are the ones who have 09:25:35
25 authority over lakes and rivers in Ontario, over 09:25:39

1 that each setback would be determined on a specific 09:23:51
2 basis based upon each individual project. 09:23:53
3 And that's the document I mentioned 09:23:55
4 that talked about 40 decibels and would be 09:23:58
5 determined on the noise limitations, in other words, 09:24:00
6 40 decibels back from a sensitive receptor. So 09:24:02
7 there was no setback. The setback -- my 09:24:05
8 interpretation was the setback would be whatever 09:24:07
9 distance would meet the MOE's guideline of 40 09:24:09
10 decibels. 09:24:12
11 And I can tell you that, in the 09:24:13
12 onshore wind world, 40 decibels is the level that 09:24:17
13 you keep -- it is -- it is the particular standard 09:24:17
14 that is applied in that context. It's a standard at 09:24:19
15 which, certainly from a health expert's perspective, 09:24:21
16 the determination is made that any particular levels 09:24:25
17 of annoyance or health effects from the noise of a 09:24:30
18 wind turbine are extremely unlikely to have any 09:24:32
19 effect, because the noise, as the documents say, the 09:24:36
20 MOE's own documents, it's a type of noise at 40 09:24:39
21 decibels of being in a quiet library. 09:24:43
22 And this is Uwe Roeper: 09:24:48
23 "So, in my mind, the lack of 09:24:50
24 a specific setback here tells 09:24:52
25 us what approach to use to 09:24:53

1 many of the wildlife issues, the species at risk 09:25:43
2 issues and others. And Rosalyn Lawrence says here 09:25:46
3 that, as a Ministry, they were: 09:25:48
4 "...very comfortable with 09:25:49
5 what is our normal approach 09:25:51
6 to work with the proponents 09:25:51
7 on a site-by-site basis and 09:25:54
8 iterate and evolve the 09:25:55
9 approval process as we went 09:25:55
10 forward." 09:25:57
11 And, again, she emphasized that again 09:25:57
12 on the right-hand side: 09:25:59
13 "Working with the proponent 09:26:00
14 on a site-specific basis and 09:26:01
15 learn and adapt as we go." 09:26:03
16 Now, I won't belabour this. You heard 09:26:06
17 a lot about this letter. Minister Cansfield says: 09:26:10
18 "In order to maintain 09:26:12
19 priority position with MNR's 09:26:13
20 site release process, you 09:26:15
21 must submit an application to 09:26:16
22 the FIT program within the 09:26:17
23 FIT launch period." 09:26:18
24 This is a message from the Government 09:26:20
25 to people in the situation of Windstream that have 09:26:22

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1 an application, because they had applied during the 09:26:25
2 window in 2008 for -- for site release to use the 09:26:28
3 lake bed to develop a wind program, that you got to 09:26:31
4 apply for the FIT program if you want to preserve 09:26:34
5 your priority. 09:26:36
6 And you'll recall the subsequent 09:26:37
7 letter from Rosalyn Lawrence to CanWEA, the industry 09:26:39
8 association, making clear that those with pride in 09:26:43
9 the FIT program would get the highest priority, and 09:26:46
10 consistent, in our view, with the understanding of 09:26:50
11 the industry at the time, which, as Sarah Powell 09:26:54
12 says: 09:26:57
13 "The Feed-In Tariff flipped 09:26:58
14 it on its head. Before the 09:27:00
15 process, the FIT process, 09:27:02
16 land tenure was a gating 09:27:03
17 issue. You go and get your 09:27:05
18 land first, and then you'd 09:27:06
19 move to get the Power 09:27:07
20 Purchase Agreement. The FIT 09:27:08
21 process flipped that on its 09:27:10
22 head. 09:27:11
23 "The Government is saying you 09:27:11
24 don't move forward on that 09:27:14
25 until you get your FIT 09:27:15

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1 to move forward through the 09:28:00
2 Crown land process to develop 09:28:01
3 the project? 09:28:02
4 "That's right." 09:28:03
5 So that is -- we not only have the 09:28:06
6 understanding of the Claimant's witnesses, but we 09:28:09
7 have the understanding from the MNR as to what the 09:28:11
8 process was and that, once someone had achieved the 09:28:13
9 hard gate, the FIT contract, the Ministry would work 09:28:18
10 with them to prioritize the applications. 09:28:21
11 And you see that after Windstream gets 09:28:23
12 its FIT contract. You see the Ministry sitting 09:28:26
13 down. 09:28:29
14 And, again, David Mars saying: 09:28:30
15 "Without this letter, we 09:28:32
16 wouldn't have -- we couldn't 09:28:33
17 apply to the FIT program. We 09:28:34
18 decided to apply based on all 09:28:36
19 the knowledge we had, all 09:28:38
20 aggregated, reviewed. This 09:28:40
21 was one of the parts." 09:28:42
22 Uwe Roeper talking about the September 09:28:43
23 letter: 09:28:45
24 "This was a really important 09:28:45
25 document because it explains 09:28:47

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1 contract. That's why I call 09:27:16
2 it the key hard gate. Once 09:27:17
3 you get your FIT contract, 09:27:20
4 the Ministries would work 09:27:21
5 with the developer to move 09:27:23
6 through the development 09:27:24
7 process." 09:27:24
8 So that's the assumption and that's 09:27:25
9 her evidence as to how a commercially reasonable 09:27:26
10 developer would be -- would understand the rules at 09:27:29
11 the time and the framework at the time, consistent, 09:27:32
12 in my submission, with what we hear from the 09:27:37
13 Ministry's witness, Rosalyn Lawrence: 09:27:40
14 "QUESTION: The basic premise 09:27:42
15 of what we're talking about 09:27:44
16 here in terms of the MNR 09:27:45
17 program is that the basis was 09:27:46
18 that the applicant would 09:27:48
19 secure a FIT contract first; 09:27:49
20 correct? 09:27:50
21 "That's right. 09:27:50
22 "And then, once that was 09:27:50
23 done, the MNR would work with 09:27:54
24 the successful applicants and 09:27:56
25 prioritize the applications 09:27:58

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1 the status of Windstream and 09:28:48
2 especially the letter says, 09:28:50
3 without me rereading it, that 09:28:51
4 this status letter -- this 09:28:53
5 letter satisfied the 09:28:54
6 requirements for you to file 09:28:55
7 for the FIT contract 09:28:56
8 applications. So it's huge. 09:28:57
9 Not only that, this letter 09:28:59
10 was huge because it was 09:29:00
11 actually issued by a 09:29:02
12 Minister." 09:29:03
13 Now, again, we heard a lot of 09:29:04
14 discussion, for example from the damages experts as 09:29:07
15 to whether or not, you know, the importance of site 09:29:09
16 access and whether that had been obtained, but as 09:29:11
17 far as the developer was concerned, under the FIT 09:29:14
18 process, you had to get the FIT contract first 09:29:16
19 before you could get your site access. 09:29:18
20 And there was a reasonable expectation 09:29:20
21 that, once you get that FIT contract, the Ministry 09:29:22
22 would work with you and you would get site access. 09:29:24
23 And of course, again, I just make it 09:29:29
24 clear that we are not submitting in any respect that 09:29:31
25 any of this was guaranteed. We're talking about 09:29:33

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1 reasonable expectations. We're talking about more 09:29:36
2 likely than not. 09:29:39
3 Now, in this section, this is 09:29:41
4 encouragement of Windstream to sign the FIT 09:29:45
5 contract. And we've got the testimony, first of 09:29:47
6 all, of Doris Dumais, who is discussing there was a 09:29:50
7 particular meeting where Mr. Baines and Ortech come 09:29:54
8 and sit down with the various Ministries, and she 09:29:57
9 talks -- she -- she talks about the commitment that 09:29:59
10 was made at that meeting. She says, if any, that 09:30:03
11 was made by Mr Mahmood, because she was clear in 09:30:05
12 saying that we didn't make any particular 09:30:08
13 commitments to or guarantees to expedite, but she 09:30:11
14 says: 09:30:13
15 "The commitment, if any, that 09:30:13
16 was made by Mr. Mahmood would 09:30:15
17 have been a commitment that 09:30:17
18 we are here to work with you 09:30:18
19 to ensure that you understand 09:30:19
20 the regulatory requirements, 09:30:20
21 that you can meet those 09:30:21
22 requirements so that a REA 09:30:22
23 can be issued to the project, 09:30:23
24 if that's appropriate at the 09:30:24
25 time when we review the 09:30:26

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1 Now, Ian Baines talks about: 09:31:15
2 "At this particular time, 09:31:18
3 regulatory uncertainty is the 09:31:19
4 guidelines. It's not the 09:31:21
5 rules. The rules are there." 09:31:22
6 Because he was asked many questions in 09:31:23
7 cross-examination about memos at the time talking 09:31:25
8 about regulatory uncertainty, and he explained his 09:31:27
9 understanding that the framework, the regulations, 09:31:30
10 were in place. 09:31:32
11 "It's not the rules." 09:31:35
12 He said. 09:31:36
13 "It's the particular, more 09:31:36
14 specific guidelines for 09:31:39
15 offshore wind." 09:31:40
16 And at this point, we do -- and we 09:31:40
17 don't deny the fact that there is uncertainty 09:31:48
18 created when the 5-kilometre setback is set out, 09:31:51
19 because clearly Windstream, at this point, has 09:31:53
20 applied for grid cells that are within 5 kilometres. 09:31:55
21 And Mr. Baines candidly in his 09:31:59
22 testimony says he had three concerns. His question 09:32:03
23 asked him the setbacks, unknown setback 09:32:07
24 requirements, uncertainty in the site release 09:32:09
25 process, and uncertainty in the detailed 09:32:11

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1 application." 09:30:28
2 "So our reason for asking the 09:30:28
3 question --" 09:30:30
4 Because, actually, this was at a 09:30:30
5 second meeting where they had asked a question about 09:30:32
6 what the drop-dead date was. 09:30:33
7 "-- was to be able to assess 09:30:34
8 what we could expect 09:30:36
9 applications, understand the 09:30:38
10 pressure for the project 09:30:39
11 proponents so that we could 09:30:39
12 continue supporting them 09:30:41
13 through the renewable energy 09:30:41
14 process that had been 09:30:43
15 established in Ontario." 09:30:44
16 So, again, a very strong message that, 09:30:44
17 from the Ministry's perspective, there is -- and we 09:30:46
18 heard this throughout the hearing, Ministries, 09:30:50
19 whether it's MOE, whether it's MNR, whether it's the 09:30:53
20 OPA, working pragmatically with developers to move 09:30:56
21 forward these projects, not putting up roadblocks, 09:30:59
22 but working with them, and particularly from the 09:31:01
23 perspective and the understanding that much of the 09:31:06
24 work and all the science would be done by the 09:31:08
25 developers and then reviewed by the Ministries. 09:31:11

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1 requirements for the REA. That's put to him in 09:32:13
2 cross-examination. He candidly says: 09:32:15
3 "Yes, we had those concerns." 09:32:17
4 And then he goes on to explain, as the 09:32:19
5 other witnesses did, the steps that Windstream took 09:32:21
6 to get comfort with respect to those concerns. 09:32:23
7 And we have, of course, the testimony 09:32:27
8 about the August 9th letter and the comfort that 09:32:29
9 Windstream took from that, and this is Mr. Benedetti 09:32:33
10 who was -- who played a large role in -- because 09:32:35
11 Windstream had retained him to take the steps to 09:32:37
12 assess whether or not, essentially, the Government 09:32:41
13 was going to be supporting this project or not at 09:32:43
14 the high level so they could get the comfort they 09:32:45
15 want to invest. 09:32:48
16 And he says: 09:32:49
17 "The intent was certainly --" 09:32:49
18 And this is the -- when he's talking 09:32:50
19 about the August 9th MNR letter. 09:32:52
20 "-- reflecting that they 09:32:54
21 would continue to work with 09:32:55
22 us and move as quickly as 09:32:56
23 possible." 09:32:57
24 And he says: 09:32:58
25 "It was always an expectation 09:32:59

1 on our part that there would 09:33:01
2 be some finalization of the 09:33:02
3 requirements." 09:33:04
4 And it's important to remember in this 09:33:04
5 period of July and August that the Ministry of the 09:33:07
6 Environment had put out a policy proposal posted on 09:33:09
7 the EBR, and they to gather information from that 09:33:13
8 process, and then the understanding was that, in 09:33:17
9 September, that process would close, and they would 09:33:19
10 make a determination as to what the appropriate 09:33:22
11 setback was going to be. They were proposing 5 09:33:24
12 kilometres. They would hear submissions and make 09:33:26
13 the determination. 09:33:28
14 And you also saw in the evidence we 09:33:28
15 put forward, and it's in the documentary record, 09:33:30
16 that, if you look at the timelines that are -- that 09:33:32
17 the Ministry has internally at the time, that those 09:33:35
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED] So that was 09:33:50
22 the expectation, certainly within the government, 09:33:53
23 and the expectation from the Windstream side was 09:33:55
24 that once this posting closed in September, the 09:33:57
25 Government would be moving forward, consistent with 09:34:00

1 the Ministry of Environment 09:34:41
2 decides its 5K setback issue. 09:34:41
3 And we see that consistently 09:34:46
4 through the documentation on 09:34:47
5 the Government's side that 09:34:48
6 that's the expectation." 09:34:49
7 And here is Uwe Roeper discussing the 09:34:53
8 August 9th letter: 09:34:55
9 "I know that's been sort of 09:34:56
10 questioned and argued about. 09:34:59
11 My personal view is that 09:35:00
12 there was a lot of surface 09:35:01
13 area there, provided we got 09:35:02
14 the swap --" 09:35:04
15 He's talking about the grid cell swap. 09:35:04
16 "-- which the letter from MNR 09:35:05
17 gave us a lot of comfort in 09:35:06
18 August that we would get the 09:35:08
19 land swap." 09:35:09
20 And he talks in his witness statement 09:35:10
21 about the very unusual nature of obtaining a letter 09:35:11
22 like this, and, indeed, Rosalyn Lawrence from -- 09:35:13
23 from the Ministry talks about how rare it was to get 09:35:16
24 this sort of letter. She says: 09:35:20
25 "The Ministry hadn't done 09:35:21

1 everything the Government had told them about 09:34:03
2 working pragmatically and cooperatively with them to 09:34:04
3 prioritize FIT contracts. 09:34:08
4 And we have Ian Baines talking about 09:34:11
5 the letter: 09:34:12
6 "I took this to believe that 09:34:13
7 he was talking about --" 09:34:15
8 This is Mr. Boysen, the MNR. 09:34:15
9 "-- the additional 09:34:17
10 applications we've made. He 09:34:18
11 was going to deal with them 09:34:20
12 under the existing process. 09:34:21
13 He would do it in a timely 09:34:21
14 manner and in order that you 09:34:23
15 maintain an applicant of 09:34:24
16 record status in a timely 09:34:25
17 manner." 09:34:26
18 And we have the evidence, again, and 09:34:27
19 the documentary evidence of Mr. Boysen, after this 09:34:29
20 meeting, writing to his colleagues and saying. 09:34:32
21 "Listen, I want to sit down 09:34:35
22 with Windstream, and I want 09:34:36
23 to try to work through this 09:34:37
24 grid application process so 09:34:38
25 that we're ready to move when 09:34:39

1 these grid cell swaps before. 09:35:23
2 It was rare to put out a 09:35:24
3 statement like this to 09:35:26
4 Windstream talking about the 09:35:29
5 perspective of MNR to work 09:35:31
6 with Windstream in terms of 09:35:33
7 reconfiguring the grid." 09:35:37
8 And here's William Ziegler. He put 09:35:38
9 also a lot of emphasis on a conversation that 09:35:45
10 occurred with Mr. Ungerman, and we don't have Mr. 09:35:48
11 Ungerman here. Canada hasn't called him. But he 09:35:50
12 was, at the time, was a senior policy official 09:35:53
13 within the Ministry of Energy. He was interacting 09:35:57
14 with Windstream through Chris Benedetti at this 09:36:01
15 time, and there was a key phone call in July 7th, I 09:36:02
16 believe it was, of 2010, and both Mr. Mars and Mr. 09:36:05
17 Ziegler were on the call. 09:36:09
18 And Mr. Ziegler talked about this 09:36:11
19 phone call. And he says, from his perspective: 09:36:13
20 "Mr. Ungerman noted in the 09:36:18
21 conversation the Premier had 09:36:20
22 indicated support as well. 09:36:22
23 Mr. Ungerman was also, I 09:36:23
24 believe -- I don't know this 09:36:24
25 directly, but he was 09:36:25

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1 instrumental in directing the 09:36:27
2 OPA to give us another year 09:36:27
3 of time in our deadline for 09:36:28
4 bringing the project into 09:36:30
5 operation, increase it from 09:36:31
6 four to five years." 09:36:32
7 So from the perspective of Mr. Ziegler 09:36:33
8 and the investors, hearing this from a senior 09:36:35
9 government official, telling them that the Premier's 09:36:39
10 office is behind this project is, in my -- in my 09:36:42
11 submission, very strong evidence of representations 09:36:45
12 made that were reasonably relied upon. 09:36:48
13 And we had the discussion here about 09:36:51
14 the fact that Windstream was asking for a year's 09:36:53
15 extension, from four to five years, to allow the 09:36:56
16 project to go ahead. 09:36:59
17 And the understanding of Chris 09:37:01
18 Benedetti, a very experienced lobbyist in this area, 09:37:04
19 that Minister Duguid's office -- he's the Minister 09:37:07
20 of Energy -- had some discussion with the OPA, and 09:37:09
21 it was because of that that the OPA came back -- the 09:37:11
22 OPA originally said, "We're not going to give you an 09:37:13
23 extension." 09:37:15
24 They gave a one-year extension, and 09:37:16
25 you heard the evidence that it wasn't exactly what 09:37:18

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1 do." 09:38:23
2 Chris Benedetti: 09:38:23
3 "We had every reason to 09:38:23
4 believe that all the 09:38:25
5 decisions that had to be made 09:38:26
6 relative to an exclusion zone 09:38:28
7 would've been made within the 09:38:29
8 12-month period." 09:38:30
9 David Mars talking about entering into 09:38:32
10 the FIT contract: 09:38:35
11 "I would not have done so 09:38:35
12 without these specific 09:38:37
13 assurances. As I set out in 09:38:38
14 an e-mail to our investors on 09:38:41
15 the day I caused WWIS to 09:38:43
16 execute the FIT contract, the 09:38:45
17 assurances I described above 09:38:47
18 us gave us the comfort we 09:38:47
19 needed to sign the FIT 09:38:49
20 contract and post 6 million 09:38:50
21 in security. We believed we 09:38:51
22 were working together with 09:38:53
23 the Ontario Government and 09:38:54
24 its various agencies to 09:38:56
25 achieve the province's green 09:38:58

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1 -- what -- Windstream's first choice, because their 09:37:21
2 first choice, in terms of a request, had been an 09:37:24
3 extension that also triggered off the granting of 09:37:27
4 AOR status. But you heard the evidence that this 09:37:30
5 was a very significant extension to them. 09:37:32
6 And it's important also to note the 09:37:34
7 fact that, as you heard from Mr. Cecchini, there was 09:37:36
8 actually a one-year extension granted to all -- all 09:37:38
9 FIT wind projects in January of 2011. And you 09:37:42
10 actually hear a reference to that in the phone 09:37:48
11 conversation. And you know, again we don't know 09:37:50
12 what would have happened in this particular case in 09:37:53
13 terms of the project, but they had got the extension 09:37:56
14 for five years. You know, might they have, in fact, 09:37:59
15 had six years to develop the project, depending how 09:38:01
16 things had worked out in the absence of the 09:38:04
17 moratorium. 09:38:06
18 Here is Ian Baines talking about the 09:38:10
19 one-year extension as being a very strong indication 09:38:11
20 these things would be resolved, and one year was 09:38:14
21 more than sufficient time. 09:38:17
22 David Mars: 09:38:19
23 "We believe that the extra 09:38:19
24 year was enough time to do 09:38:21
25 all the things we needed to 09:38:22

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1 energy goals of creating jobs 09:39:00
2 and promoting economic 09:39:00
3 development." 09:39:00
4 That's from his witness statement. 09:39:00
5 The next slide is confidential, if we 09:39:02
6 could cut the feed, just this one slide. 09:39:04
7 PRESIDENT: Now, Mr. Terry, please 09:39:07
8 let us know when would be a good time to break, 09:39:09
9 briefly, for ten minutes. 09:39:12
10 MR. TERRY: I think in a couple of 09:39:13
11 minutes, I will be turning things over to my 09:39:15
12 colleague Ms. Seers, so that would be a good time. 09:39:17
13 PRESIDENT: Okay. Good. Thank you. 09:39:18
14 MR. TERRY: It's just going to be for 09:39:25
15 one document and then back on. 09:39:26
16 --- Confidential transcript begins 09:39:28
17 MR. TERRY: There was a question that 09:39:36
18 the Tribunal had asked about in -- on your questions 09:39:37
19 of a couple of days ago about what rules were in 09:39:40
20 place in February 11, 2011. And our submission was 09:39:44
21 that there were sufficient rules in place at that 09:39:47
22 time for the project to have proceeded through the 09:39:49
23 REA application and through the application 09:39:53
24 provisions in the MNR and to have provided the 09:39:56
25 studies and provided them in accordance with the -- 09:39:58

1 with the 40 decibel -- to do their own noise 09:40:02
2 studies, as they were required to do, and as onshore 09:40:06
3 developers were to do, to ensure the 40-decibel 09:40:08
4 level was met. 09:40:11

5 And there are a number of documents 09:40:12
6 that, in our submission, are supportive of this, and 09:40:14
7 I just flag one here. That -- this -- this is being 09:40:16
8 discussed at a time when there is a question as to 09:40:20
9 whether or not Windstream can [REDACTED]

10 [REDACTED] 09:40:25
11 And the statement here -- this is a 09:40:27
12 Ministry of Environment document -- is that: 09:40:30
13

[REDACTED]

1 description of the policy and 09:42:10
2 given the drivers, was a 09:42:11
3 moratorium. 09:42:13
4 And she says: 09:42:14
5 "So what I tried to say in my 09:42:14
6 opinion -- I'm not trying to 09:42:17
7 be facetious about any of 09:42:18
8 this -- is that I don't think 09:42:19
9 a reasonable expectation for 09:42:20
10 anybody, of any of the 09:42:21
11 players, but for the internal 09:42:23
12 workings of Government, 09:42:24
13 which, again, I have no 09:42:25
14 insight on, was the 09:42:26
15 moratorium." 09:42:27
16 And, listen, she was very candid, and 09:42:27
17 she said. 09:42:29
18 "Listen, I guess I called it 09:42:30
19 wrong"; 09:42:32
20 Right? She was wrong in that. There 09:42:32
21 was a moratorium, and the process was put in place, 09:42:34
22 but she did not see it coming as an industry 09:42:37
23 insider. And, in my submission, there's no evidence 09:42:42
24 whatsoever that Windstream saw it coming. 09:42:45
25 And she says: 09:42:48

[REDACTED]

13 Back on. 09:41:33
14 --- Confidential transcript ends 09:41:33
15 MR. TERRY: In terms of reasonable 09:41:45
16 expectations at the time, there is clearly not a 09:41:47
17 whiff of evidence, in my submission, that anyone had 09:41:50
18 a reasonable expectation that a moratorium was going 09:41:53
19 to be the result. Certainly there were internal 09:41:56
20 Government discussions, but there's no evidence that 09:41:58
21 anyone on the outside knew that that was going to be 09:42:01
22 the result. 09:42:04
23 Ms. Powell here says: 09:42:05
24 "I don't think the reasonable 09:42:06
25 expectation, given the 09:42:09

1 "Again, given the legislative 09:42:48
2 sea change, all the work he 09:42:50
3 had done in that preceding 09:42:51
4 year, all the goodwill, would 09:42:51
5 I have been advising clients 09:42:53
6 that there was a moratorium? 09:42:54
7 Was it a likely possibility 09:42:55
8 for offshore? I wouldn't 09:42:55
9 have. I wouldn't have 09:42:57
10 advised that." 09:42:59
11 MR. TERRY: And I note in this respect 09:43:03
12 that there is a discussion here that I -- that we 09:43:04
13 had with -- in examination of Ms. Dumais about 09:43:08
14 October 29, 2010, and a particular meeting that 09:43:12
15 occurred then. And Ms. Dumais indicated she 09:43:16
16 listened to Windstream's presentation and made no 09:43:22
17 commitments at that time. And I asked her: 09:43:25
18 "I take it you didn't tell 09:43:26
19 Windstream a moratorium was 09:43:28
20 coming?" 09:43:29
21 "No. Because I wasn't 09:43:29
22 involved in these 09:43:32
23 conversations." 09:43:33
24 So Windstream is sitting down with the 09:43:33
25 Ministry of Environment official October 29, 2010, 09:43:34

1 and, again, no -- no statement about a moratorium. 09:43:38
2 Now, I'm not going to go over again 09:43:43
3 the promise of Ontario to freeze Windstream's 09:43:45
4 contract, because we already dealt with that under 09:43:47
5 the expropriation. We rely on the same evidence. 09:43:49
6 With respect to the breaches that 09:43:52
7 occurred here, again, what we're talking about 09:43:54
8 fundamentally are an arbitrary and unfair 09:43:57
9 repudiation of not only legitimate expectations, but 09:44:01
10 the whole regulatory framework that was in place and 09:44:06
11 that the industry would have assumed was in place 09:44:08
12 for the development and -- of an offshore wind 09:44:10
13 project. 09:44:13
14 As we say here -- and it's the same 09:44:14
15 slide we used in our opening argument: 09:44:16
16 "The moratorium and the 09:44:18
17 failure to freeze are 09:44:19
18 arbitrary, grossly unfair, 09:44:21
19 unjust, and idiosyncratic." 09:44:23
20 And I'm talking now only about the 09:44:24
21 imposition of the moratorium, but the combination, 09:44:24
22 as I emphasize again, of the moratorium and failure 09:44:27
23 to freeze, contrary to the commitment to freeze the 09:44:30
24 FIT contract, contrary to the commitment to process 09:44:32
25 regulatory approvals in a timely way, contrary to 09:44:36

1 PRESIDENT: Okay. We will resume. 09:58:22
2 It will be Ms. Seers, or you will still go on? 09:58:25
3 MR. TERRY: Just one clarification. 09:58:28
4 PRESIDENT: Yes. 09:58:29
5 MR. TERRY: I just wanted to make one 09:58:30
6 clarification. If you can turn to Slide 41 in the 09:58:31
7 book. We just saw there was a slight error. 09:58:33
8 If you look at the orange boxes, the 09:58:43
9 second box there: Ms. Wallace did not learn the 09:58:47
10 moratorium decision from Mr. Wilkinson or anyone at 09:58:49
11 MOE. In fact, she did learn, as we know, on January 09:58:53
12 14th from Paul Evans, her ADM, who forwarded her the 09:58:58
13 message from Sue Lo about the Premier's Office 09:59:04
14 direction. I just wanted to make clear what we were 09:59:08
15 saying there. 09:59:10
16 Of course what we're relying on is the 09:59:11
17 answer she provided to the Tribunal in that 09:59:13
18 question. So I will turn it over to Ms. Seers. 09:59:16
19 PRESIDENT: Okay. Thank you. Ms. 09:59:18
20 Seers. 09:59:20
21 CLOSING SUBMISSIONS BY MS. SEERS: 09:59:20
22 MS. SEERS: You will have to forgive 09:59:20
23 the speed at which I will attempt to take you 09:59:28
24 through these slides in classic senior lawyer/junior 09:59:30
25 lawyer division of labour. My time has been 09:59:34

1 the commitment to consider AOR status in a timely 09:44:38
2 way, contrary to the commitment to provide investor 09:44:41
3 certainty. Unnecessary to achieve the stated 09:44:45
4 environmental protection goal. The moratorium 09:44:46
5 motivated by desire to kill offshore wind projects. 09:44:47
6 The abruptly repudiated regulatory framework: The 09:44:49
7 regulatory framework was pulled out from -- the rug 09:44:54
8 was pulled out from under the developers. There was 09:44:58
9 no more regulatory framework to move ahead on. 09:45:01
10 The fact that little or no research 09:45:03
11 has been done, which, in our submission, is a 09:45:04
12 crucial fact in this particular case in terms of 09:45:07
13 looking at the bona fides of the reasons for the 09:45:09
14 moratorium, and looking, examining, the whole 09:45:12
15 context here. It's a fundamental, a fundamental, 09:45:15
16 piece of evidence and, of course, confirm with the 09:45:18
17 Government's recent statements that no science would 09:45:21
18 proceed. 09:45:24
19 Now, we move on to damages, so I 09:45:25
20 would -- I will stop now for the break. 09:45:27
21 PRESIDENT: Okay. Thank you very 09:45:30
22 much. Let's break for 10 minutes. We will continue 09:45:31
23 at 9:55. 09:45:34
24 -- Recess taken at 9:45 a m. 09:45:36
25 -- Upon resuming at 9:58 a m. 09:58:16

1 encroached upon. 09:59:37
2 [Laughter.] 09:59:38
3 MS. SEERS: So -- but the intention 09:59:39
4 here was to leave you with the slides so that you 09:59:45
5 could marshal the damages evidence that you've heard 09:59:50
6 over the past week. 09:59:52
7 As you -- as you know, a substantial 09:59:53
8 amount of time in this hearing has been spent 09:59:56
9 hearing damages-related expert evidence, which of 09:59:59
10 course is technical and complex. 10:00:02
11 So what we've done with the slides, 10:00:04
12 whether I speak to them or not, is try to give you 10:00:06
13 the relevant excerpts, and then hopefully they'll be 10:00:09
14 -- they'll be helpful to you in your deliberations. 10:00:12
15 And so begin with the standard of 10:00:15
16 reparation. I don't intend to belabour this point. 10:00:19
17 You know the test well. Chorzow Factory is the test 10:00:22
18 that we say you should apply in assessing what 10:00:26
19 damages flow from the breaches of the NAFTA, should 10:00:30
20 you find that breaches did, in fact, occur. And so 10:00:34
21 the standard is to put Windstream in the position it 10:00:37
22 would have been in had the breaches not occurred. 10:00:39
23 And in answer to the second part of 10:00:45
24 your question, of your fifth question from 10:00:47
25 yesterday, we say, in our submission, the same test 10:00:49

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1 applies whether the -- whether the breach is an 10:00:53
2 unlawful expropriation or whether it's a breach of 10:00:57
3 FET. 10:01:00
4 So we've given you two case law references here: 10:01:00
5 ADC, which you'll see applied the Chorzow Factory 10:01:03
6 test in the case of an unlawful expropriation on the 10:01:08
7 basis that the lex specialis established under the 10:01:13
8 treaty did not apply to unlawful expropriation, only 10:01:16
9 applied to lawful expropriation. 10:01:19
10 In our submission, that applies here as well. And, 10:01:21
11 of course, Canada does not dispute that, if an 10:01:23
12 expropriation is found, it was an unlawful and not a 10:01:26
13 lawful one. 10:01:30
14 We have given you a reference from 10:01:31
15 Gold Reserve as well, applying the Chorzow Factory 10:01:33
16 standard to a breach of FET. 10:01:38
17 The standard, then, of proof is the 10:01:43
18 balance of probabilities, in our submission, and we 10:01:47
19 have given you another excerpt from Gold Reserve to 10:01:49
20 that effect here. And that's important because 10:01:53
21 you've heard a lot of questions this past week from 10:01:55
22 both sides. And having reflected on this, it seems 10:02:00
23 that there's been a bit of a disconnect, from my 10:02:06
24 perspective. 10:02:08
25 You have heard a lot of more likely 10:02:09

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1 reasonable assumptions in establishing the but-for 10:03:32
2 scenario and that, in that but-for scenario, the 10:03:35
3 parties should be assumed to have acted reasonably 10:03:39
4 and not to have engaged in unreasonable conduct. 10:03:41
5 And the State party should be assumed 10:03:45
6 not to have engaged in further NAFTA breaches, which 10:03:47
7 we will come to, but I -- in terms of some of the 10:03:51
8 positions that we heard from Canada in its opening 10:03:55
9 statement, I would submit, is also something that 10:03:58
10 you should bear in mind in assessing the 10:04:00
11 reasonableness of the appropriate but-for scenario. 10:04:03
12 We say the appropriate valuation date 10:04:07
13 is the date of the award. In answer to one of the 10:04:09
14 questions that was posed, yes, it is -- it is 10:04:14
15 appropriate in cases such as this one, we say, to 10:04:18
16 use a different valuation date, a different date, 10:04:22
17 than the date of the breach. 10:04:26
18 And that is because this is a case that's quite 10:04:27
19 unique, actually. And we -- quite candidly, we've 10:04:30
20 grappled quite a lot on the Claimant's side with 10:04:34
21 what you do with this kind of situation where you 10:04:39
22 have a development-stage company and what your task 10:04:41
23 is to do is to try to assess what would have 10:04:45
24 happened to that company if the breaches hadn't 10:04:48
25 occurred. Would it have sold? Would Windstream 10:04:51

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1 than not; or is it likely; or what would likely have 10:02:12
2 occurred from the Claimant's side. And from the 10:02:16
3 Respondent's side, you heard a lot of questions to 10:02:19
4 experts posed in a different way: Was there a 10:02:22
5 guarantee? Was there any certainty? Are you 10:02:25
6 certain that this would have occurred? Is it not 10:02:28
7 possible that this or that would have occurred? 10:02:31
8 And in our respectful submission, that 10:02:34
9 is just not the test. The test is not one of 10:02:36
10 certainty. The test is not one of whether something 10:02:40
11 was guaranteed. Your task is to assess, in our 10:02:43
12 submission, what would more likely than not have 10:02:46
13 occurred to this company and to this investment had 10:02:50
14 the breaches of the NAFTA, should you find them, not 10:02:53
15 occurred. And so that, we say, is the lens through 10:02:57
16 which you should assess all of the expert evidence 10:03:00
17 you heard this past week. 10:03:02
18 We have given you another reference 10:03:05
19 there from Khan Resources and a few more: Lemire. 10:03:08
20 And that one speaks to establishing the appropriate 10:03:15
21 but-for scenario and to valuation not being an exact 10:03:17
22 science, as you will have seen. 10:03:21
23 And another excerpt here from Lemire, 10:03:24
24 which we hope will be helpful to you -- it's also 10:03:27
25 cited in our materials -- which speaks to making 10:03:30

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1 have sold this investment on the date of the breach? 10:04:54
2 Would it have sold this investment in May 2012? 10:04:57
3 We say it wouldn't have done that. It wouldn't have 10:05:00
4 done that. If you listened to Mr. Goncalves' 10:05:04
5 evidence, his evidence is that, actually, 10:05:07
6 Windstream's investments were worth nothing to a 10:05:10
7 third-party investor on that date. 10:05:13
8 And, of course, we disagree with that. 10:05:15
9 But if you take that evidence, if you accept that 10:05:18
10 evidence, you also have to accept, we say, that they 10:05:20
11 wouldn't have sold that investment on that day. 10:05:24
12 Rather, they would have held that investment and 10:05:27
13 perhaps sold it on a subsequent day, perhaps not 10:05:30
14 have sold it at all. 10:05:33
15 And your task is to establish, we say, 10:05:35
16 or to return them to the position they would have 10:05:37
17 been in had the moratorium not been imposed, had the 10:05:39
18 failure to freeze not occurred, and that you don't 10:05:44
19 accomplish that task if what you're doing is valuing 10:05:49
20 this investment on a date at which, according to the 10:05:51
21 Claimant's experts at least, it was worth nothing. 10:05:55
22 And, of course, our alternative 10:06:00
23 position is that the appropriate valuation date is 10:06:02
24 May 22, 2012 which is the date on which you will 10:06:05
25 have heard expert evidence to this effect the claims 10:06:10

1 or -- pardon me -- the investments became worthless. 10:06:15
2 And we say that -- you'll have heard 10:06:17
3 the evidence of Mr. Low. That's the date on which 10:06:21
4 the losses were crystallized. Before then, it's a 10:06:26
5 little bit like a creeping expropriation kind of 10:06:30
6 situation. Before then, I suppose, Windstream's 10:06:33
7 investments were being -- or the value was being 10:06:38
8 progressively eroded by the erosion of the force 10:06:42
9 majeure time. 10:06:44
10 But that didn't crystallize until much 10:06:45
11 later in time. And so that's why, we say, certainly 10:06:48
12 on the expropriation claim, the loss is crystallized 10:06:53
13 on that day. But also given the high standard in 10:06:56
14 the FET claim, we also say the loss crystallized on 10:06:58
15 that day and that the breach crystallized on that 10:07:01
16 day because that's the day on which the investments 10:07:04
17 became worthless. And so that didn't occur on the 10:07:06
18 date of the moratorium. 10:07:11
19 And so we say that if -- in the event that you 10:07:14
20 choose not to use the date of the award as a 10:07:17
21 valuation date, this would be the appropriate 10:07:20
22 valuation date and not February 11, 2011. 10:07:22
23 There was some discussion of the use 10:07:27
24 of hindsight, another rather thorny issue that has 10:07:29
25 arisen in this hearing. In our submission, if the 10:07:34

1 that it's a surprising submission, in our view, 10:09:01
2 given the submission that they've also made that 10:09:07
3 they had no power to effect a freeze. 10:09:09
4 If they had no power to effect a 10:09:13
5 freeze, which of course we -- we submit is not the 10:09:15
6 case, but if it -- even if it's true they had no 10:09:20
7 power to effect a freeze, then there is no other way 10:09:23
8 for them to have undone this loss, but to have never 10:09:25
9 had -- never imposed a moratorium on Windstream in 10:09:30
10 the first place, in our submission. 10:09:33
11 You've seen this as well. This is our 10:09:37
12 timeline. So you'll see -- you'll see the project 10:09:39
13 restart, which based on the project schedule that 10:09:46
14 we've put forward, starts in February of whether 10:09:48
15 it's 2011 or 2014, which is the three-year delay; 10:09:52
16 the MCOD that applies under the FIT; the date on 10:09:56
17 which the project achieves commercial operation, if 10:10:00
18 the project schedule is achieved; and a buffer that 10:10:03
19 is available before the project reaches the default 10:10:07
20 date on which the OPA can cancel the contract. 10:10:12
21 And then we've shown the additional 10:10:15
22 force majeure time available. 10:10:17
23 The but-for scenario that Canada puts 10:10:22
24 forward, we say, is inappropriate because what it 10:10:24
25 does is it takes -- it takes Windstream to the very 10:10:27

1 valuation date that you are applying is the date of 10:07:39
2 the award, it is appropriate to use current 10:07:41
3 information. 10:07:44
4 So, for example, all of the expert 10:07:46
5 evidence that you have heard, the experts were quite 10:07:49
6 candid as to the difficulties sometimes of putting 10:07:53
7 themselves in the position or with the knowledge 10:07:56
8 that they had in 2012 versus today and what effect 10:07:59
9 that might have. 10:08:02
10 In our submission, it's -- the 10:08:04
11 evidence is entirely appropriate for you to consider 10:08:06
12 using current information, particularly if the 10:08:11
13 valuation date is the date of the award. 10:08:16
14 So briefly, then, on the two proposed 10:08:21
15 but-for scenarios that have been put forward by the 10:08:23
16 Claimant's side, so you've got -- we showed you this 10:08:27
17 slide in the opening statement. We've put forward 10:08:30
18 two alternatives, one of which where there was no 10:08:33
19 moratorium and, therefore, no -- no reason to effect 10:08:37
20 a freeze. The other one, we've assumed a three-year 10:08:43
21 moratorium and a corresponding three-year freeze. 10:08:46
22 Canada says the first one is not 10:08:50
23 appropriate because it starts before the loss 10:08:52
24 crystallized. Obviously that doesn't apply to the 10:08:56
25 second one, but what I would say about that point is 10:08:59

1 brink of the available force majeure time without 10:10:31
2 effecting any kind of freeze. So contrary to the 10:10:36
3 promise that you heard earlier to freeze the FIT 10:10:39
4 contract, this but-for scenario doesn't accomplish 10:10:41
5 that. And Canada's own experts acknowledged that, 10:10:44
6 if there's zero force majeure time available, nobody 10:10:48
7 will invest in the project. And so this but-for 10:10:52
8 scenario effectively would result in certain project 10:10:55
9 failure. So it's not -- it's not appropriate. If 10:10:59
10 you had a May 2012 start date, in our submission, 10:11:02
11 you'd have to have a corresponding freeze. 10:11:06
12 I'd like to move through the remaining 10:11:15
13 slides rather quickly. These are the slides that 10:11:17
14 establish, in our submission, that, more likely than 10:11:20
15 not, the project would have achieved commercial 10:11:24
16 operation within the parameters of the FIT contract. 10:11:27
17 So here you see, you have evidence 10:11:31
18 that, more likely than not, the 5-kilometre setback 10:11:33
19 would have been confirmed. [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED] That's consistent with 10:11:52
24 documents that are in the record as well. 10:11:54
25 The evidence, certainly from 10:11:58

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1 Windstream's side, is that they were told that the 10:11:59
2 setback would be confirmed either late in the fall 10:12:01
3 or early 2011. 10:12:05
4 The January 2011 job communications 10:12:10
5 plan that led the Premier's Chief of Staff, Chris 10:12:13
6 Morley, to say, "Sorry, folks. This isn't good 10:12:17
7 enough. You have to kill all the projects," was one 10:12:19
8 in which the 5-kilometre setback would have been 10:12:22
9 confirmed. 10:12:24
10 You heard in Canada's opening 10:12:30
11 statement that, even if this setback had been 10:12:31
12 confirmed, that Windstream wouldn't have been able 10:12:36
13 to build the project as designed because a lot of 10:12:38
14 the turbines would be within 5 kilometres of a small 10:12:41
15 uninhabited island called Pigeon Island and of a 10:12:45
16 peninsula, uninhabited peninsula, called Long Point 10:12:48
17 and that the MOE was planning on actually not 10:12:54
18 allowing or applying a strict application or a 10:12:56
19 strict definition of shoreline. 10:12:59
20 In our submission, it's not 10:13:01
21 appropriate to assume that that would have been the 10:13:03
22 definition that would have been applied or that that 10:13:05
23 would have been strictly applied to Windstream. 10:13:07
24 First of all, you heard from Ms. Lawrence that the 10:13:11
25 5-kilometre setback in and of itself had no 10:13:14

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1 developer to assume that they could have gone 10:14:41
2 through that process. 10:14:42
3 Of course, the letter that we've seen 10:14:45
4 several times now regarding the grid cell swap said: 10:14:48
5 "I appreciate your need for 10:14:51
6 certainty on this file, and 10:14:53
7 we will move as quickly as 10:14:53
8 possible through the 10:14:55
9 remainder of the application 10:14:56
10 review process in order that 10:14:57
11 you may obtain Applicant of 10:14:58
12 Record status in a timely 10:15:00
13 manner." 10:15:02
14 Ms. Lawrence confirmed that it was 10:15:02
15 rare for the MNR to issue that kind of a letter. 10:15:08
16 And Mr. Benedetti -- Mr. Benedetti 10:15:13
17 confirmed that there was certainly an expectation on 10:15:16
18 the part of Windstream that that would be finalized. 10:15:19
19 We have several documents in the 10:15:25
20 record, of which this is one, that show that MNR 10:15:26
21 actually was preparing to issue AOR status for 10:15:29
22 Windstream, if Windstream were to proceed. 10:15:34
23 And so, more likely than not, we ask 10:15:39
24 you to find Windstream would've been permitted to 10:15:43
25 proceed through the land tenure process had the 10:15:46

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1 scientific rationale. There's a document in the 10:13:18
2 record that's not in your slides, but MNR was 10:13:20
3 apparently told to start from that number and 10:13:23
4 provide a rationale for it. There is no scientific 10:13:27
5 rationale, whatsoever, for the setback. She said 10:13:30
6 there's no science to support an exclusion zone and 10:13:35
7 that she had informed her colleagues of that on many 10:13:39
8 occasions. 10:13:42
9 Canada's own expert, Mr. Clarke, 10:13:45
10 confirmed that there's no drinking water related 10:13:48
11 reason why you would have a setback established from 10:13:51
12 an uninhabited peninsula or uninhabited island, and 10:13:54
13 we certainly haven't heard any other expert evidence 10:14:00
14 from Canada establishing why that would be 10:14:02
15 necessary. 10:14:04
16 AOR status would likely have been 10:14:08
17 granted, in our submission, in the but-for scenario. 10:14:11
18 You have heard from -- you heard testimony from 10:14:13
19 Sarah Powell that the impetus in the Government was 10:14:16
20 to ensure that, once the key hard gate of the FIT 10:14:18
21 contract had been met, that the authorities and MNR 10:14:23
22 would work together with developers to ensure that 10:14:27
23 AOR status was granted in a timely manner. 10:14:30
24 She said she thought, in her opinion, 10:14:35
25 more likely than not, it was reasonable for a 10:14:37

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1 moratorium not been imposed. 10:15:49
2 Now, I pause here on this slide 10:15:52
3 because this is an example of a statement by Canada 10:15:54
4 that, in our very respectful submission, has ended 10:15:59
5 up being a vast overstatement that has not borne out 10:16:04
6 by the evidence that you heard or that you have seen 10:16:11
7 and that's in the record. 10:16:14
8 Canada, in its Counter-Memorial, said 10:16:16
9 that the Windstream Wolfe Island Shoals offshore 10:16:18
10 wind facility was doomed to fail from the moment 10:16:21
11 that the Claimant signed on the dotted line. And, 10:16:23
12 of course, you have heard ample expert evidence this 10:16:27
13 past week that, in fact, the project was buildable; 10:16:30
14 the timelines were achievable; and that the project, 10:16:36
15 more likely than not, would have succeeded had the 10:16:40
16 moratorium not been imposed upon it. 10:16:43
17 And in making that submission, I also urge you to 10:16:45
18 reflect on the evidence that you haven't heard from 10:16:50
19 any expert on Canada's side that, in fact -- from 10:16:54
20 any qualified expert on Canada's side, I should say, 10:16:58
21 with experience in offshore wind development, with 10:17:01
22 experience in offshore wind construction to say 10:17:03
23 that, actually, the project was not buildable; the 10:17:07
24 project could not have been successful in the 10:17:11
25 timelines. 10:17:14

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1 You have heard evidence from 10:17:14
2 Windstream's experts that actually it was, and I 10:17:17
3 will try -- attempt to take you through these slides 10:17:19
4 very quickly. 10:17:23
5 Here is the project schedule that you 10:17:24
6 have seen already, the simplified version of it, 10:17:25
7 that sets out what we say or what Windstream's 10:17:29
8 experts say the project development timeline would 10:17:32
9 have been had the moratorium not been imposed on the 10:17:35
10 project. And, of course, you'll see that these 10:17:39
11 timelines were extendable by additional force 10:17:42
12 majeure that would have been available, for example, 10:17:44
13 in the event of permitting delays or any other 10:17:46
14 unforeseeable events. 10:17:49
15 We have given you a chart here on this 10:17:51
16 slide which we hope will be helpful. You saw a 10:17:53
17 version of it in our opening statement. What we 10:17:57
18 have added to the end of it, it explains the 10:17:59
19 discrepancies between the experts on both sides, in 10:18:03
20 terms of project schedule. And we have added a 10:18:06
21 comment at the end about why Canada's evidence on -- 10:18:09
22 with respect to each particular point should be 10:18:13
23 rejected. And we submit that Canada's experts have 10:18:16
24 not, in fact, succeeded in establishing that the 10:18:21
25 project schedule put forward by Windstream was not 10:18:26

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1 the project is expected to have a very small noise 10:19:43
2 impact at any of the land base noise receptors near 10:19:47
3 the project area and that in -- with respect to 10:19:52
4 either layout, it would meet the 40-decibel limit. 10:19:54
5 Ms. Lane was mentioned during the 10:19:58
6 testimony of Mr. Rose, but in absentia. She found 10:20:00
7 -- she's, of course, a fish expert and fish habitat 10:20:08
8 expert. And her opinion is part of the Baird 10:20:10
9 report. And she didn't identify any issue with the 10:20:14
10 project being permitted to proceed through the 10:20:19
11 regulatory approvals process in respect of fish. 10:20:22
12 And, of course, Mr. Rose recognized her expertise in 10:20:27
13 that regard. 10:20:30
14 Dr. Kerlinger, a bird expert, finds 10:20:32
15 that there is no biologically significant impacts to 10:20:36
16 any birds likely to result from the installation and 10:20:39
17 operation of the project. 10:20:42
18 Dr. Reynolds, a bat expert, very 10:20:45
19 little indirect impact on bats due to the lack of 10:20:50
20 impact on terrestrial habitats the bats rely upon 10:20:51
21 for roosting and forging. 10:20:54
22 And, of course, Mr. Rose confirmed 10:20:57
23 that he wasn't an expert in those areas. 10:20:59
24 You heard from Mr. Kolberg -- you saw 10:21:03
25 this slide earlier -- that contrary to the stated 10:21:06

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1 appropriate. 10:18:29
2 Mr. Roberts -- you heard from him. 10:18:33
3 He's an expert witness with substantial experience 10:18:35
4 with Renewable Energy Approvals -- confirms that the 10:18:38
5 timelines set out in the project schedule was more 10:18:42
6 likely -- was achievable and would more likely than 10:18:45
7 not have been met. 10:18:48
8 Here we've given you some excerpts 10:18:51
9 from expert reports that you did not hear. 10:18:53
10 MR. TERRY: For the record, my note 10:18:57
11 says, "Take your time." 10:18:59
12 MS. SEERS: Take your time. That's a 10:19:00
13 new one. I haven't heard that one from Mr. Terry 10:19:00
14 before. Usually they say, "Stop talking." 10:19:04
15 So, at the top, my -- the speed at 10:19:08
16 which I'm talking will slow down now. At the top, 10:19:10
17 you have an excerpt from the expert report of Payam 10:19:12
18 Ashtiani from Aercoustics, who actually conducted 10:19:17
19 noise measurements at the site, actual noise 10:19:22
20 measurements at the site, using the turbines that 10:19:26
21 are actually -- the Siemens 2.3-megawatt turbines 10:19:28
22 that are actually installed on Wolfe Island. And he 10:19:30
23 took -- he took measurements from an offshore 10:19:35
24 location to measure the sound that travels across 10:19:38
25 the water in that particular area, and he found that 10:19:40

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1 rationale for the moratorium being to protect 10:21:10
2 drinking water, this particular project, based on 10:21:12
3 its particular site-specific attributes and, in 10:21:16
4 particular, the distance from the nearest drinking 10:21:21
5 water intake being, I believe, 12 kilometres would 10:21:24
6 not pose a -- would not pose a problem or a threat 10:21:27
7 to drinking water and that there are low level 10:21:30
8 contaminants. 10:21:33
9 Mr. Clarke agreed. Drinking water was 10:21:36
10 identified by URS as being a low risk. 10:21:39
11 You also heard from Mr. Kolberg about 10:21:46
12 the shipping lane navigation channel issue that had 10:21:49
13 been raised, and, in his opinion, the project design 10:21:54
14 from 2015 is sufficient and more likely than not, 10:21:59
15 based on his expertise and experience in the Great 10:22:06
16 Lakes, the issues relating to navigation and the 10:22:08
17 other issues in his report would more likely than 10:22:11
18 not have allowed the project to proceed. 10:22:13
19 And he mentioned he has over 33 years 10:22:16
20 of direct coastal engineering experience on the 10:22:20
21 Great Lakes. That's all he does. And, of course, 10:22:23
22 Mr. Clarke confirmed that he has no similar 10:22:27
23 experience. 10:22:30
24 You heard from Ian Irvine of Sgurr 10:22:32
25 Energy that the project was technically feasible and 10:22:35

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1 more likely than not would have been developed and 10:22:38
2 built within the guidelines of the FIT contract. 10:22:40
3 And he viewed the project schedule as reasonable and 10:22:44
4 achievable. 10:22:47
5 He mentioned that Sgurr Energy's experience is 10:22:48
6 offshore wind is significant and considerable, and 10:22:54
7 they're working on 14 live lender technical adviser 10:22:56
8 assignments in respect of offshore wind, and many 10:22:58
9 other projects in connection with offshore wind. 10:23:03
10 And, of course, you'll recall that Canada's expert, 10:23:06
11 Mr. Guillet, confirmed that Sgurr is one of the top 10:23:09
12 technical experts in the field. 10:23:14
13 You heard from Richard Palmer of Weeks 10:23:18
14 Marine, a very experienced marine contractor in 10:23:21
15 North America. And he said that, at the time, in -- 10:23:24
16 either in 2009 or 2010, I believe, they strongly 10:23:29
17 believed that the Wolfe Island Shoals project would 10:23:33
18 have been the first offshore wind project 10:23:35
19 constructed in North America. And because of -- and 10:23:37
20 they had that view because of the revenue certainty 10:23:41
21 that was guaranteed under the FIT contract. And 10:23:43
22 they saw -- the marine contractor saw the FIT 10:23:45
23 contract as giving Windstream and the Wolfe Island 10:23:49
24 Shoals project a leg up over every other project 10:23:51
25 that was in the market at that time. 10:23:55

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1 waterfront and offshore structures and that COWI was 10:25:05
2 -- his firm, COWI, which is based in Denmark, was 10:25:07
3 actually the designer of the very first offshore 10:25:11
4 wind farm in Denmark and that COWI holds a 14 10:25:14
5 percent market share over all commissioned offshore 10:25:19
6 wind farms. 10:25:21
7 You heard from Mr. Roeper, the 10:25:22
8 engineer acting as project manager for Windstream. 10:25:24
9 As he saw it at the time, the project schedule was 10:25:30
10 doable. And he said: 10:25:33
11 "What you do, when you manage 10:25:34
12 a project is you design your 10:25:36
13 program around meeting a 10:25:38
14 timeline." 10:25:39
15 A couple of other issues that arose in 10:25:40
16 response to the URS report alleging that somehow 10:25:48
17 rogue waves in the Great Lakes would pose some sort 10:25:52
18 of a problem for the project: You'll recall Mr. 10:25:56
19 Kolberg being somewhat perplexed and saying he has: 10:25:59
20 "...no other way of putting 10:26:02
21 it. This is false. There is 10:26:03
22 no evidence to support that 10:26:05
23 whatsoever." 10:26:06
24 And when asked about that, Mr. Clarke 10:26:07
25 said that what led to them putting that reference in 10:26:09

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1 Mr. Palmer viewed the schedule that 10:24:00
2 had been proposed as imminently achievable. 10:24:01
3 Nothing: 10:24:05
4 "There's nothing a stretch 10:24:05
5 here. We have the equipment. 10:24:07
6 The vessels are available. 10:24:09
7 It absolutely could be 10:24:10
8 built." 10:24:11
9 And you also heard that Weeks Marine 10:24:12
10 began construction of a specific vessel, a jack-up 10:24:18
11 vessel, specifically thinking about the Wolfe Island 10:24:21
12 Shoals project because they were interested in being 10:24:22
13 part of the burgeoning and growing offshore wind 10:24:26
14 market in North America. 10:24:30
15 And this slide gives you a bit of Mr. 10:24:33
16 Palmer's direct experience with offshore wind 10:24:36
17 projects. 10:24:39
18 You heard from Mr. Brent Cooper of 10:24:40
19 COWI. He said he saw no fatal flaws, given the 10:24:43
20 proven technology regarding the foundations, and he 10:24:48
21 believes it's more likely than not that Windstream 10:24:51
22 could have achieved these. 10:24:53
23 He spoke about his seven years of 10:24:56
24 experience directly working with offshore wind 10:24:59
25 structures, nine years of experience with coastal 10:25:01

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1 their report was that they had consulted with a 10:26:13
2 friend of theirs and accepted that that was the 10:26:17
3 case, but that it was probably not admissible 10:26:21
4 evidence. 10:26:24
5 I insert that here simply to assist 10:26:26
6 the Tribunal in weighing the credibility of the 10:26:29
7 experts that have been put forward by Windstream and 10:26:35
8 their experience in connection with offshore wind 10:26:38
9 development versus the experts that have been put 10:26:40
10 forward by Canada in this case. 10:26:42
11 The label "first of a kind" has been 10:26:48
12 used a lot in the URS report and elsewhere on 10:26:52
13 Canada's side. I give you an excerpt here from the 10:26:55
14 testimony of Mr. Kolberg who says applying a label 10:26:57
15 "first of a kind," in his opinion, isn't 10:27:00
16 particularly relevant or accurate, because all of 10:27:04
17 the components that are at issue with respect to an 10:27:08
18 offshore wind project are well used, well 10:27:11
19 understood, and well known in the Great Lakes. So, 10:27:14
20 in his opinion, applying this kind of a label 10:27:17
21 doesn't really serve a purpose. 10:27:20
22 More likely than not, the project 10:27:26
23 would have received the required financing. You 10:27:28
24 have here the testimony of Mr. Ziegler, who has 10:27:31
25 decades of experience in developing projects of 10:27:36

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1 various kinds. And he says: 10:27:41
2 "The FIT contract gives us 10:27:43
3 tremendous advantage in that 10:27:45
4 regard. So you could 10:27:46
5 essentially be assured that 10:27:48
6 you would have interest in 10:27:49
7 financing. You'd have a high 10:27:50
8 degree of probability, the 10:27:52
9 wherewithal to put the 10:27:54
10 project together. You have a 10:27:55
11 fixed price, which is a 10:27:57
12 tremendous advantage. Your 10:27:59
13 financiers know what the 10:28:00
14 price is going in, and it 10:28:02
15 puts you in a totally 10:28:04
16 different category." 10:28:05
17 You heard from Mr. Remo Bucci, who is 10:28:06
18 a project finance -- he's put forward as an expert 10:28:13
19 witness in project financing from Deloitte. And he 10:28:17
20 said the project was likely to reach financial close 10:28:19
21 if not for the moratorium. 10:28:22
22 He mentioned the Government's support 10:28:24
23 conditions for renewable energy that had been 10:28:27
24 created through the FIT program and that -- he 10:28:30
25 mentioned specifically that the FIT contract created 10:28:33

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1 to the extent that there was delay, they would 10:30:03
2 likely, in her view, have considered some form of 10:30:06
3 extension. 10:30:09
4 She says that the OPA was still 10:30:12
5 committed to ensuring that the program, the FIT 10:30:14
6 program, was a success and that they did that by 10:30:17
7 being commercially reasonable in the FIT contract. 10:30:19
8 They wanted to see the stuff be built. It was a 10:30:22
9 cornerstone of their commitment to the economy to 10:30:28
10 ensure that the FIT program was a success. 10:30:31
11 You heard from Mr. Benedetti that FIT 10:30:38
12 contract extensions had happened several times and, 10:30:41
13 in fact, Mr. Cecchini confirmed that as well, 10:30:45
14 specifically with respect to extensions that had 10:30:49
15 been granted based on Ministerial directions that -- 10:30:51
16 I believe Mr. Cecchini's words were: 10:30:56
17 "The OPA always follows." 10:30:58
18 You heard from Mr. Roberts of WSP that 10:31:04
19 regulators -- and I believe he was talking about the 10:31:09
20 OPA. Yes, he's talking about the OPA. "They deal 10:31:13
21 with regulatory delays in a reasonable manner." "They 10:31:15
22 don't impose on the developer to have to sort that 10:31:20
23 out. It's looked after. It's been our experience." 10:31:23
24 And of course you heard from Marc 10:31:28
25 Rose, Canada's expert that he worked on several 10:31:30

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1 pricing and timing certainty for investors. The 10:28:35
2 investment community in Ontario, in his view, viewed 10:28:40
3 FIT contracts extremely favourably because they 10:28:43
4 simplified the development process by putting the 10:28:47
5 contract first. And he mentioned that the -- that 10:28:49
6 the equity providers for the project, so the 10:28:54
7 principals behind Windstream, had committed equity 10:28:58
8 and had a proven track record of raising debt and 10:29:01
9 equity. 10:29:04
10 I have several slides here that also 10:29:09
11 hopefully will be helpful to you on the issue of 10:29:12
12 pragmatism, which also became a bit of a theme in 10:29:16
13 responding to -- to the suggestion that had been 10:29:19
14 made that certain things were not guaranteed or that 10:29:23
15 certain delays would have occurred and so on. And 10:29:25
16 we submit that, more likely than not, had that 10:29:29
17 occurred, had, for example, permitting delays 10:29:32
18 occurred, the OPA would, more likely than not, have 10:29:36
19 worked pragmatically with Windstream to adjust those 10:29:39
20 delays, because that's what it has -- that's what it 10:29:42
21 has, in fact, done. 10:29:44
22 You have testimony from Sarah Powell 10:29:45
23 to that effect; that the OPA's willing to work with 10:29:50
24 developers to ensure that their projects get built 10:29:53
25 out. She also says that the OPA was pragmatic, and 10:29:57

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1 projects that were, in fact, built. Even though 10:31:35
2 they were -- they achieved commercial operation past 10:31:37
3 their original milestone dates for commercial 10:31:41
4 operation, they were built. The projects got built. 10:31:43
5 Why? Because the OPA adopted a pragmatic approach 10:31:47
6 in dealing with the proponents to ensure that that 10:31:50
7 happened. 10:31:53
8 And here I have given you the 10:31:56
9 direction or the request from the Deputy Minister of 10:31:58
10 Energy in 2011 to grant a one-year extension to 10:32:00
11 onshore -- onshore wind FIT contract holders to deal 10:32:06
12 with the issue of permitting delays. 10:32:10
13 Lastly, in answer to your question of 10:32:14
14 yesterday, what the impact of amendments to the REA 10:32:18
15 regulation would be if such amendments were adopted 10:32:22
16 during the project's life: 10:32:26
17 First, there's a general rule under 10:32:29
18 Ontario law that regulations do not have 10:32:32
19 retrospective application. So absent clear 10:32:37
20 statutory authority to give the regulation 10:32:40
21 retrospective application or necessarily implied 10:32:45
22 language in the statute, regulations do not apply 10:32:47
23 retrospectively. 10:32:52
24 MOE has in the past included 10:32:53
25 transitional provisions in amendments to the REA 10:32:55

1 regulation such that amendments do not apply to 10:32:58
2 existing projects, and you will find those in Part 10:33:02
3 VIII of the REA Regulation 10:33:04
4 However, MOE does have the power to 10:33:07
5 impose new conditions on an existing REA, Renewable 10:33:10
6 Energy Approval, such that any new requirements that 10:33:14
7 were to be adopted during the life of a project 10:33:17
8 could be managed on an ongoing basis -- forgive me 10:33:19
9 for using the word pragmatic again -- in a pragmatic 10:33:24
10 way through conditions of the Renewable Energy 10:33:27
11 Approval 10:33:29
12 And with that, I will turn it back to 10:33:32
13 Mr Terry to address the discounted cash flow 10:33:34
14 valuation 10:33:38
15 PRESIDENT: Thank you very much, Ms 10:33:39
16 Seers 10:33:40
17 CONTINUED CLOSING SUBMISSIONS BY MR TERRY: 10:33:41
18 PRESIDENT: Mr Terry 10:33:45
19 MR TERRY: Thank you Perhaps I will 10:33:46
20 just ask Mr Kennedy to pass up to the Tribunal -- 10:33:54
21 in our haste to put this together, we -- there were 10:34:01
22 a couple of documents we left out, so I'll pass them 10:34:05
23 up to you now I won't be addressing them right 10:34:07
24 away, but I'll address them in about 10 minutes when 10:34:10
25 I get to this point 10:34:13

1 qualifications to provide the Tribunal with the 10:35:28
2 evidentiary basis to make those determinations as to 10:35:32
3 -- as to the level of confidence in what is 10:35:34
4 obviously an assessment that's made in a but-for 10:35:39
5 world. 10:35:41
6 And so for that reason, we, again, 10:35:42
7 emphasize, when you are considering the experts put 10:35:46
8 forward on both sides, in our submission, it's very 10:35:49
9 clear that the experts put forward on the Claimant's 10:35:51
10 side have the experience and, in my submission, the 10:35:54
11 appropriate expertise and the credibility to be able 10:36:01
12 to make the appropriate -- provide you with the 10:36:03
13 appropriate evidence to make these determinations. 10:36:07
14 We cite the arbitral jurisprudence, 10:36:11
15 and we put this in our opening as well, the case 10:36:13
16 law, the Stati case law emphasizing that you can 10:36:16
17 apply DCF in a situation even when there isn't a 10:36:20
18 perennial -- or a track record of operations. A key 10:36:25
19 factor is whether there's a binding contractual 10:36:29
20 revenue obligation in place that establish the 10:36:32
21 expectation of profit. 10:36:33
22 And this is true, as the Tribunal says 10:36:35
23 there, even for projects in the early stages. 10:36:38
24 And we also rely on the Karaha Bodas 10:36:41
25 case, which is very useful in terms of its 10:36:47

1 So this section is about the DCF 10:34:15
2 approach, and our submission is that it's the 10:34:19
3 appropriate approach for the valuation of the 10:34:23
4 quantification in this case. And we have excerpted 10:34:26
5 in this slide the slide that you saw from Deloitte 10:34:31
6 with respect to the reasons for this revenue 10:34:33
7 forecast with a high degree of confidence. The 10:34:38
8 majority of capital costs would have been 10:34:41
9 contractual. Engineering doesn't involve any novel 10:34:44
10 technology. Operating costs expected to be 10:34:47
11 relatively stable. Benchmark operating capital 10:34:50
12 costs available. And you will remember the reliance 10:34:53
13 particularly on 4C. Regulatory risk accounted for 10:34:55
14 in the discount rate. 10:35:00
15 So their conclusion, as a result: 10:35:03
16 "The inputs to the DCF 10:35:04
17 approach can be estimated in 10:35:06
18 a reliable manner with a 10:35:07
19 relatively high degree of 10:35:09
20 confidence, i.e., not 10:35:10
21 speculative." 10:35:12
22 And in this respect, I make the point 10:35:13
23 that, as you've heard from Ms. Seers, we, on the 10:35:16
24 Claimant's side, have gone to a considerable effort 10:35:20
25 to retain experts with the appropriate 10:35:24

1 assessment of this issue and, again, reliance on -- 10:36:50
2 this is a PPA agreement in Indonesia and reliance on 10:36:51
3 a contractual obligation to purchase power, so I 10:36:56
4 would recommend that case to you as well. 10:36:59
5 You'll recall just two days ago when 10:37:03
6 Mr. Goncalves from BRG was testifying as to the 10:37:09
7 stage of the project, and you'll recall that 10:37:12
8 Deloitte puts the project in a late-stage situation. 10:37:14
9 BRG puts it in an early-stage situation. I explored 10:37:19
10 with Mr. Goncalves how and why he had done that and 10:37:23
11 why, for example, he had put the X on site wind 10:37:28
12 assessment and an X on interconnection agreement 10:37:31
13 when, according to the evidence of Mr. Cecchini, the 10:37:33
14 OPA was guaranteeing that grid space. 10:37:37
15 And we also talked about -- and it's 10:37:40
16 in the record -- Mr. Goncalves' expert evidence in 10:37:43
17 the Mesa Power case. And in looking at the 10:37:47
18 transcript, you'll see that he acknowledges that, in 10:37:51
19 the Mesa Power case, he applied a DCF analysis 10:37:52
20 despite the fact that the only evidence of any of 10:37:56
21 the permitting stages that he has talked about here 10:37:59
22 or any of the indicia was that there may have been 10:38:01
23 certain land agreements in place, but, otherwise, 10:38:05
24 there was nothing on that scale. 10:38:07
25 And, in my submission, in evaluating 10:38:09

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1 Mr. Goncalves' evidence -- and I appreciate that he 10:38:15
2 -- that his stance on the issue had moved. He said 10:38:18
3 it was informed by additional evidence, Green 10:38:21
4 Giraffe and others, to say DCF was not the 10:38:24
5 appropriate methodology. But I would submit that 10:38:26
6 it's appropriate to consider, in particular, what he 10:38:29
7 said now. And he said, you know, he had concerns in 10:38:33
8 his -- in the Rejoinder report about this, and he 10:38:38
9 said you have to apply the DCF prudently and 10:38:40
10 responsibly, and we don't disagree, and Mr. Low 10:38:45
11 doesn't disagree with it. We think it is being 10:38:47
12 applied prudently and responsibly here, and we think 10:38:50
13 we've got the evidence to -- to establish that. 10:38:53
14 And I should mention, you know, beyond 10:38:54
15 the issue with respect to valuation date and taking 10:38:56
16 into account current information, obviously the 10:38:59
17 experts on both sides are, to some extent, in some 10:39:02
18 cases, relying on contemporaneous information. You 10:39:04
19 know, we have examples, for example, of turbine 10:39:07
20 costs back in 2010 and other information in 2010. 10:39:10
21 We also have examples of information beyond that, 10:39:13
22 and, you know, we have experts from both sides 10:39:16
23 obtaining information on that basis. 10:39:19
24 Our -- our position is the -- that the 10:39:21
25 valuation date is -- for unlawful expropriation is 10:39:24

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1 with revenue in terms of figuring out both the 10:40:41
2 likely wind resource and the energy levels that 10:40:44
3 would flow from that. And I -- Mr. Goncalves, from 10:40:47
4 BRG, was emphasizing that, on the basis of past 10:40:51
5 information, a newspaper article that, in fact, you 10:40:56
6 know, wind resource estimates weren't very accurate; 10:40:59
7 could be off by five to 20 percent. 10:41:02
8 And if you look at his slides, he's 10:41:04
9 suggesting, then, that it should be -- you should 10:41:06
10 lower the amount of revenue, basically assume that 10:41:07
11 the wind was blowing at 5 to 10 percent less every 10:41:09
12 year. And on a P50 analysis, of course, you go plus 10:41:12
13 or minus 50 percent. You don't assume that the wind 10:41:18
14 resource is going to be less every year. So, in my 10:41:18
15 submission, that should not be a -- that's not a 10:41:21
16 reasonable assumption to make. 10:41:23
17 Here is Mr. Irvine who talks about the 10:41:25
18 robust resource, wind resource, and bankable energy 10:41:26
19 unit. And Mr. Goncalves acknowledged that one of 10:41:35
20 the firms, Garrad Hassan, who had done this work, 10:41:36
21 was a leading firm in this area. 10:41:41
22 With respect to project costs, we also 10:41:43
23 had primarily the evidence of 4C, and the URS 10:41:48
24 experts confirmed that they had been relying, for 10:41:52
25 virtually all of their information, from 4C. And, 10:41:57

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1 the date of the award, and it's appropriate to take 10:39:27
2 into account hindsight, as Ms. Seers said. But even 10:39:30
3 in the event that the valuation is the earlier date, 10:39:33
4 it's important to look closely at -- in terms of the 10:39:36
5 current information versus past information and 10:39:40
6 what's reasonable to consider in terms of 10:39:42
7 expectations even at the time as to technology 10:39:45
8 evolving, schedules, for example, evolving. 10:39:49
9 We had evidence from -- from 10:39:52
10 Mr. Irvine about, you know, schedules would go 10:39:53
11 through 30 iterations and the importance to look at 10:39:56
12 this, you know, in context and with a reasonable 10:39:59
13 assumption that these -- that, as you move forward 10:40:03
14 through the but-for world, you would have these 10:40:05
15 assessments occurring. You would have schedules 10:40:08
16 being reconsidered. You would have -- you'd have 10:40:09
17 various things occurring in light of further 10:40:12
18 knowledge. And, you know, technological 10:40:14
19 developments and all that is consistent, in my 10:40:19
20 submission, with -- with the reasonable assumptions 10:40:21
21 you take in place in terms of doing a valuation. 10:40:23
22 Now, for DCF assessment, you look at 10:40:26
23 revenue, cost, and the discount rate. Revenue -- 10:40:31
24 and this is -- again, it's a Deloitte slide. 10:40:34
25 Deloitte emphasizes here that the certainty tied 10:40:38

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1 in our submission, Mr. Aukland is the most 10:41:59
2 authoritative expert to look to in terms of costs. 10:42:02
3 You can see this is the chart he used to show how 10:42:05
4 the capital costs estimates align with other wind 10:42:08
5 farms here and particularly in the context of 10:42:13
6 comparable wind farms. And he talked, of course, 10:42:17
7 about some of the Baltic Sea and other wind farms 10:42:19
8 being comparable. 10:42:22
9 On the issue of turbine costs, this is 10:42:26
10 the slide that -- the next slide here that Mr. 10:42:28
11 Aukland relied on in terms of showing how he came to 10:42:32
12 his assessment of turbine costs here and the various 10:42:36
13 markers in addition to the Conference Board of 10:42:41
14 Canada. And there are two particularly interesting 10:42:43
15 data points here. 10:42:46
16 The Conference Board of Canada report, 10:42:47
17 which, as you heard, was a Vestas estimate of the 10:42:49
18 actual costs for the 300-megawatt Wolfe Island 10:42:54
19 Shoals wind farm, and that was in December 2010. So 10:42:58
20 very contemporaneous information there. And then 10:43:02
21 you also saw the AECOM document using figures from 10:43:05
22 Mott McDonald, one of the leading offshore energy 10:43:08
23 firms, again with capital costs. You'll recall, 10:43:12
24 when you look at the record, the capital costs in 10:43:15
25 the AECOM report, in 2010, falling within that same 10:43:17

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1 range of the capital costs that 4C came up with. 10:43:23
2 And, in our submission, that evidence from 4C is the 10:43:27
3 most reliable in terms of assessing what the costs 10:43:31
4 should be. 10:43:33
5 There is a lot of discussion of the 10:43:35
6 Turbine Supply Agreement and whether or not that 10:43:37
7 should be -- that should be a -- how that should be 10:43:41
8 treated in assessing costs in a but-for world. 10:43:45
9 And, in our submission, that cannot be 10:43:49
10 treated as an ordinary-course-of-business contract. 10:43:52
11 Bear in mind a moratorium was in place at the time. 10:43:55
12 There was -- essentially with the pending Ontario 10:43:58
13 election and a potential of a new government to come 10:44:02
14 in, the Liberal government was quite -- wanted to 10:44:05
15 ensure that, in general, wind projects would not 10:44:09
16 be -- that the program would not be cancelled by the 10:44:11
17 new government. They made this offer to all 10:44:14
18 developers that the unilateral termination right 10:44:17
19 that was otherwise available under the FIT contracts 10:44:20
20 would be waived, if there were agreements that 10:44:23
21 showed domestic content of 50 percent. 10:44:26
22 It was on that basis that Windstream 10:44:28
23 enters into this agreement. You will see, and it is 10:44:31
24 clear in the record, this wasn't an agreement that 10:44:33
25 was fully negotiated. And all of the experts, fact 10:44:35

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1 project uneconomic or impose a schedule that would 10:45:50
2 cause it to fail. 10:45:52
3 And -- and to the extent the Tribunal 10:45:53
4 is engaging that exercise of assessing whether a 10:46:00
5 reasonable assumption would be made, in our 10:46:03
6 submission, it's appropriate to make a reasonable 10:46:05
7 assumption that Siemens would be incented in this 10:46:08
8 way and that, therefore, the price wouldn't go up. 10:46:11
9 The price would be adjusted to an amount that is 10:46:14
10 appropriate for the project to go ahead. And if 10:46:17
11 there's -- the best indicator of what that price 10:46:20
12 would be would be the market price data that Mr. 10:46:22
13 Auckland put forward. 10:46:24
14 And you will see in this respect in 10:46:26
15 his testimony he says: 10:46:27
16 "It's not a realistic term in 10:46:28
17 price." 10:46:30
18 He says: 10:46:30
19 "That price in the agreement 10:46:31
20 is not relevant in the 10:46:33
21 marketplaces. The projects 10:46:33
22 don't pay that price for 10:46:35
23 their turbines. 10:46:37
24 And he says: 10:46:38
25 "There was a competitive 10:46:38

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1 and expert witnesses, appear to agree that the 10:44:41
2 agreement would likely be renegotiated. 10:44:43
3 And, of course, the way the agreement worked, there 10:44:45
4 was essentially an option on the part of Windstream 10:44:47
5 as to whether they wanted to trigger a binding offer 10:44:50
6 process that would allow the agreement to go ahead. 10:44:53
7 So the question then is, whether -- 10:44:56
8 you know, of there was renegotiation, would the 10:44:59
9 agreement have been renegotiated in a manner that 10:45:02
10 would allow the project to proceed or not. As we 10:45:04
11 understood the evidence from the Respondent's 10:45:06
12 witnesses on this side, the argument was that 10:45:09
13 Siemens would've -- would've held firm at the 10:45:14
14 contract price, even if it was going to cause the 10:45:17
15 project to not be economic to go forward. 10:45:20
16 In our submission, the more reasonable 10:45:23
17 assumption is that the parties would -- would 10:45:25
18 bargain in a way, and clearly Siemens would want to 10:45:29
19 maximize its price, but it would also not want to do 10:45:32
20 so in a way that would kill the project. Both 10:45:34
21 parties would have an interest in proceeding. 10:45:37
22 Siemens would have an interest in being part of the 10:45:39
23 first North American offshore wind project. And it 10:45:41
24 is not likely, as we say in the fourth bullet, that 10:45:46
25 Siemens would insist on a price that would make the 10:45:48

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1 market in North America for 10:46:39
2 turbines at the time. They 10:46:41
3 wanted to get on with this 10:46:42
4 project. The industry has a 10:46:44
5 good context. There was 10:46:46
6 ambition." 10:46:48
7 Now, in terms of the -- we have done 10:46:48
8 revenue and costs. The next question is the 10:46:51
9 discount rate. 10:46:53
10 And in this particular case, this is 10:46:54
11 the Deloitte slide setting out where they land on 10:46:56
12 the discount rate and, particularly, the cost of 10:46:59
13 equity, which seemed to be the major -- the most 10:47:01
14 important difference between the experts on this 10:47:04
15 issue. And you'll see here Deloitte's assessment in 10:47:06
16 applying the discount rate and the factors it takes 10:47:11
17 into account and the various -- the permitting risks 10:47:13
18 that it brings into its discount rate. 10:47:16
19 And this is a slide from BRG which is 10:47:17
20 helpful in showing the difference between the BRG 10:47:21
21 and the Deloitte analysis as to what the likely cost 10:47:25
22 of equity would have been in this case. What's 10:47:27
23 important here -- and this really became clear from 10:47:30
24 -- through the cross-examination of Mr. Goncalves -- 10:47:33
25 is Mr. Goncalves was adding two elements. If you 10:47:37

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1 look on the left-hand side, not just the -- adding 10:47:41
2 on not just 4.2 percent for his offshore technology 10:47:43
3 risk adjustment, but also adding an additional 10 10:47:47
4 percent, which was construction risk premium, which 10:47:51
5 he described -- in answer to questions because I 10:47:54
6 talked to him about the -- the development of 10:47:57
7 onshore projects, he said, well, that was for 10:48:00
8 offshore wind as well. So he was adding on to the 10:48:01
9 discount rate an additional six point -- or, sorry, 10:48:06
10 the cost of equity, an additional 6.2 percent. And 10:48:08
11 if you -- if you take off those amounts, you end up 10:48:12
12 really with a discount rate that's roughly 10:48:14
13 equivalent to the Deloitte discount rate. 10:48:16
14 And it'd important to look at what Mr. 10:48:19
15 Goncalves was relying on, and this is also important 10:48:22
16 because -- because he acknowledged that, at the time 10:48:25
17 he wrote the report, he hadn't reviewed this Green-X 10:48:27
18 report. And -- and when you look at this Green-X 10:48:30
19 report -- this is 2004 -- offshore wind engine has 10:48:32
20 not come of age. The track record is very limited. 10:48:36
21 Offshore wind turbines are new-type turbines. You 10:48:39
22 know, this is the basis for that beta of 1.4 that 10:48:42
23 leads to the 4.2 percent. Compare that with -- and 10:48:45
24 here's the confirmation from Christopher Goncalves 10:48:49
25 as to -- that he's applying this 4.2 percent plus 10:48:53

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1 appropriate approach to cost of equity is the 10:49:59
2 approach that Deloitte has taken. And it's not 10:50:03
3 appropriate to add on this offshore premium of 6.2 10:50:07
4 percent in this case, given the technology that was 10:50:09
5 being -- that was going to be used. 10:50:14
6 And remember that these 2.3-megawatt 10:50:16
7 turbines were the same turbines that were spinning 10:50:18
8 -- that are spinning on Wolfe Island Shoals -- or, 10:50:19
9 sorry, on Wolfe Island itself. 10:50:22
10 We've got the comparable transaction 10:50:25
11 approach as a check on this, and Deloitte, this is 10:50:27
12 their slide where they are discussing this and the 10:50:30
13 factors they have taken into account and their 10:50:34
14 discussion here with -- with Deloitte Denmark. 10:50:37
15 And these are the comparables they 10:50:41
16 come up with in their assessment as to how the Wolfe 10:50:44
17 Island Shoals compares to these comparables. This 10:50:48
18 is the evidence of Mr. Guillet who, as we noted, put 10:50:52
19 the project at somewhere between 0 and 60 million 10:50:57
20 Euros in terms of his charts and the comparables 10:51:00
21 that he was using. 10:51:04
22 Here is, as Ms. Seers indicated, the 10:51:11
23 testimony of Christopher Goncalves who essentially 10:51:15
24 said that the FIT contract had no value. So August 10:51:17
25 19th, it had certainly no value, and August 20th, 10:51:22

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1 the 2 percent. 10:48:56
2 And if you look at the proxy group that he uses, he 10:48:56
3 also includes, as we discussed, two companies that 10:49:01
4 are also in -- half of their business is in offshore 10:49:03
5 wind. So, really, he's -- you know, he's adding an 10:49:06
6 offshore wind risk in the 4.2 percent, the 2 10:49:09
7 percent, in our respectful submission, and also to 10:49:12
8 this proxy group. 10:49:14
9 And the appropriate thing is you choose a proxy 10:49:15
10 group that's right, that includes offshore wind, and 10:49:17
11 you use that proxy group, and you don't add on these 10:49:20
12 additional amounts. 10:49:23
13 And if you look at what was actually 10:49:23
14 being used in this case -- and this is the expert 10:49:25
15 Mr. Irvine -- the 2.3-megawatt turbine is the 10:49:28
16 workhorse of the industry. Thousands of these are 10:49:31
17 operating. He talked about how, you know, the 10:49:34
18 nacelles are cranked off in assembly line fashion. 10:49:35
19 This is not the complex technology, new technology, 10:49:39
20 the large turbines that are being discussed in the 10:49:41
21 Green-X report. 10:49:44
22 So, for those reasons, in our 10:49:45
23 submission, when you examine the expert evidence 10:49:49
24 carefully and look at the support that each of 10:49:52
25 these, Deloitte and BRG, relied upon, the 10:49:55

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1 also certainly no value: 10:51:25
2 "You ascribe no value 10:51:27
3 whatsoever to the FIT 10:51:28
4 contract. Is that right? 10:51:30
5 "Subject to what I have said, 10:51:31
6 yes." 10:51:33
7 And, in our submission, that's just -- 10:51:34
8 that evidence is not appropriate, as Ms. Seers -- 10:51:35
9 it's not appropriate in the context of a damages 10:51:37
10 analysis, and it's not -- it doesn't reflect a 10:51:40
11 realistic effort to come to terms with the question 10:51:42
12 as to what an appropriate market comparable would be 10:51:44
13 looking at reasonable assumptions. 10:51:47
14 We have said this before in our 10:51:51
15 opening, so I will be brief that the investment cost 10:51:52
16 approach is not appropriate. To limit the recovery 10:51:54
17 the victim to its actual expenditures is 10:51:59
18 commercially intolerable. 10:52:02
19 This is from Marboe: 10:52:04
20 "If an investment turns out 10:52:07
21 to be particularly promising, 10:52:09
22 the host State could be 10:52:09
23 motivated to expropriate or 10:52:13
24 otherwise impair it. Great 10:52:14
25 care must, therefore, be 10:52:16

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1 taken not to link the amount 10:52:18
2 of compensation or damages 10:52:19
3 closely to the investment 10:52:20
4 actually undertaken if the 10:52:21
5 investment has good future 10:52:22
6 prospects." 10:52:22
7 So although the point can make for 10:52:22
8 good rhetoric and can make for, you know, good, 10:52:24
9 demonstrable charts, it's not, in terms of a serious 10:52:27
10 assessment of the appropriate and serious task to be 10:52:29
11 taken here, it's not an appropriate approach to link 10:52:33
12 sunk costs to actual but-for analysis. And we have 10:52:37
13 included a slide from Deloitte on this point as 10:52:43
14 well. 10:52:45
15 And then this is also -- we had, 10:52:48
16 obviously, evidence about the sunk costs, and we had 10:52:52
17 the evidence from Mr. Goncalves in terms of what 10:52:56
18 the -- those involved in auditing sunk costs had 10:52:59
19 done or not done. And I would just, again, urge you 10:53:05
20 to read carefully the evidence on that and carefully 10:53:07
21 the evidence, including this, from Deloitte as to 10:53:10
22 what has been done in this respect. 10:53:13
23 And it's really -- in general, it's 10:53:14
24 also important to keep in mind in terms of sunk 10:53:16
25 costs and amounts expended on the project that we 10:53:18

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1 considered as appropriate sunk costs. But all of 10:54:37
2 that being said, we, of course, urge the Tribunal, 10:54:40
3 and, in our view, it is a credible basis and an 10:54:44
4 appropriate basis for you to apply the DCF analysis 10:54:47
5 in this particular case, rely on the evidence that's 10:54:52
6 in front of you, and award damages consistent with 10:54:55
7 what Deloitte comes to in terms of its 10:54:58
8 determinations. 10:55:01
9 And those are, subject to any -- me 10:55:02
10 getting any other signals, that completes our 10:55:06
11 submissions. Thank you. 10:55:08
12 PRESIDENT: Okay. Thank you very 10:55:09
13 much. Just for purposes of checking where we are, 10:55:11
14 can we see -- I understand you reserved some 25 10:55:15
15 minutes -- 20-25 minutes for rebuttal. 10:55:20
16 MR. TERRY: By our clock we may be at 10:55:24
17 27, but I could be -- we may have a timing error. 10:55:26
18 MS. NETTLETON: It's 22 minutes. 10:55:32
19 MR. TERRY: We're slightly off. Okay. 10:55:35
20 PRESIDENT: So let's break for five 10:55:37
21 minutes for the logistics and then the Government 10:55:39
22 will take over. 10:55:42
23 --- Recess taken at 10:55 a.m. 10:55:44
24 --- Upon resuming at 11:02 a.m. 11:02:34
25 PRESIDENT: Okay, if we can continue 11:03:06

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1 have sort of an unusual circumstance in this case 10:53:21
2 where we have both the project that is in this limbo 10:53:24
3 of a deferral or a moratorium, uncertain whether 10:53:28
4 that could be brought on, whether it could have an 10:53:32
5 opportunity to develop the project again, and it is 10:53:35
6 also because of various limitation periods like the 10:53:37
7 three-year limitation period on NAFTA claims, 10:53:39
8 pursuing a NAFTA claim. 10:53:41
9 You have the various -- you know, the Sgurr, the 10:53:42
10 COWIs, and others developing work, and there is -- 10:53:45
11 there is an unusual convergence here between -- 10:53:48
12 between, you know, the real world and the moratorium 10:53:52
13 and the but-for world being developed for this 10:53:57
14 arbitration. And I just encourage you to think 10:54:00
15 carefully of that before simply making the 10:54:02
16 assumption that any -- you know, the Sgurr report 10:54:04
17 and the other reports should be simply discounted in 10:54:06
18 terms of any sunk costs being related to the 10:54:09
19 arbitration, because it's simply more complicated 10:54:11
20 than that, and there's -- there are genuine reasons, 10:54:13
21 as Mr. Irvine and others had said -- and Mr. Low had 10:54:16
22 said that those reports -- you know, aside from the 10:54:21
23 reply reports later on, that those reports that were 10:54:28
24 developed and used in terms of the Memorial, in 10:54:31
25 terms of developing schedules and others, should be 10:54:33

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1 with the Respondent's closing statement. Mr. 11:03:07
2 Neufeld, please. 11:03:10
3 CLOSING SUBMISSIONS BY MR. NEUFELD: 11:03:10
4 MR. NEUFELD: Good morning Members of 11:03:12
5 the Tribunal. As my kids reminded me on the phone 11:03:13
6 this morning, we're almost there. 11:03:16
7 [Laughter.] 11:03:18
8 MR. NEUFELD: One very quick remark 11:03:22
9 before I begin: As you can, I'm sure, appreciate, 11:03:23
10 yesterday was a very busy day for us, both in terms 11:03:29
11 of preparing this opening and the accompanying 11:03:32
12 slides that go with it. 11:03:35
13 Understandably, there are some -- 11:03:37
14 there are a few typos and, in some instances, even 11:03:39
15 page numbers that are off -- that are referenced in 11:03:44
16 the slides that are off. The slides -- the correct 11:03:47
17 exhibit is being cited on occasion, but not the 11:03:53
18 correct slide. So I have spoken to our -- to Mr. 11:03:56
19 Terry and Ms. Seers, and they don't seem to object 11:04:02
20 to us filing a corrected version electronically 11:04:05
21 after the fact, which, of course, will work the same 11:04:09
22 for them. 11:04:12
23 PRESIDENT: Yes. We would actually 11:04:13
24 appreciate having an electronic version from both 11:04:15
25 parties after the hearing. 11:04:18

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1 MR. NEUFELD: Perfect. Thanks. So 11:04:20
2 Canada has organized its closing arguments as 11:04:21
3 follows: First, I'll provide a short overview of 11:04:24
4 the -- of the law, and I plan to recap the principal 11:04:27
5 provisions of the law of Article 1105, the minimum 11:04:29
6 standard of treatment, and Article 1110, 11:04:35
7 expropriation, right before I apply the facts to 11:04:38
8 that law. 11:04:41
9 We've made efforts to focus 11:04:43
10 principally on the testimony that we have heard over 11:04:45
11 the past two weeks. Afterwards, Ms. Squires will 11:04:47
12 address the law on damages as well as the facts 11:04:51
13 pertaining to engineering and financing, which 11:04:54
14 demonstrate that the Claimant would never have been 11:04:57
15 able to reach commercial operation under the terms 11:04:59
16 of the FIT contract. 11:05:01
17 And, finally, Mr. Spelliscy will 11:05:02
18 discuss the -- the Claimant's request for lost 11:05:04
19 profits and sunk costs. 11:05:10
20 As stated during Canada's opening, 11:05:13
21 there are two simple questions that you must 11:05:16
22 resolve. And I think from what I heard this morning 11:05:20
23 from Mr. Terry, we're approaching common ground on 11:05:25
24 that issue. First is whether the Ontario 11:05:27
25 Government's decision to take the time it needed to 11:05:31

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1 enough to withstand a certain challenge in the 11:06:56
2 courts by the strong public opposition to offshore 11:06:58
3 wind. We heard of NIMBYs, and we heard of BANANAS. 11:07:02
4 It was entirely legitimate for the 11:07:05
5 Government to take the time necessary to conduct 11:07:08
6 further scientific research in collaboration with 11:07:11
7 the U.S. to justify the setbacks and other rules to 11:07:14
8 approve projects. 11:07:18
9 The evidence also demonstrates that 11:07:19
10 Ontario undertook extensive efforts to collaborate 11:07:23
11 [REDACTED] 11:07:29
12 [REDACTED] 11:07:29
13 On the Ontario side, it involved 11:07:32
14 multiple Ministries and significant time and energy. 11:07:35
15 In fact, Ontario was in the throes of 11:07:39
16 collaborating [REDACTED] when Mr. Ziegler came to 11:07:42
17 the realization that the Windstream Wolfe Island 11:07:44
18 Shoals project was no longer possible to finance. 11:07:47
19 Yet the Claimant accuses Ontario of acting in bad 11:07:51
20 faith by not having undertaken the necessary 11:07:55
21 scientific research since that time. 11:07:58
22 There is no evidence that Ontario 11:08:02
23 acted in bad faith. The fact that the collaboration 11:08:03
24 did not go as planned cannot now be used to indicate 11:08:08
25 that Ontario never intended to undertake the science 11:08:11

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1 adopt an adequately informed policy framework on 11:05:35
2 offshore wind, to develop offshore wind development 11:05:38
3 with clear upfront rules is a breach of Article 1105 11:05:41
4 and, second, whether the Government violated NAFTA 11:05:46
5 Articles 1102, 1103, 1105, and 1110 by failing to 11:05:51
6 complete the approvals framework and lift the 11:05:57
7 deferral within a time frame dictated by the 11:06:01
8 Claimant. 11:06:04
9 You'll recall that the deferral had to 11:06:04
10 have been lifted -- or the Claimant needed to be 11:06:06
11 insulated from its effects by May 22, 2012 for the 11:06:09
12 Claimant to be able to meet its obligations under 11:06:15
13 the FIT contract with the OPA. 11:06:17
14 The evidence that you heard over the 11:06:20
15 last two weeks confirmed that the Government's 11:06:22
16 decision to pause development of offshore wind 11:06:25
17 development was a prudent policy decision, taken in 11:06:28
18 response to the need to finalize the policy 11:06:31
19 framework on offshore wind. 11:06:34
20 Minister Wilkinson's concern over the 11:06:37
21 regulatory framework was clearly communicated to his 11:06:39
22 Deputy and to his Chief of Staff, who, in turn, 11:06:42
23 communicated it to the Premier's Office. His 11:06:46
24 decision was based on the lack of science to inform 11:06:49
25 the approvals framework which needed to be strong 11:06:53

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1 necessary to lift the deferral. 11:08:15
2 The Claimant wants to have it both 11:08:19
3 ways. First, it refused the OPA's offer to freeze 11:08:21
4 its FIT contract beyond May 2012. Then, it accuses 11:08:25
5 Ontario of not undertaking the science necessary to 11:08:31
6 finalize the approvals framework within that three- 11:08:34
7 to five-year period that was forecasted. The 11:08:38
8 position it adopts is simply illogical. 11:08:44
9 The Claimant's allegation of bad faith also relies 11:08:47
10 improperly on one statement made by Canada in the 11:08:52
11 openings that it takes out of context. I said that 11:08:54
12 Ontario is not planning to commence scientific 11:09:00
13 studies in the near term, but I also said that, once 11:09:02
14 the noise and decommissioning studies are completed, 11:09:07
15 Ontario will analyze the findings, consider the 11:09:10
16 scientific gaps that still remain, and determine 11:09:14
17 whether further studies are required to develop the 11:09:17
18 regulatory framework before undertaking that work. 11:09:20
19 What's clear is that, for this 11:09:25
20 dispute, any science that Ontario plans to undertake 11:09:28
21 after May 2012 is irrelevant for the purposes of 11:09:32
22 addressing Windstream's claim, owing to the 11:09:36
23 Claimant's admission that it could not proceed with 11:09:39
24 developing its project after that date. 11:09:42
25 The Claimant focuses on the fact that 11:09:47

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1 five years have passed, the five years since the 11:09:51
2 decision to defer offshore wind. And it ignores all 11:09:54
3 of the content, all of the -- all of the reasons for 11:09:59
4 the delays, taking -- taking that information out of 11:10:03
5 context. 11:10:07
6 Ultimately, the Claimant urges you to 11:10:09
7 ignore the realities of the uncertain regulatory 11:10:12
8 framework for offshore wind in Ontario, the hard 11:10:14
9 deadlines of the FIT contract, the commercial 11:10:17
10 reality surrounding what would have been the first 11:10:20
11 offshore wind project in North America. 11:10:23
12 The fact is that the Claimant was 11:10:28
13 fully aware of the regulatory uncertainty 11:10:30
14 surrounding offshore wind when it applied to and 11:10:33
15 later signed back its FIT contract with the OPA. In 11:10:36
16 doing so, it undertook the responsibility of 11:10:41
17 bringing its project into commercial operation by 11:10:43
18 the milestone date for commercial operation 11:10:46
19 specified in the FIT contract. 11:10:49
20 The Claimant asks you, as well, to 11:10:52
21 overlook this aspect of the Claimant's 11:10:56
22 responsibility and find, instead, that through 11:10:59
23 goodwill, pragmatism, and the support of the Ontario 11:11:02
24 government, the OPA, industry players like Siemens, 11:11:06
25 it would have overcome every hurdle standing in its 11:11:10

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1 involves different -- differences, including limited 11:12:27
2 construction season, different equipment, additional 11:12:29
3 built-in redundancies and, most importantly, the 11:12:33
4 intersection of numerous industries learning to work 11:12:37
5 together. 11:12:40
6 Mr. Guillet also explained how the 11:12:43
7 difficulty in technical complexity of offshore wind 11:12:46
8 projects is much greater and how well-established 11:12:49
9 oil and gas companies tried to enter this market and 11:12:52
10 failed. In Mr. Guillet's words: 11:12:56
11 "It's not at all like 11:13:01
12 onshore. Offshore is a 11:13:03
13 completely new sector. It is 11:13:04
14 industries that didn't know 11:13:06
15 each other that meet in the 11:13:08
16 middle of water in a very 11:13:10
17 hostile place to build." 11:13:12
18 The Claimant also urges you to look 11:13:17
19 past the fact that it was the only developer to 11:13:19
20 apply for an offshore wind FIT contract of over 10 11:13:21
21 megawatts. Its witnesses have almost consistently 11:13:26
22 described Ontario as having a particularly 11:13:30
23 attractive, generous, secure framework for offshore 11:13:32
24 wind. But the Claimant can't get past -- it can't 11:13:36
25 explain why none of the world's leading offshore 11:13:41

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1 way to develop a 300-megawatt wind farm. But this 11:11:13
2 isn't a case of a proponent that had a FIT contract 11:11:18
3 and all of its permits lined up. 11:11:22
4 According to the Claimant, the 11:11:26
5 realities it faced were no different than those 11:11:27
6 faced by onshore wind projects in Ontario. 11:11:29
7 Mr. Baines said it most succinctly, I think, when he 11:11:32
8 said: 11:11:35
9 "I think the easiest way to 11:11:36
10 say it was that if we took 11:11:37
11 the Wolfe Island project and 11:11:39
12 we put it in the water, we'd 11:11:41
13 have this offshore Wolfe 11:11:43
14 Island Shoals project." 11:11:45
15 But as Canada's experts have made 11:11:46
16 abundantly clear, the only thing in common between 11:11:51
17 offshore and onshore wind development is the wind. 11:11:53
18 For example, Jerome Guillet of Green Giraffe, an 11:11:56
19 expert in renewable energy financing, explained how 11:12:05
20 offshore and onshore wind are completely different 11:12:08
21 industries. The costs are higher, with turbines 11:12:11
22 amounting to 90 percent of the cost of an onshore 11:12:16
23 wind project in comparison to only 30 percent of the 11:12:20
24 cost of an offshore wind project. 11:12:22
25 Offshore wind development also 11:12:25

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1 wind developers were enticed to invest in Ontario. 11:13:43
2 If Ontario truly had the best framework in the 11:13:46
3 world, where was Dong Energy? Vattenfall? PNE? 11:13:48
4 E.ON? These are the world leaders. And why is it 11:13:53
5 that, of all of the Crown land applicants, only two 11:13:57
6 applied to the FIT program? This is in direct 11:14:01
7 contrast to the interest Ontario received in onshore 11:14:05
8 wind from industry leaders, such as Nexterra, 11:14:08
9 Pattern, Samsung. 11:14:11
10 As you have heard from the experts 11:14:15
11 this week, offshore wind development is not onshore 11:14:17
12 wind development. Windstream is not Dong Energy, 11:14:19
13 and North America is not Europe. 11:14:22
14 Let me turn now to the law. 11:14:26
15 The Claimant has brought a 11:14:36
16 broad-ranging claim that Canada has breached 11:14:38
17 Articles 1102, 1103, 1105, 1110 and that, in the 11:14:42
18 alternative, Canada's breached through the actions 11:14:46
19 of the OPA these Articles. That said, the Claimant 11:14:49
20 has offered no argument over the past days in 11:14:53
21 support of its Article 1103 claim or its claims 11:14:55
22 involving the OPA. The Claimant has neither 11:14:59
23 formally abandoned these claims, nor has it pursued 11:15:03
24 them. 11:15:06
25 With respect to its claims involving the OPA, the 11:15:07

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1 Claimant continues to argue, as counsel stipulated 11:15:09
2 in its opening statement, that the OPA's a state 11:15:12
3 agency and, to the extent to which it was exercising 11:15:15
4 the authority of Energy, it failed to exercise that 11:15:18
5 authority. 11:15:22
6 As previously set out in Canada's 11:15:25
7 written pleadings, whether the OPA is acting with 11:15:28
8 delegated governmental authority is wholly 11:15:31
9 inapplicable, because the Claimant fails to 11:15:34
10 challenge a single action of the OPA in this 11:15:36
11 dispute. It is, frankly, unacceptable that the 11:15:39
12 Claimant has refused to abandon these claims 11:15:42
13 involving the OPA, forcing Canada to spend 11:15:45
14 additional time and resources responding to them and 11:15:48
15 obliging the Tribunal to resolve them. 11:15:51
16 This is equally true of the Claimant's 11:15:55
17 Article 1103 claim. Shockingly, the Claimant has 11:15:57
18 pursued this claim despite explicitly admitting that 11:16:02
19 the circumstances surrounding the award of the solar 11:16:03
20 project to Samsung are not currently known to 11:16:07
21 Windstream. This is despite having engaged Mr. 11:16:08
22 Smitherman as a witness, the very person who 11:16:13
23 negotiated the investment agreement with Samsung. 11:16:15
24 The Claimant's expert witness Sarah Powell also 11:16:18
25 testified to being involved in the Korean 11:16:21

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1 Consortium's projects. Accordingly, the claim that 11:16:23
2 the factual circumstances surrounding the treatment 11:16:27
3 of Samsung were unknown to the Claimant are simply 11:16:29
4 not credible. 11:16:32
5 The Claimant's decision not to 11:16:35
6 withdraw these claims is an issue that Canada will 11:16:36
7 return to in a cost submission. 11:16:39
8 Now, a word about the Claimant's 11:16:43
9 national treatment claim: While the Article 1102 11:16:46
10 claims have been briefly addressed during the 11:16:50
11 hearing, the Claimant still fails to identify how 11:16:53
12 the treatment it received was as a result of 11:16:56
13 nationality-based discrimination. 11:16:59
14 It is notable that, despite having 11:17:02
15 argued in its Reply Memorial that the procurement 11:17:04
16 exception does not extend to procurement of 11:17:07
17 electricity by the OPA, Claimant's counsel and 11:17:09
18 witnesses have consistently referred over the past 11:17:12
19 two weeks to the FIT as a Ministry of Energy 11:17:17
20 procurement program. 11:17:19
21 For example, in its opening remarks, 11:17:21
22 the Claimant specifically referred to the Ministry's 11:17:24
23 consideration of the cost of offshore procurement, 11:17:27
24 and Mr. Benedetti referred to the procurement of 11:17:30
25 renewable energy managed by the Ministry of Energy. 11:17:34

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1 In sum, the Claimant recognizes that the program is 11:17:37
2 the Ministry of Energy procurement program, which 11:17:41
3 means that Article 1102 and Article 1103 do not 11:17:43
4 apply. 11:17:47
5 Let's turn now to Article 1105. 11:17:49
6 Article 1105 prescribes the minimum standard of 11:17:57
7 treatment with respect to the treatment of 11:18:00
8 foreigners and their property. This was 11:18:01
9 definitively determined by the NAFTA Free Trade 11:18:05
10 Commission's binding Note of Interpretation, 2001. 11:18:07
11 Now, you've asked whether a general 11:18:10
12 practice can be discerned from the 3,000 BITs and 11:18:15
13 other agreements. In Canada's opening remarks, Ms. 11:18:18
14 Tabet noted that treaties may contribute to the 11:18:21
15 crystallization or development of a rule of 11:18:24
16 customary international law, but there should be no 11:18:26
17 presumption that they do. 11:18:29
18 She brought you to the North Sea 11:18:32
19 Continental Shelf cases and the three criteria that 11:18:35
20 the ICJ lays out, namely, that the provision must be 11:18:38
21 of a fundamentally norm-creating character. There 11:18:42
22 must be extensive and virtually uniform state 11:18:45
23 practice. And there must be practice that shows a 11:18:48
24 general recognition of a rule of law or legal 11:18:51
25 obligation. She also brought you to the Diablo 11:18:54

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1 decision which noted that the fact that diplomatic 11:18:58
2 protection provisions are often included in BITs is 11:19:00
3 not sufficient to establish they are custom. And 11:19:02
4 then finally she pointed to Professor Dumberry's 11:19:05
5 soon-to-be-published book. 11:19:08
6 Now, Canada agrees with the conclusion 11:19:10
7 that he draws, starting at page 172, that the 11:19:13
8 practice of states does not support the proposition 11:19:16
9 that standalone FET clauses have become part of the 11:19:20
10 customary international law minimum standard of 11:19:23
11 treatment. 11:19:25
12 This is because the standalone FET 11:19:28
13 clause does not have a sufficient normative content 11:19:31
14 to constitute a rule of customary international law. 11:19:33
15 BITs contain differently-worded FET and MST 11:19:36
16 provisions. And, therefore, there is no uniform 11:19:40
17 consistent practice. And, finally, the practice of 11:19:45
18 States outside the signatories to the treaties with 11:19:49
19 standalone FET clauses is, in fact, to reject the 11:19:50
20 application of the broader standard. 11:19:56
21 The latter is an important point. For a broad FET 11:19:58
22 provision to have become custom, it must be 11:20:03
23 demonstrated that States consider such rules to be 11:20:06
24 obligatory, obligatory apart from the treaty 11:20:09
25 obligations. NAFTA parties have specifically 11:20:13

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1 rejected this. And we can look to Pope and Talbot, 11:20:17
2 to Loewen, to Glamis, and Chemtura, also cited by 11:20:20
3 Professor Dumberry at pages 200 and 201. 11:20:24
4 Turning to your fourth question, on 11:20:28
5 general principles, the starting point here is, 11:20:30
6 again, the binding note of interpretation, which 11:20:35
7 refers only to a customary international law. 11:20:37
8 General principles constitute a different source of 11:20:41
9 international law in Article 38 of the ICJ statute. 11:20:44
10 And general principles do not establish 11:20:49
11 international custom. So a NAFTA Tribunal is 11:20:51
12 welcome to consult them, but they will be of limited 11:20:55
13 assistance in determining the content of MST at 11:21:00
14 customary international law. General principle of 11:21:03
15 law is really only relevant to determining the 11:21:07
16 content of MST if it also constitutes customary 11:21:11
17 international law itself. 11:21:14
18 So what this means is that, as Ms. 11:21:17
19 Tabet made abundantly clear during Canada's opening 11:21:19
20 statement, to ascertain the applicable standard of 11:21:22
21 treatment, the Tribunal must consider the applicable 11:21:25
22 customary rules, which requires proof of extensive 11:21:27
23 uniform, consistent, and general practice by States, 11:21:32
24 together with the States' belief that such practice 11:21:35
25 is required by law. 11:21:38

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1 But first let's look at the facts relevant to 11:22:59
2 Article 1105. 11:23:01
3 Canada's maintained from the beginning 11:23:05
4 that this dispute -- sorry, Canada has maintained 11:23:07
5 from the beginning of this dispute that the decision 11:23:15
6 to defer offshore development was taken by the 11:23:17
7 Minister of the Environment upon being informed that 11:23:20
8 the regulatory framework to approve projects was 11:23:23
9 unfinished. Ultimately, the Minister was unwilling 11:23:27
10 to see any project proceed without the clear, 11:23:30
11 upfront rules upon which the approval system was 11:23:32
12 predicated. 11:23:35
13 Naturally, the Government could have 11:23:37
14 decided to adopt a different approach, a different 11:23:38
15 approach to permitting and a different approach to 11:23:42
16 permitting this particular project, a process that 11:23:46
17 may have or would have resulted in its own 11:23:49
18 limitations, its own delays, its own challenges, but 11:23:52
19 that's not where we are. That's not what was 11:23:55
20 envisaged by the regulatory framework that existed. 11:23:58
21 And it was not the approach that MOE was willing to 11:24:03
22 take. 11:24:05
23 The approvals framework that Minister 11:24:07
24 Smitherman envisaged in February of 2009 when 11:24:09
25 introducing the GEGEA to the Ontario legislature 11:24:13

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1 Now, you have also asked what the 11:21:42
2 differences are between expropriation and fair and 11:21:44
3 equitable treatment in legal terms and in terms of 11:21:47
4 the facts that must be proven by an investor to 11:21:49
5 establish each cause of action. As Canada stated in 11:21:53
6 its opening, to prove a breach of Article 1105 11:21:58
7 requires proving a breach of a customary 11:22:02
8 international law standard, such as denial of 11:22:05
9 justice or a breach of an investor's full protection 11:22:07
10 and security. 11:22:09
11 The facts required to prove a breach 11:22:11
12 of such a standard depend on the standard at issue. 11:22:14
13 As aptly set out in our pleadings, the Claimant has 11:22:18
14 not met its burden in identifying a standard of 11:22:21
15 customary international law, and instead it has 11:22:24
16 pointed to the principles of legitimate expectations 11:22:26
17 and discrimination, amongst others, without proving 11:22:29
18 that these are standards of custom. And it's 11:22:32
19 noteworthy that the Claimant has not alleged a 11:22:38
20 denial of justice or a breach of full protection and 11:22:41
21 security. 11:22:43
22 In contrast, the legal standard of 11:22:46
23 expropriation has been laid out in the treaty, and 11:22:49
24 it's also informed by custom, and I will lay out 11:22:51
25 that standard later when I turn to Article 1110. 11:22:55

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1 replaced the previous proponent-driven EA-based 11:24:18
2 assessment process with universal setbacks from 11:24:21
3 adjacent homes and other sensitive areas. Indeed, 11:24:25
4 Mr. Smitherman reiterated that idea when he 11:24:29
5 testified, stating that, although he left office 11:24:32
6 before it occurred, he expected as the Ministry of 11:24:35
7 the Environment moved forward, that it would 11:24:39
8 establish setback conditions for onshore and then to 11:24:41
9 consider those and develop them also for offshore. 11:24:44
10 The undeveloped regulatory framework 11:24:49
11 for offshore wind was publicly communicated through 11:24:50
12 numerous postings on the Environmental Bill of 11:24:54
13 Registry, the EBR registry, starting with the MOE's 11:24:56
14 REA regulation proposal in June 2009, which included 11:25:02
15 a document outlining the proposed content of the REA 11:25:07
16 regulation and stated that MOE and MNR are working 11:25:10
17 together to develop future setbacks for offshore 11:25:13
18 wind. 11:25:15
19 The fact that these ministries were 11:25:16
20 continuing to work on a coordinated approach for 11:25:18
21 offshore wind facilities was reiterated, again, when 11:25:21
22 the decision notice for the regulations was posted 11:25:24
23 in September -- on September 24, 2009. 11:25:27
24 And then the March 1, 2010 EBR posting 11:25:32
25 on the REA regulations, which attached a proposed 11:25:35

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1 technical guidance bulletin for wind turbine 11:25:39
2 setbacks, also confirmed that setbacks would play a 11:25:42
3 significant role in the assessment of the offshore 11:25:45
4 wind facility report and strongly encouraged 11:25:48
5 applicants to meet with the Ministry of the 11:25:51
6 Environment prior to preparing this report. 11:25:53
7 The ongoing work to develop the 11:25:57
8 regulatory requirements for offshore wind facilities 11:25:59
9 resulted in the June 25, 2010 policy notice on 11:26:01
10 offshore wind, which stated that the Ministries were 11:26:06
11 working together to provide greater certainty and 11:26:10
12 clarity on offshore wind requirements. Like the 11:26:12
13 ones that preceded it, this notice was posted 11:26:17
14 publicly on the EBR Registry, because public 11:26:20
15 consultations are required before making regulatory 11:26:23
16 amendments. 11:26:25
17 MOE's policy notice that was posted 11:26:29
18 attached a discussion paper, and that discussion 11:26:34
19 paper discussed various considerations for the 11:26:37
20 public to comment that were relevant to offshore 11:26:41
21 wind projects and the protection of human health and 11:26:45
22 the environment. And it proposed a 5-kilometre 11:26:47
23 shoreline exclusion zone for all offshore wind 11:26:49
24 facilities. 11:26:52
25 As you have heard from Marcia Wallace, 11:26:56

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1 received an unprecedented number of comments, 11:28:22
2 approximately 1,400 in total. 11:28:24
3 The feedback that MOE received in 11:28:28
4 response to its June 25, 2010 EBR posting included a 11:28:31
5 broad range of concerns, which went well beyond the 11:28:35
6 issue of noise. In contrast to the 23 respondents 11:28:39
7 who supported offshore wind development, 65 percent 11:28:43
8 of the 1,400 comments received were opposed to 11:28:46
9 offshore wind, raising various issues. And 12 11:28:50
10 percent recommended that the Government defer 11:28:56
11 offshore wind until the proper health and 11:28:59
12 environmental studies were completed to support it. 11:29:01
13 Ultimately, as described by Ms. Wallace, the diverse 11:29:05
14 range of comments received in response to the EBR 11:29:09
15 posting informed the deferral decision. 11:29:12
16 Now, you had the benefit of hearing 11:29:16
17 directly from Mr. Wilkinson. He testified that he 11:29:18
18 made the decision because the regulations were still 11:29:22
19 not finished. In his words: 11:29:25
20 "That fell to me. I didn't 11:29:27
21 -- it didn't fall to anyone 11:29:28
22 else. It wasn't the 11:29:30
23 Premier's decision. It 11:29:33
24 wasn't the Minister of 11:29:34
25 Energy's decision. It was my 11:29:35

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1 the public consultation spanned all of the topics in 11:26:59
2 the discussion paper, not just noise. It's 11:27:02
3 important here because the Claimant focuses really 11:27:05
4 on noise. But that discussion paper contains many 11:27:07
5 more considerations, including ecological 11:27:10
6 considerations, cultural resources, shipwrecks, 11:27:14
7 shipping lanes, recreational use, drinking water, 11:27:16
8 and beach erosion. 11:27:21
9 Ontario's decision to defer offshore wind was a 11:27:22
10 direct outcome of the June 25, 2010 EBR policy 11:27:25
11 notice. And it was informed by MOE's consultations 11:27:30
12 on that policy notice. It was also informed by the 11:27:35
13 considerable amount of work undertaken by the 11:27:40
14 Government, and particularly MOE. They held 11:27:42
15 technical workshops with experts in the summer and 11:27:47
16 the fall of 2010. They conducted a jurisdictional 11:27:49
17 scan of the requirements for offshore wind 11:27:53
18 development across the Great Lakes. And all of this 11:27:54
19 highlighted the need for collaboration with the 11:27:58
20 federal government as well as U.S. governments, 11:28:00
21 which also began around the same time. 11:28:05
22 When Minister Wilkinson took office, 11:28:09
23 the Ministry had published the EBR policy notice, 11:28:12
24 but public consultations have yet to conclude. As 11:28:14
25 Minister -- as Mr. Wilkinson testified, the Ministry 11:28:19

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1 decision." 11:29:37
2 Mr. Wilkinson advised that he received 11:29:39
3 the memo on January 6, 2011 on offshore wind policy. 11:29:40
4 We haven't put that memo up on the screen because 11:29:46
5 it's confidential, but you have it in your books 11:29:48
6 before you from Brenda Lucas. It raises concerns 11:29:50
7 regarding the proposed approach to move forward with 11:29:54
8 offshore wind without adequate science to build a 11:29:56
9 more specific offshore approvals process. 11:29:59
10 The memo was written by his senior 11:30:03
11 policy adviser, and as he explained when he was 11:30:05
12 before you, it would have been inserted into his 11:30:08
13 book that he took home every evening. So he would 11:30:11
14 have read it that night. 11:30:14
15 According to Mr. Wilkinson, these 11:30:17
16 concerns, along with the 1,400 comments received in 11:30:19
17 response to the MOE's June 25th offshore wind policy 11:30:22
18 proposal, raised very, very big red flags. Mr. 11:30:26
19 Wilkinson testified that he remembers making the 11:30:33
20 decision clearly. In his words: 11:30:35
21 "I met with my Deputy. I 11:30:37
22 remember distinctly why I met 11:30:39
23 with my Deputy, what the 11:30:41
24 meeting was about, why I 11:30:43
25 called the meeting, and what 11:30:45

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1 the consequence of that 11:30:46
2 meeting was." 11:30:48
3 It was at this meeting that Minister 11:30:48
4 Wilkinson made his decision to defer offshore wind 11:30:52
5 development. In particular, he was dissatisfied 11:30:55
6 with his Deputy Minister's inability to answer 11:30:57
7 questions regarding the impact of construction of 11:30:59
8 offshore wind turbines in the Great Lakes on 11:31:03
9 drinking water. 11:31:05
10 Now, I'm going to pause here to refer 11:31:07
11 to something that Mr. Terry said this morning. He 11:31:11
12 specifically noted that the chronology that we 11:31:15
13 supplied to you does not contain this date in it. 11:31:19
14 The chronology -- I won't bore you with the gory 11:31:25
15 details and the back-and-forths of, you know, what 11:31:28
16 -- what we lived through in producing this 11:31:31
17 chronology. I think it's fair to say it took on a 11:31:33
18 life of its own, I think, as indicated by when you 11:31:38
19 received it. And -- 11:31:41
20 PRESIDENT: We are very grateful for 11:31:44
21 the outcome, though. 11:31:46
22 MR. NEUFELD: That's good to hear. 11:31:48
23 Our impression is that it ended up being a little 11:31:49
24 bit of a dumping ground, whereas a higher-level 11:31:52
25 document would have been more -- more useful, a 11:31:55

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1 proceed on a path that he thought was flawed. 11:32:56
2 Now, even the Claimant's expert -- 11:33:00
3 Claimant's own expert, Baird, would not have been 11:33:02
4 able to reassure the Minister that a 5-kilometre 11:33:05
5 setback would guarantee safe drinking water across 11:33:07
6 the Great Lakes. 11:33:10
7 When asked whether he concluded that 11:33:12
8 water quality issues may not arise with an offshore 11:33:16
9 wind farm in any other area of the Great Lakes, he 11:33:19
10 responded: 11:33:21
11 "No, my report doesn't 11:33:22
12 conclude that. It was 11:33:24
13 specific to the Windstream 11:33:25
14 Wolfe Island Shoals project." 11:33:26
15 Minister Wilkinson also -- was also 11:33:27
16 concerned that the regulations, which lacked a 11:33:34
17 scientific basis, had very little chance of 11:33:35
18 withstanding any appeal at the Environmental Review 11:33:38
19 Tribunal. 11:33:41
20 The Claimant has attacked the former 11:33:41
21 Minister's testimony in multiple ways. It argues, 11:33:46
22 first, that Canada's explanation of how Minister 11:33:51
23 Wilkinson came to his decision evolved over time. 11:33:54
24 And then it argues that the decision was a political 11:33:57
25 decision. Third, it suggests that there are no 11:33:59

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1 document that didn't necessarily includes internal 11:31:57
2 meetings of one side or the other. But to do away 11:31:59
3 with the concerns that -- that one side or the other 11:32:05
4 had, we made sure to put in the headnote the 11:32:09
5 following statement: 11:32:12
6 "The failure to include an 11:32:13
7 event in this list is not an 11:32:15
8 admission that the event is 11:32:17
9 either immaterial or 11:32:19
10 irrelevant." 11:32:21
11 And I think you should take that to 11:32:22
12 heart, given Mr. Terry's comments this morning about 11:32:24
13 whether or not that June -- or January 6th meeting 11:32:27
14 was in the -- in chronology. 11:32:30
15 As Mr. Wilkinson testified about that 11:32:34
16 meeting: 11:32:37
17 "I asked her direct questions 11:32:37
18 --" 11:32:40
19 That's his Deputy Minister. 11:32:40
20 "-- which raised within me 11:32:41
21 some very serious concerns." 11:32:44
22 The fact that the regulation was 11:32:45
23 unfinished and the fact that she could not answer 11:32:48
24 basic questions about the consequences of the 11:32:51
25 construction, he felt, that it wasn't right to 11:32:53

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1 documents to support the Minister's involvement. 11:34:02
2 And, fourth, it argues that the decision was 11:34:04
3 actually made by the Premier's Office, not by 11:34:07
4 Ministry of the Environment. 11:34:11
5 On the Claimant's first argument, it 11:34:12
6 specifically accuses Canada of arguing in the 11:34:15
7 Counter-Memorial that the decision was made by 11:34:17
8 Minister Wilkinson and then, in the Rejoinder 11:34:20
9 Memorial, that the decision was, in fact, made by 11:34:21
10 Minister Wilkinson in consultation with the 11:34:25
11 Ministers of Natural Resources, Energy, and Minister 11:34:26
12 Gerretsen. 11:34:30
13 The fact the Minister of the 11:34:32
14 Environment consulted with his counterparts is 11:34:32
15 neither an evolution nor is it surprising. Minister 11:34:36
16 Wilkinson never said that he made the decision in a 11:34:39
17 vacuum. He has never said that only his 11:34:41
18 considerations mattered. And he has never suggested 11:34:43
19 that his decision didn't result in difficult 11:34:46
20 conversations. 11:34:50
21 In fact, as he testified, all the 11:34:51
22 decisions that he would've made as Minister of the 11:34:55
23 Environment were political. They made some people 11:34:57
24 happy and others unhappy. That's just the nature of 11:35:00
25 government. 11:35:03

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1 And despite the fact that the 11:35:06
2 Ministers of Energy and Natural Resources ultimately 11:35:08
3 aligned with Minister Wilkinson's decision, it is 11:35:12
4 abundantly clear that their offices and, in some 11:35:14
5 cases, the bureaucrats and their ministries did not 11:35:17
6 support Minister Wilkinson's decision. It shouldn't 11:35:20
7 come as a surprise to anybody who's familiar with an 11:35:22
8 interagency process or an interdepartmental process 11:35:24
9 or a interministerial process. It's the way 11:35:28
10 government works. 11:35:30
11 In fact, we know that MNR wanted to 11:35:31
12 proceed with the development of offshore wind. The 11:35:35
13 bottom line for MNR was that they were as ready for 11:35:37
14 this project as for any others on Crown land, which, 11:35:40
15 Ms. Lawrence explains, was consistent with MNR's 11:35:43
16 approach to ecological approvals. They're not 11:35:47
17 accustomed to working with firm setbacks. Instead, 11:35:52
18 MNR prefers to work with the proponent on a 11:35:54
19 site-specific basis and, she said, "learn as we go." 11:35:57
20 The very idea of a setback was 11:36:00
21 unacceptable to MNR. As Ms. Lawrence explained, 11:36:02
22 her: 11:36:04
23 "... head exploded in anger at 11:36:04
24 the thought of having spent 11:36:06
25 some number of months 11:36:07

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1 explaining that we had no 11:36:08
2 science to support an 11:36:09
3 exclusion zone, and it left 11:36:10
4 MNR in a very tricky 11:36:12
5 communications position, 11:36:14
6 particularly since we had 11:36:15
7 indicated our comfort with 11:36:16
8 the knowledge that we did not 11:36:17
9 have our confidence in the 11:36:20
10 Environmental Assessment 11:36:22
11 Review processes when we 11:36:23
12 lifted the window on the 11:36:25
13 moratorium in 2006." 11:36:28
14 Minister Gerretsen was another person 11:36:29
15 who was quite unhappy with Minister Wilkinson's 11:36:34
16 decision, according to a contemporaneous e-mail sent 11:36:37
17 by Jeff Garrah of KEDCO to Nancy Baines, an e-mail 11:36:40
18 that was put to Mr. Baines during his 11:36:44
19 cross-examination. Minister Gerretsen went to bat 11:36:46
20 for the project and had a serious confrontation with 11:36:50
21 Wilkinson over it. 11:36:53
22 It's important to note here who 11:36:56
23 Minister Gerretsen was or where he was from, rather. 11:36:59
24 He was the Member of Parliament from the Kingston 11:37:01
25 and Wolfe Island riding, and his son happened to be 11:37:04

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1 the mayor of Kingston. 11:37:07
2 Additionally, it was suggested to Mr. 11:37:10
3 Wilkinson on cross-examination that his involvement 11:37:11
4 in the decision not to proceed with offshore wind 11:37:15
5 was limited to whether or not to allow Windstream to 11:37:17
6 [REDACTED] or whether to keep it whole. 11:37:20
7 However, Mr. Wilkinson testified these discussions 11:37:25
8 occurred because of his decision not to proceed with 11:37:29
9 offshore wind, which was made two weeks prior. 11:37:32
10 We also know from the documents that 11:37:40
11 Minister Wilkinson's decision was very poorly 11:37:41
12 received by the Energy Minister's office, Craig 11:37:45
13 MacLennan. The Energy Minister's Chief of Staff 11:37:47
14 sheepishly explained to Mr. Baines a week after the 11:37:51
15 decision that MOE was calling the shots, making 11:37:53
16 clear that MOE wants to get it right before 11:37:56
17 proceeding with offshore regulations. He added 11:37:58
18 that: 11:38:01
19 "The government was concerned 11:38:01
20 with legal challenges that 11:38:03
21 were occurring with onshore 11:38:04
22 wind projects, which required 11:38:06
23 that future offshore 11:38:07
24 regulations would be 11:38:08
25 bulletproof and survive 11:38:09

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1 challenges." 11:38:11
2 Internally Craig MacLennan was less 11:38:14
3 diplomatic, declaring: 11:38:17
4 [REDACTED] 11:38:18
5 When I asked Mr. Baines if he believed 11:38:21
6 Craig MacLennan at the time, he responded that he 11:38:24
7 did not and that he thought the decision was a 11:38:25
8 political decision. Then he further explained, in 11:38:28
9 response to a question from Dr. Cremades, that: 11:38:34
10 "A provincial election was 11:38:37
11 coming up, and there was 11:38:39
12 considerable opposition to 11:38:40
13 wind power." 11:38:41
14 The BANANAs we were referring to 11:38:41
15 earlier. He added that: 11:38:45
16 "The Liberals had a minority 11:38:46
17 government. They were just 11:38:48
18 on the edge. Seven of their 11:38:48
19 ridings were at risk because 11:38:51
20 of offshore wind." 11:38:52
21 Mr. Baines insinuated that the 11:38:52
22 government made a calculated decision to defer 11:38:58
23 offshore in order to save seven seats. He suggested 11:39:00
24 that the party calculated that, if it put a stop to 11:39:02
25 offshore wind, the close ridings would swing in the 11:39:05

1 party's favour, and the government would be 11:39:07
2 re-elected. And as Mr. Baines explained: 11:39:09
3 "This is why the government 11:39:12
4 cancelled the offshore very 11:39:14
5 publicly, I believe, in an 11:39:16
6 attempt to mollify public 11:39:18
7 concerns and win the 11:39:19
8 election." 11:39:20
9 Now, the news article that he relies 11:39:22
10 on cites to a Liberal insider who confided that 11:39:24
11 officials scrambled to announce the climb-down 11:39:28
12 shortly afternoon on a Friday when they realized it 11:39:31
13 would be buried by the news in Egypt. 11:39:33
14 Burying the announcement of the deferral on a Friday 11:39:36
15 afternoon is not consistent with Mr. Baines' idea 11:39:40
16 that it was a very publicly announced decision. And 11:39:42
17 as Mr. Baines himself recognized, regardless of the 11:39:47
18 decision, the Liberals ended up losing all seven of 11:39:51
19 those seats. So the decision that Mr. Baines said 11:39:54
20 was calculated to help the government retain seats 11:39:56
21 actually did the contrary. In fact, Mr. Wilkinson 11:39:59
22 also lost his seat. 11:40:02
23 Mr. Baines also testified that 11:40:05
24 Minister Wilkinson's decision was inconsistent with 11:40:07
25 what Windstream had been hearing through its 11:40:11

1 government relations firm. He testified that the 11:40:15
2 Ministry of Environment wanted to see them proceed 11:40:18
3 as a one-shot or an active research project. 11:40:19
4 Unfortunately, I think Mr. Baines 11:40:23
5 misremembers these matters. What Windstream's 11:40:24
6 documents indicate is that their government 11:40:26
7 relations firm learned from CanWEA, the Canadian 11:40:29
8 Wind Energy association, that a representative of 11:40:32
9 the Energy Minister's office wanted to see 11:40:35
10 Windstream proceed as a pilot, a representative of 11:40:38
11 the Ministry of the Energy, not Ministry of the 11:40:41
12 Environment. And the idea of an active research 11:40:43
13 project was raised by Windstream with MOE, but that 11:40:47
14 wasn't until December 7, 2011, long after the 11:40:51
15 decision on the deferral. 11:40:55
16 However, this was never the view of 11:40:57
17 the Ministry of the Environment. In fact, we know 11:40:58
18 that the MOE, both at the official level and in the 11:41:01
19 Minister's office. [REDACTED]
20 [REDACTED]. 11:41:07
21 Third, the Claimant argues that the 11:41:13
22 lack of documentary evidence involving Minister 11:41:15
23 Wilkinson somehow makes the testimony that he has 11:41:18
24 provided questionable. During his 11:41:20
25 cross-examination, Mr. Wilkinson was asked whether 11:41:23

1 he was aware of any documents in the record 11:41:26
2 regarding the meeting with his Deputy Minister other 11:41:28
3 than the January 6th memo that he received from the 11:41:30
4 senior policy adviser. He said that he was not, 11:41:33
5 which is not surprising, given that the meeting that 11:41:37
6 took place was a face-to-face meeting with his 11:41:39
7 Deputy Minister. 11:41:42
8 And after confirming the decision with 11:41:43
9 his Deputy Minister, he told his Chief of Staff to 11:41:45
10 communicate it to the Premier's Office. This too 11:41:49
11 was an oral communication, as he stated: 11:41:52
12 "The decision that I made was 11:41:54
13 a change for the path that 11:41:57
14 the government was on. It 11:41:59
15 was important before it 11:42:00
16 became announced that 11:42:02
17 everybody in the government 11:42:03
18 knew where we're were going, 11:42:03
19 and so it was a matter of 11:42:05
20 getting people coordinated." 11:42:06
21 Fourth, the Claimant clings to this 11:42:07
22 idea that the decision was made by the Premier's 11:42:12
23 Office, not by Minister Wilkinson. And, here, the 11:42:14
24 Claimant continues to rely on the draft news release 11:42:18
25 announcing a decision to defer offshore wind 11:42:21

1 development and the Premier's Chief of Staff's 11:42:23
2 response to it on January 11, 2011, dissatisfied 11:42:25
3 with the draft, made clear that the purpose of the 11:42:29
4 news release was to kill all projects, except the 11:42:31
5 Kingston one, of course, meaning the Windstream 11:42:34
6 Wolfe Island Shoals project, and not suck and blow. 11:42:36
7 In the same series of e-mails on 11:42:41
8 January 11, 2011, the Premier's Chief of Staff 11:42:43
9 demanded that the news release be rewritten to 11:42:47
10 clarify that the province would not be proceeding 11:42:49
11 with offshore wind due to [REDACTED] [REDACTED]
12 [REDACTED].
13 [REDACTED] It's not by accident the Premier's chief of 11:42:57
14 staff used the very words found in MOE's documents, 11:43:01
15 including the briefing note provided to the Ministry 11:43:05
16 of the Environment. 11:43:08
17 Mr. Wilkinson indicated that he would 11:43:11
18 have taken that January 6th memo home that evening, 11:43:13
19 meaning that the meeting with the Deputy would not 11:43:17
20 have taken place until the next day or possibly the 11:43:20
21 day after that. That puts it at either January 7th, 11:43:22
22 which was a Friday, or the Monday following. 11:43:25
23 Following that meeting, he instructed his Chief of 11:43:30
24 Staff to inform the Premier's Office. Since, 11:43:32
25 according to Mr. Wilkinson's testimony, the chiefs 11:43:35

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1 met each morning, this suggests that his concerns 11:43:39
2 would have been brought to the Premier's Chief of 11:43:41
3 Staff on the morning of January 10th or possibly 11:43:43
4 January 11th. 11:43:45
5 The fact that such a change was vetted 11:43:47
6 with the Premier's Office is normal. Even Minister 11:43:49
7 Smitherman agrees that, every time there is a 11:43:53
8 decision of significance that includes the centre, 11:43:57
9 whether that be brought through formal or informal 11:44:00
10 engagement of the Chief of Staff to the Premier or 11:44:03
11 somebody else in his office. That's how important 11:44:06
12 decisions are made. So there's no surprise that the 11:44:11
13 Premier's Office was involved in the communication 11:44:14
14 of the decision to other Ministries and in the 11:44:16
15 review of communications materials. Specifically, 11:44:19
16 the message was, the message from the top, was 11:44:23
17 necessary to communicate that the policy was 11:44:26
18 changing and to ensure that everyone was on the same 11:44:29
19 page. As Mr. Wilkinson recognized, this was a 11:44:32
20 difficult decision for the Ministry of Energy, which 11:44:35
21 meant that it was important that he had the backing 11:44:39
22 of the top-level of government. 11:44:42
23 The Claimant suggests that we look at a few of the 11:44:44
24 Premier's Chief of Staff office to conclude that the 11:44:47
25 decision was made for improper or nefarious 11:44:52

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1 have been so angry with Minister Wilkinson. Same is 11:46:07
2 true for Minister Gerretsen. 11:46:11
3 And as Mr. Terry stressed again in his 11:46:15
4 remarks today -- I wish I could read my handwriting. 11:46:17
5 [Laughter.] 11:46:29
6 MR. NEUFELD: It was even put to 11:46:42
7 Minister Wilkinson during his cross-examination that 11:46:45
8 his decision was based on the Windstream project. 11:46:48
9 However, as Mr. Wilkinson testified, the decision he 11:46:50
10 made had nothing to with the Windstream project. 11:46:54
11 His decision was with respect to creating 11:46:58
12 province-wide rules for offshore wind. 11:47:01
13 Specifically, Mr. Wilkinson's decision was based on 11:47:04
14 the lack of science on the impacts of large-scale 11:47:06
15 offshore construction in the Great Lakes. The 11:47:09
16 Ministry was developing rules for all the Great 11:47:12
17 Lakes, and he was concerned that such rules must be 11:47:14
18 based on science and the precautionary principle. 11:47:18
19 And despite still not being able to 11:47:23
20 read my handwritten notes, now I can at least 11:47:25
21 remember what they say. As Mr. Terry stressed again 11:47:28
22 this morning, everything for the Claimant turns on 11:47:31
23 Minister Wilkinson's decision with respect to the 11:47:34
24 Windstream project. 11:47:36
25 What we know is that Minister 11:47:37

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1 reasons -- to look at a few of their e-mails, 11:44:53
2 rather. 11:44:58
3 However, as confirmed by the testimony 11:44:59
4 of Rosalyn Lawrence and Marcia Wallace, the 11:45:01
5 discussions on offshore wind had occurred many, many 11:45:05
6 months prior to January 11th. Ms. Lawrence 11:45:08
7 testified that, over the course of the fall, MNR 11:45:11
8 began working with MOE, who was very involved in 11:45:13
9 discussions with [REDACTED] Similarly, Ms. Wallace 11:45:16
10 testified that discussions occurred in the fall of 11:45:21
11 2010, across the Ministries, even at the ADM and 11:45:24
12 Deputy Minister level. 11:45:30
13 The Claimant suggests that you ignore 11:45:31
14 all of that, ignore all of the policy discussions 11:45:35
15 that occurred across the Ministries in the fall of 11:45:38
16 2010, and instead focus on a few e-mails from the 11:45:40
17 Premier's Office. 11:45:42
18 Ultimately what is clear from the 11:45:44
19 evidence is that the Environment Minister's decision 11:45:46
20 was brought to the Premier's Office, and on January 11:45:49
21 11th, it was communicated to the Energy Minister's 11:45:52
22 Office. No other explanation makes sense. 11:45:54
23 Since the decision had been made by the Premier's 11:45:57
24 Office and not by the Minister of Environment, the 11:46:02
25 policy staff of the Ministry of Energy would not 11:46:04

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1 Wilkinson didn't make a decision on that basis. He 11:47:38
2 made a decision on the basis for the need for 11:47:41
3 province-wide setbacks, province-wide rules. 11:47:43
4 To conclude my comments on Article 11:47:49
5 1105, the evidence shows clearly that the decision 11:47:51
6 to defer offshore wind was made by the Minister of 11:47:53
7 the Environment in response to concerns relating to 11:47:55
8 the unfinished regulatory framework. 11:47:58
9 Despite what Sarah Powell argued, the 11:48:00
10 announcement on February 11, 2011 was a direct 11:48:03
11 result of the EBR policy notice process, which 11:48:05
12 highlighted various public concerns, including 11:48:11
13 ecological considerations, noise, and drinking water 11:48:15
14 quality. 11:48:17
15 Although the decision made a number of people 11:48:17
16 unhappy, it was also ultimately endorsed by the 11:48:21
17 Ministers of Energy and Natural Resources. As 11:48:23
18 Energy Minister Brad Duguid said at the time: 11:48:28
19 "The move was not politically 11:48:29
20 motivated. It was done for 11:48:32
21 environmental reasons." 11:48:33
22 And as Mr. Smitherman testified when 11:48:34
23 it was put to him that the news release -- that, on 11:48:36
24 the news release, the three Ministers had, in fact, 11:48:40
25 added a quote to the bottom of it, he indicated, 11:48:43

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1 yes, that that meant each of them approved it. 11:48:45
2 The Claimant's allegation that the 11:48:50
3 decision breaches Article 1105 must be rejected for 11:48:51
4 all of the reasons that we've set out in our 11:48:55
5 pleadings. In particular, the Claimant has no right 11:48:57
6 to argue that the government prevented it from 11:48:59
7 accessing a fully functioning approvals framework, 11:49:02
8 as you heard again this morning from Mr. Terry. 11:49:04
9 They can't argue that when the facts 11:49:07
10 plainly show that they never made an application. 11:49:09
11 They never made an REA application. They never even 11:49:12
12 commenced that application process. 11:49:15
13 Further, if the Tribunal needs extra 11:49:19
14 comfort to dismiss this claim, as Ms. Squires will 11:49:20
15 demonstrate, the Claimant has not even attempted to 11:49:23
16 prove that it suffered any harm arising out of this 11:49:26
17 decision. 11:49:29
18 And before I move on to expropriation, 11:49:30
19 I'd like to leave the Tribunal with one last 11:49:32
20 thought, which is that the Claimant has not always 11:49:35
21 taken the position that deferral was unfair. In 11:49:37
22 fact, Mr. Baines made clear to the Minister of 11:49:39
23 Agriculture in November 2011 that Windstream and the 11:49:41
24 Lake Ontario offshore network supported our 11:49:45
25 government's moratorium on offshore construction. 11:49:47

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1 failure to otherwise insulate the Claimant from the 12:09:53
2 deferral's effects. 12:09:57
3 Before we get into the facts, I'd like 12:09:58
4 to remind you of the law. 12:10:00
5 The prerequisite to an analysis of 12:10:01
6 whether there is an expropriation is correctly 12:10:05
7 identifying the object of a taking. 12:10:08
8 The question you have to ask is 12:10:09
9 whether the Claimant has identified a property right 12:10:11
10 that can be expropriated. Is it a vested or 12:10:14
11 contingent right? 12:10:22
12 What's certain is that a right that is 12:10:23
13 only potential or speculative cannot be 12:10:25
14 expropriated. 12:10:28
15 Once a right has been identified and 12:10:30
16 the Tribunal is satisfied that there is a right that 12:10:31
17 can be expropriated, several factors must be 12:10:33
18 considered to determine whether there is an indirect 12:10:37
19 expropriation or whether the measured issue is the 12:10:40
20 legitimate exercise of police power by the State. 12:10:43
21 The first factor is the impact of the 12:10:46
22 measure on investment. The Tribunal must determine 12:10:49
23 whether the State conduct has resulted in a total or 12:10:54
24 near total deprivation of the investor's investment 12:10:56
25 and whether the effect of the measure is permanent. 12:10:59

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1 PRESIDENT: Mr. Neufeld, would this 11:49:51
2 be a convenient time to have a break, because we 11:49:54
3 need to switch the court reporters? I trust you 11:49:57
4 need half an hour for rebuttal? So perhaps the most 11:50:02
5 practical way of proceeding would be to have the 11:50:07
6 break now, then you will continue, finish your first 11:50:10
7 part, and we have lunch, and the rebuttals after 11:50:14
8 lunch. It will mean a bit late lunch, but we are 11:50:17
9 lawyers. 11:50:22
10 [Laughter.] 11:50:22
11 MR. NEUFELD: I think we can make that 11:50:25
12 work. 11:50:26
13 PRESIDENT: Okay. Thank you. So we 11:50:26
14 need some 15, 20 minutes, I trust, for the 11:50:27
15 logistics. So let's continue around 12:10. 11:50:32
16 --- Recess taken at 11:50 a m. 11:50:39
17 --- Upon resuming at 12:09 p m. 12:01:35
18 PRESIDENT: Yes, Mr. Neufeld. Please 12:09:37
19 go ahead. 12:09:38
20 MR. NEUFELD: Thanks. So I'll turn 12:09:39
21 now to the Claimant's Article 1110 claim. 12:09:41
22 Recall here the measure at issue for 12:09:45
23 the purpose of this claim is not the deferral alone, 12:09:46
24 but rather the failure to lift the deferral before 12:09:48
25 the Claimant's project became un-financeable or the 12:09:52

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1 Second factor is the extent to which 12:11:03
2 the measure interferes with distinct reasonable 12:11:04
3 invest-backed expectations. To stress, this is one 12:11:09
4 relevant consideration, not a determinative factor. 12:11:12
5 And the third factor to consider is 12:11:17
6 the character of the measure. In other words, what 12:11:18
7 type of measure is at issue? Is it a regulatory 12:11:22
8 action by government or is it a government action 12:11:25
9 such as seizure of property targeted at a foreign 12:11:28
10 investor? 12:11:31
11 Finally, as is well recognized under 12:11:32
12 international law, the measure that is 12:11:34
13 nondiscriminatory, designed to protect legitimate 12:11:36
14 public welfare objectives and taken in good faith, 12:11:39
15 will not amount to indirect expropriation except in 12:11:42
16 rare circumstances. 12:11:46
17 Contrary to what the Claimant argues, 12:11:48
18 NAFTA does not require governments to compensate all 12:11:50
19 investors that may be negatively affected when a 12:11:52
20 government regulates in the public interest. 12:11:55
21 The Claimant has failed to prove its 12:11:58
22 Article 1110 claim for four reasons. 12:12:00
23 First, the revenue stream under the 12:12:03
24 FIT contract, which the Claimant has characterized 12:12:05
25 as guaranteed is, in fact, not a vested interest 12:12:10

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1 that is capable of being expropriated. 12:12:13
2 Second, I'll demonstrate that the 12:12:17
3 measure did not amount to a substantial deprivation 12:12:18
4 of the Claimant's investments. 12:12:21
5 Third, and because the Claimant has 12:12:23
6 focused so much of its alleged expectations -- so 12:12:25
7 much attention on its alleged expectations rather 12:12:29
8 than on the objective terms and conditions of the 12:12:33
9 FIT program and the regulatory framework, I'll then 12:12:35
10 explain how the measures did not interfere with any 12:12:38
11 distinct reasonable investment-backed expectations. 12:12:41
12 The final factor I won't deal with, 12:12:44
13 we've addressed sufficiently with respect to the 12:12:48
14 Article 1105 submissions, which explain how and -- 12:12:51
15 how the evidence in this hearing has borne out, that 12:12:56
16 the deferral is a nondiscriminatory measure of 12:13:00
17 general application that was adopted in good faith 12:13:03
18 for the purpose of protecting the environment. 12:13:05
19 So, turning first to whether the 12:13:08
20 revenue stream is an interest capable of being 12:13:10
21 expropriated. 12:13:13
22 In Canada's opening submissions, 12:13:14
23 I said that we should call a spade a spade. And 12:13:15
24 over the past two weeks I believe that's become 12:13:19
25 crystal clear that the only interest at issue in 12:13:22

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1 entered into force majeure before the deferral. 12:14:34
2 The evidence also shows that the 12:14:37
3 Claimant has not fulfilled all the conditions 12:14:38
4 precedent for obtaining NTP, making its assertion 12:14:40
5 that it would have done so but for the deferral 12:14:43
6 highly speculative. 12:14:46
7 For example, the evidence shows that 12:14:48
8 the Claimant had not even begun the process of 12:14:50
9 obtaining the relevant permits for its project. 12:14:52
10 As attested by Ms. Dumais, former 12:14:55
11 Director of MOE's Renewable Energy Approvals 12:14:58
12 Program, Windstream never initiated the REA process 12:15:02
13 with MOE. It never requested a pre-submission 12:15:03
14 consultation meeting, never provided a draft 12:15:06
15 description report, and never requested a list of 12:15:09
16 aboriginal communities to begin the consultations 12:15:11
17 required by the REA. 12:15:17
18 Mr. Roeper confirmed that the Claimant 12:15:18
19 had also not entered into consultations with the 12:15:20
20 relevant federal authorities regarding the 12:15:22
21 permitting process that would apply under the 12:15:25
22 Canadian Environmental Assessment Act and other 12:15:27
23 legislation related to fisheries, navigable waters, 12:15:30
24 migratory birds, boundary waters. And the evidence 12:15:34
25 shows that the Claimant did not even issue a request 12:15:39

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1 this claim is the alleged right to a revenue stream 12:13:27
2 under the FIT contract. 12:13:29
3 In its memorial, the Claimant advanced 12:13:31
4 the bold assertion that the FIT contract gave it the 12:13:33
5 right to a guaranteed revenue stream. The evidence 12:13:38
6 has shown this to be completely inaccurate. In 12:13:41
7 fact, the Claimant's interest in the revenue stream 12:13:43
8 under the FIT contract is highly speculative and 12:13:45
9 contingent, and, therefore, incapable of being 12:13:48
10 expropriated. 12:13:50
11 As acknowledged by Mr. Ziegler, under 12:13:52
12 section 2.5 of the FIT contract, the Claimant signed 12:13:55
13 up for the obligation to bring the project into 12:13:57
14 commercial operation by May 4th, 2015. 12:14:00
15 He also acknowledged that only once 12:14:03
16 the project enters into commercial operation is 12:14:07
17 a supplier entitled to the revenue stream under the 12:14:09
18 FIT contract. 12:14:12
19 Section 26(A)1 of the FIT contract 12:14:13
20 provides that the project -- provides that for the 12:14:17
21 project to enter into commercial operation, the OPA 12:14:20
22 must issue a Notice to Proceed, NTP, pursuant to 12:14:22
23 Article 2(4). 12:14:26
24 As we're well aware, the Claimant had 12:14:28
25 not obtained NTP from the OPA. In fact, it had 12:14:30

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1 for proposals for environmental permitting for its 12:15:42
2 project until October 8th, 2010, with a response due 12:15:45
3 back November 26th, 2010. 12:15:51
4 By February 8, 2011, exactly 10 months 12:15:53
5 after its FIT contract offer was announced, 12:15:56
6 Mr. Roeper confirmed that the Claimant had still not 12:15:59
7 obtained an environmental permitting consultant. 12:16:02
8 An environmental permitting consultant would not 12:16:06
9 have been retained, in fact, by February 17, 2011, 12:16:09
10 at the earliest. 12:16:11
11 This stands in stark contrast to the 12:16:13
12 work done by other proponents of offshore wind 12:16:15
13 projects in Ontario such as Trillium, which had 12:16:18
14 already prepared a draft project description report 12:16:20
15 and submitted it to MOE by mid 2010. 12:16:23
16 Second, as my colleagues will discuss 12:16:26
17 in further detail, the evidence shows that the 12:16:28
18 Claimant was very far, indeed, from completing 12:16:30
19 a financing plan and signing commitment letters with 12:16:33
20 investors. 12:16:37
21 And finally, the evidence shows that 12:16:39
22 the Claimant has not completed the impact 12:16:41
23 assessments required for its project as currently 12:16:44
24 formulated. While the Claimant completed system 12:16:46
25 impact and consumer impact assessments, these were 12:16:49

1 conducted on the basis of a 3.0-megawatt Vestas 12:16:52
2 turbine and not the 2.3-megawatt Siemens turbine 12:16:57
3 that the Claimant now intends to use. 12:17:00

4 In sum, the Claimant had not obtained 12:17:02
5 NTP and was very far from obtaining the key 12:17:08
6 conditions precedent that would allow it to obtain 12:17:12
7 NTP. 12:17:15

8 Not only had the right not vested, but 12:17:16
9 it was from far from vesting, and it remained a 12:17:18
10 highly contingent and speculative interest. The 12:17:21
11 Claimant simply did not have the type of actionable 12:17:23
12 and demonstrable entitlement to a certain benefit 12:17:27
13 that NAFTA Tribunals have found capable of 12:17:29
14 expropriation. 12:17:31

15 In response, the Claimant has made 12:17:34
16 much of the price certainty offered by the FIT 12:17:35
17 contract which contains a firm contract price of 19 12:17:38
18 cents per kW hour. For example, Mr. Ziegler 12:17:41
19 described the fixed prices as a tremendous advantage 12:17:45
20 to the project. Canada has never disagreed with 12:17:48
21 this. 12:17:51

22 However, the fact that the FIT 12:17:51
23 contract offered a fixed price is completely 12:17:53
24 irrelevant as to whether the right to claim payment 12:17:55
25 has vested under the FIT contract. The Claimant's 12:17:58

1 submissions have conflated these issues. The 12:18:01
2 Claimant as a FIT supplier was only entitled to 12:18:03
3 a revenue stream at a fixed price if and when it 12:18:05
4 fulfilled the conditions precedent required of its 12:18:08
5 FIT contract. 12:18:10

6 Before discussing the matter of 12:18:14
7 whether there was a substantial deprivation, I'll 12:18:16
8 turn briefly to the post deferral negotiations aimed 12:18:21
9 at freezing the Claimant's FIT contract. 12:18:24

10 The OPA decided, as you will recall, 12:18:26
11 to offer to negotiate with the Claimant to keep its 12:18:28
12 FIT contract on hold. And as Mr. Cecchini of the 12:18:31
13 OPA testified, prior to the February 11, 2011, call 12:18:35
14 with Windstream, he had a discussion with his 12:18:38
15 vice-president and director and was authorized to 12:18:40
16 negotiate three items of the FIT contract: The 12:18:43
17 force majeure provisions, the two-year force majeure 12:18:46
18 termination clause related to force majeure, and 12:18:50
19 security requirements. 12:18:52

20 Mr. Cecchini and the OPA's position -- 12:18:54
21 sorry. Mr. Cecchini presented OPA's position to 12:18:59
22 Ontario prior to the call. This was the only 12:19:05
23 solution that was offered to Windstream on the call. 12:19:07
24 Anything else would have required a ministerial 12:19:10
25 direction. 12:19:14

1 Unsatisfied, Windstream attempted to 12:19:17
2 pursue other solutions that went beyond keeping its 12:19:18
3 project on hold. According to its assumption that 12:19:21
4 the OPA was un-able to address its request that 12:19:23
5 the -- that went beyond keeping the FIT contract on 12:19:25
6 hold, Windstream sought to have discussions with the 12:19:30
7 Ministry of Energy instead. 12:19:33

8 However, when Windstream's government 12:19:35
9 relations advisor approached the 12:19:37
10 Minister of Energy's Chief of Staff he was 12:19:40
11 specifically told that Windstream was to negotiate 12:19:42
12 with the OPA. 12:19:45

13 There was no basis for Windstream to 12:19:46
14 assume that the OPA was acting as an agent for the 12:19:48
15 Ministry of Energy. In fact, [REDACTED]

[REDACTED] 12:19:56

18 I'm going to have to go into 12:20:00
19 confidential session for a little bit here. 12:20:01
20 --- Confidential transcript begins 12:20:05

21 MR. NEUFELD: In the context of the 12:20:16
22 post deferral negotiations, Windstream admits that 12:20:17
23 its proposal went beyond addressing the effects of 12:20:19
24 the February 11th deferral. As Mr. Mars stated, 12:20:22
25 they proposed items including [REDACTED] 12:20:26

1 [REDACTED] Windstream's 12:20:31
2 proposals were commercially unreasonable and went 12:20:33
3 beyond the scope of the FIT program. 12:20:36

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] 12:21:12

17 I'll now move on to the first element 12:21:18
18 of the test under Article 1110, "Substantial 12:21:19
19 deprivation." I'm only going to make some brief 12:21:23
20 comments recognizing that Mr. Spelliscy's remarks 12:21:26
21 later will demonstrate that the project had no 12:21:29
22 value. Those comments are equally applicable here 12:21:32
23 to 1110. 12:21:37

24 My remarks pertain to the 12:21:38
25 temporariness of the measure and the fact that the 12:21:40

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1 resulted from its own failure to negotiation 12:26:38
2 a contractual solution with the OPA. 12:26:40
3 Now I'd like to turn to the matter of 12:26:43
4 reasonable investment-backed expectations. 12:26:45
5 The Claimant's expectations were 12:26:51
6 unreasonable in at least three respects: First, it 12:26:53
7 overlooked the regulatory uncertainty with respect 12:26:57
8 to the un-finished REA regulation. 12:26:59
9 Second, it had unreasonable 12:27:03
10 expectations with respect to its Crown land, access 12:27:05
11 to the Crown land; and, third, it had 12:27:07
12 unreasonable expectations regarding the revenue 12:27:12
13 stream of the FIT contract. 12:27:12
14 The REA established in September of 12:27:16
15 2009 included highly prescriptive 12:27:18
16 technology-specific standards for every technology 12:27:20
17 except for offshore wind projects. 12:27:24
18 As Ms. Powell has attested, REA 12:27:27
19 applications for offshore wind projects required all 12:27:30
20 the normal REA reports as well as an additional 12:27:33
21 report called the Offshore Wind Facility Report. 12:27:36
22 That report required applicants to set 12:27:39
23 out a description of three things: The nature of the 12:27:41
24 existing environment in which the renewable energy 12:27:44
25 project will be engaged, any negative environmental 12:27:47

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1 And by the time the first FIT contracts were 12:29:01
2 offered, the regulatory framework for offshore wind 12:29:04
3 projects had not been any further developed. 12:29:07
4 As I've already discussed, Ontario 12:29:10
5 was, in fact, still in the process of reviewing its 12:29:12
6 policy on offshore wind development. This was 12:29:14
7 clearly communicated to the public in the MOE's 12:29:16
8 policy proposal notice of June 25th, 2010. 12:29:20
9 Ms. Powell agreed that this posting 12:29:24
10 signaled that change was on the horizon, including 12:29:27
11 amendments to the REA regulation or changes to the 12:29:31
12 REA process; however, Ms. Powell incorrectly 12:29:35
13 remembered that this setback proposal was driven by 12:29:38
14 noise. It wasn't. In fact, the discussion paper 12:29:40
15 attached to the proposal discusses a range of 12:29:42
16 issues, including concerns around near shore 12:29:45
17 activities, drinking water, noise, boat traffic and 12:29:48
18 tourism, habitat for fish, animals and birds, as 12:29:52
19 well as shipping activities. 12:29:56
20 So, allow me to pause here to answer 12:29:58
21 the first question that you posed yesterday, the day 12:30:00
22 before yesterday: The Tribunal has asked whether, 12:30:04
23 under Ontario law, amendments to the REA, like the 12:30:08
24 ones just being discussed, if introduced during the 12:30:11
25 implementation of the project, would have applied to 12:30:14

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1 effects that may result from engaging in the 12:27:49
2 renewable energy project and mitigation measures in 12:27:53
3 respect of any negative environmental effects 12:27:56
4 identified. 12:27:59
5 So you can see how, in contrast to the 12:28:01
6 clear upfront rules elsewhere in the REA regulations 12:28:03
7 such as the 550-metre setback for on-shore, this 12:28:07
8 report is not prescriptive. It gives little 12:28:10
9 indication of how to obtain an REA. 12:28:15
10 Interestingly, the Claimant chose not 12:28:17
11 to cross-examine Dr. Wallace on her testimony that 12:28:19
12 this report was included as a place holder for the 12:28:22
13 yet to be adopted technology-specific rules on 12:28:26
14 offshore wind. When the REA regulation was 12:28:27
15 established, the MOE clearly signaled to the public 12:28:32
16 that its policy for offshore wind development was 12:28:36
17 still under development. 12:28:38
18 Its posting on the EBR registry, 12:28:39
19 stated that MOE and MNR continued to work on a 12:28:42
20 coordinated approach to offshore wind facilities 12:28:45
21 which would include a province-wide setback minimum 12:28:45
22 separation distances for noise. 12:28:49
23 Mr. Smitherman agreed that this 12:28:52
24 posting signaled that MOE and MNR were continuing to 12:28:55
25 work on a coordinated approach including setbacks. 12:28:58

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1 the project retroactively, i.e. for tasks that had 12:30:16
2 already been completed. 12:30:21
3 Now, there is a short answer to your 12:30:22
4 question, and that's that there's -- there is no 12:30:23
5 question of retrospective application in this case 12:30:26
6 because the Claimant hadn't even begun its REA 12:30:29
7 process, hadn't initiated the process. 12:30:32
8 All of the environmental studies that 12:30:34
9 it has conducted have been undertaken for the 12:30:36
10 purposes of this arbitration, and not for the 12:30:39
11 purposes of obtaining an REA. 12:30:41
12 Based on the stages of development of 12:30:43
13 the Claimant's project and the fact that it hadn't 12:30:45
14 made an application for an REA, there is, therefore, 12:30:48
15 no doubt that any amendments to the REA regulation 12:30:51
16 would apply to it. 12:30:54
17 If the Claimant had initiated an REA 12:30:57
18 process, the applicability of the REA amendments to 12:30:59
19 the project would have depended on the stage that 12:31:05
20 the project was in and the nature of the amendment 12:31:07
21 at issue. 12:31:11
22 Ms. Seers pointed you to one part of 12:31:15
23 the REA, but she didn't point you to other sections. 12:31:17
24 An amendment could still have been made to the REA 12:31:22
25 application process set out in part 4, for example, 12:31:25

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1 which would -- it relates to the application process 12:31:27
2 in the REA. Or an amendment could have been made to 12:31:30
3 the prohibition section, the setback section, which 12:31:33
4 are set out in part 5 of the regulation and it 12:31:36
5 restricts where a renewable energy project may be 12:31:39
6 constructed. 12:31:41
7 Now, again, pausing on this idea 12:31:44
8 because, Mr. Terry said this morning, that there was 12:31:46
9 a promise to go through the regulatory process. 12:31:49
10 Now not only was there not such 12:31:53
11 promise, the fact is that the Claimant didn't in 12:31:56
12 even initiate its REA process. It didn't -- it 12:31:59
13 hadn't approached the MOE to trigger that process. 12:32:02
14 In such a situation, if it hadn't 12:32:05
15 applied for an REA, the government would have to 12:32:08
16 consider the best way -- sorry. In a situation 12:32:10
17 where, if it would have applied for an REA, at that 12:32:13
18 point the government would have had to figure out 12:32:17
19 how to proceed with it. At that point it would have 12:32:19
20 had to figure out how, through due process 12:32:22
21 considerations, what to do with its application, but 12:32:25
22 it had not initiated that process. 12:32:27
23 Now, I'd like to highlight some of the 12:32:32
24 testimony relating to the second area of regulatory 12:32:34
25 uncertainty, the Claimant's Crown land applications. 12:32:36

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1 Mr. Terry said this morning that you 12:33:51
2 have to get the FIT contract first before you could 12:33:53
3 get site access. Now, that's just not true. There 12:33:57
4 is no order established in how you go about doing 12:34:01
5 these -- these things. We heard from Ms. Powell's 12:34:04
6 interpretation of this letter, the Minister 12:34:08
7 Cansfield letter, we heard about her interpretation 12:34:11
8 from a legal perspective. 12:34:14
9 Although the Claimant says that it 12:34:16
10 took great comfort in this letter, Ms. Powell 12:34:18
11 attested that the letter did not impact MNR's 12:34:20
12 discretionary power to grant or refuse access to 12:34:22
13 Crown land, nor did it amount to the sort of 12:34:26
14 comprehensive comfort letter that MNR may provide to 12:34:28
15 developers and lenders to indicate the Crown's 12:34:32
16 commitment to the issuance of future tenure. 12:34:34
17 The Claimant also relies on a speech 12:34:38
18 that Minister Cansfield gave in October 2009, which 12:34:39
19 announced that MNR would be considering applications 12:34:44
20 for Crown land for offshore wind projects. However, 12:34:47
21 the speech also stipulated that MNR was going to 12:34:50
22 carry out a review of its site release policies, 12:34:53
23 which would not be completed until the end of 2010 12:34:57
24 at the earliest. 12:34:59
25 What's interesting is what 12:35:02

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1 The same day that the REA regulation 12:32:41
2 and FIT program were established, that's on 12:32:43
3 September 24th, 2009, the Minister of Natural 12:32:47
4 Resources sent the Claimant this letter which you 12:32:50
5 saw again this morning in Mr. Terry's presentation. 12:32:52
6 It stated that in order to maintain 12:32:56
7 its priority position within MNR's site release 12:32:58
8 process, it had to submit an application to the FIT 12:33:01
9 program within the FIT program launch period. 12:33:03
10 Despite what the Claimant has argued, 12:33:09
11 this letter could not have given rise to any 12:33:11
12 expectations relevant to an expropriation analysis, 12:33:13
13 and the testimony proves it. 12:33:16
14 Mr. Baines admitted that the letter 12:33:19
15 was not an instruction for the Minister to apply to 12:33:20
16 the FIT program, rather the Claimant's decision to 12:33:23
17 apply to the FIT program was a business decision. 12:33:25
18 And Mr. Mars agreed, stating that they did not apply 12:33:28
19 because the Minister told them to; they applied 12:33:31
20 because they thought they had a really wonderful 12:33:34
21 project. 12:33:36
22 Even Mr. Smitherman agreed that 12:33:37
23 Minister Canfield's letter left it entirely up to 12:33:40
24 proponents as to whether they wanted to proceed with 12:33:43
25 a FIT application. 12:33:45

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1 Mr. Smitherman had to say about that speech when he 12:35:03
2 was asked. And he was asked about that speech in 12:35:06
3 conjunction with MOE's decision notice on the REA 12:35:09
4 regulation. 12:35:13
5 What he called it was: A positive step 12:35:14
6 in the right direction towards certainty. He 12:35:16
7 couldn't confirm that they created any regulatory 12:35:19
8 certainty for investors. According to him the 12:35:25
9 letter merely indicated that there was a process 12:35:28
10 underway, or both these processes, the letter and 12:35:30
11 the REA process, both indicated that there was 12:35:33
12 a process underway with a destination point and that 12:35:35
13 the process, moving forward to finalizing decision 12:35:38
14 points which investors might see as a piece of 12:35:41
15 progress or a kind of growing certainty. So it 12:35:44
16 wasn't certainty, certainty, certainty, as you heard 12:35:47
17 this morning; it was growing certainty or emerging 12:35:50
18 certainty. 12:35:54
19 Now, to add to the uncertainty around 12:35:56
20 Crown land, the Claimant also required a grid cell 12:35:58
21 swap on account of the five-kilometre setback 12:36:02
22 proposal. It relies on our August 9th letter from 12:36:06
23 Mr. Boysen as a firm commitment that MNR would grant 12:36:08
24 a grid cell reconfiguration. 12:36:13
25 Mr. Terry referred to this letter this 12:36:18

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1 morning as "Rare." Now, it's telling that the 12:36:20
2 Claimant takes comfort from a process that is rare, 12:36:23
3 meaning, unusual or the first time it ever happens. 12:36:27
4 The fact is that it was rare and that 12:36:31
5 only added to the uncertainty. 12:36:35
6 The MNR committed only to discussing 12:36:38
7 a Crown land swap and only after the offshore wind 12:36:40
8 policy review and Crown land policy review were 12:36:44
9 finished. 12:36:47
10 What's even more significant is that 12:36:48
11 Mr. Boysen's letter specifically exclude the 12:36:50
12 commitment that the Claimant itself requested, 12:36:53
13 namely to be granted AOR within 30 days. It wanted 12:36:55
14 access to that site within 30 days and that wasn't 12:37:00
15 put into the letter. 12:37:03
16 Windstream's witness confirmed the 12:37:05
17 letter did not align Windstream's request for a grid 12:37:06
18 cell swap with the timelines in its FIT contract. 12:37:09
19 There were no assurances as to when 12:37:14
20 Windstream could expect to receive Applicant of 12:37:16
21 Record status, and there was no commitment as to the 12:37:18
22 specific timing when Applicant of Record status 12:37:22
23 would be awarded. 12:37:25
24 Finally, I'd like to turn to the FIT 12:37:27
25 contract and the Claimant's alleged expectations in 12:37:29

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1 disclaimed any responsibility for undertaking due 12:38:47
2 diligence in terms of the regulatory risk. That was 12:38:49
3 for the Claimant to assess. 12:38:51
4 And Mr. Cecchini confirmed that, 12:38:53
5 indeed, the OPA did no due diligence work on behalf 12:38:55
6 of proponents. Like most commercial counterparties, 12:38:59
7 the OPA places a responsibility to conduct due 12:39:02
8 diligence on the proponent and the supplier. Before 12:39:05
9 they sign the contract, they ought to satisfy 12:39:08
10 themselves that they can meet its obligations. 12:39:10
11 The high level of regulatory 12:39:13
12 uncertainty did not dissipate after Windstream was 12:39:15
13 notified of its FIT contract offer in April of 2010. 12:39:17
14 Despite the statements by the Claimant's witnesses 12:39:20
15 and experts that Ontario provided an attractive or 12:39:23
16 generous or secure environment, Windstream was 12:39:27
17 reluctant, was, in fact, reluctant to sign back that 12:39:32
18 FIT contract due to concerns regarding the 12:39:35
19 regulatory uncertainty of offshore wind. 12:39:38
20 And the OPA made clear to the Claimant 12:39:40
21 at all relevant times that the Claimant bore the 12:39:42
22 risk related to filling the NTP prerequisites, 12:39:45
23 including permitting. 12:39:50
24 For example, Mr. Cecchini attested 12:39:52
25 that on May 13, 2010, he and Michael Killeavy, the 12:39:53

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1 relation to the revenue stream under it. 12:37:34
2 I'd like to look first at the 12:37:38
3 representations made to the Claimant, made to the 12:37:39
4 Claimant by the OPA. These are important because, 12:37:42
5 as Mr. Ziegler acknowledged, the OPA is the 12:37:44
6 contractual counterparty to the FIT contract; it's 12:37:49
7 not the government, it's the OPA. 12:37:52
8 As I have already discussed, in 12:37:56
9 signing the FIT contract the Claimant assumed the 12:37:58
10 obligation of bringing the project into commercial 12:38:01
11 operation, including obtaining all the necessary 12:38:04
12 permits and approvals such as the REA, access to 12:38:05
13 Crown land, and completing applicable federal 12:38:08
14 permits. 12:38:12
15 Mr. Terry, interestingly this morning, 12:38:14
16 pointed to Mr. Ziegler's aversion to risk. And I'd 12:38:17
17 also like to point out that the same witness 12:38:21
18 admitted to not having read the FIT contract when he 12:38:24
19 appeared before you. 12:38:28
20 Section 3.3 of the FIT Rules which 12:38:30
21 govern the Claimant's application to the program, 12:38:33
22 made clear that the Claimant was solely responsible 12:38:35
23 for ensuring the technical, regulatory and financial 12:38:37
24 viability of its project. 12:38:42
25 Ms. Powell agreed that the OPA 12:38:44

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1 OPA's Director of Contracts Management, personally 12:39:56
2 reiterated to the Claimant in a meeting that the FIT 12:39:59
3 program was a standard offer program, and it was for 12:40:02
4 the Claimant to determine whether it wanted to 12:40:05
5 accept the terms of the standard FIT contract. 12:40:08
6 The OPA was not in a position, nor was 12:40:09
7 it willing to modify the terms of the FIT contract 12:40:12
8 for an individual proponent. 12:40:14
9 The record also shows that 12:40:20
10 Mr. Killeavy followed up personally, advising the 12:40:22
11 Claimant in writing on May 14th, 2010 that the OPA 12:40:27
12 was not in a position to advise the Claimant on how 12:40:32
13 it ought to manage the regulatory risk associated 12:40:34
14 with the project. 12:40:37
15 This caused the Claimant to seek 12:40:38
16 reassurances from the government, however, what 12:40:39
17 followed gave the Claimant no reasonable expectation 12:40:43
18 of regulatory certainty that it would be able to 12:40:45
19 fill the NTP requirements and bring its project into 12:40:49
20 commercial operation within the timelines 12:40:51
21 contemplated by the FIT contract. 12:40:51
22 On May 13th, 2010, Mr. Baines wrote to 12:40:54
23 the Renewable Energy Facilitation Office stating 12:40:57
24 that he was facing considerable regulatory 12:41:00
25 uncertainty, specifically the uncertainty he 12:41:04

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1 identified was caused by unknown setback 12:41:06
2 requirements for offshore wind, uncertainty in the 12:41:08
3 site review process, Crown land, and uncertainty in 12:41:11
4 the detailed requirements for the REA. 12:41:14

5 The Claimant argues that it eliminated 12:41:16
6 the regulatory uncertainty by obtaining comfort from 12:41:18
7 the Ontario government. In its pleadings it points 12:41:21
8 to the August 9 letter that we discussed from 12:41:25
9 Mr. Boysen, and it points, as well, to a one-year 12:41:26
10 extension to the MCOB in its FIT contract as 12:41:30
11 evidence of specific assurances that it received 12:41:34
12 from the Ontario government, which it relied on, it 12:41:38
13 says, it relied on in its decision to enter into the 12:41:40
14 FIT contract. 12:41:42

15 Like the MNR letter, the extension did 12:41:44
16 not contain a commitment that the regulatory 12:41:46
17 requirements for offshore wind would be developed on 12:41:48
18 a particular timeline. The OPA did not grant 12:41:50
19 Windstream's request for a conditional extension, 12:41:54
20 only to a one-year extension to the milestone date 12:41:57
21 for commercial operation. 12:41:59

22 The Claimant's suggestion that the OPA 12:42:01
23 was directed by the Minister of Energy to provide 12:42:03
24 such an extension is completely unfounded. The 12:42:06
25 Claimant asked you to read into Paul Ungerman's 12:42:09

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1 statement that he had dealt with it as a direction 12:42:11
2 from the Ministry of Energy, however, the email 12:42:14
3 itself provides no detail of a direction. Moreover, 12:42:17
4 as Mr. Mars acknowledged, the OPA's offer did not 12:42:21
5 include any specific commitments. 12:42:24

6 Although Mr. Benedetti stated that 12:42:26
7 Windstream believed that the extension would provide 12:42:28
8 sufficient time for it to obtain its approvals, he 12:42:33
9 acknowledged that the OPA's offer did not contain 12:42:36
10 any assurances that it would. Windstream simply 12:42:38
11 assumed that the extension would be sufficient. 12:42:42

12 In sum, the Claimant received no 12:42:45
13 specific commitments from MOE, MNR, MEI or the OPA 12:42:48
14 that could have caused it to expect that the 12:42:52
15 regulatory requirements would be developed in time 12:42:55
16 for it to proceed and that they would be developed 12:42:57
17 in time to proceed with its project within the 12:43:00
18 timelines of that FIT contract. 12:43:02

19 The Claimant proceeded on the basis of 12:43:06
20 its own assumptions, not on the basis of 12:43:10
21 commitments. 12:43:12

22 To conclude, I'm going to take 12:43:13
23 a moment to answer your second question. You've 12:43:14
24 asked what the scope of the alleged regulatory 12:43:16
25 uncertainty was as of February 11, 2011. 12:43:19

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1 As Sarah Powell acknowledged, in 12:43:24
2 general, nothing is a sure thing in permitting. 12:43:26
3 There is always regulatory uncertainty. And there 12:43:29
4 is always a regulatory framework that is changing; 12:43:32
5 it's never static. 12:43:35

6 Likewise, Mr. Baines acknowledges the 12:43:37
7 government's right to regulate. And the 12:43:39
8 government's right to change its regulations. 12:43:41

9 But beyond this general regulatory 12:43:44
10 risk, Ms. Powell also acknowledged that the risk 12:43:46
11 associated with offshore wind development in Ontario 12:43:49
12 was unique because we had not done offshore wind in 12:43:51
13 this jurisdiction. The regulatory risk for offshore 12:43:54
14 wind projects was different than for on-shore, as 12:43:58
15 you heard at the beginning of my closing statement. 12:44:00

16 Similarly, Mr. Roberts, from WSP 12:44:03
17 agreed that the project was a first of a kind from 12:44:07
18 a permitting perspective under Ontario's REA 12:44:10
19 process. Mr. Roberts agreed that WSP's 2010 12:44:13
20 proposal to Windstream acknowledged the possibility 12:44:19
21 of permitting delays and uncertainty due to the lack 12:44:22
22 of experience of MOE and other regulatory agencies 12:44:25
23 in Ontario, which hadn't yet dealt with an offshore 12:44:28
24 wind project. 12:44:31

25 But the first of a kind nature of the 12:44:34

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1 project is not the only reason the project had 12:44:35
2 unique and different regulatory risk or uncertainty 12:44:37
3 than on-shore wind projects. 12:44:41

4 As I've already discussed, Ontario is 12:44:43
5 in the midst of reviewing its policy on offshore 12:44:45
6 wind. This was clearly communicated to the public 12:44:48
7 on June 25th, 2010. 12:44:51

8 It is useful to refer to the 12:44:52
9 discussion paper that accompanied that EBR notice in 12:44:55
10 order to respond to the second part of your 12:45:00
11 question, because what the rules or regulations that 12:45:02
12 have yet to be promulgated. Or were technically 12:45:05
13 required for Windstream to be able to complete its 12:45:09
14 project, that was your question, and that discussion 12:45:11
15 paper discusses a whole range of issues including 12:45:13
16 concerns around near-shore activities, drinking 12:45:16
17 water, noise, boat traffic and tourism, habitat for 12:45:19
18 fish, animals, and birds, as well as shipping 12:45:24
19 activities. 12:45:27

20 The paper highlights all of the items 12:45:28
21 that have yet to be considered for the sake of 12:45:30
22 establishing clear, upfront rules, whether by way of 12:45:33
23 regulation or by technical guidance. 12:45:37

24 While a five-kilometre setback was 12:45:40
25 proposed, it remains unclear to this day whether 12:45:42

1 that would be a sufficient setback for noise or for 12:45:46
2 the protection of water quality. 12:45:49
3 This is the most obvious example of 12:45:50
4 a rule that had yet to be promulgated and which was 12:45:52
5 technically required. And unless Ontario decides to 12:45:57
6 move off the approach that it originally set out of 12:45:59
7 approving projects based on clear benchmarks, clear 12:46:02
8 upfront rules, additional setbacks may also have to 12:46:06
9 be considered. 12:46:09
10 This could include setbacks from fish 12:46:10
11 habitat, as well as setbacks for commercial fishing, 12:46:12
12 as well as setbacks for recreational activities like 12:46:15
13 fishing and boating. And similar how to the REA 12:46:19
14 establishes clear setbacks from roads and railways, 12:46:23
15 one might also expect the establishment of a setback 12:46:27
16 from a shipping lane. 12:46:29
17 At this point I can turn the floor 12:46:33
18 over to Ms. Squires who will address or begin to 12:46:34
19 address damages. 12:46:38
20 PRESIDENT: Thank you very much, 12:46:40
21 Mr. Neufeld. 12:46:41
22 CLOSING SUBMISSIONS BY MS. SQUIRES: 12:46:47
23 PRESIDENT: Ms. Squires, please. 12:46:49
24 MS. SQUIRES: Thank you, Mr. Neufeld, 12:46:59
25 and good afternoon members of the Tribunal. 12:46:59

1 [REDACTED] 12:48:10
2 They told you they can secure 12:48:11
3 a jack-up vessel to install the turbines when the 12:48:13
4 time comes despite their high demand and their 12:48:15
5 limited access to the Great Lakes. 12:48:18
6 They've told you they can do their 12:48:20
7 field studies in shorter times than the regulators 12:48:22
8 require without having ever met with the regulators 12:48:25
9 or having presented a project description, let alone 12:48:28
10 know where their project would be sited. 12:48:33
11 They've told you that an average 12:48:35
12 five-kilometre setback from an uninhabited point 12:48:37
13 would have been selected despite language from the 12:48:40
14 regulators indicating its five kilometres from the 12:48:42
15 shoreline. 12:48:45
16 They've also told you that 12:48:46
17 a well-established decades old shipping lane shared 12:48:48
18 between Canada and the United States will be reduced 12:48:51
19 to a third of its size just for their project. And 12:48:53
20 they've told you that not only will the foundations 12:48:56
21 be successfully installed using a method never 12:48:58
22 before used in the offshore wind industry, but that 12:49:01
23 any uncertainty with respect to those foundations 12:49:04
24 can simply be overcome. And they will do this 12:49:06
25 faster than any other offshore wind farm has ever 12:49:10

1 Over the course of the next hour, 12:47:03
2 myself and my colleague, Mr. Spelliscy, hope to 12:47:04
3 provide you with some additional guidance on why the 12:47:07
4 Claimant is not entitled to any damages in this 12:47:10
5 arbitration, even if you are to determine there was 12:47:12
6 a breach. 12:47:15
7 As far as damages go, the Claimant, in 12:47:16
8 a sense has straightforward burden to prove, show 12:47:18
9 how the measures caused an actual loss. 12:47:22
10 Instead, what you have before you is 12:47:25
11 a claim based on a fundamentally flawed theory of 12:47:26
12 damages, lacking in causation, and using a valuation 12:47:30
13 methodology that does not account for the risk the 12:47:34
14 project faced or its stage of development. 12:47:36
15 Over the course of this hearing, the 12:47:40
16 tribunal has heard the Claimant on many occasions 12:47:41
17 argue that its project could be built. Indeed, the 12:47:44
18 Claimant has hired some of the world's leading 12:47:48
19 players in the offshore wind industry for the 12:47:51
20 purposes of this arbitration to come before you and 12:47:53
21 tell a fantastic tale. Trust us, we can get this 12:47:55
22 done, they say. 12:47:59
23 [REDACTED]

1 done it. Yes, we can, that's their theme. 12:49:13
2 On the cover, the tale they've told is 12:49:16
3 quite captivating, but it's not the cover that 12:49:19
4 matters. The Tribunal must look at the pages 12:49:22
5 themselves, and what you'll find is a project that 12:49:24
6 not be constructed in a FIT contracts timelines, 12:49:29
7 either by design or due to the high level of risk. 12:49:31
8 The message, therefore, for the 12:49:36
9 Tribunal is simple: At the end of the day, as Canada 12:49:37
10 has demonstrated, the devil is in the details. And 12:49:41
11 in this case, those details are what the Claimant 12:49:44
12 has fought so hard to bury under the reputation of 12:49:47
13 numerous experts, asking you to judge a book by its 12:49:50
14 cover and, as a result, award it a windfall of 12:49:53
15 damages. 12:49:58
16 Now, in order to assess the damages in 12:49:59
17 this arbitration, should the Tribunal find that 12:50:00
18 there is a breach, the Tribunal must ask itself two 12:50:02
19 fundamental questions: First, has the Claimant 12:50:06
20 proven that any of the challenged measures caused 12:50:09
21 an actual loss, let alone the specific loss that it 12:50:12
22 seeks? And second, if causation has been proven, 12:50:15
23 what is the specific valuation methodology that the 12:50:20
24 Tribunal should use in addressing the quantum of 12:50:24
25 damages? 12:50:26

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1 I will answer the first question in 12:50:27
2 two parts: First, by demonstrating that the 12:50:29
3 claimants but-for scenario is entirely inappropriate 12:50:32
4 and therefore leaves the Tribunal without a proper 12:50:35
5 method to evaluate the claimants' alleged damages. 12:50:38
6 And second, that when the appropriate 12:50:42
7 but-for scenario is applied, the measure at issue 12:50:45
8 could not have caused the Claimant any harm, as both 12:50:47
9 on February 11, 2011 and May 22nd, 2012, the 12:50:50
10 Claimant's project could not have been constructed 12:50:54
11 within the FIT contract timelines. There was simply 12:50:56
12 too many unknowns. 12:51:00
13 I will then turn the floor over to my 12:51:01
14 colleague, Mr. Spelliscy who, in response to the 12:51:03
15 second question I posed, will demonstrate that if 12:51:06
16 the Tribunal finds there has been a breach, the only 12:51:09
17 appropriate remedy in this case is the return of the 12:51:12
18 claimant's sunk costs. 12:51:15
19 In doing so, he will demonstrate that 12:51:17
20 the DCF methodology itself, is an inappropriate 12:51:18
21 valuation methodology to be used given the 12:51:23
22 speculative nature of the Claimant's project. 12:51:26
23 Finally, Mr. Spelliscy will 12:51:28
24 demonstrate that applying a market comparables 12:51:29
25 approach, the Claimant is entitled to only a mere 12:51:32

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1 just their existence, but also their quantum. 12:52:44
2 At the heart of this analysis, is 12:52:47
3 a requirement for the Claimant to show a sufficient 12:52:49
4 causal link between the alleged breach of the NAFTA 12:52:51
5 and the loss sustained by the investors. 12:52:54
6 It is not enough to simply prove 12:52:58
7 a breach and to prove a loss; there must be 12:52:59
8 a connection. This requirement prevents a Claimant 12:53:02
9 from using the NAFTA as a tool to recover money 12:53:05
10 related to failure of their business due to factors 12:53:08
11 unrelated to a breach of the treaty. 12:53:11
12 Now, I would like to pause here for 12:53:14
13 a minute to discuss the question from the Tribunal 12:53:15
14 when you asked: What is the difference between 12:53:19
15 Article 1110, and 1105, if any, in terms of the 12:53:22
16 quantification of the loss or damage? 12:53:27
17 Because Article 1110 requires 12:53:29
18 a substantial deprivation of the entire investment, 12:53:31
19 Article 1102(2), indicates that restitution requires 12:53:34
20 compensation equal to the fair market value of the 12:53:37
21 entire investment. 12:53:41
22 This may also be the appropriate 12:53:42
23 standard for damages for non-expropriatory breach 12:53:43
24 such as a breach of 1105, but only if that breach 12:53:43
25 directly caused total loss of the investment. 12:53:49

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1 fraction of what it has alleged in this arbitration. 12:51:35
2 But before we turn to answering these 12:51:38
3 questions, I'd like to start with the key legal 12:51:40
4 principles that the Tribunal must address in 12:51:42
5 assessing damages in the case before it. 12:51:44
6 At international law, an award of 12:51:48
7 monetary damages should repair the wrongful conduct 12:51:50
8 by returning the Claimant to the position it would 12:51:54
9 have been in absent such wrongful conduct. This 12:51:57
10 follows the reasoning of the Permanent Court of 12:52:00
11 International Justice in the Chorzow Factory case 12:52:03
12 where it was noted that damages must, as far as 12:52:04
13 possible, wipe out the consequences of the illegal 12:52:08
14 act and reestablish the situation that would have, 12:52:10
15 in all probability, existed if an act had not been 12:52:13
16 committed. 12:52:16
17 Of fundamental importance to the 12:52:16
18 notion of damages, however, is the issue of 12:52:18
19 causation. NAFTA Articles 1116 and 1117 provide 12:52:21
20 that a Claimant may only bring a claim if 12:52:26
21 an investor has occurred loss or damage by reason of 12:52:29
22 or arising out of a substantive breach of parties 12:52:32
23 chapter 11 obligations. 12:52:37
24 The burden to prove these damages have 12:52:38
25 been suffered rests squarely on the Claimant, not 12:52:41

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1 With respect to Article 1105 then, the 12:53:52
2 Tribunal must assess what specific damages the 12:53:54
3 alleged wrongful conduct caused. There is no 12:53:58
4 default to fair market value with respect to 12:54:00
5 Article 1105. 12:54:03
6 We have also spent some time over the 12:54:06
7 last couple of days on the question of the proper 12:54:07
8 date on which to value the breach. With respect to 12:54:09
9 Article 1110, the Claimant alleged that it should be 12:54:13
10 permitted to choose from between a valuation date 12:54:17
11 under the expropriation date and the date of the 12:54:21
12 award, based on whichever is higher, but the 12:54:25
13 Claimant is incorrect. 12:54:27
14 The only relevant date is the date of 12:54:28
15 the breach. It should not be for the Claimant to, 12:54:31
16 on the one hand, reap the benefits of an increase, 12:54:33
17 while on the other hand, if the value of the 12:54:39
18 investment has decreased following the alleged 12:54:41
19 expropriation, asked for a higher valuation by using 12:54:43
20 the date of the breach. 12:54:47
21 And perhaps this has been best summed 12:54:48
22 up by Arbitrator Stern, when she stated that such 12:54:51
23 an approach. 12:54:54
24 "...is biased in favour of 12:54:54
25 investors and that 12:54:57

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1 the solution which 12:54:58
2 systematically applies the 12:54:59
3 harshest of damages on the 12:55:01
4 Respondent State resembles 12:55:04
5 punitive damages, which are 12:55:04
6 [prohibited] at international 12:55:04
7 law." [As read] 12:55:08
8 As she notes: 12:55:08
9 "A legal solution cannot...be 12:55:10
10 based on what is more 12:55:11
11 favourable to just one of the 12:55:13
12 parties." [As read] 12:55:14
13 Further, even if the Tribunal were to 12:55:15
14 consider the legal authorities that have discussed 12:55:16
15 the issue, not only will you find that not a single 12:55:20
16 NAFTA award supports the claimants' approach, but 12:55:23
17 there is simply no justification for the Claimant's 12:55:26
18 approach based on the legal authorities that they 12:55:30
19 cite either. 12:55:32
20 Indeed, the only case that the 12:55:34
21 Claimant can point to in order to support its 12:55:35
22 valuation of its position are those that involved an 12:55:38
23 operational asset that increased in value between 12:55:41
24 the date of the breach and the date of the award. 12:55:43
25 This is simply not the situation the 12:55:45

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1 than not that it would have succeeded in order to 12:56:52
2 have damages awarded to them. 12:56:54
3 However, in the circumstances where 12:56:56
4 you have a development-stage project, a damages 12:56:58
5 assessment cannot be about speculation. As 12:57:01
6 international Tribunals have noted, where 12:57:03
7 an investment is still in the pre-operational stage 12:57:05
8 or has no history of profits, awarding an amount for 12:57:08
9 future profits would require an impermissible degree 12:57:12
10 of speculation. At a Tribunal in PSEG in Turkey 12:57:15
11 noted, a Tribunal should be, 12:57:18
12 "... reluctant to award lost 12:57:19
13 profits for a beginning 12:57:19
14 industry and unperformed 12:57:21
15 work." 12:57:23
16 Similarly, as the Tribunal in 12:57:24
17 Metalclad noted: 12:57:27
18 "When an investment is 12:57:29
19 non-operational, fair market 12:57:30
20 value is best arrived at by 12:57:32
21 reference to the investor's 12:57:34
22 actual investments in the 12:57:35
23 project." [As read] 12:57:35
24 And as the Tribunal in Ioan Micula v. 12:57:37
25 Romania noted: 12:57:38

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1 Tribunal has before it. 12:55:48
2 At the time of the alleged breach the 12:55:49
3 Claimant's project was nothing more than an Excel 12:55:50
4 chart. Even if the project had have proceeded on 12:55:54
5 the Claimant's schedule in this arbitration, it 12:55:57
6 would still not be operational today. Nor can the 12:56:01
7 Claimant point to any intervening event to state 12:56:04
8 that the value of its investment has increased since 12:56:07
9 the date of the alleged breach. 12:56:10
10 As Mr. Low noted, the Claimant's 12:56:12
11 higher valuation as of the date of the award is 12:56:13
12 based solely on math and pushing the date of 12:56:15
13 valuation closer to positive cash flows. 12:56:18
14 As a result, the appropriate date to 12:56:21
15 be used by this Tribunal in the event a breach of 12:56:22
16 Article 1110 is found is the date of the alleged 12:56:25
17 breach itself, May 22nd, 2012. 12:56:28
18 Now, while I will explain to you 12:56:32
19 shortly that the Claimant has failed to demonstrate 12:56:34
20 causation in this case, in the event the Tribunal is 12:56:37
21 inclined to decide against Canada in that regard, 12:56:40
22 the Claimant is entitled to no more than its sunk 12:56:43
23 costs. 12:56:45
24 Now, the Claimant has suggested that 12:56:47
25 they must prove only that the project is more likely 12:56:48

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1 "...the sufficient certainty 12:57:40
2 standard [associated with the 12:57:40
3 discounted cash-flow method] 12:57:40
4 is usually quite difficult to 12:57:44
5 meet in the absence of 12:57:45
6 a going concern and a proven 12:57:46
7 record of profitability." [As 12:57:48
8 read] 12:57:49
9 As these cases demonstrate, an ongoing 12:57:50
10 asset must be valued based on its sunk costs alone. 12:57:52
11 Now, Mr. Low in his presentation 12:57:57
12 earlier this week, indicated that any damages award 12:57:59
13 issued to the Claimant should include a tax gross up 12:58:01
14 to account for Windstream having to pay tax on the 12:58:04
15 money awarded to it. 12:58:06
16 However, as the Tribunal in Mobil and 12:58:08
17 Canada noted, there is no. 12:58:10
18 "... requirement under 12:58:11
19 international law to gross up 12:58:12
20 compensation as a result of 12:58:14
21 tax considerations..." 12:58:15
22 Nor has the Claimant provided any 12:58:16
23 justification in law or in fact for this request 12:58:19
24 beyond the calculation done by Mr. Low. As 12:58:21
25 a result, its claim for a tax gross up should fail. 12:58:25

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1 The Claimant's argument for pre and 12:58:29
2 post judgment interest should similarly fail. The 12:58:31
3 Claimant has failed to establish why it is entitled 12:58:33
4 to interest in this particular case. It has failed 12:58:36
5 to point to a single fact at all, in that regard, 12:58:39
6 leaving the Tribunal with no choice but to dismiss 12:58:41
7 this part of its claim. 12:58:45
8 I'd now like to turn to the facts 12:58:48
9 before us and specifically how they relate to 12:58:50
10 causation. I would like to pause here to briefly 12:58:52
11 discuss Articles 1102 and 1103. 12:58:55
12 The Claimant has not even attempted to 12:58:58
13 quantify the losses it allegedly suffered as 12:59:01
14 a breach of 1103. As such, its claim should be 12:59:04
15 dismissed for failure to meet this burden alone. 12:59:07
16 With respect to 1102, Dr. Cremades 12:59:10
17 asked Mr. Low earlier this week how the Tribunal can 12:59:15
18 determine damages resulting from a breach of 1102 12:59:18
19 when the claimant's damages case lumps together, 12:59:21
20 Article 1105, Article 1110, and Article 1102. 12:59:25
21 This question put a finger on the 12:59:29
22 button of a fundamental flaw in the Claimant's 12:59:31
23 approach. The Claimant's valuation ignores the 12:59:34
24 principle of causation. The Claimant has made no 12:59:37
25 attempt to demonstrate how a decision to keep 12:59:39

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1 I believe Mr. Terry indicated this morning that the 13:00:46
2 breach itself did not occur when the deferral was 13:00:49
3 implemented, however, for the sake of completeness 13:00:51
4 we will continue to discuss the matter briefly. 13:00:53
5 To value the losses arising out of 13:00:55
6 a mere implementation of a deferral, the Claimant 13:00:57
7 has assumed project development recommences on 13:01:00
8 February 11, 2011. 13:01:02
9 This makes sense, instead of the 13:01:05
10 deferral occurring on that day, the project resumes 13:01:07
11 development. 13:01:09
12 The Claimant has then valued this 13:01:10
13 breach, using a May 22nd, 2012 valuation date. 13:01:12
14 However, as Mr. Bucci noted in his 13:01:17
15 testimony, if the deferral were lifted on 13:01:19
16 February 11, 2011, the May 22nd date is irrelevant. 13:01:22
17 By the Claimant's own admissions, a deferral that 13:01:26
18 was lifted prior to May 22nd, 2012, could not have 13:01:29
19 resulted in the loss of the full value of the 13:01:32
20 project. 13:01:34
21 A proper but-for scenario for the 13:01:35
22 implementation of the deferral itself, would have 13:01:37
23 both the project resuming development and the 13:01:39
24 valuation date on February 11th, 2011. 13:01:42
25 As a result, and as noted by Mr. Low, 13:01:45

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1 TransCanada whole in any way caused it loss. 12:59:40
2 Whether or not the quantum of loss is 12:59:44
3 the same for these three breaches is irrelevant, if 12:59:47
4 you cannot link the specific harm to the specific 12:59:49
5 loss -- to the specific action, the Tribunal is not 12:59:52
6 in a position to award any damages. 12:59:55
7 As a result the Claimant's claim for 12:59:57
8 damages based on a breach of Article 1102 must also 12:59:58
9 be dismissed. 13:00:02
10 As a result, for the remainder of my 13:00:03
11 time today I will focus on the Claimant's alleged 13:00:05
12 breaches of Article 1105 and 1110, namely, the 13:00:09
13 implementation of the deferral itself as a breach of 13:00:12
14 1105 and the failure to lift the deferral and 13:00:16
15 insulate Windstream from its effects as a breach of 13:00:18
16 both Article 1105 and 1110. 13:00:21
17 And I will approach this by speaking 13:00:24
18 to two points: First, the Claimant's failure to 13:00:26
19 provide an appropriate but-for schedule. 13:00:29
20 And second, the fact that the 13:00:32
21 Claimant's project could not be built within the FIT 13:00:34
22 contract timelines. 13:00:36
23 Let's look first at the implementation 13:00:38
24 of the deferral itself as a potential violation of 13:00:40
25 Article 1105. And I won't spend much time here as 13:00:42

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1 the Claimant has not valued the mere imposition of 13:01:48
2 the deferral itself. The claimants' failure to it 13:01:51
3 this means that it has not provided a but-for 13:01:55
4 scenario for the Tribunal and the Claimant has not 13:01:57
5 met its burden, and, as a result, any claim that the 13:01:59
6 deferral itself breached Article 1105 must fail. 13:02:03
7 If we turn to look at the Claimant's 13:02:08
8 valuation for damages arising out of failure to lift 13:02:10
9 the deferral or failure to insulate Windstream from 13:02:13
10 its effects, the Claimant's 1110 and alternative 13:02:16
11 1105 argument, we see that the Claimant has also 13:02:20
12 failed to provide an appropriate but-for scenario in 13:02:23
13 that situation as well. 13:02:25
14 The Claimant has valued the breach 13:02:26
15 using a three-year deferral in the February 11th, 13:02:28
16 2014 with a schedule start date of February 11th, 13:02:32
17 2011. 13:02:35
18 However, if the breach is the failure 13:02:36
19 to lift the deferral or insulate Windstream from its 13:02:37
20 effects before its financing ran out on May 22nd, 13:02:40
21 2012, a correct but-for scenario would assume that 13:02:44
22 the deferral was lifted or the Claimant insulated 13:02:46
23 from its effects on that date, with a project 13:02:48
24 reschedule start on that date as well. 13:02:52
25 Using a project restart date of 13:02:56

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1 February 11th, 2011 as Windstream has done is simply 13:02:58
2 illogical and the Claimant's use of, as Mr. Low put 13:03:02
3 it, a subjective three-year deferral, should be 13:03:05
4 dismissed. 13:03:08
5 So, where does that leave us? Even 13:03:09
6 before getting to the specifics of the project, the 13:03:11
7 Claimant has failed to meet its burden of proving 13:03:14
8 damages. But even if we were to continue into our 13:03:16
9 analysis, it's apparent that the project had no 13:03:21
10 value on the valuation date. 13:03:23
11 Now, over the past two weeks, we have 13:03:26
12 heard the Claimant ask every one of its experts if, 13:03:28
13 in their view, the project was more likely than not 13:03:31
14 to succeed. With unlimited time, money, and 13:03:33
15 resources, the answer is surely, yes. However, if 13:03:37
16 we dig deeper into the project specifics, we can see 13:03:42
17 that the extreme sensitivities of the project to 13:03:45
18 even minor variations show just how speculative this 13:03:48
19 whole project was. And remember, the Claimant did 13:03:51
20 not have unlimited time. Under the FIT contract 13:03:53
21 they had five years to reach commercial operation. 13:03:56
22 Let's look at some of those issues 13:04:00
23 then. Both Canada and the Claimant's expert, 13:04:01
24 Ms. Powell, agree that the REA permitting for the 13:04:05
25 project would have taken 36 months, not 30 as the 13:04:08

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1 Claimant alleges in its schedule. This six months 13:04:11
2 is significant, as Mr. Clarke from URS noted, moving 13:04:15
3 the time of the permitting in the Claimant's own 13:04:19
4 schedule by six months delays the entire project by 13:04:21
5 a year. 13:04:24
6 This, in effect, leaves the Claimant 13:04:25
7 with not enough buffer time before the OPA can 13:04:27
8 terminate the contract to even make the project 13:04:30
9 financeable. 13:04:32
10 Even by Ms. Powell's own experience 13:04:33
11 dealing with on-shore wind where financing is much 13:04:35
12 easier to obtain. As Mr. Guillet noted, with 13:04:39
13 respect to offshore wind financing, with less than 13:04:42
14 a year of buffer between the expected construction 13:04:45
15 start date and the date you risk to lose your FIT 13:04:47
16 contract, would make the project un-bankable, full 13:04:51
17 stop. One simple change to the project schedule and 13:04:54
18 the project is potentially dead before even 13:04:57
19 a foundation is in the water. 13:05:00
20 But it doesn't stop there. The 13:05:05
21 Claimant faced numerous other regulatory risks, and 13:05:07
22 while the Claimant has spent some time at this 13:05:10
23 hearing trying to establish that the OPA gives 13:05:12
24 extensions for delays, what it fails to address is 13:05:14
25 the outcome of that permitting, including how it 13:05:18

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1 would effect the project layout. 13:05:21
2 Now, we heard Mr. Roeper last week 13:05:23
3 indicate that the average five-kilometre setback 13:05:25
4 from uninhabited or uninhabitable points used in 13:05:27
5 Windstream's project layout was not only 13:05:32
6 inconsistent with the word shoreline and water's 13:05:34
7 edge, but also based solely on his own opinion and 13:05:35
8 not those of the regulators. 13:05:40
9 Perhaps the most stark absurdity with 13:05:42
10 this layout, however, was brought to the forefront 13:05:43
11 by Mr. Roeper when, despite indicating that the 13:05:47
12 setback was meant to deal with noise, he believed 13:05:49
13 that having a turbine at the noise receptor and one 13:05:52
14 ten kilometres away meets noise requirements because 13:05:55
15 the turbines are, on average, five kilometres away 13:05:57
16 from that receptor. 13:06:00
17 So what does this mean? When 13:06:04
18 a five-kilometre setback from the shoreline is 13:06:08
19 applied as the regulators intended, 24 turbines are 13:06:10
20 eliminated from the 2015 project layout. 13:06:14
21 We also heard Mr. Kolberg indicate 13:06:17
22 that the turbines would require the existing 13:06:19
23 international shipping route to be constrained to 13:06:22
24 a third of its size in order to allow for 13:06:23
25 an adequate buffer zone for the project. But 13:06:25

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1 there's no evidence the federal regulatory 13:06:28
2 authorities would have permitted this. 13:06:31
3 The consequence of such a refusal? 13:06:33
4 Well, let's have a look at that as well. A buffer 13:06:36
5 zone that requires the project to be pushed back 13:06:39
6 from the edge of the existing shipping lane by one 13:06:41
7 nautical mile removes another 27 turbines. If 13:06:44
8 a two-nautical mile buffer is applied, that results 13:06:48
9 in the possible loss of up to 62 turbines, that's 13:06:52
10 nearly 65 percent of the turbines lost. 13:06:55
11 But it just gets worse from there. 13:06:58
12 Let's have a look at the on-shore 13:07:00
13 manufacturing facility. 13:07:02
14 As Ms. Powell notes, the on-shore 13:07:04
15 foundation manufacturing facilities would not be 13:07:07
16 permitted as part of the REA. Mr. Roberts from WSP 13:07:09
17 agrees with that approach. As such, the claimants' 13:07:14
18 schedule has the development of the facility 13:07:18
19 occurring well before the REA approval is obtained 13:07:21
20 so that once financial close is reached, the first 13:07:24
21 foundation can roll off the line. However, this is 13:07:26
22 idealistic at best. 13:07:28
23 First, it assumes a third party would 13:07:31
24 be willing to hand over the facility to Windstream 13:07:33
25 without even a single permit, saying the offshore 13:07:36

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1 project would proceed. 13:07:39
2 Further as SgurrEnergy noted in their 13:07:41
3 report, paying a third party for use of this 13:07:44
4 facility prior to permitting is simply not fiscally 13:07:45
5 prudent. 13:07:50
6 The reality is, whether or not the 13:07:51
7 facility is part of the REA or not is irrelevant. 13:07:53
8 Commercial realities and fiscal prudence will lead 13:07:56
9 to shovels in the ground for the manufacturing 13:07:59
10 facility only once financial close has occurred with 13:08:01
11 subsequent impact on the construction activities and 13:08:04
12 failure of the project to meet its own deadlines. 13:08:07
13 The result: Possible termination of the FIT 13:08:10
14 contract. 13:08:13
15 And then let's look at the foundations 13:08:14
16 themselves. As Mr. Cooper from COWI confirmed, up 13:08:17
17 to five more turbines are located in water depths so 13:08:22
18 shallow that the installation vessels can not even 13:08:26
19 reach the area, and the Claimant has offered no 13:08:28
20 alternative. In fact, Mr. Cooper noted that his 13:08:31
21 firm was not even involved in the siting of the 13:08:34
22 foundations at all. 13:08:36
23 And what does this mean? Accounting 13:08:37
24 for these five turbines, three of which are located 13:08:40
25 in the shipping buffer, means the fate of two other 13:08:43

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1 Further, while the record shows that 13:09:54
2 Pigeon Island is likely not available for use as 13:09:55
3 an offshore substation, a gravity-based foundation 13:09:59
4 is also out of the picture. 13:10:02
5 The claimants have proposed a 230 kV 13:10:04
6 offshore substation, however, a substation of this 13:10:10
7 size is prohibited under the renewable energy 13:10:12
8 approvable because a Class IV wind facility cannot 13:10:15
9 have an offshore substation over 50 kVs. 13:10:17
10 Once again, the Claimant provides you 13:10:21
11 with no alternative solutions. And if we turn to 13:10:23
12 construction issues, the story gets even bleaker. 13:10:27
13 And you will recall Mr. Cecchini when 13:10:29
14 he noted that the OPA does not generally give force 13:10:32
15 majeure for construction-related issues, including 13:10:35
16 those related to weather, since, as he noted, and as 13:10:37
17 we're all well aware, winter comes every year in 13:10:39
18 Ontario. 13:10:43
19 With respect to construction, of 13:10:43
20 crucial importance is having a jack-up vessel 13:10:46
21 secured to install the turbines. Yet, as Mr. Palmer 13:10:49
22 noted, as of the deferral, Windstream had not 13:10:52
23 retained any vessels to do the job, even though 13:10:55
24 their schedule required two of the six vessels in 13:10:59
25 the world that were able to access the Great Lakes. 13:11:01

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1 turbines are called into question. 13:08:45
2 As Mr. Cooper from COWI also noted, 13:08:50
3 an additional 20 turbines are located in an area of 13:08:53
4 deep sediment. They may not be appropriate for the 13:08:56
5 foundation type that Windstream has chosen for 13:08:59
6 itself. 13:09:01
7 The result of that, the possible 13:09:02
8 elimination of another 13 turbines, because 13:09:03
9 remember, given the depths of the water and the 13:09:07
10 shoals on which Windstream needs to build, there is 13:09:10
11 simply nowhere else to go. 13:09:12
12 In the end, Windstream is left with 13:09:14
13 only 29 turbines, and this is likely a conservative 13:09:16
14 number, as by Sgurr's own estimates, over 65 percent 13:09:22
15 of the project is located in lakebed conditions 13:09:26
16 where gravity-based foundations are not the right 13:09:28
17 choice. 13:09:32
18 And again, the Claimant provides no 13:09:32
19 alternative solutions, no means to install 13:09:34
20 alternative foundations or where they would be 13:09:37
21 procured from or manufactured. 13:09:40
22 And recall, the FIT contract requires 13:09:42
23 the Claimant to reach 75 percent of their stated 13:09:43
24 contract capacity. With 29 turbines left the 13:09:46
25 project is at 22 percent. 13:09:50

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1 As Mr. Guillet emphasised, this is 13:11:04
2 a major risk to the financing of the project, yet 13:11:06
3 we're left to just speculate on Windstream's ability 13:11:10
4 to secure these vessels. 13:11:12
5 Nor has the Claimant provided a design 13:11:15
6 for a manufacturing facility that can produce 13:11:17
7 foundations at the rate required for their schedule. 13:11:20
8 Nor is it clear if the location proposed is large 13:11:23
9 enough without undergoing substantial renovations 13:11:26
10 with additional costs. 13:11:29
11 Moreover, the unknown location of the 13:11:30
12 foundation manufacturing facility can have a large 13:11:33
13 impact on project schedule. As Mr. Palmer also 13:11:36
14 noted, some of the proposed locations are more than 13:11:39
15 double the distance from the project site than the 13:11:42
16 representative facility. Increased travel time 13:11:46
17 means delay to the schedule or as Mr. Palmer noted, 13:11:49
18 hiring more vessels with increased project costs. 13:11:52
19 The Claimant has accounted for this in neither its 13:11:55
20 schedule or its budget. 13:11:58
21 We're going to go into confidential 13:12:00
22 session just for a minutes. 13:12:02
23 --- Confidential transcript begins 13:12:03
24

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 --- Confidential transcript ends 13:13:07
21 MS. SQUIRES: Now, all this may sound 13:13:14
22 extreme and the Tribunal not need to find that all 13:13:15
23 these risks would have materialized. Indeed, in 13:13:18
24 some cases, just one is enough to make the project 13:13:20
25 fail. As we know from Cape Wind, having all your 13:13:25

1 permits and the leading industry players on your 13:13:27
2 side like Weeks and SgurrEnergy, it simply may not 13:13:32
3 matter. 13:13:33
4 As Mr. Palmer noted with respect to 13:13:35
5 that project, there were no technical issues, no 13:13:37
6 permitting issues, yet they were not able to reach 13:13:40
7 financial close. The project failed. 13:13:42
8 The Claimant has asked you to assume 13:13:44
9 a completely unrealistic scenario with respect to 13:13:45
10 project risk. And perhaps, Mr. Guillet summed it up 13:13:48
11 best when he noted that the: 13:13:51
12 " assumptions that have been 13:13:53
13 made by the Claimant and his 13:13:55
14 counsels are all 13:13:56
15 best-in-class in pretty much 13:13:57
16 every category, so none of 13:13:59
17 them is completely 13:14:01
18 unrealistic on its own but 13:14:01
19 the combination itself is 13:14:03
20 absolutely unrealistic." 13:14:05
21 [As read] 13:14:08
22 And therein lie the details of the 13:14:08
23 tale that the Claimant has told the Tribunal over 13:14:10
24 the past two weeks. 13:14:14
25 The reality is that the project could 13:14:15

1 not be built within the FIT project timelines, and 13:14:17
2 as a result, causation has not been proven and the 13:14:19
3 Claimant has not been entitled to any damages. 13:14:22
4 I will now turn it over to 13:14:25
5 Mr. Spelliscy to finish off Canada's closing 13:14:27
6 submissions. 13:14:29
7 PRESIDENT: Thank you very much, 13:14:30
8 Ms. Squires. Mr. Spelliscy. 13:14:30
9 CLOSING SUBMISSIONS BY SPELLISCY: 13:14:46
10 PRESIDENT: Please. 13:14:54
11 MR. SPELLISCY: Good afternoon, and 13:14:56
12 thank you, Ms. Squires. 13:14:56
13 As Mr. Neufeld and Ms. Squires noted, 13:14:59
14 my job this afternoon is to go even further down the 13:15:02
15 rabbit hole and to talk to you about the conclusions 13:15:05
16 you should reach if you determine that the measures 13:15:07
17 in question breached Canada's obligations under 13:15:09
18 NAFTA, and also determine that the measures in 13:15:12
19 question actually caused the Claimant loss. 13:15:15
20 I'm going to divide the remainder of 13:15:20
21 my remarks today into three areas: sunk costs; lost 13:15:22
22 profits, primarily as being claimed through a DCF 13:15:28
23 analysis; and market comparables. 13:15:32
24 Let's start with the first: sunk 13:15:34
25 costs. 13:15:35

1 As Ms. Squires has explained: In cases 13:15:37
2 where there is a development project with no history 13:15:39
3 of profits, the law is clear, looking to future 13:15:41
4 losses is too speculative. 13:15:45
5 In such a case, on the assumption that 13:15:48
6 there is a breach and loss, how should the 13:15:50
7 qualification be done? 13:15:53
8 In our view, there is only one answer: 13:15:55
9 They get their money back. Simple as that. As 13:15:58
10 Ms. Squires explained, though, what amount of money 13:16:03
11 is for them to prove. It is the Claimant's burden 13:16:08
12 to prove the quantum of their losses. 13:16:12
13 Now, during these last few days the 13:16:14
14 Claimant has asked questions of Canada's witnesses 13:16:16
15 about what they and Canada requested to prove that 13:16:18
16 the Claimant did not suffer the losses in sunk costs 13:16:22
17 that they claimed, that turns the burden on its 13:16:26
18 head. 13:16:29
19 If the Claimant wants to recover sunk 13:16:29
20 costs, it bears the burden of proving with 13:16:31
21 sufficient certainty that it has suffered those 13:16:34
22 costs. It is never the other way around. 13:16:37
23 Now I want to pause to understand what 13:16:42
24 sufficient certainty means for sunk costs. And 13:16:44
25 I think we can contrast is here with future profits, 13:16:47

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1 which we'll talk about in a minute. Because with 13:16:51
2 future losses, of course, there is always some 13:16:54
3 question of uncertainty. And the question for the 13:16:56
4 Tribunal is what level of certainty is enough, 13:16:58
5 without speculation? 13:17:01
6 But sunk costs is different. Proving 13:17:03
7 sunk costs requires nothing other than due diligence 13:17:06
8 and disclosure by a Claimant. 13:17:09
9 Contrary to what Mr. Low has said, it 13:17:13
10 is neither significant overkill, nor extreme to 13:17:15
11 demand that the Claimant meet that burden. In fact, 13:17:19
12 such demanding exactitude is a way for the public to 13:17:24
13 maintain confidence in this system. 13:17:28
14 So let's look at what the Claimant has 13:17:34
15 claimed for its sunk costs. And here I need to go 13:17:36
16 into confidential session. 13:17:38
17 --- Confidential transcript begins 13:17:39
18 MR. SPELLISCY: The Claimant has 13:17:52
19 claimed \$17,428,000 in sunk costs. 13:17:53
20 The evidence has shown over the past 13:17:57
21 few days there is absolutely no support for this 13:17:58
22 claim. 13:18:02
23 Let's take the first two items that 13:18:04
24 they have in their schedule 3(b), and I'm working 13:18:06
25 from their reply report. 13:18:10

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1 was demonstrably false as a matter of fact. 13:19:34
2 Mr. Ziegler testified in his witness statement that 13:19:37
3 the Claimant did know in May of 2012, and when I put 13:19:40
4 that to Mr. Low he had to admit that. And I would 13:19:43
5 suggest that an admission like this goes to his 13:19:47
6 independence and credibility in the proceeding. 13:19:50
7 The fact is the Claimant knew in May 13:19:52
8 of 2012 that the project could not be developed. 13:19:54
9 Any expenses from that point on relate not to the 13:19:57
10 development of the project, but to this arbitration. 13:20:01
11 And, in fact, every expert the 13:20:05
12 Claimant has retained and has brought here to 13:20:08
13 present to you has confirmed that they were retained 13:20:10
14 for the arbitration or after the deferral and not 13:20:13
15 the development of the project. 13:20:16
16 As Mr. Low admitted, he included their 13:20:20
17 cost as sunk costs even though he knew that their 13:20:22
18 reports were being prepared for the purposes of the 13:20:25
19 arbitration. 13:20:27
20 The second explanation given by 13:20:30
21 Mr. Low as to why these initial reports should be 13:20:32
22 considered sunk costs, which I think was echoed by 13:20:35
23 my colleague, Mr. Terry, this morning, is that he 13:20:38
24 claimed that they could have been used in the 13:20:40
25 development of the project in the but-for world. 13:20:44

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1 It is what they called their 13:18:11
2 "Capitalised Development Costs" as well as costs 13:18:13
3 that they said they incurred in 2015, at least in 13:18:16
4 the report for development and engineering. 13:18:19
5 First, you will recall that Mr. Low 13:18:22
6 admitted in his presentation that it was 13:18:24
7 inappropriate to include the costs from January 1st, 13:18:26
8 2015 because these actually related to the 13:18:30
9 arbitration and not the development of the project. 13:18:33
10 So, let's cross those out and let's 13:18:36
11 move on and see what's left. 13:18:42
12 Now, with respect to the capitalised 13:18:45
13 costs on the first line, which total 3.773 million, 13:18:48
14 Mr. Low referred refused to exclude other expenses 13:18:53
15 related to the arbitration that occurred after the 13:18:56
16 valuation date, and you heard Mr. Terry talk about 13:18:58
17 it here this morning. 13:19:01
18 And this is something that baffles me. 13:19:02
19 Apparently expert reports done for a memorial are 13:19:05
20 development costs, but expert reports done for 13:19:08
21 a reply memorial are not development costs. 13:19:11
22 Mr. Low tried two explanations as to 13:19:15
23 why that was so; neither are credible. First, he 13:19:18
24 said that management did not know in May of 2012 the 13:19:23
25 project couldn't be developed, but Mr. Low's claim 13:19:28

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1 That makes no sense. Sunk cost aren't about the 13:20:46
2 but-for world; sunk costs are about the actual 13:20:51
3 world. 13:20:54
4 We would submit that there is no doubt 13:20:55
5 that what the Claimant is doing here is 13:20:57
6 inappropriately trying to include arbitration costs 13:20:59
7 as sunk costs, as development costs. 13:21:02
8 I would suggest that unlike what my 13:21:06
9 colleague Mr. Terry said this morning, this is not 13:21:07
10 a complicated question. There is an Article, 13:21:10
11 Article 40 in the UNCITRAL arbitration rules that 13:21:13
12 deals with arbitration costs and how they will be 13:21:17
13 allocated. There will be a separate phase for costs 13:21:19
14 in this proceeding. That's where a claim for costs 13:21:23
15 of these sort belong, just as Canada will claim its 13:21:27
16 costs in that phase. 13:21:30
17 So let's come back to what the 13:21:34
18 Claimant claimed. And let's eliminate now, 13:21:36
19 according to the information produced by Deloitte, 13:21:40
20 all of the costs from line item 1 that occurred 13:21:43
21 after May 22nd, 2012. What's left at the top there 13:21:47
22 is 2.4 million and 15 million overall. 13:21:52
23 What do we know about that 13:21:57
24 2.4 million? We know that Mr. Low said he reviewed 13:21:58
25 33 percent of the total amount, not of invoices, but 13:22:03

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1 of some un-disclosed sample of the invoices. 13:22:08
2 Now, we have no idea how much was 13:22:13
3 actually tested, and we don't know how much of what 13:22:15
4 was tested actually occurred before the valuation 13:22:18
5 date. 13:22:23
6 BRG tried to do an audit. 13:22:26
7 During the examination of 13:22:29
8 Mr. Goncalves, we saw a couple of invoice that can 13:22:31
9 be included that the auditors of BRG didn't 13:22:34
10 recognize because of their nature. They didn't 13:22:37
11 refer to the Windstream project, they referred to 13:22:39
12 Kingston or offshore. 13:22:42
13 But that isn't really the question 13:22:45
14 here. The question is: What do we think of the 13:22:45
15 other 67 percent of the sample of the sample? Where 13:22:49
16 is the evidence of that? All the Claimant has 13:22:51
17 proven is a 1.7 million that BRG was able to 13:22:54
18 substantiate, plus the few invoices that Ms. Seers 13:22:59
19 was able to show to Mr. Goncalves. 13:23:03
20 So, let's take the un-proven amounts 13:23:06
21 out of the sunk cost claim. 13:23:09
22 Stay on the previous one. It leaves 13:23:13
23 us with just over 1.8 million at the top. 13:23:21
24 Now, let's take a look at the third 13:23:23
25 item. The White Owl Capital Management cost. 13:23:25

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1 Mr. Low admitted that the evidence was 13:24:43
2 clear that some of these fees would have related to 13:24:44
3 activities other than Windstream Wolfe Island Shoals 13:24:46
4 project. 13:24:50
5 So what are we left with? A big 13:24:51
6 question mark. 13:24:54
7 So let's come back to our sunk cost 13:24:54
8 table and recall that it is the Claimant's burden to 13:24:58
9 prove the quantum of loss caused by the measure. It 13:25:00
10 has failed to do so for the White Owl Capital 13:25:03
11 management costs. 13:25:07
12 You can cost out that claim as well. 13:25:08
13 Let's look next at the accrued amounts 13:25:11
14 of Control Tech, the next item on there. Again, 13:25:14
15 these amounts are all accrued post May 2012. 13:25:18
16 This is the Claimant paying Mr. Baines 13:25:21
17 for his assistance in this dispute, not for the 13:25:23
18 development of this project. Such a claim is 13:25:26
19 inappropriate as sunk costs. Further, as Mr. Baines 13:25:31
20 admitted, at the time he was also working on other 13:25:34
21 projects. And the Claimant has offered no means to 13:25:37
22 allow an allocation between what those projects were 13:25:41
23 and the Wolfe Island Shoals one. It's failed to 13:25:44
24 meet its burden again. So, let's come back to our 13:25:48
25 sunk costs and let's cross those ones out too. 13:25:51

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1 The Claimant seeks 710,000 for that. 13:23:29
2 Well let's turn now to the sheet showing how they 13:23:32
3 calculated that. I apologize, this one is small. 13:23:35
4 We tried. But we're going to do something to help 13:23:40
5 us out a little bit. 13:23:43
6 First, almost the entire amount 13:23:45
7 relates to post-2010 costs. As we just saw, those 13:23:48
8 are not related to the development of the project 13:23:51
9 and not losses caused by the deferral. They are 13:23:53
10 internal costs by of the Claimant and not losses 13:23:55
11 caused by the deferral and can't be allowed. Let's 13:23:59
12 cross them out. 13:24:03
13 Of the remaining entries, what 13:24:04
14 evidence do we have? The only evidence we've seen 13:24:05
15 is a memo sent by Mr. Mars to investors. It's not 13:24:08
16 an agreement; it's a memo. 13:24:10
17 But as is clear from the memo itself, 13:24:12
18 which I won't pull up here, but the memo states that 13:24:14
19 the charges would begin in January of 2011. 13:24:17
20 Mr. Low claimed all the way back to 13:24:21
21 October 2010. There's no basis for that in the 13:24:23
22 record. He said he'd seen tax slips. Those tax 13:24:27
23 slips aren't in the record. Let's cross those out. 13:24:30
24 What of the remaining entries between January 2011 13:24:37
25 and May 2012? 13:24:41

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1 Now we get to the bigger items. Let's 13:25:56
2 talk about the letter of credit. 13:25:59
3 This is not a sunk cost at all. 13:26:02
4 There's been no draw on it; it still exists exactly 13:26:04
5 as it was when they filed it with the OPA. 13:26:09
6 And Mr. Cecchini made clear that it 13:26:12
7 can be returned. I believe he said he'd return it 13:26:14
8 tomorrow. There's no evidence that this amount 13:26:17
9 cannot be claimed back now, if the Claimant is 13:26:20
10 willing to cancel their FIT contract. 13:26:23
11 Even if we leave that aside, the 13:26:28
12 incontrovertible evidence is that the letter of 13:26:32
13 credit may be cancelled no later than May 4th, 13:26:36
14 2017, next year. Mr. Cecchini confirmed that, as 13:26:39
15 does the plain language of section 10(1)g of the FIT 13:26:43
16 contract. 13:26:48
17 In fact, the Tribunal will recall that 13:26:49
18 a few days ago when we came back from a break before 13:26:51
19 I started asking questions, Mr. Low admitted that, 13:26:55
20 in the current circumstance, he found that it was 13:26:57
21 now likely inappropriate to include the letter of 13:26:59
22 credit amount as a sunk cost because it would lead 13:27:02
23 to the possibility of a double recovery. 13:27:05
24 So, let's cross that out too. 13:27:07
25 And finally, let's get to the last 13:27:13

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1 line, which is interest on the letter of credit. 13:27:14
2 Well that's what it's stated in the Deloitte 13:27:18
3 schedule anyways. But as the evidence showed, this 13:27:21
4 is not interest on the letter of credit, but a fee 13:27:23
5 that Windstream's investors are causing Windstream 13:27:26
6 to pay back to themselves for putting up the money 13:27:29
7 to secure the letter of credit. 13:27:31
8 Before we get to the economics of 13:27:34
9 that, let's get to and talk about a little legal 13:27:36
10 principle. Sunk costs should be external costs; 13:27:39
11 they should not be internal costs of the investors. 13:27:43
12 This fee is just something that the 13:27:47
13 investor decided to pay back to themselves as a way 13:27:49
14 to take out additional money out of the company. It 13:27:51
15 shouldn't be recoverable as a sunk cost, but even if 13:27:54
16 it were, let's talk a little economics. 13:27:58
17 If this was going to be awarded, what 13:28:00
18 should it represent? It should represent the 13:28:03
19 opportunity cost of having the money that was locked 13:28:04
20 in our Royal Bank of Scotland to secure the line of 13:28:07
21 credit. 13:28:12
22 Now, we can't allow a Claimant to set 13:28:12
23 that opportunity cost rate itself. This is not 13:28:15
24 a negotiated rate at all. It is the investor 13:28:19
25 setting it for themselves, and so, on that logic, 13:28:22

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1 it no longer had an opportunity to develop its 13:29:32
2 project, it had the duty to seek to mitigate by 13:29:35
3 asking for its letter of credit back under 13:29:39
4 section 10(1)g of its FIT contract. It never did 13:29:42
5 that. What it did was it asked for its letter back 13:29:48
6 and asked to keep its FIT contract. 13:29:51
7 So, any claim for interest past those 13:29:55
8 days is inappropriate as well, and that reduces it 13:30:00
9 substantially. As you see we've run the numbers. 13:30:03
10 The claim now comes down to 437,000 in opportunity 13:30:07
11 costs. 13:30:14
12 But again, we are not done because, 13:30:16
13 remember, the investors are making interest on this 13:30:18
14 bank account in the Royal Bank of Scotland, which 13:30:20
15 also compensates them to some extent for the 13:30:23
16 opportunity of having that money tied up. 13:30:26
17 The problem is will there is no 13:30:28
18 evidence on the record as to what that interest rate 13:30:30
19 is. 13:30:33
20 Mr. Ziegler, the only one here who 13:30:33
21 came to testify whose money is at stake, he did not 13:30:35
22 know. 13:30:40
23 So, for the real opportunity cost of 13:30:42
24 this money being held to secure the letter of 13:30:45
25 credit, what are we left with? Again, nothing other 13:30:47

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1 they could have put 1,000 percent fee for themselves 13:28:24
2 in there. This is not the way this should work. 13:28:28
3 What I would suggest is the way this 13:28:31
4 should work, is that the parties have already agreed 13:28:33
5 on the opportunity costs related to Claimant's money 13:28:36
6 being unavailable to it. They have agreed on the 13:28:39
7 applicable rate of pre-judgment interest and there 13:28:42
8 is a legal question of whether you should award it, 13:28:44
9 but they've agreed on the applicable rate if you do. 13:28:46
10 That is exactly the same thing as 13:28:49
11 a matter of principle. It is the opportunity cost 13:28:50
12 of not having that money. It is not 12 and a half 13:28:52
13 per cent; it's 3 percent. 13:28:57
14 The Claimant hasn't done that 13:29:00
15 calculation, but we have. We did that calculation, 13:29:01
16 and this is what it shows in U.S. dollars. The 13:29:05
17 total is not 5 some odd million dollars in interest, 13:29:10
18 which would essentially be a rate that would allow 13:29:13
19 the Claimant to have doubled its money over the last 13:29:15
20 few years, a pretty nice return. It's actually over 13:29:18
21 a million dollars in fees. 13:29:20
22 Now that's more reasonable, but we 13:29:22
23 can't stop there because the Claimant actually has 13:29:24
24 a duty to mitigate its damages. 13:29:27
25 On the day when the Claimant knew that 13:29:31

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1 than question marks. 13:30:51
2 As a result, the Claimant has failed 13:30:55
3 to meet its burden and this line item must be taken 13:30:57
4 off the sunk cost claim as well. 13:31:02
5 As of May 22nd, 2012, the evidence in 13:31:04
6 the record establishes that about 1.8 million had 13:31:07
7 been invested in the development of the company. 13:31:11
8 That is money they should get back if there is 13:31:14
9 a finding about the breach and causation, nothing 13:31:17
10 more. 13:31:21
11 Now let me turn to my second topic 13:31:26
12 this morning, the Claimant's claim for lost profits 13:31:28
13 using the DCF analysis. And I think we can come out 13:31:31
14 of confidential session for at least a little while 13:31:34
15 here. 13:31:38
16 --- Confidential transcript ends 13:31:38
17 MR. SPELLISCY: Now, as I come to 13:31:42
18 talking about lost profits, I do want to pause and 13:31:45
19 talk about why I spent so much time on sunk costs. 13:31:48
20 Not only is it our view that that is 13:31:53
21 the appropriate legal principle for how to calculate 13:31:55
22 damages for a project that is not even beginning its 13:31:58
23 development, but I also would suggest to you that 13:32:00
24 the way in which it was prepared, the way in which 13:32:03
25 that amount was claimed, the inclusion without 13:32:06

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1 evidence, the inclusion of things that were not 13:32:09
2 sunk, the letter of credit, this should reflect on 13:32:11
3 the credibility of the entire damages claim that the 13:32:15
4 Claimant is presenting here. 13:32:18
5 I think that reflects as well, because 13:32:21
6 when we look at what their discount cash-flow 13:32:24
7 analysis is, the Claimant is reaching for the stars 13:32:27
8 in this case. It is asking for 100 percent of the 13:32:29
9 future value, even though it has spent, as we just 13:32:32
10 saw, less than 10 percent, a 10th of a percent on 13:32:35
11 the budget required to develop the project. 13:32:39
12 Claimant says it's not the future 13:32:42
13 operating value, but it is the value as if the 13:32:44
14 project started to produce profits. 13:32:47
15 As Mr. Guillet explained, DCF is not 13:32:52
16 appropriate for development projects until they have 13:32:57
17 reached financial close. 13:33:00
18 Mr. Guillet is the only one in this 13:33:06
19 market -- in this hearing, who has experience in 13:33:08
20 transactions of offshore wind farms. 13:33:11
21 That is what he does. 13:33:14
22 And he tells you that the market does 13:33:16
23 not use DCF, in the not at this stage. 13:33:18
24 Mr. Low suggests that a DCF is 13:33:23
25 appropriate here because, in his view, there was 13:33:26

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1 he was questioned that two of the most prominent 13:34:41
2 builders for offshore wind were Mott and Sgurr. 13:34:44
3 The Claimant had Mott MacDonald as 13:34:49
4 a technical advisor prior to the arbitration. In 13:34:51
5 fact, the Claimant had Mott MacDonald prepare 13:34:56
6 a revised cost estimate for the project on 13:34:59
7 October 12th, 2012. 13:35:02
8 They submitted a notice intent to 13:35:03
9 arbitration, five days later on October 17th, 2012. 13:35:05
10 I would suggest that timing is not coincidental. 13:35:09
11 But where's Mott? Why are they not 13:35:11
12 here? Mott's estimate is on the record and we did 13:35:17
13 refer to it in examination. I won't bring it up 13:35:22
14 here because it is confidential, but it is 13:35:24
15 Exhibit C-0625, and you will see that Mott's 13:35:26
16 estimate was about 1.2 billion Euros in October of 13:35:33
17 2012. 13:35:36
18 More than 20 percent of what the 13:35:37
19 Claimant has said is reliable here. I think the 13:35:39
20 answer to where is Mott? Is relatively clear. 13:35:44
21 Their estimate is too high. 13:35:46
22 Now, let's remember, as well, that the 13:35:50
23 Claimant had Sgurr appear at this arbitration, the 13:35:52
24 other prominent engineer. 13:35:57
25 They didn't get a cost estimate from 13:35:59

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1 sufficient certainty, and Mr. Terry this morning 13:33:28
2 said that Mr. Low was prudent and careful in his 13:33:30
3 analysis. I would suggest that the evidence shows 13:33:34
4 that he was not. 13:33:36
5 Let's look at what he relies upon. 13:33:38
6 He relies upon the FIT contract as 13:33:41
7 providing certainty that is enough to using a DCF 13:33:43
8 analysis in his mind, but remember, price -- the 13:33:47
9 price one gets for a product is only one single 13:33:52
10 aspect of a DCF. DCF requires a number of other 13:33:54
11 inputs. On the cost side there is CAPEX and 13:33:58
12 financing cost and OPEX, and on the revenue side 13:34:01
13 there is the amount of the product that will be 13:34:04
14 generated and the price that you get for it. 13:34:07
15 The Claimant only has reliable 13:34:10
16 information regarding the last one, the price. 13:34:11
17 The evidence this week and throughout 13:34:14
18 the hearing showed it has no reliability regarding 13:34:16
19 the other inputs. 13:34:20
20 I want to spend here in assessing that 13:34:26
21 reliability, spend a fair amount of time on one of 13:34:28
22 those inputs, because it's really important, what it 13:34:31
23 would have cost to build this project. So let's 13:34:34
24 look at what's on the record. 13:34:37
25 Remember, Mr. Guillet explained when 13:34:39

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1 Sgurr. They didn't get a cost estimate from COWI. 13:36:01
2 They didn't get a cost estimate from Weeks Marine. 13:36:05
3 Why not? We would submit to you that the inference 13:36:10
4 you should draw from the evidence is that the 13:36:13
5 project-specific estimates would have shown the 13:36:14
6 uncertainty of their capital cost estimates. So 13:36:17
7 what did they do? They rely on benchmark costs for 13:36:20
8 building a project in Europe. 13:36:24
9 There are a number of problems with 13:36:27
10 this approach. First, there is no reason to assume 13:36:28
11 mature European pricing is at all relevant. 13:36:31
12 In fact, the evidence is to the 13:36:35
13 contrary. 13:36:37
14 Mr. Guillet explained, in his reports 13:36:38
15 and his experience, that North American projects 13:36:39
16 that pay a premium. And I asked 4C about North 13:36:42
17 American projects, and though his job was to track 13:36:45
18 the market, he said he had no idea about the cost 13:36:49
19 for North American projects and confirmed that he 13:36:52
20 had not even looked at it, even though they were in 13:36:55
21 his database. 13:36:58
22 What we do know some information on 13:37:04
23 North American projects, there are two that we have 13:37:07
24 on the record: Block Island and Cape Wind. 13:37:09
25 Block Island, 30-megawatts and you'll 13:37:13

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1 see there, investment 360 million, over 10 million 13:37:15
2 U.S. dollars a megawatt. 13:37:20
3 Cape Wind, 2.6 billion in financing. 13:37:22
4 It's a 468-megawatt project. It's about 5.6 million 13:37:26
5 U.S. a megawatt. 13:37:30
6 This is all substantially higher than 13:37:33
7 the Claimant's value of a little over 4 million 13:37:35
8 Canadian per megawatt, and, of course, these funds 13:37:38
9 are in U.S. dollars, which would mean they'd be even 13:37:40
10 higher converted to Canadian. 13:37:44
11 And of course that's the other big 13:37:45
12 issue with the capital cost estimate provided; the 13:37:48
13 pricing it in Euros. 13:37:51
14 The sensitivity analysis that we 13:37:54
15 talked through with 4C showed that, in fact, merely 13:37:56
16 using proper exchange rates would result in 13:37:59
17 an increase, and in fact, a massive increase in the 13:38:02
18 amount of the CAPEX required for the project. 13:38:05
19 Now, Deloitte suggested that it was 13:38:11
20 inappropriate to use actual exchange rates on the 13:38:12
21 date of financial close because, in his opinion, 13:38:15
22 this violated a fundamental rule of valuation 13:38:18
23 analysis and that was against using hindsight. 13:38:21
24 That was an exceptionally curious 13:38:24
25 thing for Deloitte to claim, because in their first 13:38:28

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1 It makes no sense to use foreign 13:39:39
2 exchange on that rate, except, of course, for the 13:39:41
3 fact that it's favourable for the claimants. 13:39:45
4 In short, Mr. Low's sudden 13:39:48
5 identification of this fundamental rule of valuation 13:39:50
6 analysis gives them a benefit, a windfall of 19 13:39:54
7 cents on the dollar for the Siemens TSA, and more, 13:39:58
8 21 cents, I think, for the rest of the cost. 13:40:01
9 The other reason this doesn't make 13:40:05
10 sense, and we've heard it today, it's not a credible 13:40:07
11 position for the Claimant to take because all of 13:40:09
12 their expert reports use hindsight. 13:40:11
13 We heard Ms. Seers say it today, they 13:40:15
14 think hindsight is appropriate. They think using 13:40:17
15 current information is appropriate. 13:40:20
16 The Claimant cannot have it both ways. 13:40:21
17 It cannot eschew hindsight when it doesn't work in 13:40:24
18 their favour and embrace it when it does. 13:40:28
19 Changing their estimates to recognize 13:40:32
20 the reality of the foreign exchange risks for the 13:40:35
21 project eliminates a significant value for the 13:40:37
22 Claimant. 13:40:43
23 There are other sensitivities as well, 13:40:43
24 in fact, though there were few differences between 13:40:45
25 the parties. 13:40:48

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1 report, they did exactly that. 13:38:30
2 They used the actual foreign exchange 13:38:33
3 rate on the date of projected financial close, 13:38:35
4 explaining in their report exactly why they thought 13:38:37
5 it was appropriate to do so. Now, this, of course, 13:38:40
6 was very beneficial for them, because their 13:38:43
7 projected financial close date was September 2012, 13:38:45
8 a period when the Canadian dollar was the strongest 13:38:48
9 that it's been against the Euro in the last six or 13:38:51
10 seven years. 13:38:54
11 Now, when they changed their schedule, 13:38:55
12 once Sgurr realises that the one they were relying 13:38:57
13 on would lead errors and inaccurate conclusions, 13:38:59
14 financial close moves to February 11th, 2014. 13:39:02
15 What happens next? Deloitte all of 13:39:07
16 a sudden identifies a fundamental rule of valuation 13:39:09
17 analysis that means that they can ignore the impact 13:39:14
18 of actual foreign exchange risk and instead use 13:39:16
19 a forecast. 13:39:19
20 They applied that forecast to the 13:39:20
21 Siemens turbine agreement, but then continue to use 13:39:22
22 the actual foreign exchange rate on May 22nd, 2012 13:39:24
23 for the rest of the costs. But on May 22nd, 2012, 13:39:28
24 Mr. Low admits that less than 3 percent of the 13:39:32
25 budget would have been spent. 13:39:36

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1 There were differences in estimates of 13:40:49
2 CAPEX between the experts on things like 13:40:50
3 decommissioning. 13:40:53
4 As Mr. Barillaro explained, the 13:40:55
5 Claimant's assertion, for example, that they should 13:40:56
6 not have to provision for decommissioning because of 13:40:58
7 the scrap value generally associated with wind 13:41:01
8 turbines is irrelevant. Massive concrete 13:41:02
9 foundations don't have scrap value; they just cost. 13:41:05
10 There was also the issue of the 13:41:09
11 contingency. The Claimant put theirs at 10 percent, 13:41:11
12 which we heard from Mr. Barillaro was more typical 13:41:16
13 for standard power companies. Mr. Guillet explained 13:41:21
14 in his report why this project, the first of its 13:41:23
15 kind in Ontario would have been required by the 13:41:26
16 banks to have a 20 percent contingency or around 13:41:28
17 there. Again, he's the only one who's done offshore 13:41:32
18 wind financing of that sort. 13:41:34
19 But, obviously, the biggest difference 13:41:36
20 was the TSA. And I want to take a deeper dive into 13:41:38
21 the TSA here and to do so, we need to go back into 13:41:41
22 confidential session. 13:41:44
23 I'm keeping you busy. 13:41:47
24 --- Confidential transcript begins 13:41:47
25 MR. SPELLISCY: Now, as I said at the 13:42:01

1 beginning of the hearing, the Claimant is 13:42:02
 2 essentially desperate to have the Tribunal assume 13:42:03
 3 that this agreement could be negotiated on price and 13:42:05
 4 terms because of the effect on value that it has if 13:42:09
 5 it must comply. 13:42:12
 6 As a matter of law and practice we 13:42:14
 7 would suggest that Tribunals cannot just simply 13:42:16
 8 assume that signed and binding contracts will be 13:42:18
 9 renegotiated unless they have both parties here 13:42:20
 10 telling them that this is so. 13:42:23
 11 Siemens is not here. And there was no 13:42:25
 12 reason to allow the Claimant to unilaterally amend 13:42:28
 13 a signed and binding agreement. 13:42:31
 14 In fact, as Mr. Mars explained about 13:42:34
 15 a different contract, he said "We believe there's 13:42:37
 16 a sanctity to a contract. When you sign it, you are 13:42:39
 17 signing up to obligations." 13:42:42
 18 Again, the Claimant cannot have it 13:42:44
 19 both ways. They can't embrace the contracts they 13:42:45
 20 like and eschew the ones they don't. Moreover, the 13:42:48
 21 Siemens TSA itself, as the evidence shows, makes 13:42:56
 22 clear that the price flexibility was there to 13:42:58
 23 protect Siemens. There are no price adjustment 13:43:00
 24 rights for Windstream. 13:43:03
 25 The Siemens TSA also makes clear that 13:43:05

1 there were no further agreements, oral or written, 13:43:09
 2 nor other terms or conditions that were not -- that 13:43:14
 3 neither party has relied on any representations, 13:43:17
 4 express or implied, not contained in this contract. 13:43:20
 5 Now, Mr. Guillet explained this 13:43:31
 6 contract was not bankable, but there is no reason to 13:43:33
 7 expect the price to go down. The claimant has 13:43:36
 8 offered several theories on why the price would go 13:43:40
 9 down, but none holds water. 13:43:43
 10 First, they have suggested that 13:43:45
 11 Siemens would bring the price down in order to 13:43:47
 12 assist Windstream to be the first project in North 13:43:48
 13 America. We heard that again this morning, but as 13:43:51
 14 Mr. Goncalves explained, it is naive to suggest that 13:43:54
 15 the Claimant's single project of 300-megawatts would 13:43:58
 16 give them some sort of leverage over a massive 13:44:00
 17 company like Siemens. There is no reason to expect 13:44:03
 18 Siemens to bend over backwards to help them. 13:44:07
 19 Second, the Claimant has also 13:44:10
 20 suggested, and you did hear this this morning, that 13:44:13
 21 the price would go down because of market pressures. 13:44:15
 22 Essentially, Siemens would have to complete with 13:44:17
 23 other turbine manufacturers. 13:44:20
 24 As Mr. Goncalves explained, the 13:44:22
 25 problem is Siemens had a virtual monopoly in Ontario 13:44:25

1 at the time. 13:44:30
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED] 13:45:44

1 --- Confidential transcript ends 13:45:44
 2 MR. SPELLISCY: Now, those are some of 13:45:46
 3 the biggest areas of specific disagreement in terms 13:45:47
 4 of CAPEX, but I do want to come to one other point. 13:45:48
 5 The Claimant has placed great reliance 13:45:52
 6 on the Conference Board of Canada paper prepared by 13:45:54
 7 Vestas as providing some sort of independent 13:45:57
 8 corroboration of its estimate. In fact, we've 13:45:59
 9 probably seen it half a dozen times and we heard it 13:46:01
 10 again this morning, but they haven't taken you to 13:46:04
 11 the part of the conference paper where Vestas 13:46:06
 12 admitted -- where Vestas talks about their 13:46:08
 13 methodology. 13:46:10
 14 So let's go there. Vestas says their 13:46:11
 15 methodology is based upon international experience 13:46:13
 16 over the past three years. 13:46:15
 17 So, in short, they're using the same 13:46:17
 18 methodology that 4C is using; they're looking at 13:46:21
 19 international experience. 13:46:25
 20 This paper does not offer 13:46:26
 21 an independent method leading to the same result; it 13:46:27
 22 is the same method leading to the same result. 13:46:30
 23 That is not verification and that is 13:46:34
 24 not surprising. More importantly, the emphasis on 13:46:36
 25 this paper over the last several days went back 13:46:42

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1 through the record and see if we had anything there 13:46:45
2 about what the Claimant said about it. 13:46:48
3 Now let's pull up an exhibit that 13:46:50
4 I don't think has come up yet, though it is referred 13:46:52
5 to in Canada's written pleadings. 13:46:54
6 This is a draft of a letter that 13:46:56
7 Mr. Baines apparently prepared to the Conference 13:46:58
8 Board of Canada when he received an advance copy of 13:47:00
9 that report. I would suggest you read this letter 13:47:02
10 when you have time. Mr. Baines is not happy about 13:47:05
11 the report. 13:47:07
12 Now, this is all we have that was 13:47:10
13 produced. I don't know whether it was sent, but 13:47:12
14 Mr. Baines writes at the time, his opinion: 13:47:14
15 "The conference board report 13:47:15
16 is inaccurate," he says, and 13:47:18
17 among his reasons is that, 13:47:19
18 "The capital cost assumed for 13:47:20
19 a project is incorrect. If 13:47:23
20 it is based upon some 13:47:24
21 detailed design work done by 13:47:26
22 Vestas, this should be noted, 13:47:28
23 as we feel that capital cost 13:47:29
24 is much higher than shown." 13:47:31
25 So while they've come back again and 13:47:38

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1 again, to this report, during this date, or during 13:47:40
2 this hearing, it seems to us that at the time in 13:47:46
3 question, their strenuous contention was that report 13:47:49
4 was not accurate. 13:47:54
5 Now, in addition to the problems with 13:47:56
6 their capital cost analysis, there are other 13:47:58
7 problems with their DCF, like inputs on OPEX, 13:48:00
8 financing and resources, wind resource. 13:48:05
9 I didn't want to spend a lot of time 13:48:08
10 here. We rely upon our pleadings and our expert 13:48:10
11 reports, but I would suggest there was no certainty 13:48:12
12 on operational expenses. And as Mr. Goncalves 13:48:14
13 explained in his presentation, there is always 13:48:17
14 uncertainty on how much the wind will blow. 13:48:19
15 These are the inputs and the 13:48:26
16 uncertainty of the inputs that go into the DCF, but 13:48:27
17 if we look at the actual model that was used by 13:48:30
18 Deloitte with these inputs we see that it is also 13:48:33
19 inappropriate. 13:48:35
20 There is a large amount of uncertainty 13:48:37
21 on the Claimant's financial inputs into the DCF 13:48:41
22 model, like its cost of equity in particular, and 13:48:43
23 you heard about this from my colleague, Mr. Terry. 13:48:46
24 I won't spend, again, a lot of time on 13:48:49
25 this because, frankly, I'm a little bit tired of 13:48:51

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1 talking about betas. But I do want to highlight 13:48:53
2 that the inappropriately low cost of equity the 13:48:57
3 Claimant has suggested for a project at this stage 13:49:01
4 of development. 13:49:03
5 Now, Ms. Squires has already walked 13:49:04
6 you through all of the major risks associated with 13:49:07
7 project layout, design, schedule, and more. 13:49:09
8 Now, curiously, Mr. Low actually 13:49:11
9 suggested that his weighted average cost of capital 13:49:14
10 wasn't related to the stage of this project. 13:49:17
11 In doing so, he had to disagree with 13:49:20
12 his own report. He had to back away from what he 13:49:22
13 had written. 13:49:26
14 It as Mr. Goncalves explained, Mr. Low 13:49:28
15 is wrong. 13:49:33
16 The cost of equity is related to the 13:49:33
17 project's stage of development. Now, perhaps it is 13:49:35
18 Mr. Low's failure to take the stage of development 13:49:39
19 to account that led him to select the proxy group 13:49:42
20 that he did, because the proxy group that he 13:49:44
21 selected is primarily large, diversified, operating 13:49:48
22 companies. And not only did he rely upon results 13:49:50
23 from three companies with less than five years of 13:49:58
24 operating data, which although he said it was 13:50:00
25 "Okay," he admitted it did significantly reduce his 13:50:03

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1 beta and his cost of equity. 13:50:06
2 He didn't appropriately adjust his 13:50:08
3 results for the stage of development, claiming 13:50:10
4 instead that he was valuing not what Windstream was, 13:50:12
5 but what he assumed it would be on the valuation 13:50:16
6 date in the but-for world. 13:50:18
7 Again that is not appropriate. 13:50:20
8 The question was: What stage was 13:50:22
9 Windstream at on the valuation date, not where one 13:50:25
10 would assume it might be if everything goes 13:50:28
11 according to their plans. 13:50:30
12 The fact that Mr. Low's beta does not 13:50:31
13 accurately calculate the specific risk Windstream 13:50:34
14 faces, also evidenced by the fact that his 13:50:38
15 adjustment for Windstream's company-specific risk is 13:50:41
16 at least mathematically wiped out by his country 13:50:44
17 adjustment. 13:50:48
18 To say by investing in Windstream 13:50:48
19 should result in an adjustment that can be 13:50:50
20 mathematically eliminated simply by the fact that 13:50:52
21 it's an investment in Canada versus the United 13:50:55
22 States is simply not plausible. 13:50:58
23 Windstream had no permits, no site, no 13:51:01
24 turbines, no revenues, no plants. 13:51:03
25 It was more risky than merely the 13:51:05

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1 difference between investing between the two 13:51:08
2 countries. 13:51:10
3 And this is exactly why Mr. Low's cost 13:51:11
4 of equity is so inappropriately low, and why 13:51:13
5 Mr. Goncalves' adjustments that Mr. Terry talked 13:51:17
6 about this morning, are appropriate. They 13:51:21
7 reflect -- Mr. Goncalves' adjustments reflect 13:51:24
8 appropriate risks for offshore wind projects, 13:51:27
9 especially considered in light of the particular 13:51:32
10 circumstances of Windstream. 13:51:33
11 Finally, I will turn to my third area 13:51:36
12 today, the use of a market multiples analysis. 13:51:39
13 Now, again, in our view, the only 13:51:42
14 appropriate damages here, if causation is 13:51:44
15 established, would be sunk costs. But let's talk 13:51:46
16 market multiples quickly as well. The Claimant says 13:51:50
17 that it should be considered a late stage 13:51:53
18 development company and be compared to other late 13:51:55
19 stage companies because it had a FIT contract and 13:51:58
20 a turbine sales agreement. 13:52:00
21 Now, their claim to the latter is 13:52:02
22 strange, because they've essentially said that they 13:52:05
23 are going to renegotiate every aspect of that TSA. 13:52:07
24 Again, the Claimant cannot have it both ways. 13:52:10
25 It cannot embrace the TSA for the 13:52:13

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1 The Claimant has placed great emphasis 13:53:32
2 on the fact that they had a spot reserved on the 13:53:35
3 grid, but as Mr. Guillet explained, that is not 13:53:37
4 enough. You need an actual agreement. 13:53:40
5 Those are the things -- your FIT 13:53:44
6 contract, your PPA, permitting, site control, and 13:53:48
7 a grid access agreement, that's what leads to a bump 13:53:52
8 in value. You need all four. We saw the number 13:53:55
9 come up earlier where it was Mr. Guillet estimating 13:54:00
10 that it's between 0 and 60 million Euros. 13:54:02
11 60 million Euros is for a project that has all four; 13:54:06
12 that's what he said. \$200,000 a Euro or megawatt -- 13:54:09
13 or 200,000 Euros a megawatt for a project that has 13:54:12
14 all four, that is fully permitted. 13:54:17
15 Windstream did not have all four. And 13:54:20
16 as Mr. Guillet's report makes clear, as a result, it 13:54:22
17 would be worth only a fraction of the amount of 13:54:24
18 that. Mr. Goncalves' multiples analysis comes up 13:54:27
19 with a similar number using a far more sophisticated 13:54:32
20 approach and looking at transactions that do no, in 13:54:35
21 fact have all of the requirements identified by Mr. 13:54:38
22 Guillet. He comes up with a multiple of .05 per 13:54:41
23 megawatt for a total of between 0 and 15 million. 13:54:45
24 But as Mr. Goncalves has said, even 13:54:49
25 that is generous because what the Claimant had is 13:54:51

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1 purposes of the stage of the project analysis, but 13:52:15
2 then eschew it when it comes to considering its 13:52:18
3 costs. 13:52:21
4 No doubt, having a TSA was something. 13:52:22
5 But it's he not enough to make the project a late 13:52:23
6 stage project. Similarly, having a FIT contract is 13:52:27
7 something. It's a milestone, but not in enough to 13:52:32
8 give the project any sort of significant bump in 13:52:35
9 value. 13:52:37
10 The FIT contract is a piece of paper, 13:52:40
11 if you can't build your contract, your project, that 13:52:42
12 piece of paper is worth nothing. As Mr. Goncalves 13:52:44
13 explained on Wednesday, a FIT contract is a single 13:52:50
14 milestone on the path towards value. That is it. 13:52:53
15 Hence, by comparing itself to late stage projects, 13:52:58
16 the Claimant is not using the right comparables. 13:53:01
17 Let's look to what Mr. Guillet says. 13:53:04
18 He's the only one with market 13:53:09
19 experience here. As Mr. Neufeld has explained, the 13:53:11
20 Claimant was not permitted at all. They hadn't even 13:53:16
21 submitted an application, there is no dispute about 13:53:19
22 that. They did not have site control. They needed 13:53:21
23 the Crown land lease and did not have it. They did 13:53:23
24 not have a grid connection. Let's pause on that one 13:53:26
25 because there's some dispute about that. 13:53:29

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1 not as important as what it did not have, in terms 13:54:54
2 of market value. 13:54:57
3 As Mr. Guillet concluded in his 13:54:58
4 report, without site control, Windstream likely had 13:55:01
5 no material value at all in the market at the time. 13:55:03
6 The Claimant has suggested that this 13:55:08
7 was simply a misunderstanding based upon a European 13:55:09
8 experience where space is constrained; that is 13:55:13
9 wrong. It's not about space; its about common 13:55:16
10 sense. 13:55:20
11 To make money from a wind farm, you 13:55:20
12 need to produce power. To produce power, you need 13:55:23
13 to have turbines spinning. To have turbines 13:55:26
14 spinning, you need a spot to put those turbines. If 13:55:28
15 you have no spot to put the turbines, what are you 13:55:31
16 selling? Nothing. 13:55:34
17 So let me sum up our view, on 13:55:39
18 qualification. For all of the reasons that I just 13:55:42
19 discussed and that are further detailed in our 13:55:44
20 pleadings, we would submit that the only appropriate 13:55:47
21 measure of damages in this case, should you 13:55:49
22 determine that there is both breach and causation, 13:55:52
23 would be to give the Claimant back the money it had 13:55:55
24 spent on the development of the project, on the 13:55:57
25 development of the project, approximately 13:55:59

1 1.8 million. 13:56:02
 2 Thank you. 13:56:11
 3 PRESIDENT: Thank you very much, 13:56:15
 4 Mr. Spelliscy. I think that was on the minute of 13:56:15
 5 1:30, 2:30. 13:56:19
 6 28 minutes left. Thank you. So, we 13:56:24
 7 had 22 minutes left for the Claimant, 28 minutes 13:56:28
 8 left for the Respondent for rebuttal. 13:56:32
 9 I would expect these minutes are quite 13:56:35
 10 valuable. And they will be used. 13:56:38
 11 I suggest we break now for 20 minutes, 13:56:42
 12 that should be sufficient for the sandwiches that 13:56:47
 13 are waiting for us. 13:56:49
 14 So we continue at 2:15. 13:56:51
 15 That should then leave also enough 13:56:57
 16 time for discussing any housekeeping issues that we 13:56:59
 17 will have a few to discuss at the end of the day. 13:57:02
 18 Thank you. 13:57:05
 19 --- Recess taken at 2:00 p.m. 14:00:55
 20 --- Upon resuming at 2:21 p.m. 14:00:55
 21 PRESIDENT: We resume. Mr. Terry, 14:21:44
 22 please. 14:21:46
 23 REPLY SUBMISSIONS BY MR. TERRY: 14:21:49
 24 MR. TERRY: I want to respond to some 14:22:05
 25 points that each of my friends made in their 14:22:06

1 to, subsequently, when the issue was discussed in 14:23:40
 2 the caucus and when there were discussions in the 14:23:43
 3 media about that particular issue, in my submission, 14:23:45
 4 in terms of the actual documentary record, and the 14:23:47
 5 most reliable evidence in this case is the 14:23:52
 6 documentary record. We just don't have support for 14:23:54
 7 Mr. Wilkinson's statements. 14:23:59
 8 And in that respect, it's important to 14:24:01
 9 look back at the various submissions that have been 14:24:07
 10 made in the counter memorial, in the rejoinder, in 14:24:09
 11 the witness statements, and to look at the point at 14:24:12
 12 which documents were disclosed, and you can see 14:24:15
 13 an evolution of a story, and we heard the latest 14:24:17
 14 version of it this morning from Mr. Neufeld 14:24:20
 15 explaining how things fit together. But in my 14:24:23
 16 submission the shifting nature of that story tells 14:24:28
 17 us a lot about how things -- or when that decision 14:24:31
 18 was made and the bona fides of that decision. 14:24:34
 19 Now, you should also, in my 14:24:43
 20 submission, ask why it was that Marcia Wallace who 14:24:44
 21 testified that she'd led the development of the 14:24:48
 22 Renewable Energy Program at the Ministry, and why is 14:24:51
 23 it that she and her ADM, Mr. Evans, so direct 14:24:57
 24 reports from the Deputy Minister, the ADM to her, 14:25:01
 25 first learn about the decision to have a moratorium 14:25:05

1 presentations. 14:22:09
 2 And with respect to Mr. Neufeld's 14:22:09
 3 submissions, I want to respond to his submissions 14:22:14
 4 with respect to Mr. Wilkinson, and I've already -- 14:22:18
 5 in my closing argument, talked about Mr. Wilkinson 14:22:23
 6 and how his evidence lines up with respect to the 14:22:30
 7 evidence of the other officials at the time. 14:22:33
 8 And when you are going back and 14:22:35
 9 examining this issue and deliberating, I'd ask you 14:22:39
 10 to ask yourself the following questions: 14:22:42
 11 Why is it that there are no documents 14:22:48
 12 whatsoever showing evidence of a decision being made 14:22:51
 13 by Minister Wilkinson at the dates that he said they 14:22:55
 14 were made and communications to both -- down 14:22:59
 15 through -- from the Deputy Minister through to her 14:23:04
 16 staff in the ministry and horizontally throughout 14:23:08
 17 minister's offices and to the Premier's office, 14:23:14
 18 among other places. 14:23:17
 19 Secondly, why is it, in contrast, that 14:23:19
 20 there is an ample documentary record which shows 14:23:24
 21 Minister Wilkinson and is office involved later in 14:23:28
 22 January and in February, where the focus in that 14:23:28
 23 case is about the Windstream project and whether it 14:23:32
 24 can [REDACTED] 14:23:35
 25 And, of course, as my friend took you 14:23:38

1 from the Ministry of Energy official, Sue Lo, 14:25:08
 2 providing that information, as opposed to from their 14:25:14
 3 own -- from her own deputy or her own Minister's 14:25:18
 4 office. 14:25:23
 5 And another question: How do you 14:25:24
 6 explain Mr. Wilkinson's evidence that he informed 14:25:32
 7 his Chief of Staff to let the Premier's office know 14:25:35
 8 about the decision that he made, in light of his 14:25:39
 9 testimony at paragraphs 18 and 19 of his witness 14:25:41
 10 statement in terms of involvement, in contact with 14:25:43
 11 the Premier's office, in the decision? 14:25:46
 12 And among other questions, fifthly, 14:25:50
 13 how do you explain that Chris Morley, the Premier's 14:25:53
 14 Chief of Staff, is the one who gave the update on 14:25:58
 15 offshore wind at the energy issues meeting. In the 14:25:59
 16 absence of any involvement -- this is 14:26:03
 17 January 13th -- at the absence of any involvement at 14:26:04
 18 that meeting with MOE staff or either in the 14:26:07
 19 bureaucracy or the Minister's office. 14:26:11
 20 In our submission, the documentary 14:26:19
 21 evidence is the most credible in this case. And 14:26:22
 22 this evidence has to be considered, together with 14:26:25
 23 the subsequent fact that the offshore -- the science 14:26:28
 24 that was going to be done on offshore wind was not 14:26:37
 25 done, and Mr. Neufeld says, "Well, that doesn't 14:26:40

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1 matter because Windstream had already, because of 14:26:45
2 its own fault, done itself out of a FIT contract." 14:26:47
3 Now, whatever you think of that 14:26:52
4 argument, the fact is that the other thing that you 14:26:54
5 can tell and draw as an inference from the fact that 14:26:56
6 the science wasn't done, you can use that to assess 14:26:59
7 the nature and the purpose of the decision for the 14:27:02
8 moratorium and whether it truly was a decision based 14:27:05
9 on science or not. And that's an appropriate thing 14:27:09
10 for the Tribunal to do in terms of drawing 14:27:12
11 inferences as to how the decision was made and what 14:27:15
12 its purpose was, so, in my submission, it is 14:27:18
13 a relevant factor. 14:27:20
14 And when you do look at the witness 14:27:24
15 statements also, please, bear in mind that Marcia 14:27:25
16 Wallace, in her witness statement on January 6th, 14:27:29
17 talks about a meeting with her deputy, and the 14:27:31
18 deputy instructs her to take certain steps with 14:27:35
19 respect to offshore wind [REDACTED] and, again, 14:27:37
20 see how the timing of that squares with what we have 14:27:41
21 heard subsequent to the witness statement in 14:27:45
22 Mr. Wilkinson's testimony about the timing of these 14:27:47
23 decisions. 14:27:51
24 Now, Mr. Neufeld, to move to other 14:27:51
25 topic, Mr. Neufeld talked about the fact that 14:27:57

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1 Windstream hadn't taken any steps to apply for REA 14:27:59
2 under the renewable regulation and the suggestion 14:28:03
3 that somehow we couldn't have been serious about the 14:28:06
4 project, we had to have known there was regulatory 14:28:09
5 uncertainty because we hadn't taken any steps. And 14:28:13
6 he compared the situation of Windstream to Trillium, 14:28:16
7 another offshore project. 14:28:19
8 Now, Trillium, of course, didn't have 14:28:20
9 a FIT contract. What Trillium did have is it had 14:28:22
10 its AOR status. So it knew about its site, and its 14:28:27
11 site was more than five kilometres offshore, so it 14:28:31
12 was in a position to apply for REA, and, in fact, 14:28:34
13 there's contemporaneous documentation that shows 14:28:34
14 that it was applying for REA and that the Ministry 14:28:39
15 of the Environment was telling it that, of course, 14:28:41
16 it could apply for a REA, which, in my submission, 14:28:43
17 is actually evidence that we could have also applied 14:28:46
18 for a REA, we, meaning Windstream. 14:28:48
19 And why did Windstream not? Because 14:28:51
20 of course Windstream didn't know what the exact 14:28:53
21 location of its turbines would be. Windstream was 14:28:55
22 waiting for the setback policy to be determined, for 14:28:58
23 the AOR status to be determined before it could take 14:29:02
24 the steps necessary under the REA regulation to 14:29:07
25 apply for those studies. 14:29:12

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1 And what you see when you look at the 14:29:14
2 contemporaneous documentation, is you see that 14:29:17
3 Windstream is having meetings with the Ministry of 14:29:21
4 the Environment and there are records of meetings in 14:29:23
5 April, in June. There's, of course, during the 14:29:25
6 summer, a lot of focus on working with Ministry 14:29:28
7 offices and the OPA to obtain appropriate 14:29:31
8 extensions. And then we have another meeting, we 14:29:35
9 have meetings with MNR in September and then with 14:29:38
10 Ministry of the Environment in October, and that's 14:29:41
11 a meeting where Doris Dumais, as she mentioned in 14:29:43
12 her testimony, did not mention anything about 14:29:46
13 a pending moratorium. 14:29:49
14 So Windstream is doing what it can, 14:29:50
15 and in addition, as my friend acknowledged, 14:29:52
16 Windstream is taking the steps at that point to put 14:29:55
17 out an RFP to retain the consultants, because the 14:29:57
18 thinking around this time -- and this is consistent 14:30:02
19 with the phone conversation we heard this morning -- 14:30:04
20 the thinking is that the setback policy is going to 14:30:06
21 be dealt with, within the government at least, in 14:30:08
22 late summer, August, early September time period, 14:30:13
23 and certainly outside -- [REDACTED]
[REDACTED]
[REDACTED]

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1 that will be resolved, and at that point the 14:30:24
2 consultants who Windstream has retained -- and the 14:30:27
3 evidence is they retained Stantec -- would be able 14:30:30
4 to move ahead with their REA process, so that's what 14:30:33
5 the evidence shows about moving forward under the 14:30:36
6 REA. 14:30:38
7 In response to Ms. Squires, again, as 14:30:39
8 we've said before, what we're hearing on this issue 14:30:45
9 and we have made the point already about, and 14:30:50
10 I think Ms. Squires acknowledged it, in terms of the 14:30:53
11 experience of the claims experts on this issue. 14:30:56
12 What we're hearing is questions of risks and 14:30:59
13 possible risks and what might happen. What we're 14:31:04
14 not hearing is an assessment of what's probable. 14:31:09
15 And the question for the Tribunal to answer is 14:31:11
16 what -- more likely than not, what is probable in 14:31:13
17 terms of the development of the project? 14:31:16
18 And that's an issue that should be 14:31:18
19 determined in the best available evidence including 14:31:21
20 the evidence from the agencies about working 14:31:23
21 pragmatically with the developers and the use of 14:31:28
22 force majeure, the use of extensions, the 14:31:33
23 information you heard from the experts in that area 14:31:36
24 about working to deadlines, working back from 14:31:41
25 deadlines, the whole sort of approach in the 14:31:45

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1 industry of working to be able to get these types of 14:31:50
2 projects permitted, constructed, and operated within 14:31:53
3 the timelines with the support from Ontario 14:31:57
4 agencies. 14:32:00
5 And in my respectful submission, it's 14:32:02
6 not a question of -- in terms of the evidence, 14:32:04
7 looking at the evidence from the other side about 14:32:09
8 what was possible; it's what was probable. 14:32:10
9 And just to point out one issue that 14:32:14
10 was made, and this is something I want to just make 14:32:18
11 sure is very clear on the record: There was 14:32:21
12 an argument that the offshore substation would not 14:32:24
13 have been possible on Pigeon Island. Now, that was 14:32:28
14 based on the fact that a met mast approval had been 14:32:31
15 denied by the coastguard. 14:32:36
16 My friends never asked Ian Baines, who 14:32:41
17 was the person to ask about the reason that had been 14:32:44
18 denied, and there is simply no basis for the 14:32:47
19 Tribunal to make any determination that 14:32:49
20 a transformer station could not have been put on the 14:32:54
21 island on the basis of a denial for a met mast 14:32:58
22 permit. 14:33:02
23 And this is something -- I'll return 14:33:02
24 to this in dealing with damages. Where my friends 14:33:04
25 have, in my respectful submission, have not put the 14:33:06

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1 can't do that until the termination -- until the 14:34:26
2 May 2017 termination date. And as we said, I think 14:34:32
3 it was two days ago in the cross-examination of -- 14:34:39
4 examination of one of the witnesses, the effect of 14:34:42
5 this is that the respondents are saying that 14:34:44
6 Windstream essentially should terminate its most 14:34:49
7 valuable asset in order to somehow get back the 14:34:52
8 letter of credit and bring this all to an end. 14:34:58
9 And that's in a context where there is 14:35:01
10 no -- and we heard from Mr. Cecchini in his 14:35:06
11 testimony, that the OPA is willing to enter into 14:35:09
12 some sort of agreement but specifically when he was 14:35:10
13 asked about how this affects the NAFTA claim, he's 14:35:13
14 advised by Mr. Spelliscy, and Mr. Spelliscy objects 14:35:16
15 and is not able to answer a question on that. 14:35:19
16 With respect to the issue of the 14:35:22
17 audit, it's important to be very clear on the record 14:35:25
18 here, as to what -- as to what Deloitte has done. 14:35:30
19 Deloitte did, in response to issues that were raised 14:35:35
20 in the counter memorial -- well, in the counter 14:35:38
21 memorial, initially conducted an audit, a sampling 14:35:44
22 audit with the 30 percent sample, but then when the 14:35:47
23 rejoinder memorial when further comments were made, 14:35:51
24 Deloitte went on and carried on a full audit. 14:35:54
25 And you can see that, just refer you 14:35:57

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1 question to the appropriate witness to be able to 14:33:07
2 answer the question, and there are severe 14:33:09
3 limitations as to the conclusions this Tribunal can 14:33:12
4 draw when allegations are made about a particular 14:33:15
5 document or a particular event without having asked 14:33:18
6 the witness about that particular event and what 14:33:21
7 occurred. 14:33:24
8 To move to damages, with respect to 14:33:27
9 sunk costs, again, it is important to keep in mind 14:33:33
10 first of all, and you've seen this in the evidence, 14:33:37
11 that the project could have been turned on at any 14:33:40
12 time. We heard for the first time last Monday, that 14:33:43
13 from -- and this is in response to a question that 14:33:46
14 the Tribunal had asked: What is Ontario's current 14:33:49
15 intent with respect to the project? And at that 14:33:52
16 point Ontario said, "Well, effectively, we're not 14:33:55
17 going to be doing more science in the near term; the 14:33:58
18 project is dead." 14:34:02
19 That's the first time Windstream heard 14:34:04
20 about that. And even -- even knowing that, it still 14:34:05
21 remains unclear. Mr. Cecchini's testimony was that 14:34:11
22 from the OPA's perspective, there is certainly no 14:34:16
23 definitive intention to terminate the agreement; 14:34:19
24 it's a question of whether Windstream wants to 14:34:21
25 terminate the agreement. And, of course, Windstream 14:34:23

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1 to it -- you don't have to bring it up -- but slide 14:35:59
2 208, they describe the audit here: 14:36:02
3 "Since the date of Deloitte's 14:36:05
4 second report in response to 14:36:06
5 the BRG rejoinder we have 14:36:08
6 verified all payments that 14:36:09
7 BRG indicated were 14:36:12
8 substantiated, but payment 14:36:14
9 could not be verified. We've 14:36:15
10 reviewed the amounts 14:36:17
11 categorized as 14:36:18
12 unsubstantiated by BRG and 14:36:18
13 believe that the analysis was 14:36:18
14 not thorough, i.e. the BRG 14:36:20
15 analysis was not thorough." 14:36:23
16 [As read] 14:36:24
17 And you saw some of that in the 14:36:24
18 cross-examination on Wednesday of Mr. Goncalves. 14:36:26
19 So, there was been a thorough audit 14:36:28
20 done by Deloitte, and it's also important to keep in 14:36:31
21 mind in this context that always the Claimant has 14:36:35
22 responded to questions and requests with respect to 14:36:40
23 these issues from the Respondent. 14:36:44
24 And there were never -- in my 14:36:48
25 respectful submission, the idea that a Claimant 14:36:51

1 needs to file every single one of their invoices 14:36:54
 2 when they make a claim and file it with their 14:36:57
 3 memorial is simply inconsistent with their practice, 14:37:00
 4 international arbitration. 14:37:04
 5 It is fair to respond to the other 14:37:06
 6 side when they raise questions, and that's what's 14:37:07
 7 been done in this particular case, but any 14:37:10
 8 suggestion that there's actually an onus in 14:37:13
 9 a memorial to do something like that is, again, in 14:37:17
 10 my submission, not consistent. 14:37:20
 11 And it's important in that respect, 14:37:22
 12 again, to note that my friend, Mr. Spelliscy 14:37:24
 13 chooses -- he chose to put his questions to Mr. Low 14:37:30
 14 in cross-examination. He did not ask Mr. Mars, for 14:37:34
 15 example, about the particular arrangements for 14:37:39
 16 paying, the list of the \$10,000 per month payments 14:37:43
 17 and how those were allocated. He didn't ask 14:37:46
 18 Mr. Baines about the allocations with respect to the 14:37:50
 19 Control Tech company. 14:37:53
 20 He chose to put the questions to 14:37:56
 21 Deloitte and there's -- if he had put them to the 14:37:59
 22 witnesses who were actually making those 14:38:02
 23 arrangements and incurring those expenses, in my 14:38:05
 24 submission, he would have obtained relevant answers 14:38:09
 25 to his questions. And, again, I would submit that 14:38:12

1 the Tribunal, in the absence -- in the case of only 14:38:14
 2 partial information, I suggest that you should be 14:38:18
 3 very cautious about making any particular 14:38:22
 4 determination on that basis. 14:38:24
 5 With respect to the LC, again, there 14:38:27
 6 is no ability -- just to make sure this is clear on 14:38:31
 7 the record -- there's no ability for Windstream, 14:38:35
 8 prior to May 2017, to terminate under 10.1(g). As 14:38:38
 9 I said before, to do so or to suggest that that 14:38:48
 10 should be the resolution of this matter, that 14:38:50
 11 Windstream should give this up in the absence of any 14:38:53
 12 step being taken from the OPA, in terms of 14:38:58
 13 termination, and really, given the fact that in this 14:39:01
 14 particular case, we still have Canada saying on 14:39:05
 15 behalf of Ontario, "Well, we're not going to do 14:39:10
 16 anymore science in the near term." And what does 14:39:13
 17 the "near term" mean? And is this project, you 14:39:16
 18 know, really dead? 14:39:18
 19 So, to move on to the cost issue -- 14:39:20
 20 and I want to take a moment on this point, the 14:39:23
 21 Turbine Supply Agreement, if we could -- if I could 14:39:26
 22 hand up to you, the -- it's important to look at the 14:39:31
 23 agreement and take you to the provisions that Mr. 14:39:37
 24 Spelliscy didn't take you to, and you saw this in 14:39:40
 25 one of the witnesses. 14:39:43

1 MR. SPELLISCY: Do you want this 14:39:50
 2 confidential? 14:39:51
 3 MR. TERRY: Sure, if we can do it 14:39:52
 4 quickly. 14:39:54
 5 -- Confidential transcript begins 14:39:54
 6 MR. SPELLISCY: I don't think it 14:39:57
 7 counts against your time. 14:39:57
 8 MS. NETTLETON: Yes. 14:39:59
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14:41:24
 Now, with respect to the slide at 190, 14:41:25
 this is the one where Mr. Baines is raising 14:41:28
 questions with respect to the Conference Board of 14:41:30
 Canada Report and the Vestas capital cost. Again, 14:41:32
 here's another example. My friend could have asked 14:41:37
 Mr. Baines about it. He didn't. 14:41:40
 And with respect, you have to treat 14:41:41
 with great skepticism, assessments now that you 14:41:43
 should make determinations on the basis of that 14:41:47
 letter when it's -- there's never been -- it's never 14:41:49
 been put to a witness. 14:41:52
 Finally, on the market comparables 14:41:54
 point, the evidence -- the uncontroverted evidence 14:41:59
 is that Mr. Guillet put -- put an estimate in terms 14:42:02
 of market comparables for a project at the -- at 14:42:09

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1 stage before it had all its permits somewhere 14:42:13
2 between 0 and \$60 million. 14:42:17
3 And we've had, you know, arguments as 14:42:20
4 to whether the project is in late stage or in 14:42:21
5 Euros -- whether it's a late stage or an early stage 14:42:23
6 project. 14:42:26
7 Now, Mr. Guillet, from his 14:42:27
8 perspective, may have said, well, it's on -- it's on 14:42:29
9 the spectrum; we go all the way to zero for this 14:42:32
10 project, but Mr. Guillet admitted he hadn't read the 14:42:36
11 FIT project. Didn't know about the Crown land 14:42:43
12 release process. 14:42:45
13 He didn't know about -- as Ms. Powell 14:42:47
14 said, the first step is to get a FIT contract and 14:42:50
15 then the agencies MNR will work with you as well 14:42:53
16 as -- Lawrence said, going through the site release 14:42:56
17 process. 14:43:00
18 The whole process here, as Sarah 14:43:00
19 Powell said, was flipped, it wasn't site access 14:43:03
20 first; it was power purchase agreement. And it was 14:43:05
21 a very good power purchase agreement. So keep that 14:43:09
22 in mind, again, when you are considering market 14:43:11
23 comparables, that when you're looking at the range 14:43:15
24 that Mr. Guillet has set out -- and bear in mind 14:43:18
25 that, to the extent he's saying it should be in the 14:43:20

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1 the five questions about Minister Wilkinson and his 14:47:04
2 decision, I would suggest to you when you go back 14:47:10
3 and look to the documentary record, you will 14:47:13
4 actually see, as Mr. Neufeld walked you through, 14:47:16
5 that it is consistent with the story that we're 14:47:20
6 telling. The timing is consistent. The content of 14:47:22
7 the communications are consistent. 14:47:25
8 We walked you through some of that. 14:47:28
9 I don't intend to go through it again, but I think 14:47:30
10 you also have to pay attention to those dates. 14:47:35
11 For example, at the end, he brought 14:47:37
12 you to and referred to a comment by Marcia Wallace 14:47:39
13 in talking about how our timeline could square 14:47:42
14 because she had a meeting on January the 6th. 14:47:45
15 It squares perfectly. 14:47:48
16 Mr. Wilkinson testified that he got 14:47:51
17 the briefing note in his package on the evening of 14:47:54
18 January 6th. 14:47:57
19 There would be nothing about what his 14:47:58
20 decision was at that time. He hadn't seen the 14:48:00
21 briefing note yet, and he hadn't met with his 14:48:03
22 Deputy. So, go back and look at that timeline, pay 14:48:06
23 attention to days, pay attention to weekends, when 14:48:09
24 meetings would occur. You've got that evidence from 14:48:12
25 Minister Wilkinson, and I would ask you to review it 14:48:15

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1 lower end of the range on the basis of a European 14:43:23
2 perspective as to whether site access had been 14:43:26
3 secured or not, consider that he doesn't have the 14:43:28
4 relevant information as he himself acknowledged to 14:43:33
5 be able to assess this in an Ontario context under 14:43:35
6 a FIT contract. 14:43:38
7 Those are -- subject to any questions 14:43:43
8 you may have -- those are our submissions. 14:43:44
9 PRESIDENT: Any questions? 14:43:49
10 Okay. Thank you very much, Mr. Terry. 14:43:52
11 MR. SPELLISCY: I will request just 14:43:57
12 a couple of minutes to discuss with my colleagues. 14:43:58
13 PRESIDENT: Sure. 14:44:00
14 [Counsel confer] 14:44:01
15 --- Confidential transcript ends 14:44:08
16 PRESIDENT: Okay, Mr. Spelliscy, 14:46:39
17 please. 14:46:40
18 REPLY SUBMISSIONS BY MR. SPELLISCY: 14:46:40
19 MR. SPELLISCY: Thank you. I will not 14:46:42
20 try to address all of what my colleague, Mr. Terry, 14:46:47
21 has raised in his rebuttal. 14:46:50
22 I think that most of it is addressed 14:46:53
23 already in the documents and the pleadings on the 14:46:55
24 record, so I don't intend to rehash old ground here. 14:46:57
25 I would suggest to you, when he asks 14:47:02

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1 carefully. 14:48:18
2 Because what I would suggest to you to 14:48:19
3 you is that the Claimant talked about the failure to 14:48:21
4 present or the failure to bring questions to 14:48:25
5 witnesses. 14:48:26
6 The person who made the decision, who 14:48:27
7 says he made the decision, he was here. 14:48:28
8 They questioned him, not for very 14:48:32
9 long. The other two individuals from the Ministry 14:48:35
10 of the Environment, Marcia Wallace and Doris Dumais, 14:48:40
11 they were here. They didn't question them for very 14:48:44
12 long. 14:48:46
13 The Claimant is more intent on telling 14:48:47
14 a story based upon how it would like to interpret 14:48:49
15 the documents and then suggests that we haven't put 14:48:52
16 the questions to the right witnesses. 14:48:54
17 I would urge you to go back and look 14:48:56
18 at the transcript, from the beginning this has been 14:48:58
19 told as the story of a Ministry of the Environment 14:49:01
20 decision. 14:49:04
21 You had people from the Ministry of 14:49:04
22 the Environment, including the very Minister who 14:49:06
23 testified and swore he made the decision, who came 14:49:08
24 here. Pay attention to that testimony, and then 14:49:10
25 look at the documents in that regard. And I will 14:49:14

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1 suggest to you that it squares perfectly. 14:49:16
2 On the same lines, we now hear in his 14:49:22
3 closing submissions today, my colleague, Mr. Terry, 14:49:25
4 referred to an email from Sue Lo, on January the 14:49:27
5 13th, as the person conveying the news to her 14:49:33
6 colleagues. 14:49:38
7 Ms. Lo was scheduled to be here. The 14:49:40
8 Claimant chose not to call her. For the Claimant 14:49:42
9 now, to suggest that it was Canada not putting the 14:49:46
10 questions to the right witnesses, I would suggest 14:49:49
11 that it's the exact opposite. We've made those 14:49:51
12 witnesses available who could answer the questions 14:49:55
13 about this timeline. The Claimant hasn't asked the 14:49:57
14 questions because it doesn't want to know the answer 14:50:01
15 to the questions. 14:50:02
16 It would prefer, instead, to operate 14:50:03
17 on the basis of inferences from documents that are 14:50:05
18 actually about different things, about 14:50:08
19 communications plans, reflecting decisions that are 14:50:10
20 made. 14:50:12
21 Now, let me address another point, let 14:50:15
22 me talk about the balance of the probabilities, and, 14:50:23
23 again, this gets back to what my colleague, 14:50:27
24 Ms. Squires, said, the balance of the probabilities 14:50:30
25 is what they've said. 14:50:32

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1 that the Claimant has brought here, they fail. 14:51:46
2 I come back to something I said again, to wrap more 14:51:50
3 of this up: Projects fail. They do. That's why 14:51:53
4 Tribunals are consistently -- are consistent in 14:51:58
5 rejecting the idea that they should speculate as to 14:52:02
6 the future of bringing a project into operation, the 14:52:05
7 future in awarding future profits. There can be not 14:52:09
8 sufficient certainty to allow this damages 14:52:14
9 calculation to be done. 14:52:19
10 I want to talk also about some of the 14:52:24
11 things that my colleague, Mr. Terry, said about some 14:52:26
12 of the sunk costs in 10.1(g) and what has happened 14:52:30
13 since the claimant knew in May 2012, that it 14:52:40
14 couldn't develop its project. I would suggest that 14:52:42
15 you look at 10.1(g) carefully, because 10.1(g) sets 14:52:44
16 out a rule that establishes if a project will be 14:52:47
17 delayed by events of force majeure for more than 24 14:52:52
18 months past its milestone date of commercial 14:52:55
19 operation, there are no obligations; you will get 14:52:58
20 your money back. 14:53:00
21 Mr. Cecchini was here. He testified 14:53:01
22 that, even outside of the context of waiting past 14:53:03
23 that date, the OPA negotiations with developers. 14:53:06
24 If this is really a question of what 14:53:09
25 should have happened in May of 2012, at that point 14:53:12

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1 In my opening submissions, what I had 14:50:34
2 said was that the question of whether, given 14:50:36
3 unlimited time, resources, and money, could it be 14:50:38
4 built was irrelevant, and the Claimant suggested 14:50:41
5 that the real issue was a balance of the 14:50:43
6 probabilities. 14:50:45
7 It is an issue of whether it could 14:50:45
8 actually be built in the time required by the FIT 14:50:49
9 contract. That is a relevant question that you have 14:50:52
10 to answer -- ask yourselves. The Claimant is here 14:50:55
11 to suggest, again, it could just renegotiate those 14:50:59
12 timelines, the OPA would work with them. You heard 14:51:02
13 from Mr. Cecchini about the extensions that were 14:51:05
14 granted to groups across the industry. 14:51:08
15 You heard about the problems and what 14:51:11
16 his comments were on force majeure for construction 14:51:13
17 delays. He said that's not the OPA's practice. We 14:51:16
18 saw a slide at the very beginning of two weeks ago, 14:51:20
19 that was a slide done by General Electric on the 14:51:24
20 wind industry. 14:51:28
21 Two out of every 20 projects that are 14:51:30
22 wind projects, succeed. 14:51:32
23 We had ample evidence through 14:51:34
24 Cape Wind and other projects of proposed 14:51:38
25 developments that had the same roster of the experts 14:51:42

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1 when they knew it couldn't be developed, when 14:53:16
2 pursuant to Mr. Ziegler's testimony, he doesn't say 14:53:19
3 we learned later, he said in May 2012 we knew it 14:53:22
4 could not be developed, at that point they have 14:53:24
5 a duty to mitigate. 14:53:26
6 We see the claim was brought in 14:53:28
7 October of 2012. It is a claim for expropriation in 14:53:31
8 October of 2012. A claim for expropriation, October 14:53:35
9 of 2012 is fundamentally inconsistent with the idea 14:53:38
10 that the project still had value as of that date. 14:53:43
11 My colleague, Ms. Squires, walked you 14:53:46
12 through this, for there to be an expropriation has 14:53:49
13 to be substantially deprived of all value. And 14:53:51
14 I would note the same about the value of the FIT 14:53:54
15 contract. 14:53:57
16 The FIT contract was raised by my 14:53:58
17 colleague, Mr. Terry, saying, "Why would they have 14:54:00
18 to give up their most valuable asset?" The 14:54:02
19 claimant's claim here is premised that that most 14:54:05
20 valuable asset is worth zero and has been since May 14:54:09
21 of 2012. 14:54:14
22 There is no reason to hold on to it. 14:54:15
23 It can't be developed under it. If in fact, that 14:54:17
24 asset was worth something, you should have seen that 14:54:19
25 in their damages analysis. 14:54:23

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1 Look at what Mr. Low said. What 14:54:24
2 Mr. Low said is the project only had nominal value 14:54:26
3 as of May of 2012 because it could not be developed; 14:54:29
4 the FIT contract had no value as at that date. 14:54:32
5 There was no reason not to seek relief under 14:54:35
6 10.1(g). 14:54:46
7 On the issue of sunk costs. 14:54:48
8 At one time we talked about the audit. 14:54:59
9 We also talked, again, about things being put to 14:55:00
10 certain witnesses. With respect to Control Tech it 14:55:02
11 was put to Mr. Baines, and he explained, "I wasn't 14:55:04
12 only working for Wolfe Island Shoals." That's where 14:55:07
13 the quote in my slide came from, we did put it to 14:55:11
14 him. 14:55:15
15 But I would put to you that the role 14:55:15
16 of a damages expert is to understand the basis of 14:55:17
17 his cost evaluation. We asked Mr. Low because he 14:55:23
18 submitted an opinion these were sunk costs. We have 14:55:27
19 the documents in the record. We have the document 14:55:29
20 that says it's a memo; it's dated the right date. 14:55:29
21 We see the costs before that. We eliminated those 14:55:34
22 costs. 14:55:37
23 We have documents showing what they 14:55:38
24 were doing, the allocation of time. The documents 14:55:40
25 are clear. And if the Claimant wants to claim some 14:55:42

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1 Thank you, Mr. Spelliscy. 14:57:02
2 That concludes the substantive part of 14:57:13
3 the hearing. 14:57:15
4 We had flagged a few items for 14:57:16
5 discussion. I believe there are at least three. We 14:57:20
6 invited the parties to discuss and see whether there 14:57:24
7 would be any need for post hearing submissions, 14:57:28
8 that's one item. Then we should discuss cost 14:57:32
9 submissions, and a more mundane subject of 14:57:37
10 corrections to transcript, which you may wish to 14:57:42
11 leave for the parties to see how they want to go 14:57:48
12 about this. 14:57:50
13 On these three items, may we start 14:57:52
14 with the post hearing briefs. The Tribunal's 14:57:54
15 feeling -- 14:57:58
16 MR. SPELLISCY: Could I add one more 14:57:59
17 item to the agenda that I don't think -- 14:58:00
18 PRESIDENT: Sure. 14:58:02
19 MR. SPELLISCY: -- either party 14:58:02
20 covered in their submissions, but we should for the 14:58:03
21 Tribunal, which was question 7 on the questions the 14:58:04
22 Tribunal posed to us, which was really more of 14:58:06
23 a procedural question about the deliberations of the 14:58:08
24 Tribunal. 14:58:11
25 PRESIDENT: That leaves -- 14:58:12

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1 costs, it bears the burden. And I would caution you 14:55:45
2 that my colleague, Mr. Terry, said at some point, 14:55:47
3 "If there is only partial information, you should be 14:55:49
4 cautious." 14:55:54
5 You should be cautious when there is 14:55:55
6 only partial information. And it is the claimant's 14:55:56
7 burden to prove to you its loss. You cannot assume 14:55:59
8 in favour of the Claimant. The Claimant bears the 14:56:03
9 burden, in the words of Jerome, full stop. 14:56:06
10 I will come to the last issue which 14:56:13
11 I will address, which is Mr. Baines' letter; and 14:56:14
12 there was a question, again, that we should have put 14:56:20
13 it to Mr. Baines. 14:56:22
14 I urge you just to read the letter. 14:56:23
15 It is clear on its face as to what he thinks of the 14:56:25
16 report that was being prepared and that was being 14:56:29
17 relied upon by the Claimant extensively at this 14:56:32
18 arbitration. 14:56:35
19 There is no need to ask Mr. Baines 14:56:36
20 a question about a contemporaneous document produced 14:56:39
21 to us that is clear, that contradicts the very story 14:56:42
22 that they're offering you here. 14:56:47
23 Thank you. That's all I have. If 14:56:51
24 there are questions, I'd be happy to answer them. 14:56:54
25 PRESIDENT: Thank you very much. 14:56:57

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1 MR. SPELLISCY: I would be happy 14:58:13
2 and -- and the consideration of legal authorities. 14:58:14
3 I would be happy to give you our view on that. 14:58:17
4 PRESIDENT: That could be discussed 14:58:20
5 first. It is sort of linked to the post hearing 14:58:20
6 issue as well. 14:58:24
7 So, maybe we can discuss those 14:58:25
8 together. 14:58:28
9 The Tribunal's feeling certainly is 14:58:28
10 that in our view there is no need for post hearing 14:58:30
11 submissions unless the parties have agreed otherwise 14:58:35
12 whether that there are any specific issues you would 14:58:39
13 like to address. 14:58:41
14 The case has been thoroughly briefed 14:58:42
15 in terms of law and facts. We have a sense that the 14:58:45
16 issues have been set out for us as clearly as they 14:58:49
17 can be. But we are happy to hear how the parties 14:58:51
18 feel about this. Mr. Terry? 14:58:57
19 MR. TERRY: I think our -- I think all 14:59:01
20 three of us, Tribunal, ourselves, and my friends, 14:59:04
21 are of the same view with respect to post hearing 14:59:06
22 briefs that -- and of course I'll let Canada speak 14:59:09
23 for itself, but based on our discussions we don't 14:59:14
24 feel they are necessary in this case. 14:59:23
25 PRESIDENT: Mr. Neufeld? 14:59:24

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1 MR. NEUFELD: We agree and Mr. Terry 14:59:26
2 was correct in stating our view. We had some quick 14:59:28
3 discussions. The reason we set up our hearing this 14:59:30
4 way was to have a break before our closing 14:59:34
5 submission, which was quite helpful in organizing 14:59:36
6 our thoughts, and we thank the Tribunal for the 14:59:39
7 questions again because that was also very helpful. 14:59:42
8 So given the format and your willingness to 14:59:43
9 accommodate us in that regard, I think that's what 14:59:47
10 helped us to fully brief the matters. 14:59:50
11 PRESIDENT: Okay, thank you. So we 14:59:54
12 are on the same page, on that particular issue. 14:59:55
13 Then there is the question of -- 15:00:00
14 question 7, we haven't heard the parties' views on 15:00:01
15 those. Maybe Mr. Terry first. 15:00:07
16 MR. TERRY: From our perspective, we 15:00:09
17 don't have any concerns with the Tribunal consulting 15:00:11
18 legal authorities as suggested. 15:00:15
19 MR. SPELLISCY: Certainly our 15:00:19
20 perspective as well is that the Tribunal is free to 15:00:20
21 consult legal authorities, consultation with the 15:00:24
22 parties on those authorities we think is advisable. 15:00:26
23 The only caution that we would draw 15:00:29
24 is, I think in our view there's a difference between 15:00:31
25 consulting legal authorities and consulting such 15:00:34

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1 I don't know whether the parties have had a chance 15:01:56
2 to consider this, Mr. Terry. 15:01:58
3 MR. TERRY: We haven't had any 15:02:04
4 discussions yet. Of course, we're happy to take 15:02:05
5 direction from the Tribunal or we could have 15:02:11
6 discussions and then follow up with the Tribunal on 15:02:13
7 this issue. I'm happy to do whatever makes sense 15:02:15
8 and is most efficient. 15:02:19
9 MR. NEUFELD: Likewise, we're always 15:02:25
10 happy to discuss. One thing we note is that they're 15:02:26
11 often quite helpful after the submissions have 15:02:28
12 been -- or after the decision has been rendered, so 15:02:31
13 that, perhaps, is a first step to -- before deciding 15:02:36
14 whether cost submissions will be filed, but we're 15:02:41
15 happy to continue the conversation with Claimant 15:02:44
16 counsel. 15:02:47
17 MR. TERRY: But that might be 15:02:49
18 an appropriate approach. In this case, I think it's 15:02:50
19 partly reflecting Canadian domestic practice in 15:02:54
20 terms of costs quite often we find this an effective 15:02:57
21 way to deal with it. 15:03:03
22 PRESIDENT: You mean that the cost 15:03:05
23 submissions will be made only after the award has 15:03:06
24 been rendered? 15:03:08
25 MR. TERRY: Yes. And there may well 15:03:10

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1 authorities and pursuing a theory of the case that 15:00:37
2 was not offered by either of the parties. I think 15:00:40
3 certainly in the latter case consultation would be 15:00:43
4 required. 15:00:45
5 PRESIDENT: Yes, the Tribunal's 15:00:45
6 proposal was actually -- and we don't know yet where 15:00:47
7 we end up in the deliberations, but the proposal was 15:00:50
8 simply to flag to the parties that, if there are 15:00:52
9 legal authorities that the Tribunal may wish to 15:00:57
10 consult, if they are not on record we would convey 15:00:59
11 the information to the parties and ask them to 15:01:03
12 comment, if they wish, on any of those authorities 15:01:05
13 and their relevance to the case. 15:01:09
14 That was the thinking. Certainly 15:01:11
15 there was no thinking that the Tribunal would 15:01:14
16 develop its own case theory; it was a rather more 15:01:17
17 limited purpose simply to allow the parties to 15:01:22
18 comment, in case there is any need for reliance on 15:01:26
19 the authorities. And as you remember, this question 15:01:29
20 was raised, I believe, in relation to the minimum 15:01:32
21 standard issue only. 15:01:35
22 So, if there is an agreement on that, 15:01:40
23 we will note that for the -- it will now be recorded 15:01:44
24 in the transcript, as well. 15:01:48
25 Then the question of cost submissions. 15:01:52

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1 be also discussions between the parties, but, again, 15:03:16
2 we're happy to seek your guidance and if that's 15:03:20
3 problematic from the Tribunal's perspective we're 15:03:22
4 happy to discuss it further. 15:03:26
5 PRESIDENT: Without consulting my 15:03:28
6 colleagues I would say that we prefer to have -- we 15:03:29
7 would prefer to have the cost submissions now. 15:03:32
8 What we could do is the usual two 15:03:37
9 rounds. One other question is whether you would 15:03:40
10 like to make full cost submissions or simply 15:03:42
11 statements of costs, that's perhaps one thing, which 15:03:44
12 we can leave for the parties to discuss and agree. 15:03:49
13 The second is the deadlines, which we 15:03:54
14 could discuss now if there is -- for reasons of 15:03:57
15 efficiency we could agree on the deadlines, whether 15:04:01
16 you need three weeks, for instance, first-round, 15:04:03
17 a week for the second round, in terms of efficiency, 15:04:06
18 or we can leave it for the parties to agree. 15:04:12
19 MR. TERRY: I think it might be useful 15:04:14
20 having a discussion, because I think whether or not 15:04:16
21 we just file costs or actually file cost 15:04:18
22 submissions, it may increase the length of time 15:04:22
23 that's required for doing it. 15:04:24
24 PRESIDENT: Okay, so we'll leave it 15:04:27
25 for the parties. We are encouraged by the level of 15:04:29

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1 cooperation that we have seen so far. We have no 15:04:31
2 doubt that you will be able to agree on the 15:04:34
3 deadlines for the submissions, and the only deadline 15:04:36
4 we could perhaps fix is for the parties to come back 15:04:39
5 to the Tribunal for a proposed timetable for cost 15:04:42
6 submissions. And we can throw, perhaps, the issue 15:04:46
7 of how to deal with corrections to the transcript 15:04:48
8 into the same pot. 15:04:50
9 And where are we now? We are on 15:04:53
10 Friday -- perhaps it is -- is ten days a reasonable 15:04:55
11 period of time for the parties to agree? 15:05:03
12 MR. TERRY: It sounds reasonable to 15:05:07
13 us. 15:05:09
14 MR. NEUFELD: Sure, we can agree. 15:05:10
15 PRESIDENT: So that would be 15:05:12
16 Tuesday -- in March, I believe, still. 15:05:13
17 MR. TERRY: March -- 15:05:26
18 PRESIDENT: March 8th. Tuesday 15:05:27
19 March 8th, so agreed timetable from the parties on 15:05:29
20 cost submissions as well as the nature of the 15:05:35
21 submissions, whether it's submissions or statements 15:05:37
22 of costs. 15:05:39
23 And then proposal how to deal with 15:05:41
24 corrections to the transcript, including the 15:05:44
25 timetable for that; is that agreeable? 15:05:48

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1 matter. 15:07:10
2 PRESIDENT: Okay. It is usually the 15:07:10
3 word "Not missing" in these instances. Okay, very 15:07:11
4 good. 15:07:16
5 If there is nothing else, it just 15:07:17
6 remains for us to thank counsel, the parties, the 15:07:22
7 experts and the people who have been attending the 15:07:25
8 hearing very patiently over the last two weeks, as 15:07:30
9 well as the court reporters, and the secretary of 15:07:34
10 the Tribunal, of course. 15:07:37
11 And especially we would like to thank 15:07:42
12 the parties for the level of -- high level of 15:07:46
13 cooperation shown throughout the proceedings. It 15:07:49
14 has been exceptionally pleasant from a professional 15:07:54
15 based on, at least on my own prior experience in 15:07:58
16 these proceedings, we are very grateful for that. 15:08:01
17 We are also grateful to the parties 15:08:05
18 for the very thorough closing submissions made 15:08:07
19 today. They will greatly assist the Tribunal in the 15:08:10
20 deliberations, and we can only say that the parties 15:08:14
21 are in very good hands. No better job could have 15:08:16
22 been done to brief the Tribunal on the issues and in 15:08:22
23 terms of presenting the evidence. 15:08:25
24 The Tribunal will start its 15:08:27
25 deliberations, and we can assure that we will try to 15:08:30

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1 MR. TERRY: That's agreeable to us. 15:05:55
2 MR. SPELLISCY: That's fine, yes. 15:05:56
3 PRESIDENT: Okay. And do we have 15:05:57
4 anything else? We have already actually asked the 15:06:00
5 court reporter to produce a one consolidated 15:06:09
6 transcript which will be sent after the hearing, so 15:06:12
7 it will be everything from Day 1, so that you don't 15:06:14
8 need to compile your own version, so that can be 15:06:18
9 then made available, not only to the Tribunal but 15:06:22
10 also to the parties. So maybe logistically easier. 15:06:25
11 Anything else? 15:06:30
12 MR. TERRY: We have one small issue, 15:06:32
13 probably best discussed first with my friends. We 15:06:34
14 realized today that there was -- that there was 15:06:38
15 actually a typographical error which actually has 15:06:42
16 some significance in terms of the meaning of the 15:06:45
17 word in one of our witness statements, so we'll 15:06:47
18 discuss with our friends and see if we can find 15:06:49
19 a way to resolve it. 15:06:53
20 It is a witness statement that's been 15:06:54
21 filed, and, unfortunately, to our -- in an expert 15:06:57
22 report, and unfortunately we should have corrected 15:06:59
23 it while the witness was here. We didn't. In any 15:07:02
24 event, I'll discuss with my friends and see if we 15:07:06
25 can make any arrangement with respect to this 15:07:08

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1 complete the award and the deliberations diligently. 15:08:36
2 We have a certain time program. We should call for 15:08:40
3 the confidential go into confidential for this part 15:08:45
4 of the discussion, perhaps not, but we have -- we 15:08:48
5 are aiming at producing a decision as a matter of 15:08:51
6 months, rather than years. 15:08:56
7 But more seriously, the aim is to have 15:09:01
8 a draft award concluded, finalized hopefully by the 15:09:03
9 end of the summer, and we will see then how long it 15:09:11
10 takes to finalize it. That's also a matter for 15:09:14
11 the -- for the Tribunal members to see how we 15:09:16
12 proceed. 15:09:24
13 But, that is the goal. So hopefully 15:09:25
14 within a few months we will have the award. 15:09:29
15 Anything else my colleagues would like 15:09:32
16 to add? 15:09:35
17 MR. TERRY: May I add, I expect Canada 15:09:36
18 would want to as well, express my thanks and great 15:09:39
19 respect to all the Tribunal members and the 15:09:42
20 secretary for what I have found to be 15:09:45
21 an exceptionally well-run hearing and appreciate the 15:09:48
22 care. I know all four of you, as well as the 15:09:52
23 reporters were working extremely hard all the time, 15:09:56
24 and my only regret is that you likely didn't have 15:09:58
25 much time to get to know our city, and you're here 15:10:04

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1	at an interesting time of the year when the weather 15:10:07	1	I have because I'm extremely privileged to be able 15:11:16
2	isn't quite as good as it's been at other times. 15:10:10	2	to work with very, very competent and capable 15:11:19
3	But it has been a very, very pleasant 15:10:14	3	individuals at the Trade Law Bureau of Canada. 15:11:25
4	experience, and on behalf of Torys team and our 15:10:16	4	PRESIDENT: Thank you very much. On 15:11:29
5	clients, and our assorted experts and others, I just 15:10:20	5	that happy note we will close the hearing and we 15:11:30
6	wanted to give our heartfelt thanks to all the 15:10:23	6	wish safe travels to those that aren't going to stay 15:11:33
7	Tribunal members. Thank you, and the secretary. 15:10:26	7	in Toronto and enjoy the weekend here. Thank you 15:11:37
8	Thanks very much. 15:10:28	8	very much. 15:11:41
9	PRESIDENT: Thank you. 15:10:29	9	--- Whereupon the proceedings concluded at 3:11 p m.
10	Yeah, we are grateful to the City of 15:10:30	10	
11	Toronto for organizing the weather that certainly 15:10:31	11	
12	didn't create a distraction during the hearings. 15:10:35	12	
13	Thank you very much. 15:10:38	13	
14	MR. NEUFELD: I'd like to echo those 15:10:41	14	
15	thanks as well, please. Thank you to the Tribunal, 15:10:43	15	
16	to Ms. Nettleton, for not just running an efficient 15:10:45	16	
17	hearing but also an efficient arbitration, you know, 15:10:49	17	
18	very, very grateful for that. 15:10:52	18	
19	I'm grateful to John, Myriam, Nick 15:10:55	19	
20	Emily, Chris, Rose, whole gang at Torys. 15:10:58	20	
21	It has been pleasant to work through 15:11:03	21	
22	issues ourselves without having to take them to the 15:11:04	22	
23	Tribunal. I think we are very grateful for that. 15:11:06	23	
24	And I would also -- this is a little 15:11:10	24	
25	self-serving -- but I'd like to thank the team that 15:11:13	25	

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