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

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

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

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

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complexity, in my submission, as applied to the facts today and in terms of the onus we have to make out, I don't believe are particularly complex on the liability side. 08:17:43 08:17:46 08:17:49 08:17:56

On the damages side, as you'll hear, and -- you know, we, I think, like all counsel here, have struggled to put the particular dates in the context of an appropriate but-for analysis. And we have come up with our -- our perspective as to how the -- the appropriate way is to -- is to value and measure that, together with the Deloitte damages experts, and we'll talk about that. 08:17:57 08:18:00 08:18:03 08:18:06 08:18:09 08:18:12 08:18:15 08:18:17

But certainly, on liability, we don't see this as a complex case in terms of -- of legal issues, bearing in mind, of course, that there are particular issues with respect to 1105. They have particular interest to the Government of Canada, but in our case, we'll be saying we don't think it's necessary to decide our case to necessarily decide those -- those other issues. 08:18:19 08:18:21 08:18:24 08:18:26 08:18:32 08:18:34 08:18:37 08:18:38

So I'd like to start with this -- this slide, again, to -- to reinforce our assessment of the particular stages of this case that lead to the breach. 08:18:44 08:18:46 08:18:51 08:18:54

We have the moratorium of February 08:18:55

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11th. We have the promise to freeze, as articulated in that phone call. We have the force majeure time that gets used up, and we have the point on May 22, 2012 when the project becomes worthless. 08:18:56 08:19:01 08:19:03 08:19:07

So it's the combination of the moratorium and the failure of the promise to freeze which caused the breach, which caused, both with respect to Windstream, the expropriation, and which caused, also with respect to Windstream, the violation of fair and equitable treatment, because you'll hear from that conversation, what was communicated to Windstream at the date of the moratorium was that: You're in a special circumstance. You're unique. You have a FIT contract, and, therefore, we're going to freeze you. 08:19:10 08:19:13 08:19:15 08:19:19 08:19:23 08:19:26 08:19:28 08:19:30 08:19:32 08:19:34 08:19:37

The breach does not occur then with respect to Windstream, although it's certainly relevant in determining whether a breach has occurred to look at the moratorium and the bona fides and the reason it was put into place, but the breach occurs in May -- date of breach: May 22nd, when the project becomes worthless. 08:19:39 08:19:41 08:19:44 08:19:46 08:19:49 08:19:51 08:19:56

Now, this is the structure of our closing argument. We're going to go through 1110, 1105, and damages. With respect to the 1102 and 08:20:00 08:20:02 08:20:06

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1103 arguments, we're going to rely on our written submissions. 08:20:10 08:20:13

This slide, of course, sets out the familiar 1110 statement under the NAFTA, similar to the expropriation clause in many other bilateral investment treaties. And the steps, which I believe my friends of Canada agree with, to determine whether there has been a breach are: Is there an investment capable of being expropriated? Has the investment been expropriated? And was the expropriation unlawful? And I should just, in terms of foreshadowing (c), we don't have much to say there because our understanding is that Canada agrees that, if expropriation has occurred in this case, it's an unlawful expropriation. 08:20:16 08:20:19 08:20:25 08:20:28 08:20:33 08:20:35 08:20:38 08:20:41 08:20:44 08:20:47 08:20:51 08:20:52 08:20:55

We talked in our opening about the investment that we say was expropriated here, Windstream Wolfe Island Shoals Inc., the project, and everything related to the project and, of course, the FIT contract which has been a focus of much of the evidence in this -- in this hearing. 08:20:59 08:21:01 08:21:06 08:21:10 08:21:13 08:21:16

And we start with the argument that's been made by Canada that the FIT contract is not an investment capable of expropriation. And, in our submission, this -- this argument has no validity 08:21:20 08:21:24 08:21:28 08:21:32

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whatsoever. And it's important to recall here that Windstream has never claimed that its investments included an operational wind farm that would, of course, would generate guaranteed income from the sale of its electricity. If we had, our damages, as you had seen in Mr. Low's presentation, would be much higher. We would be valuing an operational wind farm. 08:21:38 08:21:42 08:21:45 08:21:48 08:21:51 08:21:55 08:21:58 08:22:02

And we've never -- we've never made the claim -- and you heard this, this week -- that there was, you know, a guarantee on the part of the FIT contract that there would be an operational wind farm. We understand there was a regulatory process that had to be proceeded through, and we have provided a great deal of evidence as to -- as to what we think, more likely than not, would've happened if we had been able to proceed through there. 08:22:02 08:22:04 08:22:06 08:22:10 08:22:13 08:22:14 08:22:17 08:22:20 08:22:23 08:22:25

Now, Canada relies on the Emmis v. Hungary case, and they've relied on it in their submissions, both in writing and orally, but it's important to keep in mind that, in that particular case, the Tribunal applied Hungarian law because it's a domestic law question as to whether -- as to whether the investment is a -- is a proprietary 08:22:26 08:22:28 08:22:32 08:22:36 08:22:38 08:22:44 08:22:46

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interest; it's capable of expropriation, and held in that case -- and this was actually -- there was a jurisdictional ruling in that case. The question was whether there was an investment under the Convention and held that the investors in that case had no proprietary rights. Their broadcasting licence had expired. And what they were actually effectively trying to do was to bring an FET claim on the basis of expropriation, because that particular treaty did not include FET claims as within the investor -- investment dispute provisions, only expropriation claims. So that case does not have any application to our case because, as you heard from a number of witnesses, the FIT contract itself is a valuable asset and constitutes personal property under Ontario law. 08:22:50 08:22:54 08:22:57 08:22:58 08:23:00 08:23:04 08:23:08 08:23:11 08:23:14 08:23:16 08:23:18 08:23:21 08:23:23 08:23:27 08:23:31 08:23:34 08:23:37

And we have, for example, the evidence of Sarah Powell. You'll recall that she testified last week, and you will recall her -- her expertise as an Ontario lawyer who practises in this area, both the environmental permitting side and also the advising lenders. She, of course, is the only expert Ontario lawyer called by either party in this case, and she says here, as we've highlighted, that: 08:23:38 08:23:43 08:23:46 08:23:50 08:23:52 08:23:55 08:23:59 08:24:02

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"It's a scarce and valuable commodity. It allows for assignment. It allows for change of control. FIT contracts may also be mortgaged, and they constitute not only a valuable asset, but personal property." 08:24:06 08:24:08 08:24:09 08:24:10 08:24:12 08:24:13 08:24:14 08:24:15 08:24:17

That's -- that is the evidence, the sum and total of the evidence with respect to Ontario law with respect to how the FIT contract is treated. And, in my view, it's persuasive evidence that, if you, like the Tribunal did in Emmis v. Hungary, and which is appropriate, you look to domestic law to make the determination, and the evidence is clear that it is a propriety interest, capable of being expropriated. The FIT contract is an asset and fulfils the requirements under expropriation provision. 08:24:17 08:24:20 08:24:22 08:24:25 08:24:29 08:24:31 08:24:35 08:24:36 08:24:40 08:24:41 08:24:46

Now, we note here, from the other side, a recognition from Mr. Guillet of the Green Giraffe that it was also a very good contract for offshore wind. He has no problem saying that. It's a very good -- it would have been a very good 08:24:47 08:24:49 08:24:54 08:24:57 08:25:00

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contract for offshore wind. And he talks about the fact that 20 years is good. It's good tariff. Between 15 and 20 is better for the investors so you can have a lower tariff to make it work, and both are fully bankable. 08:25:02 08:25:06 08:25:10 08:25:14 08:25:17

And we also have the testimony of Robert Low, the expert from Deloitte. And, again, he mentions the point here that: 08:25:19 08:25:20 08:25:25

"The development of these FIT contracts and the offering of them and securing of them created value to the acquirers of those. Those companies that applied and received a FIT program, I think, received something of value on the day they got them." 08:25:26 08:25:28 08:25:29 08:25:30 08:25:31 08:25:33 08:25:34 08:25:36 08:25:37 08:25:38

And, finally, Remo Bucci also: 08:25:38

"The investment community in Ontario viewed FIT contracts extremely favourably. They created volume certainty; created off-take certainty." 08:25:43 08:25:44 08:25:46 08:25:49 08:25:50

So we have, in my submission, clear 08:25:51

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and convincing evidence, frankly, not refuted at all from the other side. It is a matter of Ontario law. The FIT contract was an investment, a proprietary interest capable of being expropriated. 08:25:57 08:26:00 08:26:04 08:26:09

So we move on to the next step: Has the investment been expropriated? We rely on two leading cases, Burlington Resources and Quiborax, both of whom had very well-regarded Tribunal Members, and the test that's set out here with: 08:26:11 08:26:13 08:26:17 08:26:23 08:26:25

"The measure constitutes an appropriation if the measure deprives the investor of his investment; the deprivation is permanent; and the deprivation finds no justification under the Police Powers Doctrine." 08:26:32 08:26:34 08:26:37 08:26:38 08:26:39 08:26:41 08:26:42 08:26:42

So the test, in our submission, at this stage, is solely -- is to look solely at the effects of the deprivation, not at the purpose, at this point, of the test: 08:26:44 08:26:50 08:26:54 08:26:58

"The measure must substantially deprive the investor of all or most of the benefits of the 08:26:58 08:27:00 08:27:02 08:27:03

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

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

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

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

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

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

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

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

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law, which, again, I would argue is not complicated on this issue, is that Windstream was permanently deprived of its investments, and we cite, again, the case law going back to the seminal case of Burlington Resources. You focus on the nature of the deprivation. You don't focus on the duration of the measure. So you can have a temporary measure, and if it causes a substantial deprivation, as we argue it does in this case, that's sufficient. 08:34:57 08:34:59 08:35:03 08:35:08 08:35:12 08:35:14 08:35:19 08:35:22 08:35:26

Now, of course, in this particular case, we know, from what Canada told us in its opening, that it's not going to go ahead, in any event, with the science; that there is no future for Windstream. So the moratorium is effectively indefinite when it comes to Windstream. 08:35:29 08:35:31 08:35:34 08:35:37 08:35:41 08:35:44

But whether or not you were to find that the moratorium was temporary or was indefinite, in our submission, we have the elements of substantial deprivation here because we have the evidence clearly from the witnesses, at May 22, 2012, the project became substantially worthless. 08:35:46 08:35:47 08:35:53 08:35:55 08:35:57 08:36:00

And, of course, as I mentioned, we have the statement in Canada's -- and there's a lot -- and you hear -- you heard evidence about science. There's been a lot of submissions in the -- in the 08:36:08 08:36:09 08:36:11 08:36:14

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materials, the written materials, about scientific studies and what was done and wasn't done. The evidence, in our submission, shows that there were some sporadic attempts to start scientific studies, never followed through on, and, you know, the confirmation now is that Ontario says it's not planning to commence further scientific studies in the near term to address areas initially set out in its earlier plans. And that's from the Government of Canada on behalf of Ontario. 08:36:17 08:36:19 08:36:22 08:36:25 08:36:29 08:36:31 08:36:33 08:36:35 08:36:39 08:36:42

Now, as I understand it, although we're not completely clear on the basis for it, there's -- Canada appears to be arguing that -- that there is some sort of public purpose exception to expropriation that would apply in this case. In our submission, the case law establishes that there isn't such a broad public purpose exception. There is the narrower Police Powers Doctrine. 08:36:47 08:36:49 08:36:53 08:36:55 08:36:59 08:37:03 08:37:06 08:37:08

And we have set -- we describe the case law here, and you could -- you could, in reviewing the authorities later, consider this. The Tecmed case is a leading case in describing that the Police Powers Doctrine has no application when the measures, in effect, are disproportionate to its stated public policy rationale. So if you're going 08:37:11 08:37:15 08:37:18 08:37:22 08:37:25 08:37:30 08:37:32

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to engage the Police Powers Doctrine, you have to engage in a proportionality exercise. 08:37:34 08:37:36

And from the ADM case, an acknowledgement there that the Tribunal not only has to determine proportionality and whether the particular measure is necessary for a legitimate purpose, so necessity, proportionality, but is also entitled to consider whether it interfered with the investor's legitimate expectations when the investment was made. 08:37:40 08:37:42 08:37:45 08:37:48 08:37:50 08:37:55 08:37:58 08:38:00

And -- and it's important for us to note -- and we set it out in the last bullet here -- contrary to what Canada appears to have suggested in its -- its materials, it's only at this stage in and considering whether a Police Powers Doctrine applies or not and considering the proportionality analysis that you can consider the character of the measure and the investor's reasonable expectations, because Canada appears in their written materials to be focusing in its expropriation argument on the question as to whether the investor had legitimate expectations, reasonable investment-backed expectations. 08:38:01 08:38:03 08:38:07 08:38:09 08:38:12 08:38:16 08:38:20 08:38:22 08:38:25 08:38:26 08:38:31 08:38:34 08:38:38

In our submission, this only becomes relevant if you engage in the Police Powers 08:38:38 08:38:40

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Doctrine. If you're not, that issue is not relevant whatsoever. You look at the sole effects of the measure to determine whether there has been expropriation. 08:38:41 08:38:45 08:38:48 08:38:50

Now, we say the Police Powers Doctrine does not apply in this case. And, again, we emphasize that it's not a broad doctrine. It's a narrow doctrine. And we say the moratorium and the failure to freeze -- and you have to look at them together -- are not proportionate or necessary for legitimate public purpose. 08:38:51 08:38:52 08:38:57 08:39:00 08:39:03 08:39:05 08:39:08

And, of course, we -- we set out the purpose of the moratorium as articulated, at least, in what appears to be the primary decision-making document to "kill" offshore wind projects; that there is no end in sight to the moratorium; with respect to the freeze, that Ontario could have frozen the FIT contract, as they promised they would, while research was conducted. 08:39:08 08:39:10 08:39:13 08:39:16 08:39:20 08:39:23 08:39:28 08:39:30

So in terms of proportionality, there's an obvious alternative that could have been chosen if Canada wanted to do the science and simply freeze this project. There is no basis, looking at the police powers in terms of necessity and proportionality, to say that Ontario was obliged, Canada was obliged to 08:39:32 08:39:35 08:39:39 08:39:41 08:39:45 08:39:47

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both have the moratorium and to fail to freeze this project. 08:39:52 08:39:56

And, of course, we emphasize, as we have throughout this proceeding, that Windstream was already required to conduct site-specific environmental studies. That was the whole basis of the regime that had been placed -- that had been put in place, both under the REA regulation and under the Ministry of Natural Resources' approval and permitting requirements. 08:39:58 08:40:00 08:40:03 08:40:05 08:40:08 08:40:11 08:40:15 08:40:19

And there were, as we have discussed, under the REA regulations, certain prescriptive elements, like the 550-metre setback, that were prescribed. But for the most part, as the evidence established, we were dealing with a regime that was very consistent with the way in which Ontario had always carried out environmental assessments, where the proponent does a multiple number of studies, very thorough studies, covering a number of different areas, and then provides those to the appropriate regulatory authorities, Ministry of the Environment, Ministry of Natural Resources. And then those are evaluated by them to ensure that the project is not going to cause environmental concerns and is completely compliant. 08:40:20 08:40:26 08:40:29 08:40:32 08:40:37 08:40:39 08:40:42 08:40:44 08:40:47 08:40:49 08:40:51 08:40:55 08:40:57 08:41:00 08:41:03

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So that's already in place, and, of course, in considering any proportionality and necessity, you have to consider that that was already in place in considering whether or not the Police Powers Doctrine can properly be applied. 08:41:04 08:41:06 08:41:08 08:41:10 08:41:12

Now, what do we hear in the evidence about how the decision was made? 08:41:17 08:41:22

This, in our submission -- and it took a lot of work in this case to obtain all the documents and the relevant e-mails, but eventually this was provided, and this is -- this is the statement responding to a draft communications plan from the Chief of Staff of the Premier's Office: 08:41:28 08:41:30 08:41:33 08:41:37 08:41:42 08:41:45

> "Sorry, folks. This isn't good enough. The purpose of this release is to kill all projects, except the Kingston one, not suck and blow. Please turn this around so it kills the projects, not sounds like we're in favour of offshore wind." 08:41:49 08:41:51 08:41:52 08:41:54 08:41:55 08:41:57 08:41:59 08:42:00 08:42:01

And then we have the communication of this to the other officials who we've seen were working on this: 08:42:04 08:42:08 08:42:10

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> "Following up on our teleconference, I received further direction from the MO, Minister's Office; PO, Premier's Office; Deputy Minister's office on this file. The --" 08:42:11 08:42:14 08:42:15 08:42:16 08:42:16 08:42:19 08:42:20

And that is Deputy Minister of this -- this is Sue Lo from the Ministry of Energy. 08:42:21 08:42:23

> "-- the communications that will be developed will focus on the preferred option of being moratorium in offshore wind for the next three to five years to provide time to develop the science and create the uniform rules and policies in collaboration with the Great Lakes states. The preferred option will also involve discussions with the developer of the Wolfe Island Shoals project such that the project won't proceed until the science and 08:42:25 08:42:27 08:42:28 08:42:28 08:42:29 08:42:31 08:42:32 08:42:35 08:42:35 08:42:35 08:42:35 08:42:37 08:42:38 08:42:39 08:42:41 08:42:43

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> uniform rules and policies have been developed." 08:42:45 08:42:46

So, in our submission, the -- the timeline in the communications, what we've seen in terms of the documents show a decision being made by the Premier's Office, a communication to the staff, the science rationale, but, again, consistent with the Government's intention to freeze the project, discussions with respect to Wolfe Island Shoals in a recognition that it is in a separate category than other projects. 08:42:47 08:42:48 08:42:50 08:42:53 08:42:55 08:42:59 08:43:02 08:43:04 08:43:08

Now, of course, Canada has described, both in its written materials and its opening statement, that we're spinning a complicated tale, sort of a conspiracy theory, and we're ignoring the vast quantity of evidence disproving our theory, and we're ignoring the documents and evidence, what they say on their face, adopting a grand conspiracy theory. 08:43:11 08:43:14 08:43:16 08:43:20 08:43:23 08:43:27 08:43:28 08:43:30

I would resist very strongly that submission. Our case is based on the evidence, and what we have tried to do in the last two weeks is provide the evidence to you to establish -- and, of course, it's always very difficult, I would recognize, for an outside Claimant dealing with government e-mails to 08:43:31 08:43:33 08:43:35 08:43:38 08:43:41 08:43:43

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

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

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

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

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would suggest that Mr. Wilkinson's testimony is inconsistent; that she also had not learned of any moratorium decision from Mr. Wilkinson or anyone else at the MOE. 08:47:52 08:47:54 08:47:57 08:48:01

We heard some testimony from others with respect to how this decision -- as to Mr. Wilkinson's evidence as to how this decision was made. You heard, you'll remember, former cabinet Minister George Smitherman. He says: 08:48:06 08:48:07 08:48:12 08:48:14 08:48:18

> "With the exception of the Attorney General, who's in a special case with respect to having to be independent of government in some cases, you don't have Ministers that have the authority to go on and take a significant initiative like this without -- without the backing of the government." 08:48:20 08:48:22 08:48:23 08:48:24 08:48:25 08:48:27 08:48:28 08:48:30 08:48:32 08:48:32 08:48:36

And you heard from Sarah Powell who said, this was -- she found it. She was here to hear Mr. Wilkinson's explanation and to hear Marcia Wallace. And she says, I think in answer to a question from one of the Tribunal members, that she 08:48:38 08:48:39 08:48:43 08:48:46 08:48:49

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found this perplexing, and she doesn't have insider information, but for one Deputy Minister and one Minister to sit in a room and make such an important decision, relying on one person's information, when the Ministry of Natural Resources that has more expertise had already got comfortable, she doesn't understand that. 08:48:52 08:48:55 08:48:57 08:49:00 08:49:01 08:49:04 08:49:07

So she says: 08:49:10

> "What I was perplexed about, and I continue to be perplexed about, is the concept of the use of the precautionary principle." 08:49:11 08:49:13 08:49:14 08:49:15 08:49:17

Because you'll remember that Mr. Wilkinson spoke about that, and she didn't understand how she could justify his decision. 08:49:17 08:49:19 08:49:21

And Mr. Kolberg, from Baird, who has expertise in terms of how sediment affects drinking water in the lake, who has substantial experience for many, many years working on various projects in Lake Ontario, including major industrial projects, who was from the same company that was retained by the Ontario Government in 2010 to look at the whole issue of offshore wind turbines on the Great Lakes, he says: 08:49:24 08:49:29 08:49:32 08:49:34 08:49:37 08:49:41 08:49:43 08:49:46 08:49:51

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> "It's an unfortunate comparison to Walkerton. In my opinion, the two are so different that I just had to highlight some elements of it." 08:49:51 08:49:53 08:49:54 08:49:55 08:49:57 08:49:58

And you heard, of course, in Walkerton, that was the case about -- about negligent employees not protecting the water source, E. coli resulting, and seven or eight people dying. In a completely different world than issues of sediment from an offshore wind turbine 5 kilometres off the shores of Lake Ontario and closest, if anything, to an uninhabited peninsula. 08:49:58 08:49:59 08:50:03 08:50:06 08:50:10 08:50:13 08:50:16 08:50:20

So, in our submission, the Police Powers Doctrine cannot, by any stretch of the imagination, be applied to this case. Even if you could find there was a valid environmental purpose, the moratorium was not proportionate. And I emphasize that Canada has not provided any, any credible evidence of harm to the environment and, of course, could have avoided the breach through following up with the freeze. 08:50:26 08:50:27 08:50:31 08:50:33 08:50:36 08:50:38 08:50:42 08:50:45 08:50:47

And this case can be distinguished, among other things, from the Methanex and Chemtura cases which 08:50:48 08:50:52

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applied a Police Powers Doctrine, and in those particular cases, the Respondent, the responding Government submitted expert evidence illustrating proven harm. 08:50:57 08:50:59 08:51:01 08:51:05

We do not have that expert evidence in this case. What we have in fact with respect to the rationale that the Minister provided on drinking water is, again, from Sarah Powell. She says it wasn't aware of any: 08:51:05 08:51:08 08:51:14 08:51:17 08:51:19

> "There wasn't any credible scientific evidence of a significant threat or irreversible threat that would have triggered the precautionary principle." 08:51:19 08:51:21 08:51:22 08:51:23 08:51:25 08:51:27

We have Mark Kolberg: 08:51:28

> "These sediments would actually not pose a problem for or cause a threat to drinking water. They're low-level contaminants." 08:51:29 08:51:31 08:51:32 08:51:34 08:51:35

And he's an expert on the effect of -- of construction on the lake on drinking water and has provided, obviously, as you know, expert witness testimony on this. 08:51:36 08:51:38 08:51:42 08:51:45

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And we have the experts from the other side, from URS, asked about this drinking water issue. And Mr. Clarke here says: 08:51:46 08:51:50 08:51:54

"Drinking water, we identified as a low risk. Yes, that was our conclusion." 08:51:58 08:52:00 08:52:02 08:52:03

So what does the expert evidence say on both sides? It says there's no threat to drinking water. Completely the opposite of the evidence that was put forward to the Tribunals in the cases of Methanex or Chemtura. No scientific evidence whatsoever to justify the purported rationale of the Minister who says he made the decision in this case. 08:52:03 08:52:07 08:52:10 08:52:13 08:52:16 08:52:20 08:52:23 08:52:25

Now, as I indicated, if you find expropriation has occurred -- and Canada, as we set out here, has confirmed and agrees that it would be an unlawful expropriation, and, of course, that has -- that has consequences for damages and for valuation date. 08:52:31 08:52:33 08:52:35 08:52:37 08:52:40 08:52:44

And before I leave expropriation, one other remark which -- which applies really to -- to all of the breaches that are alleged in our case and your approach to them: Canada submits, as it has in 08:52:50 08:52:51 08:52:56 08:53:00

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other cases, that under 31(3) of the Vienna Convention, that to the extent you have an alignment of the litigation positions of the NAFTA parties, because, of course, there's an entitlement for Mexico and U.S. To make 1128 submissions in the case, that that should be taken as subsequent practice. And they state that the Tribunal should give considerable weight. 08:53:03 08:53:07 08:53:10 08:53:13 08:53:16 08:53:19 08:53:21 08:53:24

And we just briefly submit here that -- that to the extent that this Article applies, it would only require the Tribunal to take into account subsequent practice. There's no requirement to give it considerable weight. There's already a mechanism of -- which Canada has already used, of course, the free trade -- for Canada and the other parties, the Free Trade Commission to issue interpretations under Article 2001(2)(c). 08:53:25 08:53:27 08:53:31 08:53:34 08:53:36 08:53:38 08:53:39 08:53:42 08:53:43

And with respect to that issue, I would -- I would respectfully submit that this Tribunal should take the same approach that other NAFTA Tribunals have when this argument has been made for it and not to give the fact that all three States may have the same perspective any additional weight other than taking it into account. 08:53:50 08:53:51 08:53:54 08:53:56 08:53:59 08:54:02 08:54:06

And, again, there is, as Gabrielle 08:54:08

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Kaufmann-Kohler, among others, has said in article, there are -- there is a certain problem where you have a treaty that's granting rights to non-state parties to assume that the views of the three state parties should somehow be given greater weight in the interpretive process than the views of other Claimants. 08:54:10 08:54:15 08:54:21 08:54:23 08:54:28 08:54:31 08:54:34

Now to move on to 1105 and the breaches here. And this is -- this is the section where we'll talk more about -- about the representations made and, in our view, reasonable reliance on them. 08:54:35 08:54:43 08:54:45 08:54:50

So in starting with 1105, we have, of course, the -- the statement in 1105 of: 08:54:53 08:54:56

"Each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable and treatment and full protection and security." 08:55:00 08:55:04 08:55:05 08:55:06 08:55:07 08:55:09 08:55:11 08:55:12

So the FET clearly included with treatment in accordance with international law. 08:55:12 08:55:16

We then have the FTC Note of Interpretation, stating that: 08:55:18 08:55:20

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"Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party." 08:55:21 08:55:26 08:55:26 08:55:28 08:55:28 08:55:29 08:55:30 08:55:31

The second phrase: 08:55:32

"The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by customary international law minimum standard of treatment of aliens." 08:55:33 08:55:34 08:55:35 08:55:36 08:55:37 08:55:38 08:55:39 08:55:40 08:55:42

And then the statement which isn't relevant to our case, I don't believe, that: 08:55:45 08:55:46

"A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish 08:55:50 08:55:51 08:55:52 08:55:53 08:55:54

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

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

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

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

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

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

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State and harmful to the 09:02:08
claimant if the conduct is 09:02:08
arbitrary, grossly unfair, 09:02:08
unjust or idiosyncratic, is 09:02:08
discriminatory and exposes 09:02:08
the claimant to sectional or 09:02:08
racial prejudice, or involves 09:02:08
a lack of due process leading 09:02:08
to an outcome which offends 09:02:08
judicial propriety -- as 09:02:08
might be the case with a 09:02:08
manifest failure of natural 09:02:08
justice in judicial 09:02:08
proceedings or a complete 09:02:08
lack of transparency and 09:02:08
candour in an administrative 09:02:08
process." 09:02:08
And they also say: 09:02:08
"In applying this standard it 09:02:40
is relevant that the 09:02:40
treatment is in breach of 09:02:40
representations made by the 09:02:40
host State which were 09:02:40
reasonably relied on by the 09:02:40
claimant." 09:02:40

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

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

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

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

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

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Cargill Tribunals adopted a more convincing approach." 09:07:38 09:07:39

So they have held that the host State's failure to respect an investor's legitimate expectation does not constitute a breach of the FET standard, but is, rather, a factor to be taken into account when assessing whether or not well-established elements of the standard have been breached. So he recognizes that it's a factor in these tests. 09:07:41 09:07:42 09:07:45 09:07:47 09:07:51 09:07:53 09:07:54 09:07:57

Now, the Tribunal has asked about the evidence of all the various bits, some close to 3,000, that have been entered into by state parties, you know, as well as a multilateral energy charter treaty and various other -- other treaties, some of which, of course, are going through the ratification process right now. 09:07:58 09:08:00 09:08:02 09:08:06 09:08:09 09:08:12 09:08:14

And there was an expert opinion of Professor Dolzer that we filed as part of this case. And he concludes -- he carries out a survey with respect to, as he described, 2,800 bilateral investment treaties at the time. And his conclusion is that customary international law requires states to grant FET to foreign investors. 09:08:15 09:08:18 09:08:22 09:08:26 09:08:28 09:08:31 09:08:33

He looks at this from the customary 09:08:36

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law test perspective of the uniformity and representativeness of the state practice. He -- you'll see in his opinion he looks at a survey of bilateral investment treaty language and finds that almost 94 percent of the BITs he surveyed contained FET provisions that are not linked to MST. 09:08:38 09:08:43 09:08:44 09:08:46 09:08:49 09:08:53

He also reaches the opinion that, in the context of these treaties, that States are acting out of a sense of obligation as to how they are required to treat investors under customary law. 09:08:54 09:08:57 09:08:59 09:09:02

Now, I just want to be very clear as to what our position is. As I say, our position is that -- is that Canada's conduct, Ontario's conduct is sufficiently egregious to meet either of the Waste Management or Glamis Gold standards. So, in our submission, we're not asking you or requiring you to go further and find that somehow there has been a legitimate expectations doctrine or anything else that's developed under customary law. 09:09:06 09:09:08 09:09:10 09:09:14 09:09:17 09:09:19 09:09:21 09:09:24 09:09:28

But we nevertheless support Professor Dolzer's opinion, and as we say here, like the MST requirement which, of course, has had a traditional focus on physical security, if you look back to the Neer standard, a requirement that aliens and alien corporations be treated fairly and equitably in 09:09:30 09:09:33 09:09:39 09:09:41 09:09:44 09:09:47

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relation to business and investment has reached the stage of becoming sufficiently part of a widespread and consistent practice so as to constitute a standard of customary international law with the requisite opinio juris. And, of course, we're picking up the language of Judge Schwebel in terms of what he had stated there. 09:09:49 09:09:51 09:09:55 09:09:57 09:10:00 09:10:02 09:10:06

And I -- listen, I fully appreciate that -- that the issue of determining whether or not something has become a custom is a complicated issue. You know, there are questions as to how much time has been past. There are questions as to the uniformity and consistency. 09:10:06 09:10:09 09:10:11 09:10:13 09:10:15 09:10:18

Dumberry, for example, the best I understand it, he makes -- from his assessment, he finds that you don't have the consistency, because he looks at the variability of some of the bit language. 09:10:20 09:10:25 09:10:28 09:10:30 09:10:33

And I appreciate all of that, and to be frank, we're not requiring you to make that determination, which I think is a complicated determination to make, but we do support the view of Professor Dolzer. He's provided an expert opinion here that there is sufficient evidence, as Judge Schwebel has also said, to be able to come to a 09:10:33 09:10:35 09:10:38 09:10:40 09:10:43 09:10:47 09:10:50

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conclusion. Should you decide you need to determine this issue, that there is sufficient evidence from the state practice, you know, supported by the other references, because Professor Dolzer also refers to other state practice in his opinion to come to the conclusion and then, with respect to that, from that conclusion, as to what that means for FET as it might be applied in the context of the NAFTA. 09:10:54 09:10:56 09:11:00 09:11:05 09:11:08 09:11:11 09:11:16 09:11:21

But, listen, that's all I want to say on the -- the legal issue of 1105. And I want to focus really on the facts because our case, as we have tried to say all along, is based on the facts, and it's an evidence-based case. 09:11:23 09:11:25 09:11:29 09:11:31 09:11:34

So in terms of the representations that were made, I spent a lot of time on this in our opening statement, and I'll be fairly brief in running through the evidence here. Of course, the purpose of my closing is not to repeat what we said in our opening, but to -- to show how, in our view, the evidence that came out through this hearing supports what we said. 09:11:39 09:11:41 09:11:43 09:11:45 09:11:48 09:11:50 09:11:53 09:11:56

We've got this speech Minister Smitherman made in introducing this into legislature and the focus on certainty and creating this attractive investment climate, of certainty that 09:11:58 09:12:01 09:12:04 09:12:07

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power would be purchased at a fair price, 09:12:09
certainty that, wherever feasible, the power would 09:12:12
be connected to the grid, certainty that Government 09:12:13
would issues permits in a timely way. And that's 09:12:16
really where -- I mean, we have the lifting of the 09:12:18
moratorium before that, which starts in terms of 09:12:19
representations made, but this is where their 09:12:22
representations really hit the road and become very, 09:12:25
very powerful from the Government of Ontario. Come 09:12:27
and invest in Ontario. Come and apply for a FIT 09:12:31
contract, and we'll give you certainty, certainty, 09:12:36
certainty, certainty, which, of course, if you're an 09:12:39
investor hearing this, these are words you like to 09:12:43
hear. 09:12:45

Now, what does Sarah Powell say? And 09:12:46
this is going through the oral evidence. She says 09:12:49
it was intended to turbocharge. And that -- she 09:12:52
says: 09:12:56

"That's the word the 09:12:56
Government used, and I think 09:12:56
it did accomplish that goal, 09:12:58
and it did turbocharge the 09:12:59
creation of renewable energy 09:13:01
in Ontario." 09:13:02

And she talked about the fact of her 09:13:02

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involvement in the industry at that time and the 09:13:04
important effect that this had in terms of bringing 09:13:07
investment and creating the industry. 09:13:09

She says that it represented 09:13:12
unparalleled commitment to this process. She 09:13:13
described it as a legislative sea change. And, 09:13:15
again, for those of us who lived through this 09:13:19
period, this was a fundamental -- this was not just 09:13:21
some sort of -- you know, one of 10 policies of the 09:13:24
Government of Ontario. This was their policy, both 09:13:27
to move away from coal burning. This was their 09:13:30
climate change policy. This was their industrial 09:13:32
policy to revive the Ontario economy which had 09:13:36
suffered so much from the financial crisis. 09:13:40

There was complete support. This 09:13:42
wasn't a rogue initiative of Minister Smitherman. 09:13:44
This was complete support, as he says in his witness 09:13:46
statement, at the central level, with the Premier by 09:13:49
his side, in supporting this legislative agenda. 09:13:51
Absolutely supported by the Government. 09:13:55

The pace of change, as Ms. Powell 09:13:56
says, was fast and furious. 09:13:58

And Smitherman says, former Minister 09:14:02
Smitherman: 09:14:05

"Ontario had sent a very, 09:14:05

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very strong signal that they 09:14:08
were moving forward with the 09:14:09
implementation of more 09:14:10
renewable energy, including 09:14:12
offshore wind." 09:14:13

And he said: 09:14:14

"It creates a reasonable 09:14:15
expectation among developers 09:14:17
that they should look at such 09:14:18
opportunities guided by the 09:14:19
information they had." 09:14:20

And in his witness statement, of 09:14:21
course, he said specifically -- and this is 09:14:23
important -- that he, in making these statements, 09:14:26
intended for investors to rely on them, because how 09:14:30
often do we get cases such as this, investment 09:14:35
arbitration cases, where we actually have someone 09:14:39
who was there in the government at the time in a 09:14:41
very senior position bringing forth this 09:14:43
legislation, making it clear that, not only did he 09:14:45
make these representations, but he intended 09:14:48
investors to rely on them, which I think is an 09:14:50
important factor for you to take into account in 09:14:53
determining the objective test as to whether the 09:14:55
investors did reasonably rely on these 09:14:57

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representations. 09:14:59

Rosalyn Lawrence, at the time, you'll 09:15:02
recall, she was the MNR official who testified. She 09:15:04
is talking here about the required REA, the 09:15:08
Renewable Energy Approval: 09:15:10

"Did it apply to wind 09:15:10
projects? 09:15:15
"Yes, it would. 09:15:15
"It applied to onshore wind? 09:15:15
"Yes, it would. 09:15:16
"And offshore wind? 09:15:16
"Yes, it did." 09:15:17

Uwe Roeper, and this is -- this is all 09:15:22
the sense that there were rules in place at this 09:15:24
time for offshore wind. We weren't dealing -- and 09:15:26
I'm talking here about the period before Windstream 09:15:27
is offered the FIT contract when they're deciding 09:15:32
whether or not to apply for the FIT contract and 09:15:35
what they're relying upon. 09:15:37
So, from their perspective, the rules are in place. 09:15:38
From the Government's perspective, as you heard from 09:15:41
Ms. Rosalyn Lawrence, she -- her testimony there, 09:15:43
from her perspective, the rules were in place. 09:15:46

Uwe Roeper, you will recall the 09:15:50
engineer who was advising -- from Ortech, who was 09:15:52

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advising Windstream at the time. He's very clear in saying: 09:15:55 09:15:58

"I'm not talking about the framework, because we believe the framework is fully established." 09:15:58 09:16:00 09:16:01 09:16:02

He's saying: 09:16:02

"I think it was established that although traditionally permitting was done on the Environmental Assessment Act, permitting would not be done as approvals under the Approval Act, but under the Act, the regulations had been put out, which are the REA regulations." 09:16:02 09:16:05 09:16:07 09:16:07 09:16:07 09:16:11 09:16:11 09:16:12 09:16:13 09:16:15

And then he was talking about specific guidance for models to use, what setbacks to use had not been published, so, therefore, we need to develop that. 09:16:16 09:16:18 09:16:21 09:16:23

So he, you'll recall -- and I suggest you read his evidence very carefully -- was making a distinction between rules and guidelines and understood that there were additional guidelines to 09:16:24 09:16:26 09:16:30 09:16:33

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come, but the basic rules -- and we took some time going through all the REA regulations that were in place and all the MNR regulations that were in place. Those rules were available for the project to move forward. 09:16:35 09:16:38 09:16:41 09:16:43 09:16:45

And Mr. Guillet, certainly he indicated that he had been -- he had made some trips over to Ontario at the time; was very interested in it. He was one of the international players looking at it. And he can confirm that, at that time, it was looking like an attractive market for offshore wind. And if the moratorium hadn't played, it would probably be a good place to do offshore wind with the FIT tariff, with these policy steps to make these projects doable. 09:16:47 09:16:51 09:16:54 09:16:57 09:16:59 09:17:01 09:17:04 09:17:06 09:17:09 09:17:10

And you'll see when you review his -- his evidence, he did confirm that it was a good contract, a very good contract. The 20 years was very good. The inflation indexing was very good. The full guaranteed off-take was very good. And we can see in his statements here a confirmation again -- this isn't a but-for analysis, but in the real world -- that he, as an individual working in the offshore wind space, found this an attractive market for offshore wind, again supporting our 09:17:11 09:17:13 09:17:15 09:17:18 09:17:21 09:17:24 09:17:27 09:17:30 09:17:33 09:17:37

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submission of the objective -- objectively as to whether Windstream would've properly relied on this evidence in terms of making their -- or the framework at that time in terms of making their investment. 09:17:40 09:17:44 09:17:47 09:17:50 09:17:51

And we have specifically the testimony of David Mars, asked what he -- what representations he has relied on, and he said: 09:17:52 09:17:55 09:18:01

"This includes Minister Cansfield's announcement that Ontario was open for business for offshore wind, numerous speeches by the members of the Ontario Government, positive investment climate created by Green Energy Act, inclusion of offshore wind in the FIT program, Minister Cansfield's letter encouraging Crown land applicants to apply for a FIT contract and streamline regulatory regime." 09:18:02 09:18:04 09:18:05 09:18:07 09:18:08 09:18:09 09:18:10 09:18:12 09:18:13 09:18:14 09:18:16 09:18:17 09:18:18 09:18:20 09:18:21

That these were all elements that he relied on. 09:18:22 09:18:24

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And William Ziegler, the senior business person, who really was putting his money behind the project, says -- and this may have been a response -- I can't recall right now -- to a question from -- from Dr. Cremades. I can't recall exactly. One of the Tribunal members asked about risk. 09:18:26 09:18:31 09:18:34 09:18:41 09:18:43 09:18:48 09:18:50

"I don't like risk." 09:18:50

He says: 09:18:51

"Risk is what keeps you up at night." 09:18:51 09:18:55

And he talks about prudent investors trying to anticipates what can be thrown at them as they go through the process and mitigate those risks in any way possible: 09:18:55 09:18:57 09:18:59 09:19:03

"The Government risk or a political risk is very hard to understand or appraise if you're not part of that world. And, you know, for this project, we hired people that would help us try to understand what was happening in the province. And from everything we saw, it was 09:19:04 09:19:05 09:19:06 09:19:07 09:19:08 09:19:08 09:19:10 09:19:11 09:19:13 09:19:14

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

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

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

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

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noise setbacks. It's not our line of business." 09:22:51 09:22:53

So I don't know exactly what was meant by, 09:22:54 09:22:57

"There were continuing discussions between the MNR and MOE on this." 09:22:57 09:22:59 09:23:00

In our submission, when you look at the evidence, I think you'll find that both MOE and MNR had -- as Ms. Wallace and Ms. Dumais candidly admitted, were putting offshore wind on kind of a back burner. They were focusing on other issues. They didn't expect there to be a FIT contract for offshore wind. They didn't appear to be particularly aware that the MNR was requiring those applying for a site release to apply into the FIT program or else lose their site release. 09:23:02 09:23:04 09:23:06 09:23:13 09:23:15 09:23:18 09:23:20 09:23:22 09:23:25 09:23:29

So although the statement was there, I don't think we have seen any evidence to suggest that such discussions were actually going on at the time. 09:23:32 09:23:34 09:23:36 09:23:38

So -- and what can we take from that in terms of what representations were made? 09:23:40 09:23:42

Certainly, from Mr. Baines, his perspective, is that the offshore regulations said 09:23:45 09:23:48

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that each setback would be determined on a specific basis based upon each individual project. 09:23:51 09:23:53

And that's the document I mentioned that talked about 40 decibels and would be determined on the noise limitations, in other words, 40 decibels back from a sensitive receptor. So there was no setback. The setback -- my interpretation was the setback would be whatever distance would meet the MOE's guideline of 40 decibels. 09:23:55 09:23:58 09:24:00 09:24:02 09:24:05 09:24:07 09:24:09 09:24:12

And I can tell you that, in the onshore wind world, 40 decibels is the level that you keep -- it is -- it is the particular standard that is applied in that context. It's a standard at which, certainly from a health expert's perspective, the determination is made that any particular levels of annoyance or health effects from the noise of a wind turbine are extremely unlikely to have any effect, because the noise, as the documents say, the MOE's own documents, it's a type of noise at 40 decibels of being in a quiet library. 09:24:13 09:24:17 09:24:17 09:24:19 09:24:21 09:24:25 09:24:30 09:24:32 09:24:36 09:24:39 09:24:43

And this is Uwe Roeper: 09:24:48

"So, in my mind, the lack of a specific setback here tells us what approach to use to 09:24:50 09:24:52 09:24:53

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resolve the issue, and the approach is detailed in noise modelling as opposed to following a standard setback." 09:24:53 09:24:53 09:24:55 09:24:58 09:24:59

Sarah Powell, asked about this: 09:25:00

"They would have had to come up with their own modelling to confirm that the noise receptors onshore would have satisfied the 40 decibels." 09:25:02 09:25:03 09:25:03 09:25:06 09:25:08

So the proponents come up with that modelling in her perspective. 09:25:09 09:25:10

"The industry understood that offshore setbacks would be determined on a site-by-site basis." 09:25:12 09:25:13 09:25:15 09:25:16

And she is talking very involved with the industry at the time. 09:25:17 09:25:18

Rosalyn Lawrence, she was very firm in her evidence, in emphasizing that MNR's perspective. And, remember, that MNR has a very significant role in actually going out and ensuring that these regulations are imposed. They are the ones who have authority over lakes and rivers in Ontario, over 09:25:20 09:25:25 09:25:28 09:25:31 09:25:35 09:25:39

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many of the wildlife issues, the species at risk issues and others. And Rosalyn Lawrence says here that, as a Ministry, they were: 09:25:43 09:25:46 09:25:48

"...very comfortable with what is our normal approach to work with the proponents on a site-by-site basis and iterate and evolve the approval process as we went forward." 09:25:49 09:25:51 09:25:51 09:25:54 09:25:55 09:25:55 09:25:57

And, again, she emphasized that again on the right-hand side: 09:25:57 09:25:59

"Working with the proponent on a site-specific basis and learn and adapt as we go." 09:26:00 09:26:01 09:26:03

Now, I won't belabour this. You heard a lot about this letter. Minister Cansfield says: 09:26:06 09:26:10

"In order to maintain priority position with MNR's site release process, you must submit an application to the FIT program within the FIT launch period." 09:26:12 09:26:13 09:26:15 09:26:16 09:26:17 09:26:18

This is a message from the Government to people in the situation of Windstream that have 09:26:20 09:26:22

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an application, because they had applied during the window in 2008 for -- for site release to use the lake bed to develop a wind program, that you got to apply for the FIT program if you want to preserve your priority. 09:26:25 09:26:28 09:26:31 09:26:34 09:26:36

And you'll recall the subsequent letter from Rosalyn Lawrence to CanWEA, the industry association, making clear that those with pride in the FIT program would get the highest priority, and consistent, in our view, with the understanding of the industry at the time, which, as Sarah Powell says: 09:26:37 09:26:39 09:26:43 09:26:46 09:26:50 09:26:54 09:26:57

"The Feed-In Tariff flipped it on its head. Before the process, the FIT process, land tenure was a gating issue. You go and get your land first, and then you'd move to get the Power Purchase Agreement. The FIT process flipped that on its head. 09:26:58 09:27:00 09:27:02 09:27:03 09:27:05 09:27:06 09:27:07 09:27:08 09:27:10 09:27:11

"The Government is saying you don't move forward on that until you get your FIT 09:27:11 09:27:14 09:27:15

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contract. That's why I call it the key hard gate. Once you get your FIT contract, the Ministries would work with the developer to move through the development process." 09:27:16 09:27:17 09:27:20 09:27:21 09:27:23 09:27:24 09:27:24

So that's the assumption and that's her evidence as to how a commercially reasonable developer would be -- would understand the rules at the time and the framework at the time, consistent, in my submission, with what we hear from the Ministry's witness, Rosalyn Lawrence: 09:27:25 09:27:26 09:27:29 09:27:32 09:27:37 09:27:40

"QUESTION: The basic premise of what we're talking about here in terms of the MNR program is that the basis was that the applicant would secure a FIT contract first; correct? 09:27:42 09:27:44 09:27:45 09:27:46 09:27:48 09:27:49 09:27:50

"That's right. 09:27:50

"And then, once that was done, the MNR would work with the successful applicants and prioritize the applications 09:27:50 09:27:54 09:27:56 09:27:58

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to move forward through the Crown land process to develop the project? 09:28:00 09:28:01 09:28:02

"That's right." 09:28:03

So that is -- we not only have the understanding of the Claimant's witnesses, but we have the understanding from the MNR as to what the process was and that, once someone had achieved the hard gate, the FIT contract, the Ministry would work with them to prioritize the applications. 09:28:06 09:28:09 09:28:11 09:28:13 09:28:18 09:28:21

And you see that after Windstream gets its FIT contract. You see the Ministry sitting down. 09:28:23 09:28:26 09:28:29

And, again, David Mars saying: 09:28:30

"Without this letter, we wouldn't have -- we couldn't apply to the FIT program. We decided to apply based on all the knowledge we had, all aggregated, reviewed. This was one of the parts." 09:28:32 09:28:33 09:28:34 09:28:36 09:28:38 09:28:40 09:28:42

Uwe Roeper talking about the September letter: 09:28:43 09:28:45

"This was a really important document because it explains 09:28:45 09:28:47

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the status of Windstream and especially the letter says, without me rereading it, that this status letter -- this letter satisfied the requirements for you to file for the FIT contract applications. So it's huge. Not only that, this letter was huge because it was actually issued by a Minister." 09:28:48 09:28:50 09:28:51 09:28:53 09:28:54 09:28:55 09:28:56 09:28:57 09:28:59 09:29:00 09:29:02 09:29:03

Now, again, we heard a lot of discussion, for example from the damages experts as to whether or not, you know, the importance of site access and whether that had been obtained, but as far as the developer was concerned, under the FIT process, you had to get the FIT contract first before you could get your site access. 09:29:04 09:29:07 09:29:09 09:29:11 09:29:14 09:29:16 09:29:18

And there was a reasonable expectation that, once you get that FIT contract, the Ministry would work with you and you would get site access. 09:29:20 09:29:22 09:29:24

And of course, again, I just make it clear that we are not submitting in any respect that any of this was guaranteed. We're talking about 09:29:29 09:29:31 09:29:33

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reasonable expectations. We're talking about more likely than not. 09:29:36 09:29:39

Now, in this section, this is encouragement of Windstream to sign the FIT contract. And we've got the testimony, first of all, of Doris Dumais, who is discussing there was a particular meeting where Mr. Baines and Ortech come and sit down with the various Ministries, and she talks -- she -- she talks about the commitment that was made at that meeting. She says, if any, that was made by Mr Mahmood, because she was clear in saying that we didn't make any particular commitments to or guarantees to expedite, but she says: 09:29:41 09:29:45 09:29:47 09:29:50 09:29:54 09:29:57 09:29:59 09:30:03 09:30:05 09:30:08 09:30:11 09:30:13

"The commitment, if any, that was made by Mr. Mahmood would have been a commitment that we are here to work with you to ensure that you understand the regulatory requirements, that you can meet those requirements so that a REA can be issued to the project, if that's appropriate at the time when we review the application." 09:30:13 09:30:15 09:30:17 09:30:18 09:30:19 09:30:20 09:30:21 09:30:22 09:30:23 09:30:24 09:30:26 09:30:28

"So our reason for asking the question --" 09:30:28 09:30:30

Because, actually, this was at a second meeting where they had asked a question about what the drop-dead date was. 09:30:30 09:30:32 09:30:33

"-- was to be able to assess what we could expect applications, understand the pressure for the project proponents so that we could continue supporting them through the renewable energy process that had been established in Ontario." 09:30:34 09:30:36 09:30:38 09:30:39 09:30:39 09:30:41 09:30:41 09:30:43 09:30:44

So, again, a very strong message that, from the Ministry's perspective, there is -- and we heard this throughout the hearing, Ministries, whether it's MOE, whether it's MNR, whether it's the OPA, working pragmatically with developers to move forward these projects, not putting up roadblocks, but working with them, and particularly from the perspective and the understanding that much of the work and all the science would be done by the developers and then reviewed by the Ministries. 09:30:44 09:30:46 09:30:50 09:30:53 09:30:56 09:30:59 09:31:01 09:31:06 09:31:08 09:31:11

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Now, Ian Baines talks about: 09:31:15

"At this particular time, regulatory uncertainty is the guidelines. It's not the rules. The rules are there." 09:31:18 09:31:19 09:31:21 09:31:22

Because he was asked many questions in cross-examination about memos at the time talking about regulatory uncertainty, and he explained his understanding that the framework, the regulations, were in place. 09:31:23 09:31:25 09:31:27 09:31:30 09:31:32

"It's not the rules." 09:31:35

He said. 09:31:36

"It's the particular, more specific guidelines for offshore wind." 09:31:36 09:31:39 09:31:40

And at this point, we do -- and we don't deny the fact that there is uncertainty created when the 5-kilometre setback is set out, because clearly Windstream, at this point, has applied for grid cells that are within 5 kilometres. 09:31:40 09:31:48 09:31:51 09:31:53 09:31:55

And Mr. Baines candidly in his testimony says he had three concerns. His question asked him the setbacks, unknown setback requirements, uncertainty in the site release process, and uncertainty in the detailed 09:31:59 09:32:03 09:32:07 09:32:09 09:32:11

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requirements for the REA. That's put to him in cross-examination. He candidly says: 09:32:13 09:32:15

"Yes, we had those concerns." 09:32:17

And then he goes on to explain, as the other witnesses did, the steps that Windstream took to get comfort with respect to those concerns. 09:32:19 09:32:21 09:32:23

And we have, of course, the testimony about the August 9th letter and the comfort that Windstream took from that, and this is Mr. Benedetti who was -- who played a large role in -- because Windstream had retained him to take the steps to assess whether or not, essentially, the Government was going to be supporting this project or not at the high level so they could get the comfort they want to invest. 09:32:27 09:32:29 09:32:33 09:32:35 09:32:37 09:32:41 09:32:43 09:32:45 09:32:48

And he says: 09:32:49

"The intent was certainly --" 09:32:49

And this is the -- when he's talking about the August 9th MNR letter. 09:32:50 09:32:52

"-- reflecting that they would continue to work with us and move as quickly as possible." 09:32:54 09:32:55 09:32:56 09:32:57

And he says: 09:32:58

"It was always an expectation 09:32:59

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on our part that there would be some finalization of the requirements." 09:33:01 09:33:02 09:33:04

And it's important to remember in this period of July and August that the Ministry of the Environment had put out a policy proposal posted on the EBR, and they to gather information from that process, and then the understanding was that, in September, that process would close, and they would make a determination as to what the appropriate setback was going to be. They were proposing 5 kilometres. They would hear submissions and make the determination. 09:33:04 09:33:07 09:33:09 09:33:13 09:33:17 09:33:19 09:33:22 09:33:24 09:33:26 09:33:28

And you also saw in the evidence we put forward, and it's in the documentary record, that, if you look at the timelines that are -- that the Ministry has internally at the time, that those [redacted] So that was the expectation, certainly within the government, and the expectation from the Windstream side was that once this posting closed in September, the Government would be moving forward, consistent with 09:33:28 09:33:30 09:33:32 09:33:35 09:33:50 09:33:53 09:33:55 09:33:57 09:34:00

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everything the Government had told them about working pragmatically and cooperatively with them to prioritize FIT contracts. 09:34:03 09:34:04 09:34:08

And we have Ian Baines talking about the letter: 09:34:11 09:34:12

"I took this to believe that he was talking about --" 09:34:13 09:34:15

This is Mr. Boysen, the MNR. 09:34:15

"-- the additional applications we've made. He was going to deal with them under the existing process. He would do it in a timely manner and in order that you maintain an applicant of record status in a timely manner." 09:34:17 09:34:18 09:34:20 09:34:21 09:34:21 09:34:23 09:34:24 09:34:25 09:34:26

And we have the evidence, again, and the documentary evidence of Mr. Boysen, after this meeting, writing to his colleagues and saying. 09:34:27 09:34:29 09:34:32

"Listen, I want to sit down with Windstream, and I want to try to work through this grid application process so that we're ready to move when 09:34:35 09:34:36 09:34:37 09:34:38 09:34:39

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the Ministry of Environment decides its 5K setback issue. And we see that consistently through the documentation on the Government's side that that's the expectation." 09:34:41 09:34:41 09:34:46 09:34:47 09:34:48 09:34:49

And here is Uwe Roeper discussing the August 9th letter: 09:34:53 09:34:55

"I know that's been sort of questioned and argued about. My personal view is that there was a lot of surface area there, provided we got the swap --" 09:34:56 09:34:59 09:35:00 09:35:01 09:35:02 09:35:04

He's talking about the grid cell swap. 09:35:04

"-- which the letter from MNR gave us a lot of comfort in August that we would get the land swap." 09:35:05 09:35:06 09:35:08 09:35:09

And he talks in his witness statement about the very unusual nature of obtaining a letter like this, and, indeed, Rosalyn Lawrence from -- from the Ministry talks about how rare it was to get this sort of letter. She says: 09:35:10 09:35:11 09:35:13 09:35:16 09:35:20

"The Ministry hadn't done 09:35:21

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these grid cell swaps before. It was rare to put out a statement like this to Windstream talking about the perspective of MNR to work with Windstream in terms of reconfiguring the grid." 09:35:23 09:35:24 09:35:26 09:35:29 09:35:31 09:35:33 09:35:37

And here's William Ziegler. He put also a lot of emphasis on a conversation that occurred with Mr. Ungerman, and we don't have Mr. Ungerman here. Canada hasn't called him. But he was, at the time, was a senior policy official within the Ministry of Energy. He was interacting with Windstream through Chris Benedetti at this time, and there was a key phone call in July 7th, I believe it was, of 2010, and both Mr. Mars and Mr. Ziegler were on the call. 09:35:38 09:35:45 09:35:48 09:35:50 09:35:53 09:35:57 09:36:01 09:36:02 09:36:05 09:36:09

And Mr. Ziegler talked about this phone call. And he says, from his perspective: 09:36:11 09:36:13

"Mr. Ungerman noted in the conversation the Premier had indicated support as well. Mr. Ungerman was also, I believe -- I don't know this directly, but he was 09:36:18 09:36:20 09:36:22 09:36:23 09:36:24 09:36:25

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

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

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

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

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

And there are a number of documents that, in our submission, are supportive of this, and I just flag one here. That -- this -- this is being discussed at a time when there is a question as to whether or not Windstream can [redacted] 09:40:12 09:40:14 09:40:16 09:40:20 09:40:25

And the statement here -- this is a Ministry of Environment document -- is that: 09:40:27 09:40:30

[redacted]

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[redacted] 09:41:30

Back on. 09:41:33

--- Confidential transcript ends 09:41:33

MR. TERRY: In terms of reasonable expectations at the time, there is clearly not a whiff of evidence, in my submission, that anyone had a reasonable expectation that a moratorium was going to be the result. Certainly there were internal Government discussions, but there's no evidence that anyone on the outside knew that that was going to be the result. 09:41:45 09:41:47 09:41:50 09:41:53 09:41:56 09:41:58 09:42:01 09:42:04

Ms. Powell here says: 09:42:05

> "I don't think the reasonable expectation, given the description of the policy and given the drivers, was a moratorium. 09:42:06 09:42:09 09:42:10 09:42:11 09:42:13

And she says: 09:42:14

> "So what I tried to say in my opinion -- I'm not trying to be facetious about any of this -- is that I don't think a reasonable expectation for anybody, of any of the players, but for the internal workings of Government, which, again, I have no insight on, was the moratorium." 09:42:14 09:42:17 09:42:18 09:42:19 09:42:20 09:42:21 09:42:23 09:42:24 09:42:25 09:42:26 09:42:27

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And, listen, she was very candid, and she said. 09:42:27 09:42:29

> "Listen, I guess I called it wrong"; 09:42:30 09:42:32

Right? She was wrong in that. There was a moratorium, and the process was put in place, but she did not see it coming as an industry insider. And, in my submission, there's no evidence whatsoever that Windstream saw it coming. 09:42:32 09:42:34 09:42:37 09:42:42 09:42:45

And she says: 09:42:48

> "Again, given the legislative sea change, all the work he had done in that preceding year, all the goodwill, would I have been advising clients that there was a moratorium? Was it a likely possibility for offshore? I wouldn't have. I wouldn't have advised that." 09:42:48 09:42:50 09:42:51 09:42:51 09:42:53 09:42:54 09:42:55 09:42:55 09:42:57 09:42:59

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MR. TERRY: And I note in this respect that there is a discussion here that I -- that we had with -- in examination of Ms. Dumais about October 29, 2010, and a particular meeting that occurred then. And Ms. Dumais indicated she listened to Windstream's presentation and made no commitments at that time. And I asked her: 09:43:03 09:43:04 09:43:08 09:43:12 09:43:16 09:43:22 09:43:25

> "I take it you didn't tell Windstream a moratorium was coming?" 09:43:26 09:43:28 09:43:29
>
> "No. Because I wasn't involved in these conversations." 09:43:29 09:43:32 09:43:33

So Windstream is sitting down with the Ministry of Environment official October 29, 2010, 09:43:33 09:43:34

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

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

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

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

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applies whether the -- whether the breach is an unlawful expropriation or whether it's a breach of FET. 10:00:53 10:00:57 10:01:00

So we've given you two case law references here: ADC, which you'll see applied the Chorzow Factory test in the case of an unlawful expropriation on the basis that the lex specialis established under the treaty did not apply to unlawful expropriation, only applied to lawful expropriation. 10:01:00 10:01:03 10:01:08 10:01:13 10:01:16 10:01:19

In our submission, that applies here as well. And, of course, Canada does not dispute that, if an expropriation is found, it was an unlawful and not a lawful one. 10:01:21 10:01:23 10:01:26 10:01:30

We have given you a reference from Gold Reserve as well, applying the Chorzow Factory standard to a breach of FET. 10:01:31 10:01:33 10:01:38

The standard, then, of proof is the balance of probabilities, in our submission, and we have given you another excerpt from Gold Reserve to that effect here. And that's important because you've heard a lot of questions this past week from both sides. And having reflected on this, it seems that there's been a bit of a disconnect, from my perspective. 10:01:43 10:01:47 10:01:49 10:01:53 10:01:55 10:02:00 10:02:06 10:02:08

You have heard a lot of more likely 10:02:09

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than not; or is it likely; or what would likely have occurred from the Claimant's side. And from the Respondent's side, you heard a lot of questions to experts posed in a different way: Was there a guarantee? Was there any certainty? Are you certain that this would have occurred? Is it not possible that this or that would have occurred? 10:02:12 10:02:16 10:02:19 10:02:22 10:02:25 10:02:28 10:02:31

And in our respectful submission, that is just not the test. The test is not one of certainty. The test is not one of whether something was guaranteed. Your task is to assess, in our submission, what would more likely than not have occurred to this company and to this investment had the breaches of the NAFTA, should you find them, not occurred. And so that, we say, is the lens through which you should assess all of the expert evidence you heard this past week. 10:02:34 10:02:36 10:02:40 10:02:43 10:02:46 10:02:50 10:02:53 10:02:57 10:03:00 10:03:02

We have given you another reference there from Khan Resources and a few more: Lemire. And that one speaks to establishing the appropriate but-for scenario and to valuation not being an exact science, as you will have seen. 10:03:05 10:03:08 10:03:15 10:03:17 10:03:21

And another excerpt here from Lemire, which we hope will be helpful to you -- it's also cited in our materials -- which speaks to making 10:03:24 10:03:27 10:03:30

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reasonable assumptions in establishing the but-for scenario and that, in that but-for scenario, the parties should be assumed to have acted reasonably and not to have engaged in unreasonable conduct. 10:03:32 10:03:35 10:03:39 10:03:41

And the State party should be assumed not to have engaged in further NAFTA breaches, which we will come to, but I -- in terms of some of the positions that we heard from Canada in its opening statement, I would submit, is also something that you should bear in mind in assessing the reasonableness of the appropriate but-for scenario. 10:03:45 10:03:47 10:03:51 10:03:55 10:03:58 10:04:00 10:04:03

We say the appropriate valuation date is the date of the award. In answer to one of the questions that was posed, yes, it is -- it is appropriate in cases such as this one, we say, to use a different valuation date, a different date, than the date of the breach. 10:04:07 10:04:09 10:04:14 10:04:18 10:04:22 10:04:26

And that is because this is a case that's quite unique, actually. And we -- quite candidly, we've grappled quite a lot on the Claimant's side with what you do with this kind of situation where you have a development-stage company and what your task is to do is to try to assess what would have happened to that company if the breaches hadn't occurred. Would it have sold? Would Windstream 10:04:27 10:04:30 10:04:34 10:04:39 10:04:41 10:04:45 10:04:48 10:04:51

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have sold this investment on the date of the breach? Would it have sold this investment in May 2012? We say it wouldn't have done that. It wouldn't have done that. If you listened to Mr. Goncalves' evidence, his evidence is that, actually, Windstream's investments were worth nothing to a third-party investor on that date. 10:04:54 10:04:57 10:05:00 10:05:04 10:05:07 10:05:10 10:05:13

And, of course, we disagree with that. But if you take that evidence, if you accept that evidence, you also have to accept, we say, that they wouldn't have sold that investment on that day. Rather, they would have held that investment and perhaps sold it on a subsequent day, perhaps not have sold it at all. 10:05:15 10:05:18 10:05:20 10:05:24 10:05:27 10:05:30 10:05:33

And your task is to establish, we say, or to return them to the position they would have been in had the moratorium not been imposed, had the failure to freeze not occurred, and that you don't accomplish that task if what you're doing is valuing this investment on a date at which, according to the Claimant's experts at least, it was worth nothing. 10:05:35 10:05:37 10:05:39 10:05:44 10:05:49 10:05:51 10:05:55

And, of course, our alternative position is that the appropriate valuation date is May 22, 2012 which is the date on which you will have heard expert evidence to this effect the claims 10:06:00 10:06:02 10:06:05 10:06:10

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

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

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

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

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Windstream's side, is that they were told that the setback would be confirmed either late in the fall or early 2011. 10:11:59 10:12:01 10:12:05

The January 2011 job communications plan that led the Premier's Chief of Staff, Chris Morley, to say, "Sorry, folks. This isn't good enough. You have to kill all the projects," was one in which the 5-kilometre setback would have been confirmed. 10:12:10 10:12:13 10:12:17 10:12:19 10:12:22 10:12:24

You heard in Canada's opening statement that, even if this setback had been confirmed, that Windstream wouldn't have been able to build the project as designed because a lot of the turbines would be within 5 kilometres of a small uninhabited island called Pigeon Island and of a peninsula, uninhabited peninsula, called Long Point and that the MOE was planning on actually not allowing or applying a strict application or a strict definition of shoreline. 10:12:30 10:12:31 10:12:36 10:12:38 10:12:41 10:12:45 10:12:48 10:12:54 10:12:56 10:12:59

In our submission, it's not appropriate to assume that that would have been the definition that would have been applied or that that would have been strictly applied to Windstream. 10:13:01 10:13:03 10:13:05 10:13:07

First of all, you heard from Ms. Lawrence that the 5-kilometre setback in and of itself had no 10:13:11 10:13:14

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scientific rationale. There's a document in the record that's not in your slides, but MNR was apparently told to start from that number and provide a rationale for it. There is no scientific rationale, whatsoever, for the setback. She said there's no science to support an exclusion zone and that she had informed her colleagues of that on many occasions. 10:13:18 10:13:20 10:13:23 10:13:27 10:13:30 10:13:35 10:13:39 10:13:42

Canada's own expert, Mr. Clarke, confirmed that there's no drinking water related reason why you would have a setback established from an uninhabited peninsula or uninhabited island, and we certainly haven't heard any other expert evidence from Canada establishing why that would be necessary. 10:13:45 10:13:48 10:13:51 10:13:54 10:14:00 10:14:02 10:14:04

AOR status would likely have been granted, in our submission, in the but-for scenario. 10:14:08 10:14:11

You have heard from -- you heard testimony from Sarah Powell that the impetus in the Government was to ensure that, once the key hard gate of the FIT contract had been met, that the authorities and MNR would work together with developers to ensure that AOR status was granted in a timely manner. 10:14:13 10:14:16 10:14:18 10:14:23 10:14:27 10:14:30

She said she thought, in her opinion, more likely than not, it was reasonable for a 10:14:35 10:14:37

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developer to assume that they could have gone through that process. 10:14:41 10:14:42

Of course, the letter that we've seen several times now regarding the grid cell swap said: 10:14:45 10:14:48

> "I appreciate your need for certainty on this file, and we will move as quickly as possible through the remainder of the application review process in order that you may obtain Applicant of Record status in a timely manner." 10:14:51 10:14:53 10:14:53 10:14:55 10:14:56 10:14:57 10:14:58 10:15:00 10:15:02

Ms. Lawrence confirmed that it was rare for the MNR to issue that kind of a letter. 10:15:02 10:15:08

And Mr. Benedetti -- Mr. Benedetti confirmed that there was certainly an expectation on the part of Windstream that that would be finalized. 10:15:13 10:15:16 10:15:19

We have several documents in the record, of which this is one, that show that MNR actually was preparing to issue AOR status for Windstream, if Windstream were to proceed. 10:15:25 10:15:26 10:15:29 10:15:34

And so, more likely than not, we ask you to find Windstream would've been permitted to proceed through the land tenure process had the 10:15:39 10:15:43 10:15:46

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moratorium not been imposed. 10:15:49

Now, I pause here on this slide because this is an example of a statement by Canada that, in our very respectful submission, has ended up being a vast overstatement that has not borne out by the evidence that you heard or that you have seen and that's in the record. 10:15:52 10:15:54 10:15:59 10:16:04 10:16:11 10:16:14

Canada, in its Counter-Memorial, said that the Windstream Wolfe Island Shoals offshore wind facility was doomed to fail from the moment that the Claimant signed on the dotted line. And, of course, you have heard ample expert evidence this past week that, in fact, the project was buildable; the timelines were achievable; and that the project, more likely than not, would have succeeded had the moratorium not been imposed upon it. 10:16:16 10:16:18 10:16:21 10:16:23 10:16:27 10:16:30 10:16:36 10:16:40 10:16:43

And in making that submission, I also urge you to reflect on the evidence that you haven't heard from any expert on Canada's side that, in fact -- from any qualified expert on Canada's side, I should say, with experience in offshore wind development, with experience in offshore wind construction to say that, actually, the project was not buildable; the project could not have been successful in the timelines. 10:16:45 10:16:50 10:16:54 10:16:58 10:17:01 10:17:03 10:17:07 10:17:11 10:17:14

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You have heard evidence from Windstream's experts that actually it was, and I will try -- attempt to take you through these slides very quickly. 10:17:14 10:17:17 10:17:19 10:17:23

Here is the project schedule that you have seen already, the simplified version of it, that sets out what we say or what Windstream's experts say the project development timeline would have been had the moratorium not been imposed on the project. And, of course, you'll see that these timelines were extendable by additional force majeure that would have been available, for example, in the event of permitting delays or any other unforeseeable events. 10:17:24 10:17:25 10:17:29 10:17:32 10:17:35 10:17:39 10:17:42 10:17:44 10:17:46 10:17:49

We have given you a chart here on this slide which we hope will be helpful. You saw a version of it in our opening statement. What we have added to the end of it, it explains the discrepancies between the experts on both sides, in terms of project schedule. And we have added a comment at the end about why Canada's evidence on -- with respect to each particular point should be rejected. And we submit that Canada's experts have not, in fact, succeeded in establishing that the project schedule put forward by Windstream was not 10:17:51 10:17:53 10:17:57 10:17:59 10:18:03 10:18:06 10:18:09 10:18:13 10:18:16 10:18:21 10:18:26

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appropriate. 10:18:29

Mr. Roberts -- you heard from him. He's an expert witness with substantial experience with Renewable Energy Approvals -- confirms that the timelines set out in the project schedule was more likely -- was achievable and would more likely than not have been met. 10:18:33 10:18:35 10:18:38 10:18:42 10:18:45 10:18:48

Here we've given you some excerpts from expert reports that you did not hear. 10:18:51 10:18:53

MR. TERRY: For the record, my note says, "Take your time." 10:18:57 10:18:59

MS. SEERS: Take your time. That's a new one. I haven't heard that one from Mr. Terry before. Usually they say, "Stop talking." 10:19:00 10:19:00 10:19:04

So, at the top, my -- the speed at which I'm talking will slow down now. At the top, you have an excerpt from the expert report of Payam Ashtiani from Aercoustics, who actually conducted noise measurements at the site, actual noise measurements at the site, using the turbines that are actually -- the Siemens 2.3-megawatt turbines that are actually installed on Wolfe Island. And he took -- he took measurements from an offshore location to measure the sound that travels across the water in that particular area, and he found that 10:19:08 10:19:10 10:19:12 10:19:17 10:19:22 10:19:26 10:19:28 10:19:30 10:19:35 10:19:38 10:19:40

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the project is expected to have a very small noise impact at any of the land base noise receptors near the project area and that in -- with respect to either layout, it would meet the 40-decibel limit. 10:19:43 10:19:47 10:19:52 10:19:54

Ms. Lane was mentioned during the testimony of Mr. Rose, but in absentia. She found -- she's, of course, a fish expert and fish habitat expert. And her opinion is part of the Baird report. And she didn't identify any issue with the project being permitted to proceed through the regulatory approvals process in respect of fish. And, of course, Mr. Rose recognized her expertise in that regard. 10:19:58 10:20:00 10:20:08 10:20:10 10:20:14 10:20:19 10:20:22 10:20:27 10:20:30

Dr. Kerlinger, a bird expert, finds that there is no biologically significant impacts to any birds likely to result from the installation and operation of the project. 10:20:32 10:20:36 10:20:39 10:20:42

Dr. Reynolds, a bat expert, very little indirect impact on bats due to the lack of impact on terrestrial habitats the bats rely upon for roosting and forging. 10:20:45 10:20:50 10:20:51 10:20:54

And, of course, Mr. Rose confirmed that he wasn't an expert in those areas. 10:20:57 10:20:59

You heard from Mr. Kolberg -- you saw this slide earlier -- that contrary to the stated 10:21:03 10:21:06

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rationale for the moratorium being to protect drinking water, this particular project, based on its particular site-specific attributes and, in particular, the distance from the nearest drinking water intake being, I believe, 12 kilometres would not pose a -- would not pose a problem or a threat to drinking water and that there are low level contaminants. 10:21:10 10:21:12 10:21:16 10:21:21 10:21:24 10:21:27 10:21:30 10:21:33

Mr. Clarke agreed. Drinking water was identified by URS as being a low risk. 10:21:36 10:21:39

You also heard from Mr. Kolberg about the shipping lane navigation channel issue that had been raised, and, in his opinion, the project design from 2015 is sufficient and more likely than not, based on his expertise and experience in the Great Lakes, the issues relating to navigation and the other issues in his report would more likely than not have allowed the project to proceed. 10:21:46 10:21:49 10:21:54 10:21:59 10:22:06 10:22:08 10:22:11 10:22:13

And he mentioned he has over 33 years of direct coastal engineering experience on the Great Lakes. That's all he does. And, of course, Mr. Clarke confirmed that he has no similar experience. 10:22:16 10:22:20 10:22:23 10:22:27 10:22:30

You heard from Ian Irvine of Sgurr Energy that the project was technically feasible and 10:22:32 10:22:35

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more likely than not would have been developed and built within the guidelines of the FIT contract. And he viewed the project schedule as reasonable and achievable. 10:22:38 10:22:40 10:22:44 10:22:47

He mentioned that Sgurr Energy's experience is offshore wind is significant and considerable, and they're working on 14 live lender technical adviser assignments in respect of offshore wind, and many other projects in connection with offshore wind. 10:22:48 10:22:54 10:22:56 10:22:58 10:23:03

And, of course, you'll recall that Canada's expert, Mr. Guillet, confirmed that Sgurr is one of the top technical experts in the field. 10:23:06 10:23:09 10:23:14

You heard from Richard Palmer of Weeks Marine, a very experienced marine contractor in North America. And he said that, at the time, in -- either in 2009 or 2010, I believe, they strongly believed that the Wolfe Island Shoals project would have been the first offshore wind project constructed in North America. And because of -- and they had that view because of the revenue certainty that was guaranteed under the FIT contract. And they saw -- the marine contractor saw the FIT contract as giving Windstream and the Wolfe Island Shoals project a leg up over every other project that was in the market at that time. 10:23:18 10:23:21 10:23:24 10:23:29 10:23:33 10:23:35 10:23:37 10:23:41 10:23:43 10:23:45 10:23:49 10:23:51 10:23:55

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Mr. Palmer viewed the schedule that had been proposed as imminently achievable. 10:24:00 10:24:01

Nothing: 10:24:05

> "There's nothing a stretch here. We have the equipment. The vessels are available. It absolutely could be built." 10:24:05 10:24:07 10:24:09 10:24:10 10:24:11

And you also heard that Weeks Marine began construction of a specific vessel, a jack-up vessel, specifically thinking about the Wolfe Island Shoals project because they were interested in being part of the burgeoning and growing offshore wind market in North America. 10:24:12 10:24:18 10:24:21 10:24:22 10:24:26 10:24:30

And this slide gives you a bit of Mr. Palmer's direct experience with offshore wind projects. 10:24:33 10:24:36 10:24:39

You heard from Mr. Brent Cooper of COWI. He said he saw no fatal flaws, given the proven technology regarding the foundations, and he believes it's more likely than not that Windstream could have achieved these. 10:24:40 10:24:43 10:24:48 10:24:51 10:24:53

He spoke about his seven years of experience directly working with offshore wind structures, nine years of experience with coastal 10:24:56 10:24:59 10:25:01

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waterfront and offshore structures and that COWI was -- his firm, COWI, which is based in Denmark, was actually the designer of the very first offshore wind farm in Denmark and that COWI holds a 14 percent market share over all commissioned offshore wind farms. 10:25:05 10:25:07 10:25:11 10:25:14 10:25:19 10:25:21

You heard from Mr. Roeper, the engineer acting as project manager for Windstream. As he saw it at the time, the project schedule was doable. And he said: 10:25:22 10:25:24 10:25:30 10:25:33

> "What you do, when you manage a project is you design your program around meeting a timeline." 10:25:34 10:25:36 10:25:38 10:25:39

A couple of other issues that arose in response to the URS report alleging that somehow rogue waves in the Great Lakes would pose some sort of a problem for the project: You'll recall Mr. Kolberg being somewhat perplexed and saying he has: 10:25:40 10:25:48 10:25:52 10:25:56 10:25:59

> "...no other way of putting it. This is false. There is no evidence to support that whatsoever." 10:26:02 10:26:03 10:26:05 10:26:06

And when asked about that, Mr. Clarke said that what led to them putting that reference in 10:26:07 10:26:09

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their report was that they had consulted with a friend of theirs and accepted that that was the case, but that it was probably not admissible evidence. 10:26:13 10:26:17 10:26:21 10:26:24

I insert that here simply to assist the Tribunal in weighing the credibility of the experts that have been put forward by Windstream and their experience in connection with offshore wind development versus the experts that have been put forward by Canada in this case. 10:26:26 10:26:29 10:26:35 10:26:38 10:26:40 10:26:42

The label "first of a kind" has been used a lot in the URS report and elsewhere on Canada's side. I give you an excerpt here from the testimony of Mr. Kolberg who says applying a label "first of a kind," in his opinion, isn't particularly relevant or accurate, because all of the components that are at issue with respect to an offshore wind project are well used, well understood, and well known in the Great Lakes. So, in his opinion, applying this kind of a label doesn't really serve a purpose. 10:26:48 10:26:52 10:26:55 10:26:57 10:27:00 10:27:04 10:27:08 10:27:11 10:27:14 10:27:17 10:27:20

More likely than not, the project would have received the required financing. You have here the testimony of Mr. Ziegler, who has decades of experience in developing projects of 10:27:26 10:27:28 10:27:31 10:27:36

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

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

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to the extent that there was delay, they would 10:30:03
likely, in her view, have considered some form of 10:30:06
extension. 10:30:09
She says that the OPA was still 10:30:12
committed to ensuring that the program, the FIT 10:30:14
program, was a success and that they did that by 10:30:17
being commercially reasonable in the FIT contract. 10:30:19
They wanted to see the stuff be built. It was a 10:30:22
cornerstone of their commitment to the economy to 10:30:28
ensure that the FIT program was a success. 10:30:31
You heard from Mr. Benedetti that FIT 10:30:38
contract extensions had happened several times and, 10:30:41
in fact, Mr. Cecchini confirmed that as well, 10:30:45
specifically with respect to extensions that had 10:30:49
been granted based on Ministerial directions that -- 10:30:51
I believe Mr. Cecchini's words were: 10:30:56
"The OPA always follows." 10:30:58
You heard from Mr. Roberts of WSP that 10:31:04
regulators -- and I believe he was talking about the 10:31:09
OPA. Yes, he's talking about the OPA. "They deal 10:31:13
with regulatory delays in a reasonable manner." "They10:31:15
don't impose on the developer to have to sort that 10:31:20
out. It's looked after. It's been our experience." 10:31:23
And of course you heard from Marc 10:31:28
Rose, Canada's expert that he worked on several 10:31:30

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

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

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

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

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

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Mr. Goncalves' evidence -- and I appreciate that he -- that his stance on the issue had moved. He said it was informed by additional evidence, Green Giraffe and others, to say DCF was not the appropriate methodology. But I would submit that it's appropriate to consider, in particular, what he said now. And he said, you know, he had concerns in his -- in the Rejoinder report about this, and he said you have to apply the DCF prudently and responsibly, and we don't disagree, and Mr. Low doesn't disagree with it. We think it is being applied prudently and responsibly here, and we think we've got the evidence to -- to establish that. 10:38:15 10:38:18 10:38:21 10:38:24 10:38:26 10:38:29 10:38:33 10:38:38 10:38:40 10:38:45 10:38:47 10:38:50 10:38:53

And I should mention, you know, beyond the issue with respect to valuation date and taking into account current information, obviously the experts on both sides are, to some extent, in some cases, relying on contemporaneous information. You know, we have examples, for example, of turbine costs back in 2010 and other information in 2010. We also have examples of information beyond that, and, you know, we have experts from both sides obtaining information on that basis. 10:38:54 10:38:56 10:38:59 10:39:02 10:39:04 10:39:07 10:39:10 10:39:13 10:39:16 10:39:19

Our -- our position is the -- that the valuation date is -- for unlawful expropriation is 10:39:21 10:39:24

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the date of the award, and it's appropriate to take into account hindsight, as Ms. Seers said. But even in the event that the valuation is the earlier date, it's important to look closely at -- in terms of the current information versus past information and what's reasonable to consider in terms of expectations even at the time as to technology evolving, schedules, for example, evolving. 10:39:27 10:39:30 10:39:33 10:39:36 10:39:40 10:39:42 10:39:45 10:39:49

We had evidence from -- from Mr. Irvine about, you know, schedules would go through 30 iterations and the importance to look at this, you know, in context and with a reasonable assumption that these -- that, as you move forward through the but-for world, you would have these assessments occurring. You would have schedules being reconsidered. You would have -- you'd have various things occurring in light of further knowledge. And, you know, technological developments and all that is consistent, in my submission, with -- with the reasonable assumptions you take in place in terms of doing a valuation. 10:39:52 10:39:53 10:39:56 10:39:59 10:40:03 10:40:05 10:40:08 10:40:09 10:40:12 10:40:14 10:40:19 10:40:21 10:40:23

Now, for DCF assessment, you look at revenue, cost, and the discount rate. Revenue -- and this is -- again, it's a Deloitte slide. Deloitte emphasizes here that the certainty tied 10:40:26 10:40:31 10:40:34 10:40:38

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with revenue in terms of figuring out both the likely wind resource and the energy levels that would flow from that. And I -- Mr. Goncalves, from BRG, was emphasizing that, on the basis of past information, a newspaper article that, in fact, you know, wind resource estimates weren't very accurate; could be off by five to 20 percent. 10:40:41 10:40:44 10:40:47 10:40:51 10:40:56 10:40:59 10:41:02

And if you look at his slides, he's suggesting, then, that it should be -- you should lower the amount of revenue, basically assume that the wind was blowing at 5 to 10 percent less every year. And on a P50 analysis, of course, you go plus or minus 50 percent. You don't assume that the wind resource is going to be less every year. So, in my submission, that should not be a -- that's not a reasonable assumption to make. 10:41:04 10:41:06 10:41:07 10:41:09 10:41:12 10:41:16 10:41:18 10:41:21 10:41:23

Here is Mr. Irvine who talks about the robust resource, wind resource, and bankable energy unit. And Mr. Goncalves acknowledged that one of the firms, Garrad Hassan, who had done this work, was a leading firm in this area. 10:41:25 10:41:26 10:41:35 10:41:36 10:41:41

With respect to project costs, we also had primarily the evidence of 4C, and the URS experts confirmed that they had been relying, for virtually all of their information, from 4C. And, 10:41:43 10:41:48 10:41:52 10:41:57

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in our submission, Mr. Aukland is the most authoritative expert to look to in terms of costs. You can see this is the chart he used to show how the capital costs estimates align with other wind farms here and particularly in the context of comparable wind farms. And he talked, of course, about some of the Baltic Sea and other wind farms being comparable. 10:41:59 10:42:02 10:42:05 10:42:08 10:42:13 10:42:17 10:42:19 10:42:22

On the issue of turbine costs, this is the slide that -- the next slide here that Mr. Aukland relied on in terms of showing how he came to his assessment of turbine costs here and the various markers in addition to the Conference Board of Canada. And there are two particularly interesting data points here. 10:42:26 10:42:28 10:42:32 10:42:36 10:42:41 10:42:43 10:42:46

The Conference Board of Canada report, which, as you heard, was a Vestas estimate of the actual costs for the 300-megawatt Wolfe Island Shoals wind farm, and that was in December 2010. So very contemporaneous information there. And then you also saw the AECOM document using figures from Mott McDonald, one of the leading offshore energy firms, again with capital costs. You'll recall, when you look at the record, the capital costs in the AECOM report, in 2010, falling within that same 10:42:47 10:42:49 10:42:54 10:42:58 10:43:02 10:43:05 10:43:08 10:43:12 10:43:15 10:43:17

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range of the capital costs that 4C came up with. And, in our submission, that evidence from 4C is the most reliable in terms of assessing what the costs should be. 10:43:23 10:43:27 10:43:31 10:43:33

There is a lot of discussion of the Turbine Supply Agreement and whether or not that should be -- that should be a -- how that should be treated in assessing costs in a but-for world. 10:43:35 10:43:37 10:43:41 10:43:45

And, in our submission, that cannot be treated as an ordinary-course-of-business contract. Bear in mind a moratorium was in place at the time. There was -- essentially with the pending Ontario election and a potential of a new government to come in, the Liberal government was quite -- wanted to ensure that, in general, wind projects would not be -- that the program would not be cancelled by the new government. They made this offer to all developers that the unilateral termination right that was otherwise available under the FIT contracts would be waived, if there were agreements that showed domestic content of 50 percent. 10:43:49 10:43:52 10:43:55 10:43:58 10:44:02 10:44:05 10:44:09 10:44:11 10:44:14 10:44:17 10:44:20 10:44:23 10:44:26

It was on that basis that Windstream enters into this agreement. You will see, and it is clear in the record, this wasn't an agreement that was fully negotiated. And all of the experts, fact 10:44:28 10:44:31 10:44:33 10:44:35

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and expert witnesses, appear to agree that the agreement would likely be renegotiated. 10:44:41 10:44:43

And, of course, the way the agreement worked, there was essentially an option on the part of Windstream as to whether they wanted to trigger a binding offer process that would allow the agreement to go ahead. 10:44:45 10:44:47 10:44:50 10:44:53

So the question then is, whether -- you know, of there was renegotiation, would the agreement have been renegotiated in a manner that would allow the project to proceed or not. As we understood the evidence from the Respondent's witnesses on this side, the argument was that Siemens would've -- would've held firm at the contract price, even if it was going to cause the project to not be economic to go forward. 10:44:56 10:44:59 10:45:02 10:45:04 10:45:06 10:45:09 10:45:14 10:45:17 10:45:20

In our submission, the more reasonable assumption is that the parties would -- would bargain in a way, and clearly Siemens would want to maximize its price, but it would also not want to do so in a way that would kill the project. Both parties would have an interest in proceeding. Siemens would have an interest in being part of the first North American offshore wind project. And it is not likely, as we say in the fourth bullet, that Siemens would insist on a price that would make the 10:45:23 10:45:25 10:45:29 10:45:32 10:45:34 10:45:37 10:45:39 10:45:41 10:45:46 10:45:48

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project uneconomic or impose a schedule that would cause it to fail. 10:45:50 10:45:52

And -- and to the extent the Tribunal is engaging that exercise of assessing whether a reasonable assumption would be made, in our submission, it's appropriate to make a reasonable assumption that Siemens would be incented in this way and that, therefore, the price wouldn't go up. The price would be adjusted to an amount that is appropriate for the project to go ahead. And if there's -- the best indicator of what that price would be would be the market price data that Mr. Aukland put forward. 10:45:53 10:46:00 10:46:03 10:46:05 10:46:08 10:46:11 10:46:14 10:46:17 10:46:20 10:46:22 10:46:24

And you will see in this respect in his testimony he says: 10:46:26 10:46:27

> "It's not a realistic term in price." 10:46:28 10:46:30

He says: 10:46:30

> "That price in the agreement is not relevant in the marketplaces. The projects don't pay that price for their turbines. 10:46:31 10:46:33 10:46:33 10:46:35 10:46:37

And he says: 10:46:38

> "There was a competitive 10:46:38

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> market in North America for turbines at the time. They wanted to get on with this project. The industry has a good context. There was ambition." 10:46:39 10:46:41 10:46:42 10:46:44 10:46:46 10:46:48

Now, in terms of the -- we have done revenue and costs. The next question is the discount rate. 10:46:48 10:46:51 10:46:53

And in this particular case, this is the Deloitte slide setting out where they land on the discount rate and, particularly, the cost of equity, which seemed to be the major -- the most important difference between the experts on this issue. And you'll see here Deloitte's assessment in applying the discount rate and the factors it takes into account and the various -- the permitting risks that it brings into its discount rate. 10:46:54 10:46:56 10:46:59 10:47:01 10:47:04 10:47:06 10:47:11 10:47:13 10:47:16

And this is a slide from BRG which is helpful in showing the difference between the BRG and the Deloitte analysis as to what the likely cost of equity would have been in this case. What's important here -- and this really became clear from -- through the cross-examination of Mr. Goncalves -- is Mr. Goncalves was adding two elements. If you 10:47:17 10:47:21 10:47:25 10:47:27 10:47:30 10:47:33 10:47:37

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

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

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

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

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

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

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

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

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

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

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

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

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five years have passed, the five years since the decision to defer offshore wind. And it ignores all of the content, all of the -- all of the reasons for the delays, taking -- taking that information out of context. 11:09:51 11:09:54 11:09:59 11:10:03 11:10:07

Ultimately, the Claimant urges you to ignore the realities of the uncertain regulatory framework for offshore wind in Ontario, the hard deadlines of the FIT contract, the commercial reality surrounding what would have been the first offshore wind project in North America. 11:10:09 11:10:12 11:10:14 11:10:17 11:10:20 11:10:23

The fact is that the Claimant was fully aware of the regulatory uncertainty surrounding offshore wind when it applied to and later signed back its FIT contract with the OPA. In doing so, it undertook the responsibility of bringing its project into commercial operation by the milestone date for commercial operation specified in the FIT contract. 11:10:28 11:10:30 11:10:33 11:10:36 11:10:41 11:10:43 11:10:46 11:10:49

The Claimant asks you, as well, to overlook this aspect of the Claimant's responsibility and find, instead, that through goodwill, pragmatism, and the support of the Ontario government, the OPA, industry players like Siemens, it would have overcome every hurdle standing in its 11:10:52 11:10:56 11:10:59 11:11:02 11:11:06 11:11:10

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way to develop a 300-megawatt wind farm. But this isn't a case of a proponent that had a FIT contract and all of its permits lined up. 11:11:13 11:11:18 11:11:22

According to the Claimant, the realities it faced were no different than those faced by onshore wind projects in Ontario. 11:11:26 11:11:27 11:11:29

Mr. Baines said it most succinctly, I think, when he said: 11:11:32 11:11:35

> "I think the easiest way to say it was that if we took the Wolfe Island project and we put it in the water, we'd have this offshore Wolfe Island Shoals project." 11:11:36 11:11:37 11:11:39 11:11:41 11:11:43 11:11:45

But as Canada's experts have made abundantly clear, the only thing in common between offshore and onshore wind development is the wind. For example, Jerome Guillet of Green Giraffe, an expert in renewable energy financing, explained how offshore and onshore wind are completely different industries. The costs are higher, with turbines amounting to 90 percent of the cost of an onshore wind project in comparison to only 30 percent of the cost of an offshore wind project. 11:11:46 11:11:51 11:11:53 11:11:56 11:12:05 11:12:08 11:12:11 11:12:16 11:12:20 11:12:22

Offshore wind development also 11:12:25

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involves different -- differences, including limited construction season, different equipment, additional built-in redundancies and, most importantly, the intersection of numerous industries learning to work together. 11:12:27 11:12:29 11:12:33 11:12:37 11:12:40

Mr. Guillet also explained how the difficulty in technical complexity of offshore wind projects is much greater and how well-established oil and gas companies tried to enter this market and failed. In Mr. Guillet's words: 11:12:43 11:12:46 11:12:49 11:12:52 11:12:56

> "It's not at all like onshore. Offshore is a completely new sector. It is industries that didn't know each other that meet in the middle of water in a very hostile place to build." 11:13:01 11:13:03 11:13:04 11:13:06 11:13:08 11:13:10 11:13:12

The Claimant also urges you to look past the fact that it was the only developer to apply for an offshore wind FIT contract of over 10 megawatts. Its witnesses have almost consistently described Ontario as having a particularly attractive, generous, secure framework for offshore wind. But the Claimant can't get past -- it can't explain why none of the world's leading offshore 11:13:17 11:13:19 11:13:21 11:13:26 11:13:30 11:13:32 11:13:36 11:13:41

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wind developers were enticed to invest in Ontario. If Ontario truly had the best framework in the world, where was Dong Energy? Vattenfall? PNE? E.ON? These are the world leaders. And why is it that, of all of the Crown land applicants, only two applied to the FIT program? This is in direct contrast to the interest Ontario received in onshore wind from industry leaders, such as Nexterra, Pattern, Samsung. 11:13:43 11:13:46 11:13:48 11:13:53 11:13:57 11:14:01 11:14:05 11:14:08 11:14:11

As you have heard from the experts this week, offshore wind development is not onshore wind development. Windstream is not Dong Energy, and North America is not Europe. 11:14:15 11:14:17 11:14:19 11:14:22

Let me turn now to the law. 11:14:26

The Claimant has brought a broad-ranging claim that Canada has breached Articles 1102, 1103, 1105, 1110 and that, in the alternative, Canada's breached through the actions of the OPA these Articles. That said, the Claimant has offered no argument over the past days in support of its Article 1103 claim or its claims involving the OPA. The Claimant has neither formally abandoned these claims, nor has it pursued them. 11:14:36 11:14:38 11:14:42 11:14:46 11:14:49 11:14:53 11:14:55 11:14:59 11:15:03 11:15:06

With respect to its claims involving the OPA, the 11:15:07

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Claimant continues to argue, as counsel stipulated in its opening statement, that the OPA's a state agency and, to the extent to which it was exercising the authority of Energy, it failed to exercise that authority. 11:15:09 11:15:12 11:15:15 11:15:18 11:15:22

As previously set out in Canada's written pleadings, whether the OPA is acting with delegated governmental authority is wholly inapplicable, because the Claimant fails to challenge a single action of the OPA in this dispute. It is, frankly, unacceptable that the Claimant has refused to abandon these claims involving the OPA, forcing Canada to spend additional time and resources responding to them and obliging the Tribunal to resolve them. 11:15:25 11:15:28 11:15:31 11:15:34 11:15:36 11:15:39 11:15:42 11:15:45 11:15:48 11:15:51

This is equally true of the Claimant's Article 1103 claim. Shockingly, the Claimant has pursued this claim despite explicitly admitting that the circumstances surrounding the award of the solar project to Samsung are not currently known to Windstream. This is despite having engaged Mr. Smitherman as a witness, the very person who negotiated the investment agreement with Samsung. The Claimant's expert witness Sarah Powell also testified to being involved in the Korean 11:15:55 11:15:57 11:16:02 11:16:03 11:16:07 11:16:08 11:16:13 11:16:15 11:16:18 11:16:21

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Consortium's projects. Accordingly, the claim that the factual circumstances surrounding the treatment of Samsung were unknown to the Claimant are simply not credible. 11:16:23 11:16:27 11:16:29 11:16:32

The Claimant's decision not to withdraw these claims is an issue that Canada will return to in a cost submission. 11:16:35 11:16:36 11:16:39

Now, a word about the Claimant's national treatment claim: While the Article 1102 claims have been briefly addressed during the hearing, the Claimant still fails to identify how the treatment it received was as a result of nationality-based discrimination. 11:16:43 11:16:46 11:16:50 11:16:53 11:16:56 11:16:59

It is notable that, despite having argued in its Reply Memorial that the procurement exception does not extend to procurement of electricity by the OPA, Claimant's counsel and witnesses have consistently referred over the past two weeks to the FIT as a Ministry of Energy procurement program. 11:17:02 11:17:04 11:17:07 11:17:09 11:17:12 11:17:17 11:17:19

For example, in its opening remarks, the Claimant specifically referred to the Ministry's consideration of the cost of offshore procurement, and Mr. Benedetti referred to the procurement of renewable energy managed by the Ministry of Energy. 11:17:21 11:17:24 11:17:27 11:17:30 11:17:34

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In sum, the Claimant recognizes that the program is the Ministry of Energy procurement program, which means that Article 1102 and Article 1103 do not apply. 11:17:37 11:17:41 11:17:43 11:17:47

Let's turn now to Article 1105. Article 1105 prescribes the minimum standard of treatment with respect to the treatment of foreigners and their property. This was definitively determined by the NAFTA Free Trade Commission's binding Note of Interpretation, 2001. 11:17:49 11:17:57 11:18:00 11:18:01 11:18:05 11:18:07

Now, you've asked whether a general practice can be discerned from the 3,000 BITs and other agreements. In Canada's opening remarks, Ms. Tabet noted that treaties may contribute to the crystallization or development of a rule of customary international law, but there should be no presumption that they do. 11:18:10 11:18:15 11:18:18 11:18:21 11:18:24 11:18:26 11:18:29

She brought you to the North Sea Continental Shelf cases and the three criteria that the ICJ lays out, namely, that the provision must be of a fundamentally norm-creating character. There must be extensive and virtually uniform state practice. And there must be practice that shows a general recognition of a rule of law or legal obligation. She also brought you to the Diablo 11:18:32 11:18:35 11:18:38 11:18:42 11:18:45 11:18:48 11:18:51 11:18:54

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decision which noted that the fact that diplomatic protection provisions are often included in BITs is not sufficient to establish they are custom. And then finally she pointed to Professor Dumberry's soon-to-be-published book. 11:18:58 11:19:00 11:19:02 11:19:05 11:19:08

Now, Canada agrees with the conclusion that he draws, starting at page 172, that the practice of states does not support the proposition that standalone FET clauses have become part of the customary international law minimum standard of treatment. 11:19:10 11:19:13 11:19:16 11:19:20 11:19:23 11:19:25

This is because the standalone FET clause does not have a sufficient normative content to constitute a rule of customary international law. BITs contain differently-worded FET and MST provisions. And, therefore, there is no uniform consistent practice. And, finally, the practice of States outside the signatories to the treaties with standalone FET clauses is, in fact, to reject the application of the broader standard. 11:19:28 11:19:31 11:19:33 11:19:36 11:19:40 11:19:45 11:19:49 11:19:50 11:19:56

The latter is an important point. For a broad FET provision to have become custom, it must be demonstrated that States consider such rules to be obligatory, obligatory apart from the treaty obligations. NAFTA parties have specifically 11:19:58 11:20:03 11:20:06 11:20:09 11:20:13

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

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

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

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

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technical guidance bulletin for wind turbine setbacks, also confirmed that setbacks would play a significant role in the assessment of the offshore wind facility report and strongly encouraged applicants to meet with the Ministry of the Environment prior to preparing this report. 11:25:39 11:25:42 11:25:45 11:25:48 11:25:51 11:25:53

The ongoing work to develop the regulatory requirements for offshore wind facilities resulted in the June 25, 2010 policy notice on offshore wind, which stated that the Ministries were working together to provide greater certainty and clarity on offshore wind requirements. Like the ones that preceded it, this notice was posted publicly on the EBR Registry, because public consultations are required before making regulatory amendments. 11:25:57 11:25:59 11:26:01 11:26:06 11:26:10 11:26:12 11:26:17 11:26:20 11:26:23 11:26:25

MOE's policy notice that was posted attached a discussion paper, and that discussion paper discussed various considerations for the public to comment that were relevant to offshore wind projects and the protection of human health and the environment. And it proposed a 5-kilometre shoreline exclusion zone for all offshore wind facilities. 11:26:29 11:26:34 11:26:37 11:26:41 11:26:45 11:26:47 11:26:49 11:26:52

As you have heard from Marcia Wallace, 11:26:56

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the public consultation spanned all of the topics in the discussion paper, not just noise. It's important here because the Claimant focuses really on noise. But that discussion paper contains many more considerations, including ecological considerations, cultural resources, shipwrecks, shipping lanes, recreational use, drinking water, and beach erosion. 11:26:59 11:27:02 11:27:05 11:27:07 11:27:10 11:27:14 11:27:16 11:27:21

Ontario's decision to defer offshore wind was a direct outcome of the June 25, 2010 EBR policy notice. And it was informed by MOE's consultations on that policy notice. It was also informed by the considerable amount of work undertaken by the Government, and particularly MOE. They held technical workshops with experts in the summer and the fall of 2010. They conducted a jurisdictional scan of the requirements for offshore wind development across the Great Lakes. And all of this highlighted the need for collaboration with the federal government as well as U.S. governments, which also began around the same time. 11:27:22 11:27:25 11:27:30 11:27:35 11:27:40 11:27:42 11:27:47 11:27:49 11:27:53 11:27:54 11:27:58 11:28:00 11:28:05

When Minister Wilkinson took office, the Ministry had published the EBR policy notice, but public consultations have yet to conclude. As Minister -- as Mr. Wilkinson testified, the Ministry 11:28:09 11:28:12 11:28:14 11:28:19

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received an unprecedented number of comments, approximately 1,400 in total. 11:28:22 11:28:24

The feedback that MOE received in response to its June 25, 2010 EBR posting included a broad range of concerns, which went well beyond the issue of noise. In contrast to the 23 respondents who supported offshore wind development, 65 percent of the 1,400 comments received were opposed to offshore wind, raising various issues. And 12 percent recommended that the Government defer offshore wind until the proper health and environmental studies were completed to support it. Ultimately, as described by Ms. Wallace, the diverse range of comments received in response to the EBR posting informed the deferral decision. 11:28:28 11:28:31 11:28:35 11:28:39 11:28:43 11:28:46 11:28:50 11:28:56 11:28:59 11:29:01 11:29:05 11:29:09 11:29:12

Now, you had the benefit of hearing directly from Mr. Wilkinson. He testified that he made the decision because the regulations were still not finished. In his words: 11:29:16 11:29:18 11:29:22 11:29:25

> "That fell to me. I didn't -- it didn't fall to anyone else. It wasn't the Premier's decision. It wasn't the Minister of Energy's decision. It was my 11:29:27 11:29:28 11:29:30 11:29:33 11:29:34 11:29:35

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> decision." 11:29:37

Mr. Wilkinson advised that he received the memo on January 6, 2011 on offshore wind policy. We haven't put that memo up on the screen because it's confidential, but you have it in your books before you from Brenda Lucas. It raises concerns regarding the proposed approach to move forward with offshore wind without adequate science to build a more specific offshore approvals process. 11:29:39 11:29:40 11:29:46 11:29:48 11:29:50 11:29:54 11:29:56 11:29:59

The memo was written by his senior policy adviser, and as he explained when he was before you, it would have been inserted into his book that he took home every evening. So he would have read it that night. 11:30:03 11:30:05 11:30:08 11:30:11 11:30:14

According to Mr. Wilkinson, these concerns, along with the 1,400 comments received in response to the MOE's June 25th offshore wind policy proposal, raised very, very big red flags. Mr. Wilkinson testified that he remembers making the decision clearly. In his words: 11:30:17 11:30:19 11:30:22 11:30:26 11:30:33 11:30:35

> "I met with my Deputy. I remember distinctly why I met with my Deputy, what the meeting was about, why I called the meeting, and what 11:30:37 11:30:39 11:30:41 11:30:43 11:30:45

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

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

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

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

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And despite the fact that the 11:35:06
Ministers of Energy and Natural Resources ultimately 11:35:08
aligned with Minister Wilkinson's decision, it is 11:35:12
abundantly clear that their offices and, in some 11:35:14
cases, the bureaucrats and their ministries did not 11:35:17
support Minister Wilkinson's decision. It shouldn't 11:35:20
come as a surprise to anybody who's familiar with an 11:35:22
interagency process or an interdepartmental process 11:35:24
or a interministerial process. It's the way 11:35:28
government works. 11:35:30

In fact, we know that MNR wanted to 11:35:31
proceed with the development of offshore wind. The 11:35:35
bottom line for MNR was that they were as ready for 11:35:37
this project as for any others on Crown land, which, 11:35:40
Ms. Lawrence explains, was consistent with MNR's 11:35:43
approach to ecological approvals. They're not 11:35:47
accustomed to working with firm setbacks. Instead, 11:35:52
MNR prefers to work with the proponent on a 11:35:54
site-specific basis and, she said, "learn as we go." 11:35:57

The very idea of a setback was 11:36:00
unacceptable to MNR. As Ms. Lawrence explained, 11:36:02
her: 11:36:04

> ".. head exploded in anger at 11:36:04
> the thought of having spent 11:36:06
> some number of months 11:36:07

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> explaining that we had no 11:36:08
> science to support an 11:36:09
> exclusion zone, and it left 11:36:10
> MNR in a very tricky 11:36:12
> communications position, 11:36:14
> particularly since we had 11:36:15
> indicated our comfort with 11:36:16
> the knowledge that we did not 11:36:17
> have our confidence in the 11:36:20
> Environmental Assessment 11:36:22
> Review processes when we 11:36:23
> lifted the window on the 11:36:25
> moratorium in 2006." 11:36:28

Minister Gerretsen was another person 11:36:29
who was quite unhappy with Minister Wilkinson's 11:36:34
decision, according to a contemporaneous e-mail sent 11:36:37
by Jeff Garrah of KEDCO to Nancy Baines, an e-mail 11:36:40
that was put to Mr. Baines during his 11:36:44
cross-examination. Minister Gerretsen went to bat 11:36:46
for the project and had a serious confrontation with 11:36:50
Wilkinson over it. 11:36:53

It's important to note here who 11:36:56
Minister Gerretsen was or where he was from, rather. 11:36:59
He was the Member of Parliament from the Kingston 11:37:01
and Wolfe Island riding, and his son happened to be 11:37:04

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the mayor of Kingston. 11:37:07

Additionally, it was suggested to Mr. 11:37:10
Wilkinson on cross-examination that his involvement 11:37:11
in the decision not to proceed with offshore wind 11:37:15
was limited to whether or not to allow Windstream to 11:37:17
[redacted] or whether to keep it whole. 11:37:20
However, Mr. Wilkinson testified these discussions 11:37:25
occurred because of his decision not to proceed with 11:37:29
offshore wind, which was made two weeks prior. 11:37:32

We also know from the documents that 11:37:40
Minister Wilkinson's decision was very poorly 11:37:41
received by the Energy Minister's office, Craig 11:37:45
MacLennan. The Energy Minister's Chief of Staff 11:37:47
sheepishly explained to Mr. Baines a week after the 11:37:51
decision that MOE was calling the shots, making 11:37:53
clear that MOE wants to get it right before 11:37:56
proceeding with offshore regulations. He added 11:37:58
that: 11:38:01

> "The government was concerned 11:38:01
> with legal challenges that 11:38:03
> were occurring with onshore 11:38:04
> wind projects, which required 11:38:06
> that future offshore 11:38:07
> regulations would be 11:38:08
> bulletproof and survive 11:38:09

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> challenges." 11:38:11

Internally Craig MacLennan was less 11:38:14
diplomatic, declaring: 11:38:17

> [redacted] 11:38:18

When I asked Mr. Baines if he believed 11:38:21
Craig MacLennan at the time, he responded that he 11:38:24
did not and that he thought the decision was a 11:38:25
political decision. Then he further explained, in 11:38:28
response to a question from Dr. Cremades, that: 11:38:34

> "A provincial election was 11:38:37
> coming up, and there was 11:38:39
> considerable opposition to 11:38:40
> wind power." 11:38:41

The BANANAs we were referring to 11:38:41
earlier. He added that: 11:38:45

> "The Liberals had a minority 11:38:46
> government. They were just 11:38:48
> on the edge. Seven of their 11:38:48
> ridings were at risk because 11:38:51
> of offshore wind." 11:38:52

Mr. Baines insinuated that the 11:38:52
government made a calculated decision to defer 11:38:58
offshore in order to save seven seats. He suggested 11:39:00
that the party calculated that, if it put a stop to 11:39:02
offshore wind, the close ridings would swing in the 11:39:05

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party's favour, and the government would be re-elected. And as Mr. Baines explained: 11:39:07 11:39:09

> "This is why the government cancelled the offshore very publicly, I believe, in an attempt to mollify public concerns and win the election." 11:39:12 11:39:14 11:39:16 11:39:18 11:39:19 11:39:20

Now, the news article that he relies on cites to a Liberal insider who confided that officials scrambled to announce the climb-down shortly afternoon on a Friday when they realized it would be buried by the news in Egypt. Burying the announcement of the deferral on a Friday afternoon is not consistent with Mr. Baines' idea that it was a very publicly announced decision. And as Mr. Baines himself recognized, regardless of the decision, the Liberals ended up losing all seven of those seats. So the decision that Mr. Baines said was calculated to help the government retain seats actually did the contrary. In fact, Mr. Wilkinson also lost his seat. 11:39:22 11:39:24 11:39:28 11:39:31 11:39:33 11:39:36 11:39:40 11:39:42 11:39:47 11:39:51 11:39:54 11:39:56 11:39:59 11:40:02

Mr. Baines also testified that Minister Wilkinson's decision was inconsistent with what Windstream had been hearing through its 11:40:05 11:40:07 11:40:11

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government relations firm. He testified that the Ministry of Environment wanted to see them proceed as a one-shot or an active research project. 11:40:15 11:40:18 11:40:19

Unfortunately, I think Mr. Baines misremembers these matters. What Windstream's documents indicate is that their government relations firm learned from CanWEA, the Canadian Wind Energy association, that a representative of the Energy Minister's office wanted to see Windstream proceed as a pilot, a representative of the Ministry of the Energy, not Ministry of the Environment. And the idea of an active research project was raised by Windstream with MOE, but that wasn't until December 7, 2011, long after the decision on the deferral. 11:40:23 11:40:24 11:40:26 11:40:29 11:40:32 11:40:35 11:40:38 11:40:41 11:40:43 11:40:47 11:40:51 11:40:55

However, this was never the view of the Ministry of the Environment. In fact, we know that the MOE, both at the official level and in the Minister's office, [redacted]. 11:40:57 11:40:58 11:41:01 11:41:07

Third, the Claimant argues that the lack of documentary evidence involving Minister Wilkinson somehow makes the testimony that he has provided questionable. During his cross-examination, Mr. Wilkinson was asked whether 11:41:13 11:41:15 11:41:18 11:41:20 11:41:23

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he was aware of any documents in the record regarding the meeting with his Deputy Minister other than the January 6th memo that he received from the senior policy adviser. He said that he was not, which is not surprising, given that the meeting that took place was a face-to-face meeting with his Deputy Minister. 11:41:26 11:41:28 11:41:30 11:41:33 11:41:37 11:41:39 11:41:42

And after confirming the decision with his Deputy Minister, he told his Chief of Staff to communicate it to the Premier's Office. This too was an oral communication, as he stated: 11:41:43 11:41:45 11:41:49 11:41:52

> "The decision that I made was a change for the path that the government was on. It was important before it became announced that everybody in the government knew where we're were going, and so it was a matter of getting people coordinated." 11:41:54 11:41:57 11:41:59 11:42:00 11:42:02 11:42:03 11:42:03 11:42:05 11:42:06

Fourth, the Claimant clings to this idea that the decision was made by the Premier's Office, not by Minister Wilkinson. And, here, the Claimant continues to rely on the draft news release announcing a decision to defer offshore wind 11:42:07 11:42:12 11:42:14 11:42:18 11:42:21

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development and the Premier's Chief of Staff's response to it on January 11, 2011, dissatisfied with the draft, made clear that the purpose of the news release was to kill all projects, except the Kingston one, of course, meaning the Windstream Wolfe Island Shoals project, and not suck and blow. 11:42:23 11:42:25 11:42:29 11:42:31 11:42:34 11:42:36

In the same series of e-mails on January 11, 2011, the Premier's Chief of Staff demanded that the news release be rewritten to clarify that the province would not be proceeding with offshore wind due to [redacted]. It's not by accident the Premier's chief of staff used the very words found in MOE's documents, including the briefing note provided to the Ministry of the Environment. 11:42:41 11:42:43 11:42:47 11:42:49 11:42:57 11:43:01 11:43:05 11:43:08

Mr. Wilkinson indicated that he would have taken that January 6th memo home that evening, meaning that the meeting with the Deputy would not have taken place until the next day or possibly the day after that. That puts it at either January 7th, which was a Friday, or the Monday following. Following that meeting, he instructed his Chief of Staff to inform the Premier's Office. Since, according to Mr. Wilkinson's testimony, the chiefs 11:43:11 11:43:13 11:43:17 11:43:20 11:43:22 11:43:25 11:43:30 11:43:32 11:43:35

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met each morning, this suggests that his concerns would have been brought to the Premier's Chief of Staff on the morning of January 10th or possibly January 11th. 11:43:39 11:43:41 11:43:43 11:43:45

The fact that such a change was vetted with the Premier's Office is normal. Even Minister Smitherman agrees that, every time there is a decision of significance that includes the centre, whether that be brought through formal or informal engagement of the Chief of Staff to the Premier or somebody else in his office. That's how important decisions are made. So there's no surprise that the Premier's Office was involved in the communication of the decision to other Ministries and in the review of communications materials. Specifically, the message was, the message from the top, was necessary to communicate that the policy was changing and to ensure that everyone was on the same page. As Mr. Wilkinson recognized, this was a difficult decision for the Ministry of Energy, which meant that it was important that he had the backing of the top-level of government. 11:43:47 11:43:49 11:43:53 11:43:57 11:44:00 11:44:03 11:44:06 11:44:11 11:44:14 11:44:16 11:44:19 11:44:23 11:44:26 11:44:29 11:44:32 11:44:35 11:44:39 11:44:42

The Claimant suggests that we look at a few of the Premier's Chief of Staff office to conclude that the decision was made for improper or nefarious 11:44:44 11:44:47 11:44:52

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reasons -- to look at a few of their e-mails, rather. 11:44:53 11:44:58

However, as confirmed by the testimony of Rosalyn Lawrence and Marcia Wallace, the discussions on offshore wind had occurred many, many months prior to January 11th. Ms. Lawrence testified that, over the course of the fall, MNR began working with MOE, who was very involved in discussions with [redacted] Similarly, Ms. Wallace testified that discussions occurred in the fall of 2010, across the Ministries, even at the ADM and Deputy Minister level. 11:44:59 11:45:01 11:45:05 11:45:08 11:45:11 11:45:13 11:45:16 11:45:21 11:45:24 11:45:30

The Claimant suggests that you ignore all of that, ignore all of the policy discussions that occurred across the Ministries in the fall of 2010, and instead focus on a few e-mails from the Premier's Office. 11:45:31 11:45:35 11:45:38 11:45:40 11:45:42

Ultimately what is clear from the evidence is that the Environment Minister's decision was brought to the Premier's Office, and on January 11th, it was communicated to the Energy Minister's Office. No other explanation makes sense. Since the decision had been made by the Premier's Office and not by the Minister of Environment, the policy staff of the Ministry of Energy would not 11:45:44 11:45:46 11:45:49 11:45:52 11:45:54 11:45:57 11:46:02 11:46:04

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have been so angry with Minister Wilkinson. Same is true for Minister Gerretsen. 11:46:07 11:46:11

And as Mr. Terry stressed again in his remarks today -- I wish I could read my handwriting. 11:46:15 11:46:17

[Laughter.] 11:46:29

MR. NEUFELD: It was even put to Minister Wilkinson during his cross-examination that his decision was based on the Windstream project. However, as Mr. Wilkinson testified, the decision he made had nothing to with the Windstream project. His decision was with respect to creating province-wide rules for offshore wind. 11:46:42 11:46:45 11:46:48 11:46:50 11:46:54 11:46:58 11:47:01

Specifically, Mr. Wilkinson's decision was based on the lack of science on the impacts of large-scale offshore construction in the Great Lakes. The Ministry was developing rules for all the Great Lakes, and he was concerned that such rules must be based on science and the precautionary principle. 11:47:04 11:47:06 11:47:09 11:47:12 11:47:14 11:47:18

And despite still not being able to read my handwritten notes, now I can at least remember what they say. As Mr. Terry stressed again this morning, everything for the Claimant turns on Minister Wilkinson's decision with respect to the Windstream project. 11:47:23 11:47:25 11:47:28 11:47:31 11:47:34 11:47:36

What we know is that Minister 11:47:37

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Wilkinson didn't make a decision on that basis. He made a decision on the basis for the need for province-wide setbacks, province-wide rules. 11:47:38 11:47:41 11:47:43

To conclude my comments on Article 1105, the evidence shows clearly that the decision to defer offshore wind was made by the Minister of the Environment in response to concerns relating to the unfinished regulatory framework. 11:47:49 11:47:51 11:47:53 11:47:55 11:47:58

Despite what Sarah Powell argued, the announcement on February 11, 2011 was a direct result of the EBR policy notice process, which highlighted various public concerns, including ecological considerations, noise, and drinking water quality. 11:48:00 11:48:03 11:48:05 11:48:11 11:48:15 11:48:17

Although the decision made a number of people unhappy, it was also ultimately endorsed by the Ministers of Energy and Natural Resources. As Energy Minister Brad Duguid said at the time: 11:48:17 11:48:21 11:48:23 11:48:28

> "The move was not politically motivated. It was done for environmental reasons." 11:48:29 11:48:32 11:48:33

And as Mr. Smitherman testified when it was put to him that the news release -- that, on the news release, the three Ministers had, in fact, added a quote to the bottom of it, he indicated, 11:48:34 11:48:36 11:48:40 11:48:43

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There was no basis for Windstream to assume that the OPA was acting as an agent for the Ministry of Energy. In fact, [redacted] 12:19:46 12:19:48 12:19:56

I'm going to have to go into confidential session for a little bit here. 12:20:00 12:20:01

--- Confidential transcript begins 12:20:05

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

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

[redacted] 12:21:12

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

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

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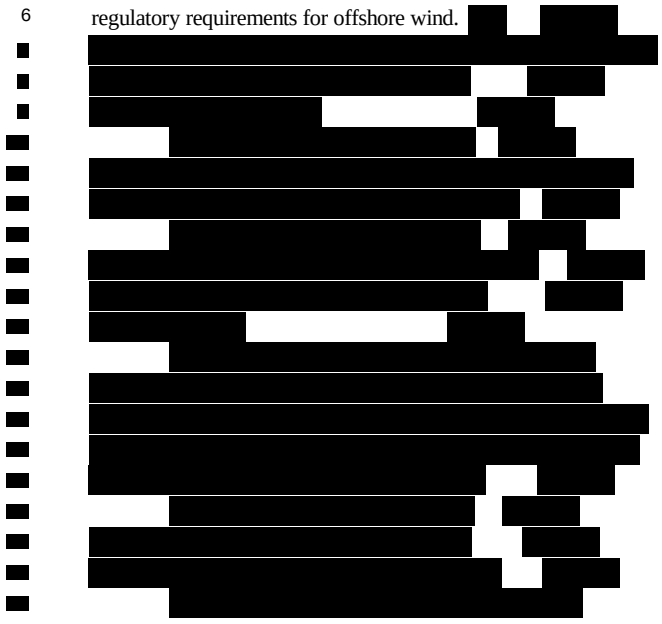
Claimant's assets remain intact. 12:21:44
First, with respect to temporariness. 12:21:47
Starting in the fall of 2010 to the 12:21:50
summer of 2012, Ontario undertook extensive efforts 12:21:52
to conduct the science necessary to develop the 12:21:56
regulatory requirements for offshore wind.



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12:23:12
Consequently, Ontario was forced to -- 12:23:15
I'm just realizing that even if this were in the 12:23:18
public area, there's no way that they could read 12:23:21
these slides. 12:23:25
Consequently, Ontario was forced to 12:23:26
reconsider its plans for conducting the science for 12:23:28
offshore wind. 12:23:30
MOE maintained its lead role under the 12:23:32
research plan with a focus on the areas of noise, 12:23:35
water, and sediment quality, technical standards and 12:23:38
safety, and decommissioning, and valuation of 12:23:41
financial assurance. 12:23:43
An updated MOE-specific research plan 12:23:46
was then developed in March of 2013, which indicated 12:23:49
that research would not be completed until the end 12:23:52
of 2016 at the earliest. 12:23:54
We can go back to public session now. 12:23:56
--- Confidential transcript ends 12:23:58
MR. NEUFELD: To date, Ontario has 12:24:06
continued to pursue the science for offshore wind. 12:24:08

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Throughout this hearing, the Claimant has focused on 12:24:10
the statement that I made in Canada's opening that 12:24:13
Ontario is not planning to commence further studies 12:24:15
in the near term to address areas set out in its 12:24:18
initial plans; however, as I went on to explain, 12:24:22
once the noise and decommissioning studies are 12:24:26
completed, Ontario will analyze the findings to 12:24:28
determine if there are any gaps and if any further 12:24:31
study is required. 12:24:34
Now, I just want to pause here to 12:24:35
explain why Ontario's future plans to conduct the 12:24:37
science to develop a regulatory framework for 12:24:39
offshore wind have no bearing on this claim. 12:24:42
I said it at the beginning but I'd 12:24:44
like to repeat it now: By the Claimant's own 12:24:46
admission, as of May 22nd, 2012, its project could 12:24:48
no longer achieve commercial operation and it became 12:24:52
substantially worthless. What Ontario did after 12:24:55
that date does not affect the Claimant's project. 12:24:59
Here it's important to note that even 12:25:06
the Claimant admits that its FIT contract -- this is 12:25:08
now going to deal with, not the temporariness of the 12:25:11
measure, but the fact that its assets remain intact. 12:25:15
It's important to note that the 12:25:19
Claimant admits that its FIT remains in force as 12:25:22

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a valid and binding contract. As Mr. Cecchini of 12:25:24
the OPA has also attested, a FIT contract is still 12:25:26
in place and under force majeure. As a result, 12:25:29
under 10(1)g of the FIT contract, both the OPA and 12:25:32
the Claimant have the right to terminated the FIT as 12:25:41
of the 24 months after the original MCOD, meaning 12:25:43
after May 4th, 2017. 12:25:47
The evidence also establishes that the 12:25:50
Claimant could obtain its security deposit sooner if 12:25:52
it entered into a mutual termination agreement with 12:25:55
the OPA. Mr. Cecchini has testified that in 12:25:59
accordance with the OPA's practice, the OPA would 12:26:02
return the security deposit if the Claimant pursued 12:26:05
this option. 12:26:08
Not only has the Claimant failed to 12:26:09
prove any substantial deprivation of the FIT 12:26:11
contract, it has not led any evidence that it was 12:26:14
substantially deprived of the other investments it 12:26:16
originally asserted to be part of its claim, 12:26:19
including its enterprise, its work product, its 12:26:22
data, it's MET tower, turbine sales agreement with 12:26:24
Siemens or its private land leases. 12:26:27
To the extent that the Claimant has 12:26:29
experienced a substantial deprivation of the its 12:26:32
investment, the economic impact it has experienced 12:26:35

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

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

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

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

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which would -- it relates to the application process 12:31:27
in the REA. Or an amendment could have been made to 12:31:30
the prohibition section, the setback section, which 12:31:33
are set out in part 5 of the regulation and it 12:31:36
restricts where a renewable energy project may be 12:31:39
constructed. 12:31:41

Now, again, pausing on this idea 12:31:44
because, Mr. Terry said this morning, that there was 12:31:46
a promise to go through the regulatory process. 12:31:49

Now not only was there not such 12:31:53
promise, the fact is that the Claimant didn't in 12:31:56
even initiate its REA process. It didn't -- it 12:31:59
hadn't approached the MOE to trigger that process. 12:32:02

In such a situation, if it hadn't 12:32:05
applied for an REA, the government would have to 12:32:08
consider the best way -- sorry. In a situation 12:32:10
where, if it would have applied for an REA, at that 12:32:13
point the government would have had to figure out 12:32:17
how to proceed with it. At that point it would have 12:32:19
had to figure out how, through due process 12:32:22
considerations, what to do with its application, but 12:32:25
it had not initiated that process. 12:32:27

Now, I'd like to highlight some of the 12:32:32
testimony relating to the second area of regulatory 12:32:34
uncertainty, the Claimant's Crown land applications. 12:32:36

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The same day that the REA regulation 12:32:41
and FIT program were established, that's on 12:32:43
September 24th, 2009, the Minister of Natural 12:32:47
Resources sent the Claimant this letter which you 12:32:50
saw again this morning in Mr. Terry's presentation. 12:32:52

It stated that in order to maintain 12:32:56
its priority position within MNR's site release 12:32:58
process, it had to submit an application to the FIT 12:33:01
program within the FIT program launch period. 12:33:03

Despite what the Claimant has argued, 12:33:09
this letter could not have given rise to any 12:33:11
expectations relevant to an expropriation analysis, 12:33:13
and the testimony proves it. 12:33:16

Mr. Baines admitted that the letter 12:33:19
was not an instruction for the Minister to apply to 12:33:20
the FIT program, rather the Claimant's decision to 12:33:23
apply to the FIT program was a business decision. 12:33:25
And Mr. Mars agreed, stating that they did not apply 12:33:28
because the Minister told them to; they applied 12:33:31
because they thought they had a really wonderful 12:33:34
project. 12:33:36

Even Mr. Smitherman agreed that 12:33:37
Minister Canfield's letter left it entirely up to 12:33:40
proponents as to whether they wanted to proceed with 12:33:43
a FIT application. 12:33:45

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Mr. Terry said this morning that you 12:33:51
have to get the FIT contract first before you could 12:33:53
get site access. Now, that's just not true. There 12:33:57
is no order established in how you go about doing 12:34:01
these -- these things. We heard from Ms. Powell's 12:34:04
interpretation of this letter, the Minister 12:34:08
Cansfield letter, we heard about her interpretation 12:34:11
from a legal perspective. 12:34:14

Although the Claimant says that it 12:34:16
took great comfort in this letter, Ms. Powell 12:34:18
attested that the letter did not impact MNR's 12:34:20
discretionary power to grant or refuse access to 12:34:22
Crown land, nor did it amount to the sort of 12:34:26
comprehensive comfort letter that MNR may provide to 12:34:28
developers and lenders to indicate the Crown's 12:34:32
commitment to the issuance of future tenure. 12:34:34

The Claimant also relies on a speech 12:34:38
that Minister Cansfield gave in October 2009, which 12:34:39
announced that MNR would be considering applications 12:34:44
for Crown land for offshore wind projects. However, 12:34:47
the speech also stipulated that MNR was going to 12:34:50
carry out a review of its site release policies, 12:34:53
which would not be completed until the end of 2010 12:34:57
at the earliest. 12:34:59

What's interesting is what 12:35:02

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Mr. Smitherman had to say about that speech when he 12:35:03
was asked. And he was asked about that speech in 12:35:06
conjunction with MOE's decision notice on the REA 12:35:09
regulation. 12:35:13

What he called it was: A positive step 12:35:14
in the right direction towards certainty. He 12:35:16
couldn't confirm that they created any regulatory 12:35:19
certainty for investors. According to him the 12:35:25
letter merely indicated that there was a process 12:35:28
underway, or both these processes, the letter and 12:35:30
the REA process, both indicated that there was 12:35:33
a process underway with a destination point and that 12:35:35
the process, moving forward to finalizing decision 12:35:38
points which investors might see as a piece of 12:35:41
progress or a kind of growing certainty. So it 12:35:44
wasn't certainty, certainty, certainty, as you heard 12:35:47
this morning; it was growing certainty or emerging 12:35:50
certainty. 12:35:54

Now, to add to the uncertainty around 12:35:56
Crown land, the Claimant also required a grid cell 12:35:58
swap on account of the five-kilometre setback 12:36:02
proposal. It relies on our August 9th letter from 12:36:06
Mr. Boysen as a firm commitment that MNR would grant 12:36:08
a grid cell reconfiguration. 12:36:13

Mr. Terry referred to this letter this 12:36:18

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morning as "Rare." Now, it's telling that the Claimant takes comfort from a process that is rare, meaning, unusual or the first time it ever happens. 12:36:20 12:36:23 12:36:27

The fact is that it was rare and that only added to the uncertainty. 12:36:31 12:36:35

The MNR committed only to discussing a Crown land swap and only after the offshore wind policy review and Crown land policy review were finished. 12:36:38 12:36:40 12:36:44 12:36:47

What's even more significant is that Mr. Boysen's letter specifically exclude the commitment that the Claimant itself requested, namely to be granted AOR within 30 days. It wanted access to that site within 30 days and that wasn't put into the letter. 12:36:48 12:36:50 12:36:53 12:36:55 12:37:00 12:37:03

Windstream's witness confirmed the letter did not align Windstream's request for a grid cell swap with the timelines in its FIT contract. 12:37:05 12:37:06 12:37:09

There were no assurances as to when Windstream could expect to receive Applicant of Record status, and there was no commitment as to the specific timing when Applicant of Record status would be awarded. 12:37:14 12:37:16 12:37:18 12:37:22 12:37:25

Finally, I'd like to turn to the FIT contract and the Claimant's alleged expectations in 12:37:27 12:37:29

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relation to the revenue stream under it. 12:37:34

I'd like to look first at the representations made to the Claimant, made to the Claimant by the OPA. These are important because, as Mr. Ziegler acknowledged, the OPA is the contractual counterparty to the FIT contract; it's not the government, it's the OPA. 12:37:38 12:37:39 12:37:42 12:37:44 12:37:49 12:37:52

As I have already discussed, in signing the FIT contract the Claimant assumed the obligation of bringing the project into commercial operation, including obtaining all the necessary permits and approvals such as the REA, access to Crown land, and completing applicable federal permits. 12:37:56 12:37:58 12:38:01 12:38:04 12:38:05 12:38:08 12:38:12

Mr. Terry, interestingly this morning, pointed to Mr. Ziegler's aversion to risk. And I'd also like to point out that the same witness admitted to not having read the FIT contract when he appeared before you. 12:38:14 12:38:17 12:38:21 12:38:24 12:38:28

Section 3.3 of the FIT Rules which govern the Claimant's application to the program, made clear that the Claimant was solely responsible for ensuring the technical, regulatory and financial viability of its project. 12:38:30 12:38:33 12:38:35 12:38:37 12:38:42

Ms. Powell agreed that the OPA 12:38:44

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disclaimed any responsibility for undertaking due diligence in terms of the regulatory risk. That was for the Claimant to assess. 12:38:47 12:38:49 12:38:51

And Mr. Cecchini confirmed that, indeed, the OPA did no due diligence work on behalf of proponents. Like most commercial counterparties, the OPA places a responsibility to conduct due diligence on the proponent and the supplier. Before they sign the contract, they ought to satisfy themselves that they can meet its obligations. 12:38:53 12:38:55 12:38:59 12:39:02 12:39:05 12:39:08 12:39:10

The high level of regulatory uncertainty did not dissipate after Windstream was notified of its FIT contract offer in April of 2010. Despite the statements by the Claimant's witnesses and experts that Ontario provided an attractive or generous or secure environment, Windstream was reluctant, was, in fact, reluctant to sign back that FIT contract due to concerns regarding the regulatory uncertainty of offshore wind. 12:39:13 12:39:15 12:39:17 12:39:20 12:39:23 12:39:27 12:39:32 12:39:35 12:39:38

And the OPA made clear to the Claimant at all relevant times that the Claimant bore the risk related to filling the NTP prerequisites, including permitting. 12:39:40 12:39:42 12:39:45 12:39:50

For example, Mr. Cecchini attested that on May 13, 2010, he and Michael Killeavy, the 12:39:52 12:39:53

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OPA's Director of Contracts Management, personally reiterated to the Claimant in a meeting that the FIT program was a standard offer program, and it was for the Claimant to determine whether it wanted to accept the terms of the standard FIT contract. 12:39:56 12:39:59 12:40:02 12:40:05 12:40:08

The OPA was not in a position, nor was it willing to modify the terms of the FIT contract for an individual proponent. 12:40:09 12:40:12 12:40:14

The record also shows that Mr. Killeavy followed up personally, advising the Claimant in writing on May 14th, 2010 that the OPA was not in a position to advise the Claimant on how it ought to manage the regulatory risk associated with the project. 12:40:20 12:40:22 12:40:27 12:40:32 12:40:34 12:40:37

This caused the Claimant to seek reassurances from the government, however, what followed gave the Claimant no reasonable expectation of regulatory certainty that it would be able to fill the NTP requirements and bring its project into commercial operation within the timelines contemplated by the FIT contract. 12:40:38 12:40:39 12:40:43 12:40:45 12:40:49 12:40:51 12:40:51

On May 13th, 2010, Mr. Baines wrote to the Renewable Energy Facilitation Office stating that he was facing considerable regulatory uncertainty, specifically the uncertainty he 12:40:54 12:40:57 12:41:00 12:41:04

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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that would be a sufficient setback for noise or for the protection of water quality. 12:45:46 12:45:49

This is the most obvious example of a rule that had yet to be promulgated and which was technically required. And unless Ontario decides to move off the approach that it originally set out of approving projects based on clear benchmarks, clear upfront rules, additional setbacks may also have to be considered. 12:45:50 12:45:52 12:45:57 12:45:59 12:46:02 12:46:06 12:46:09

This could include setbacks from fish habitat, as well as setbacks for commercial fishing, as well as setbacks for recreational activities like fishing and boating. And similar how to the REA establishes clear setbacks from roads and railways, one might also expect the establishment of a setback from a shipping lane. 12:46:10 12:46:12 12:46:15 12:46:19 12:46:23 12:46:27 12:46:29

At this point I can turn the floor over to Ms. Squires who will address or begin to address damages. 12:46:33 12:46:34 12:46:38

PRESIDENT: Thank you very much, Mr. Neufeld. 12:46:40 12:46:41

CLOSING SUBMISSIONS BY MS. SQUIRES: 12:46:47

PRESIDENT: Ms. Squires, please. 12:46:49

MS. SQUIRES: Thank you, Mr. Neufeld, and good afternoon members of the Tribunal. 12:46:49 12:46:59

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Over the course of the next hour, myself and my colleague, Mr. Spelliscy, hope to provide you with some additional guidance on why the Claimant is not entitled to any damages in this arbitration, even if you are to determine there was a breach. 12:47:03 12:47:04 12:47:07 12:47:10 12:47:12 12:47:15

As far as damages go, the Claimant, in a sense has straightforward burden to prove, show how the measures caused an actual loss. 12:47:16 12:47:18 12:47:22

Instead, what you have before you is a claim based on a fundamentally flawed theory of damages, lacking in causation, and using a valuation methodology that does not account for the risk the project faced or its stage of development. 12:47:25 12:47:26 12:47:30 12:47:34 12:47:36

Over the course of this hearing, the tribunal has heard the Claimant on many occasions argue that its project could be built. Indeed, the Claimant has hired some of the world's leading players in the offshore wind industry for the purposes of this arbitration to come before you and tell a fantastic tale. Trust us, we can get this done, they say. 12:47:40 12:47:41 12:47:44 12:47:48 12:47:51 12:47:53 12:47:55 12:47:59

[redacted]

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[redacted] 12:48:10

They told you they can secure a jack-up vessel to install the turbines when the time comes despite their high demand and their limited access to the Great Lakes. 12:48:11 12:48:13 12:48:15 12:48:18

They've told you they can do their field studies in shorter times than the regulators require without having ever met with the regulators or having presented a project description, let alone know where their project would be sited. 12:48:20 12:48:22 12:48:25 12:48:28 12:48:33

They've told you that an average five-kilometre setback from an uninhabited point would have been selected despite language from the regulators indicating its five kilometres from the shoreline. 12:48:35 12:48:37 12:48:40 12:48:42 12:48:45

They've also told you that a well-established decades old shipping lane shared between Canada and the United States will be reduced to a third of its size just for their project. And they've told you that not only will the foundations be successfully installed using a method never before used in the offshore wind industry, but that any uncertainty with respect to those foundations can simply be overcome. And they will do this faster than any other offshore wind farm has ever 12:48:46 12:48:48 12:48:51 12:48:53 12:48:56 12:48:58 12:49:01 12:49:04 12:49:06 12:49:10

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done it. Yes, we can, that's their theme. 12:49:13

On the cover, the tale they've told is quite captivating, but it's not the cover that matters. The Tribunal must look at the pages themselves, and what you'll find is a project that not be constructed in a FIT contracts timelines, either by design or due to the high level of risk. 12:49:16 12:49:19 12:49:22 12:49:24 12:49:29 12:49:31

The message, therefore, for the Tribunal is simple: At the end of the day, as Canada has demonstrated, the devil is in the details. And in this case, those details are what the Claimant has fought so hard to bury under the reputation of numerous experts, asking you to judge a book by its cover and, as a result, award it a windfall of damages. 12:49:36 12:49:37 12:49:41 12:49:44 12:49:47 12:49:50 12:49:53 12:49:58

Now, in order to assess the damages in this arbitration, should the Tribunal find that there is a breach, the Tribunal must ask itself two fundamental questions: First, has the Claimant proven that any of the challenged measures caused an actual loss, let alone the specific loss that it seeks? And second, if causation has been proven, what is the specific valuation methodology that the Tribunal should use in addressing the quantum of damages? 12:49:59 12:50:00 12:50:02 12:50:06 12:50:09 12:50:12 12:50:15 12:50:20 12:50:24 12:50:26

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

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

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

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

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

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

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

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

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

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

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

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

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February 11th, 2011 as Windstream has done is simply illogical and the Claimant's use of, as Mr. Low put it, a subjective three-year deferral, should be dismissed. 13:02:58 13:03:02 13:03:05 13:03:08

So, where does that leave us? Even before getting to the specifics of the project, the Claimant has failed to meet its burden of proving damages. But even if we were to continue into our analysis, it's apparent that the project had no value on the valuation date. 13:03:09 13:03:11 13:03:14 13:03:16 13:03:21 13:03:23

Now, over the past two weeks, we have heard the Claimant ask every one of its experts if, in their view, the project was more likely than not to succeed. With unlimited time, money, and resources, the answer is surely, yes. However, if we dig deeper into the project specifics, we can see that the extreme sensitivities of the project to even minor variations show just how speculative this whole project was. And remember, the Claimant did not have unlimited time. Under the FIT contract they had five years to reach commercial operation. 13:03:26 13:03:28 13:03:31 13:03:33 13:03:37 13:03:42 13:03:45 13:03:48 13:03:51 13:03:53 13:03:56

Let's look at some of those issues then. Both Canada and the Claimant's expert, Ms. Powell, agree that the REA permitting for the project would have taken 36 months, not 30 as the 13:04:00 13:04:01 13:04:05 13:04:08

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Claimant alleges in its schedule. This six months is significant, as Mr. Clarke from URS noted, moving the time of the permitting in the Claimant's own schedule by six months delays the entire project by a year. 13:04:11 13:04:15 13:04:19 13:04:21 13:04:24

This, in effect, leaves the Claimant with not enough buffer time before the OPA can terminate the contract to even make the project financeable. 13:04:25 13:04:27 13:04:30 13:04:32

Even by Ms. Powell's own experience dealing with on-shore wind where financing is much easier to obtain. As Mr. Guillet noted, with respect to offshore wind financing, with less than a year of buffer between the expected construction start date and the date you risk to lose your FIT contract, would make the project un-bankable, full stop. One simple change to the project schedule and the project is potentially dead before even a foundation is in the water. 13:04:33 13:04:35 13:04:39 13:04:42 13:04:45 13:04:47 13:04:51 13:04:54 13:04:57 13:05:00

But it doesn't stop there. The Claimant faced numerous other regulatory risks, and while the Claimant has spent some time at this hearing trying to establish that the OPA gives extensions for delays, what it fails to address is the outcome of that permitting, including how it 13:05:05 13:05:07 13:05:10 13:05:12 13:05:14 13:05:18

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would effect the project layout. 13:05:21

Now, we heard Mr. Roeper last week indicate that the average five-kilometre setback from uninhabited or uninhabitable points used in Windstream's project layout was not only inconsistent with the word shoreline and water's edge, but also based solely on his own opinion and not those of the regulators. 13:05:23 13:05:25 13:05:27 13:05:32 13:05:34 13:05:35 13:05:40

Perhaps the most stark absurdity with this layout, however, was brought to the forefront by Mr. Roeper when, despite indicating that the setback was meant to deal with noise, he believed that having a turbine at the noise receptor and one ten kilometres away meets noise requirements because the turbines are, on average, five kilometres away from that receptor. 13:05:42 13:05:43 13:05:47 13:05:49 13:05:52 13:05:55 13:05:57 13:06:00

So what does this mean? When a five-kilometre setback from the shoreline is applied as the regulators intended, 24 turbines are eliminated from the 2015 project layout. 13:06:04 13:06:08 13:06:10 13:06:14

We also heard Mr. Kolberg indicate that the turbines would require the existing international shipping route to be constrained to a third of its size in order to allow for an adequate buffer zone for the project. But 13:06:17 13:06:19 13:06:22 13:06:23 13:06:25

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there's no evidence the federal regulatory authorities would have permitted this. 13:06:28 13:06:31

The consequence of such a refusal? Well, let's have a look at that as well. A buffer zone that requires the project to be pushed back from the edge of the existing shipping lane by one nautical mile removes another 27 turbines. If a two-nautical mile buffer is applied, that results in the possible loss of up to 62 turbines, that's nearly 65 percent of the turbines lost. 13:06:33 13:06:36 13:06:39 13:06:41 13:06:44 13:06:48 13:06:52 13:06:55

But it just gets worse from there. 13:06:58

Let's have a look at the on-shore manufacturing facility. 13:07:00 13:07:02

As Ms. Powell notes, the on-shore foundation manufacturing facilities would not be permitted as part of the REA. Mr. Roberts from WSP agrees with that approach. As such, the claimants' schedule has the development of the facility occurring well before the REA approval is obtained so that once financial close is reached, the first foundation can roll off the line. However, this is idealistic at best. 13:07:04 13:07:07 13:07:09 13:07:14 13:07:18 13:07:21 13:07:24 13:07:26 13:07:28

First, it assumes a third party would be willing to hand over the facility to Windstream without even a single permit, saying the offshore 13:07:31 13:07:33 13:07:36

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

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

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

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

[redacted]

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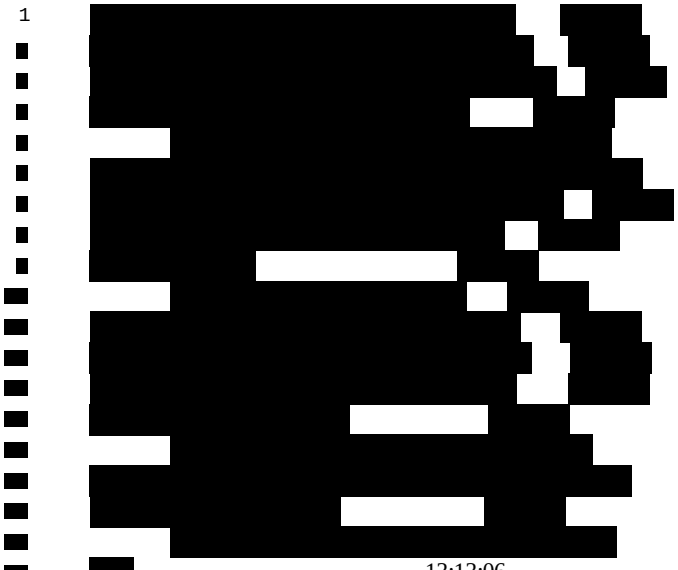

13:13:06
--- Confidential transcript ends 13:13:07
MS. SQUIRES: Now, all this may sound 13:13:14
extreme and the Tribunal not need to find that all 13:13:15
these risks would have materialized. Indeed, in 13:13:18
some cases, just one is enough to make the project 13:13:20
fail. As we know from Cape Wind, having all your 13:13:25

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

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

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

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which we'll talk about in a minute. Because with future losses, of course, there is always some question of uncertainty. And the question for the Tribunal is what level of certainty is enough, without speculation? 13:16:51 13:16:54 13:16:56 13:16:58 13:17:01

But sunk costs is different. Proving sunk costs requires nothing other than due diligence and disclosure by a Claimant. 13:17:03 13:17:06 13:17:09

Contrary to what Mr. Low has said, it is neither significant overkill, nor extreme to demand that the Claimant meet that burden. In fact, such demanding exactitude is a way for the public to maintain confidence in this system. 13:17:13 13:17:15 13:17:19 13:17:24 13:17:28

So let's look at what the Claimant has claimed for its sunk costs. And here I need to go into confidential session. 13:17:34 13:17:36 13:17:38

--- Confidential transcript begins 13:17:39

MR. SPELLISCY: The Claimant has claimed $17,428,000 in sunk costs. 13:17:52 13:17:53

The evidence has shown over the past few days there is absolutely no support for this claim. 13:17:57 13:17:58 13:18:02

Let's take the first two items that they have in their schedule 3(b), and I'm working from their reply report. 13:18:04 13:18:06 13:18:10

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It is what they called their "Capitalised Development Costs" as well as costs that they said they incurred in 2015, at least in the report for development and engineering. 13:18:11 13:18:13 13:18:16 13:18:19

First, you will recall that Mr. Low admitted in his presentation that it was inappropriate to include the costs from January 1st, 2015 because these actually related to the arbitration and not the development of the project. 13:18:22 13:18:24 13:18:26 13:18:30 13:18:33

So, let's cross those out and let's move on and see what's left. 13:18:36 13:18:42

Now, with respect to the capitalised costs on the first line, which total 3.773 million, Mr. Low referred refused to exclude other expenses related to the arbitration that occurred after the valuation date, and you heard Mr. Terry talk about it here this morning. 13:18:45 13:18:48 13:18:53 13:18:56 13:18:58 13:19:01

And this is something that baffles me. Apparently expert reports done for a memorial are development costs, but expert reports done for a reply memorial are not development costs. 13:19:02 13:19:05 13:19:08 13:19:11

Mr. Low tried two explanations as to why that was so; neither are credible. First, he said that management did not know in May of 2012 the project couldn't be developed, but Mr. Low's claim 13:19:15 13:19:18 13:19:23 13:19:28

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was demonstrably false as a matter of fact. Mr. Ziegler testified in his witness statement that the Claimant did know in May of 2012, and when I put that to Mr. Low he had to admit that. And I would suggest that an admission like this goes to his independence and credibility in the proceeding. 13:19:34 13:19:37 13:19:40 13:19:43 13:19:47 13:19:50

The fact is the Claimant knew in May of 2012 that the project could not be developed. Any expenses from that point on relate not to the development of the project, but to this arbitration. 13:19:52 13:19:54 13:19:57 13:20:01

And, in fact, every expert the Claimant has retained and has brought here to present to you has confirmed that they were retained for the arbitration or after the deferral and not the development of the project. 13:20:05 13:20:08 13:20:10 13:20:13 13:20:16

As Mr. Low admitted, he included their cost as sunk costs even though he knew that their reports were being prepared for the purposes of the arbitration. 13:20:20 13:20:22 13:20:25 13:20:27

The second explanation given by Mr. Low as to why these initial reports should be considered sunk costs, which I think was echoed by my colleague, Mr. Terry, this morning, is that he claimed that they could have been used in the development of the project in the but-for world. 13:20:30 13:20:32 13:20:35 13:20:38 13:20:40 13:20:44

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That makes no sense. Sunk cost aren't about the but-for world; sunk costs are about the actual world. 13:20:46 13:20:51 13:20:54

We would submit that there is no doubt that what the Claimant is doing here is inappropriately trying to include arbitration costs as sunk costs, as development costs. 13:20:55 13:20:57 13:20:59 13:21:02

I would suggest that unlike what my colleague Mr. Terry said this morning, this is not a complicated question. There is an Article, Article 40 in the UNCITRAL arbitration rules that deals with arbitration costs and how they will be allocated. There will be a separate phase for costs in this proceeding. That's where a claim for costs of these sort belong, just as Canada will claim its costs in that phase. 13:21:06 13:21:07 13:21:10 13:21:13 13:21:17 13:21:19 13:21:23 13:21:27 13:21:30

So let's come back to what the Claimant claimed. And let's eliminate now, according to the information produced by Deloitte, all of the costs from line item 1 that occurred after May 22nd, 2012. What's left at the top there is 2.4 million and 15 million overall. 13:21:34 13:21:36 13:21:40 13:21:43 13:21:47 13:21:52

What do we know about that 2.4 million? We know that Mr. Low said he reviewed 33 percent of the total amount, not of invoices, but 13:21:57 13:21:58 13:22:03

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

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

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

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

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

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

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

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

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evidence, the inclusion of things that were not sunk, the letter of credit, this should reflect on the credibility of the entire damages claim that the Claimant is presenting here. 13:32:09 13:32:11 13:32:15 13:32:18

I think that reflects as well, because when we look at what their discount cash-flow analysis is, the Claimant is reaching for the stars in this case. It is asking for 100 percent of the future value, even though it has spent, as we just saw, less than 10 percent, a 10th of a percent on the budget required to develop the project. 13:32:21 13:32:24 13:32:27 13:32:29 13:32:32 13:32:35 13:32:39

Claimant says it's not the future operating value, but it is the value as if the project started to produce profits. 13:32:42 13:32:44 13:32:47

As Mr. Guillet explained, DCF is not appropriate for development projects until they have reached financial close. 13:32:52 13:32:57 13:33:00

Mr. Guillet is the only one in this market -- in this hearing, who has experience in transactions of offshore wind farms. 13:33:06 13:33:08 13:33:11

That is what he does. 13:33:14

And he tells you that the market does not use DCF, in the not at this stage. 13:33:16 13:33:18

Mr. Low suggests that a DCF is appropriate here because, in his view, there was 13:33:23 13:33:26

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sufficient certainty, and Mr. Terry this morning said that Mr. Low was prudent and careful in his analysis. I would suggest that the evidence shows that he was not. 13:33:28 13:33:30 13:33:34 13:33:36

Let's look at what he relies upon. 13:33:38

He relies upon the FIT contract as providing certainty that is enough to using a DCF analysis in his mind, but remember, price -- the price one gets for a product is only one single aspect of a DCF. DCF requires a number of other inputs. On the cost side there is CAPEX and financing cost and OPEX, and on the revenue side there is the amount of the product that will be generated and the price that you get for it. 13:33:41 13:33:43 13:33:47 13:33:52 13:33:54 13:33:58 13:34:01 13:34:04 13:34:07

The Claimant only has reliable information regarding the last one, the price. 13:34:10 13:34:11

The evidence this week and throughout the hearing showed it has no reliability regarding the other inputs. 13:34:14 13:34:16 13:34:20

I want to spend here in assessing that reliability, spend a fair amount of time on one of those inputs, because it's really important, what it would have cost to build this project. So let's look at what's on the record. 13:34:26 13:34:28 13:34:31 13:34:34 13:34:37

Remember, Mr. Guillet explained when 13:34:39

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he was questioned that two of the most prominent builders for offshore wind were Mott and Sgurr. 13:34:41 13:34:44

The Claimant had Mott MacDonald as a technical advisor prior to the arbitration. In fact, the Claimant had Mott MacDonald prepare a revised cost estimate for the project on October 12th, 2012. 13:34:49 13:34:51 13:34:56 13:34:59 13:35:02

They submitted a notice intent to arbitration, five days later on October 17th, 2012. I would suggest that timing is not coincidental. 13:35:03 13:35:05 13:35:09

But where's Mott? Why are they not here? Mott's estimate is on the record and we did refer to it in examination. I won't bring it up here because it is confidential, but it is Exhibit C-0625, and you will see that Mott's estimate was about 1.2 billion Euros in October of 2012. 13:35:11 13:35:17 13:35:22 13:35:24 13:35:26 13:35:33 13:35:36

More than 20 percent of what the Claimant has said is reliable here. I think the answer to where is Mott? Is relatively clear. Their estimate is too high. 13:35:37 13:35:39 13:35:44 13:35:46

Now, let's remember, as well, that the Claimant had Sgurr appear at this arbitration, the other prominent engineer. 13:35:50 13:35:52 13:35:57

They didn't get a cost estimate from 13:35:59

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Sgurr. They didn't get a cost estimate from COWI. They didn't get a cost estimate from Weeks Marine. Why not? We would submit to you that the inference you should draw from the evidence is that the project-specific estimates would have shown the uncertainty of their capital cost estimates. So what did they do? They rely on benchmark costs for building a project in Europe. 13:36:01 13:36:05 13:36:10 13:36:13 13:36:14 13:36:17 13:36:20 13:36:24

There are a number of problems with this approach. First, there is no reason to assume mature European pricing is at all relevant. 13:36:27 13:36:28 13:36:31

In fact, the evidence is to the contrary. 13:36:35 13:36:37

Mr. Guillet explained, in his reports and his experience, that North American projects that pay a premium. And I asked 4C about North American projects, and though his job was to track the market, he said he had no idea about the cost for North American projects and confirmed that he had not even looked at it, even though they were in his database. 13:36:38 13:36:39 13:36:42 13:36:45 13:36:49 13:36:52 13:36:55 13:36:58

What we do know some information on North American projects, there are two that we have on the record: Block Island and Cape Wind. 13:37:04 13:37:07 13:37:09

Block Island, 30-megawatts and you'll 13:37:13

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see there, investment 360 million, over 10 million U.S. dollars a megawatt. 13:37:15 13:37:20

Cape Wind, 2.6 billion in financing. It's a 468-megawatt project. It's about 5.6 million U.S. a megawatt. 13:37:22 13:37:26 13:37:30

This is all substantially higher than the Claimant's value of a little over 4 million Canadian per megawatt, and, of course, these funds are in U.S. dollars, which would mean they'd be even higher converted to Canadian. 13:37:33 13:37:35 13:37:38 13:37:40 13:37:44

And of course that's the other big issue with the capital cost estimate provided; the pricing it in Euros. 13:37:45 13:37:48 13:37:51

The sensitivity analysis that we talked through with 4C showed that, in fact, merely using proper exchange rates would result in an increase, and in fact, a massive increase in the amount of the CAPEX required for the project. 13:37:54 13:37:56 13:37:59 13:38:02 13:38:05

Now, Deloitte suggested that it was inappropriate to use actual exchange rates on the date of financial close because, in his opinion, this violated a fundamental rule of valuation analysis and that was against using hindsight. 13:38:11 13:38:12 13:38:15 13:38:18 13:38:21

That was an exceptionally curious thing for Deloitte to claim, because in their first 13:38:24 13:38:28

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report, they did exactly that. 13:38:30

They used the actual foreign exchange rate on the date of projected financial close, explaining in their report exactly why they thought it was appropriate to do so. Now, this, of course, was very beneficial for them, because their projected financial close date was September 2012, a period when the Canadian dollar was the strongest that it's been against the Euro in the last six or seven years. 13:38:33 13:38:35 13:38:37 13:38:40 13:38:43 13:38:45 13:38:48 13:38:51 13:38:54

Now, when they changed their schedule, once Sgurr realises that the one they were relying on would lead errors and inaccurate conclusions, financial close moves to February 11th, 2014. 13:38:55 13:38:57 13:38:59 13:39:02

What happens next? Deloitte all of a sudden identifies a fundamental rule of valuation analysis that means that they can ignore the impact of actual foreign exchange risk and instead use a forecast. 13:39:07 13:39:09 13:39:14 13:39:16 13:39:19

They applied that forecast to the Siemens turbine agreement, but then continue to use the actual foreign exchange rate on May 22nd, 2012 for the rest of the costs. But on May 22nd, 2012, Mr. Low admits that less than 3 percent of the budget would have been spent. 13:39:20 13:39:22 13:39:24 13:39:28 13:39:32 13:39:36

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It makes no sense to use foreign exchange on that rate, except, of course, for the fact that it's favourable for the claimants. 13:39:39 13:39:41 13:39:45

In short, Mr. Low's sudden identification of this fundamental rule of valuation analysis gives them a benefit, a windfall of 19 cents on the dollar for the Siemens TSA, and more, 21 cents, I think, for the rest of the cost. 13:39:48 13:39:50 13:39:54 13:39:58 13:40:01

The other reason this doesn't make sense, and we've heard it today, it's not a credible position for the Claimant to take because all of their expert reports use hindsight. 13:40:05 13:40:07 13:40:09 13:40:11

We heard Ms. Seers say it today, they think hindsight is appropriate. They think using current information is appropriate. 13:40:15 13:40:17 13:40:20

The Claimant cannot have it both ways. It cannot eschew hindsight when it doesn't work in their favour and embrace it when it does. 13:40:21 13:40:24 13:40:28

Changing their estimates to recognize the reality of the foreign exchange risks for the project eliminates a significant value for the Claimant. 13:40:32 13:40:35 13:40:37 13:40:43

There are other sensitivities as well, in fact, though there were few differences between the parties. 13:40:43 13:40:45 13:40:48

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There were differences in estimates of CAPEX between the experts on things like decommissioning. 13:40:49 13:40:50 13:40:53

As Mr. Barillaro explained, the Claimant's assertion, for example, that they should not have to provision for decommissioning because of the scrap value generally associated with wind turbines is irrelevant. Massive concrete foundations don't have scrap value; they just cost. 13:40:55 13:40:56 13:40:58 13:41:01 13:41:02 13:41:05

There was also the issue of the contingency. The Claimant put theirs at 10 percent, which we heard from Mr. Barillaro was more typical for standard power companies. Mr. Guillet explained in his report why this project, the first of its kind in Ontario would have been required by the banks to have a 20 percent contingency or around there. Again, he's the only one who's done offshore wind financing of that sort. 13:41:09 13:41:11 13:41:16 13:41:21 13:41:23 13:41:26 13:41:28 13:41:32 13:41:34

But, obviously, the biggest difference was the TSA. And I want to take a deeper dive into the TSA here and to do so, we need to go back into confidential session. 13:41:36 13:41:38 13:41:41 13:41:44

I'm keeping you busy. 13:41:47

--- Confidential transcript begins 13:41:47

MR. SPELLISCY: Now, as I said at the 13:42:01

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beginning of the hearing, the Claimant is 13:42:02
essentially desperate to have the Tribunal assume 13:42:03
that this agreement could be negotiated on price and 13:42:05
terms because of the effect on value that it has if 13:42:09
it must comply. 13:42:12

As a matter of law and practice we 13:42:14
would suggest that Tribunals cannot just simply 13:42:16
assume that signed and binding contracts will be 13:42:18
renegotiated unless they have both parties here 13:42:20
telling them that this is so. 13:42:23

Siemens is not here. And there was no 13:42:25
reason to allow the Claimant to unilaterally amend 13:42:28
a signed and binding agreement. 13:42:31

In fact, as Mr. Mars explained about 13:42:34
a different contract, he said "We believe there's 13:42:37
a sanctity to a contract. When you sign it, you are 13:42:39
signing up to obligations." 13:42:42

Again, the Claimant cannot have it 13:42:44
both ways. They can't embrace the contracts they 13:42:45
like and eschew the ones they don't. Moreover, the 13:42:48
Siemens TSA itself, as the evidence shows, makes 13:42:56
clear that the price flexibility was there to 13:42:58
protect Siemens. There are no price adjustment 13:43:00
rights for Windstream. 13:43:03

The Siemens TSA also makes clear that 13:43:05

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there were no further agreements, oral or written, 13:43:09
nor other terms or conditions that were not -- that 13:43:14
neither party has relied on any representations, 13:43:17
express or implied, not contained in this contract. 13:43:20

Now, Mr. Guillet explained this 13:43:31
contract was not bankable, but there is no reason to 13:43:33
expect the price to go down. The claimant has 13:43:36
offered several theories on why the price would go 13:43:40
down, but none holds water. 13:43:43

First, they have suggested that 13:43:45
Siemens would bring the price down in order to 13:43:47
assist Windstream to be the first project in North 13:43:48
America. We heard that again this morning, but as 13:43:51
Mr. Goncalves explained, it is naive to suggest that 13:43:54
the Claimant's single project of 300-megawatts would 13:43:58
give them some sort of leverage over a massive 13:44:00
company like Siemens. There is no reason to expect 13:44:03
Siemens to bend over backwards to help them. 13:44:07

Second, the Claimant has also 13:44:10
suggested, and you did hear this this morning, that 13:44:13
the price would go down because of market pressures. 13:44:15
Essentially, Siemens would have to complete with 13:44:17
other turbine manufacturers. 13:44:20

As Mr. Goncalves explained, the 13:44:22
problem is Siemens had a virtual monopoly in Ontario 13:44:25

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at the time. 13:44:30

[redacted]

13:45:44

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--- Confidential transcript ends 13:45:44

MR. SPELLISCY: Now, those are some of 13:45:46
the biggest areas of specific disagreement in terms 13:45:47
of CAPEX, but I do want to come to one other point. 13:45:48

The Claimant has placed great reliance 13:45:52
on the Conference Board of Canada paper prepared by 13:45:54
Vestas as providing some sort of independent 13:45:57
corroboration of its estimate. In fact, we've 13:45:59
probably seen it half a dozen times and we heard it 13:46:01
again this morning, but they haven't taken you to 13:46:04
the part of the conference paper where Vestas 13:46:06
admitted -- where Vestas talks about their 13:46:08
methodology. 13:46:10

So let's go there. Vestas says their 13:46:11
methodology is based upon international experience 13:46:13
over the past three years. 13:46:15

So, in short, they're using the same 13:46:17
methodology that 4C is using; they're looking at 13:46:21
international experience. 13:46:25

This paper does not offer 13:46:26
an independent method leading to the same result; it 13:46:27
is the same method leading to the same result. 13:46:30

That is not verification and that is 13:46:34
not surprising. More importantly, the emphasis on 13:46:36
this paper over the last several days went back 13:46:42

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through the record and see if we had anything there about what the Claimant said about it. 13:46:45 13:46:48

Now let's pull up an exhibit that I don't think has come up yet, though it is referred to in Canada's written pleadings. 13:46:50 13:46:52 13:46:54

This is a draft of a letter that Mr. Baines apparently prepared to the Conference Board of Canada when he received an advance copy of that report. I would suggest you read this letter when you have time. Mr. Baines is not happy about the report. 13:46:56 13:46:58 13:47:00 13:47:02 13:47:05 13:47:07

Now, this is all we have that was produced. I don't know whether it was sent, but Mr. Baines writes at the time, his opinion: 13:47:10 13:47:12 13:47:14

"The conference board report is inaccurate," he says, and among his reasons is that, "The capital cost assumed for a project is incorrect. If it is based upon some detailed design work done by Vestas, this should be noted, as we feel that capital cost is much higher than shown." 13:47:15 13:47:18 13:47:19 13:47:20 13:47:23 13:47:24 13:47:26 13:47:28 13:47:29 13:47:31

So while they've come back again and 13:47:38

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again, to this report, during this date, or during this hearing, it seems to us that at the time in question, their strenuous contention was that report was not accurate. 13:47:40 13:47:46 13:47:49 13:47:54

Now, in addition to the problems with their capital cost analysis, there are other problems with their DCF, like inputs on OPEX, financing and resources, wind resource. 13:47:56 13:47:58 13:48:00 13:48:05

I didn't want to spend a lot of time here. We rely upon our pleadings and our expert reports, but I would suggest there was no certainty on operational expenses. And as Mr. Goncalves explained in his presentation, there is always uncertainty on how much the wind will blow. 13:48:08 13:48:10 13:48:12 13:48:14 13:48:17 13:48:19

These are the inputs and the uncertainty of the inputs that go into the DCF, but if we look at the actual model that was used by Deloitte with these inputs we see that it is also inappropriate. 13:48:26 13:48:27 13:48:30 13:48:33 13:48:35

There is a large amount of uncertainty on the Claimant's financial inputs into the DCF model, like its cost of equity in particular, and you heard about this from my colleague, Mr. Terry. 13:48:37 13:48:41 13:48:43 13:48:46

I won't spend, again, a lot of time on this because, frankly, I'm a little bit tired of 13:48:49 13:48:51

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talking about betas. But I do want to highlight that the inappropriately low cost of equity the Claimant has suggested for a project at this stage of development. 13:48:53 13:48:57 13:49:01 13:49:03

Now, Ms. Squires has already walked you through all of the major risks associated with project layout, design, schedule, and more. 13:49:04 13:49:07 13:49:09

Now, curiously, Mr. Low actually suggested that his weighted average cost of capital wasn't related to the stage of this project. 13:49:11 13:49:14 13:49:17

In doing so, he had to disagree with his own report. He had to back away from what he had written. 13:49:20 13:49:22 13:49:26

It as Mr. Goncalves explained, Mr. Low is wrong. 13:49:28 13:49:33

The cost of equity is related to the project's stage of development. Now, perhaps it is Mr. Low's failure to take the stage of development to account that led him to select the proxy group that he did, because the proxy group that he selected is primarily large, diversified, operating companies. And not only did he rely upon results from three companies with less than five years of operating data, which although he said it was "Okay," he admitted it did significantly reduce his 13:49:33 13:49:35 13:49:39 13:49:42 13:49:44 13:49:48 13:49:50 13:49:58 13:50:00 13:50:03

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beta and his cost of equity. 13:50:06

He didn't appropriately adjust his results for the stage of development, claiming instead that he was valuing not what Windstream was, but what he assumed it would be on the valuation date in the but-for world. 13:50:08 13:50:10 13:50:12 13:50:16 13:50:18

Again that is not appropriate. 13:50:20

The question was: What stage was Windstream at on the valuation date, not where one would assume it might be if everything goes according to their plans. 13:50:22 13:50:25 13:50:28 13:50:30

The fact that Mr. Low's beta does not accurately calculate the specific risk Windstream faces, also evidenced by the fact that his adjustment for Windstream's company-specific risk is at least mathematically wiped out by his country adjustment. 13:50:31 13:50:34 13:50:38 13:50:41 13:50:44 13:50:48

To say by investing in Windstream should result in an adjustment that can be mathematically eliminated simply by the fact that it's an investment in Canada versus the United States is simply not plausible. 13:50:48 13:50:50 13:50:52 13:50:55 13:50:58

Windstream had no permits, no site, no turbines, no revenues, no plants. 13:51:01 13:51:03

It was more risky than merely the 13:51:05

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difference between investing between the two countries. 13:51:08 13:51:10

And this is exactly why Mr. Low's cost of equity is so inappropriately low, and why Mr. Goncalves' adjustments that Mr. Terry talked about this morning, are appropriate. They reflect -- Mr. Goncalves' adjustments reflect appropriate risks for offshore wind projects, especially considered in light of the particular circumstances of Windstream. 13:51:11 13:51:13 13:51:17 13:51:21 13:51:24 13:51:27 13:51:32 13:51:33

Finally, I will turn to my third area today, the use of a market multiples analysis. 13:51:36 13:51:39

Now, again, in our view, the only appropriate damages here, if causation is established, would be sunk costs. But let's talk market multiples quickly as well. The Claimant says that it should be considered a late stage development company and be compared to other late stage companies because it had a FIT contract and a turbine sales agreement. 13:51:42 13:51:44 13:51:46 13:51:50 13:51:53 13:51:55 13:51:58 13:52:00

Now, their claim to the latter is strange, because they've essentially said that they are going to renegotiate every aspect of that TSA. Again, the Claimant cannot have it both ways. 13:52:02 13:52:05 13:52:07 13:52:10

It cannot embrace the TSA for the 13:52:13

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purposes of the stage of the project analysis, but then eschew it when it comes to considering its costs. 13:52:15 13:52:18 13:52:21

No doubt, having a TSA was something. But it's he not enough to make the project a late stage project. Similarly, having a FIT contract is something. It's a milestone, but not in enough to give the project any sort of significant bump in value. 13:52:22 13:52:23 13:52:27 13:52:32 13:52:35 13:52:37

The FIT contract is a piece of paper, if you can't build your contract, your project, that piece of paper is worth nothing. As Mr. Goncalves explained on Wednesday, a FIT contract is a single milestone on the path towards value. That is it. Hence, by comparing itself to late stage projects, the Claimant is not using the right comparables. Let's look to what Mr. Guillet says. 13:52:40 13:52:42 13:52:44 13:52:50 13:52:53 13:52:58 13:53:01 13:53:04

He's the only one with market experience here. As Mr. Neufeld has explained, the Claimant was not permitted at all. They hadn't even submitted an application, there is no dispute about that. They did not have site control. They needed the Crown land lease and did not have it. They did not have a grid connection. Let's pause on that one because there's some dispute about that. 13:53:09 13:53:11 13:53:16 13:53:19 13:53:21 13:53:23 13:53:26 13:53:29

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The Claimant has placed great emphasis on the fact that they had a spot reserved on the grid, but as Mr. Guillet explained, that is not enough. You need an actual agreement. 13:53:32 13:53:35 13:53:37 13:53:40

Those are the things -- your FIT contract, your PPA, permitting, site control, and a grid access agreement, that's what leads to a bump in value. You need all four. We saw the number come up earlier where it was Mr. Guillet estimating that it's between 0 and 60 million Euros. 60 million Euros is for a project that has all four; that's what he said. $200,000 a Euro or megawatt -- or 200,000 Euros a megawatt for a project that has all four, that is fully permitted. 13:53:44 13:53:48 13:53:52 13:53:55 13:54:00 13:54:02 13:54:06 13:54:09 13:54:12 13:54:17

Windstream did not have all four. And as Mr. Guillet's report makes clear, as a result, it would be worth only a fraction of the amount of that. Mr. Goncalves' multiples analysis comes up with a similar number using a far more sophisticated approach and looking at transactions that do no, in fact have all of the requirements identified by Mr. Guillet. He comes up with a multiple of .05 per megawatt for a total of between 0 and 15 million. 13:54:20 13:54:22 13:54:24 13:54:27 13:54:32 13:54:35 13:54:38 13:54:41 13:54:45

But as Mr. Goncalves has said, even that is generous because what the Claimant had is 13:54:49 13:54:51

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not as important as what it did not have, in terms of market value. 13:54:54 13:54:57

As Mr. Guillet concluded in his report, without site control, Windstream likely had no material value at all in the market at the time. 13:54:58 13:55:01 13:55:03

The Claimant has suggested that this was simply a misunderstanding based upon a European experience where space is constrained; that is wrong. It's not about space; its about common sense. 13:55:08 13:55:09 13:55:13 13:55:16 13:55:20

To make money from a wind farm, you need to produce power. To produce power, you need to have turbines spinning. To have turbines spinning, you need a spot to put those turbines. If you have no spot to put the turbines, what are you selling? Nothing. 13:55:20 13:55:23 13:55:26 13:55:28 13:55:31 13:55:34

So let me sum up our view, on qualification. For all of the reasons that I just discussed and that are further detailed in our pleadings, we would submit that the only appropriate measure of damages in this case, should you determine that there is both breach and causation, would be to give the Claimant back the money it had spent on the development of the project, on the development of the project, approximately 13:55:39 13:55:42 13:55:44 13:55:47 13:55:49 13:55:52 13:55:55 13:55:57 13:55:59

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

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

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

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

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matter because Windstream had already, because of its own fault, done itself out of a FIT contract." 14:26:45 14:26:47

Now, whatever you think of that argument, the fact is that the other thing that you can tell and draw as an inference from the fact that the science wasn't done, you can use that to assess the nature and the purpose of the decision for the moratorium and whether it truly was a decision based on science or not. And that's an appropriate thing for the Tribunal to do in terms of drawing inferences as to how the decision was made and what its purpose was, so, in my submission, it is a relevant factor. 14:26:52 14:26:54 14:26:56 14:26:59 14:27:02 14:27:05 14:27:09 14:27:12 14:27:15 14:27:18 14:27:20

And when you do look at the witness statements also, please, bear in mind that Marcia Wallace, in her witness statement on January 6th, talks about a meeting with her deputy, and the deputy instructs her to take certain steps with respect to offshore wind [redacted] and, again, see how the timing of that squares with what we have heard subsequent to the witness statement in Mr. Wilkinson's testimony about the timing of these decisions. 14:27:24 14:27:25 14:27:29 14:27:31 14:27:35 14:27:37 14:27:41 14:27:45 14:27:47 14:27:51

Now, Mr. Neufeld, to move to other topic, Mr. Neufeld talked about the fact that 14:27:51 14:27:57

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Windstream hadn't taken any steps to apply for REA under the renewable regulation and the suggestion that somehow we couldn't have been serious about the project, we had to have known there was regulatory uncertainty because we hadn't taken any steps. And he compared the situation of Windstream to Trillium, another offshore project. 14:27:59 14:28:03 14:28:06 14:28:09 14:28:13 14:28:16 14:28:19

Now, Trillium, of course, didn't have a FIT contract. What Trillium did have is it had its AOR status. So it knew about its site, and its site was more than five kilometres offshore, so it was in a position to apply for REA, and, in fact, there's contemporaneous documentation that shows that it was applying for REA and that the Ministry of the Environment was telling it that, of course, it could apply for a REA, which, in my submission, is actually evidence that we could have also applied for a REA, we, meaning Windstream. 14:28:20 14:28:22 14:28:27 14:28:31 14:28:34 14:28:34 14:28:39 14:28:41 14:28:43 14:28:46 14:28:48

And why did Windstream not? Because of course Windstream didn't know what the exact location of its turbines would be. Windstream was waiting for the setback policy to be determined, for the AOR status to be determined before it could take the steps necessary under the REA regulation to apply for those studies. 14:28:51 14:28:53 14:28:55 14:28:58 14:29:02 14:29:07 14:29:12

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And what you see when you look at the contemporaneous documentation, is you see that Windstream is having meetings with the Ministry of the Environment and there are records of meetings in April, in June. There's, of course, during the summer, a lot of focus on working with Ministry offices and the OPA to obtain appropriate extensions. And then we have another meeting, we have meetings with MNR in September and then with Ministry of the Environment in October, and that's a meeting where Doris Dumais, as she mentioned in her testimony, did not mention anything about a pending moratorium. 14:29:14 14:29:17 14:29:21 14:29:23 14:29:25 14:29:28 14:29:31 14:29:35 14:29:38 14:29:41 14:29:43 14:29:46 14:29:49

So Windstream is doing what it can, and in addition, as my friend acknowledged, Windstream is taking the steps at that point to put out an RFP to retain the consultants, because the thinking around this time -- and this is consistent with the phone conversation we heard this morning -- the thinking is that the setback policy is going to be dealt with, within the government at least, in late summer, August, early September time period, and certainly outside -- [redacted] 14:29:50 14:29:52 14:29:55 14:29:57 14:30:02 14:30:04 14:30:06 14:30:08 14:30:13

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that will be resolved, and at that point the consultants who Windstream has retained -- and the evidence is they retained Stantec -- would be able to move ahead with their REA process, so that's what the evidence shows about moving forward under the REA. 14:30:24 14:30:27 14:30:30 14:30:33 14:30:36 14:30:38

In response to Ms. Squires, again, as we've said before, what we're hearing on this issue and we have made the point already about, and I think Ms. Squires acknowledged it, in terms of the experience of the claims experts on this issue. What we're hearing is questions of risks and possible risks and what might happen. What we're not hearing is an assessment of what's probable. And the question for the Tribunal to answer is what -- more likely than not, what is probable in terms of the development of the project? 14:30:39 14:30:45 14:30:50 14:30:53 14:30:56 14:30:59 14:31:04 14:31:09 14:31:11 14:31:13 14:31:16

And that's an issue that should be determined in the best available evidence including the evidence from the agencies about working pragmatically with the developers and the use of force majeure, the use of extensions, the information you heard from the experts in that area about working to deadlines, working back from deadlines, the whole sort of approach in the 14:31:18 14:31:21 14:31:23 14:31:28 14:31:33 14:31:36 14:31:41 14:31:45

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industry of working to be able to get these types of projects permitted, constructed, and operated within the timelines with the support from Ontario agencies. 14:31:50 14:31:53 14:31:57 14:32:00

And in my respectful submission, it's not a question of -- in terms of the evidence, looking at the evidence from the other side about what was possible; it's what was probable. 14:32:02 14:32:04 14:32:09 14:32:10

And just to point out one issue that was made, and this is something I want to just make sure is very clear on the record: There was an argument that the offshore substation would not have been possible on Pigeon Island. Now, that was based on the fact that a met mast approval had been denied by the coastguard. 14:32:14 14:32:18 14:32:21 14:32:24 14:32:28 14:32:31 14:32:36

My friends never asked Ian Baines, who was the person to ask about the reason that had been denied, and there is simply no basis for the Tribunal to make any determination that a transformer station could not have been put on the island on the basis of a denial for a met mast permit. 14:32:41 14:32:44 14:32:47 14:32:49 14:32:54 14:32:58 14:33:02

And this is something -- I'll return to this in dealing with damages. Where my friends have, in my respectful submission, have not put the 14:33:02 14:33:04 14:33:06

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question to the appropriate witness to be able to answer the question, and there are severe limitations as to the conclusions this Tribunal can draw when allegations are made about a particular document or a particular event without having asked the witness about that particular event and what occurred. 14:33:07 14:33:09 14:33:12 14:33:15 14:33:18 14:33:21 14:33:24

To move to damages, with respect to sunk costs, again, it is important to keep in mind first of all, and you've seen this in the evidence, that the project could have been turned on at any time. We heard for the first time last Monday, that from -- and this is in response to a question that the Tribunal had asked: What is Ontario's current intent with respect to the project? And at that point Ontario said, "Well, effectively, we're not going to be doing more science in the near term; the project is dead." 14:33:27 14:33:33 14:33:37 14:33:40 14:33:43 14:33:46 14:33:49 14:33:52 14:33:55 14:33:58 14:34:02

That's the first time Windstream heard about that. And even -- even knowing that, it still remains unclear. Mr. Cecchini's testimony was that from the OPA's perspective, there is certainly no definitive intention to terminate the agreement; it's a question of whether Windstream wants to terminate the agreement. And, of course, Windstream 14:34:04 14:34:05 14:34:11 14:34:16 14:34:19 14:34:21 14:34:23

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can't do that until the termination -- until the May 2017 termination date. And as we said, I think it was two days ago in the cross-examination of -- examination of one of the witnesses, the effect of this is that the respondents are saying that Windstream essentially should terminate its most valuable asset in order to somehow get back the letter of credit and bring this all to an end. 14:34:26 14:34:32 14:34:39 14:34:42 14:34:44 14:34:49 14:34:52 14:34:58

And that's in a context where there is no -- and we heard from Mr. Cecchini in his testimony, that the OPA is willing to enter into some sort of agreement but specifically when he was asked about how this affects the NAFTA claim, he's advised by Mr. Spelliscy, and Mr. Spelliscy objects and is not able to answer a question on that. 14:35:01 14:35:06 14:35:09 14:35:10 14:35:13 14:35:16 14:35:19

With respect to the issue of the audit, it's important to be very clear on the record here, as to what -- as to what Deloitte has done. Deloitte did, in response to issues that were raised in the counter memorial -- well, in the counter memorial, initially conducted an audit, a sampling audit with the 30 percent sample, but then when the rejoinder memorial when further comments were made, Deloitte went on and carried on a full audit. 14:35:22 14:35:25 14:35:30 14:35:35 14:35:38 14:35:44 14:35:47 14:35:51 14:35:54

And you can see that, just refer you 14:35:57

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to it -- you don't have to bring it up -- but slide 208, they describe the audit here: 14:35:59 14:36:02

> "Since the date of Deloitte's second report in response to the BRG rejoinder we have verified all payments that BRG indicated were substantiated, but payment could not be verified. We've reviewed the amounts categorized as unsubstantiated by BRG and believe that the analysis was not thorough, i.e. the BRG analysis was not thorough." [As read] 14:36:05 14:36:06 14:36:08 14:36:09 14:36:12 14:36:14 14:36:15 14:36:17 14:36:18 14:36:18 14:36:18 14:36:20 14:36:23 14:36:24

And you saw some of that in the cross-examination on Wednesday of Mr. Goncalves. 14:36:24 14:36:26

So, there was been a thorough audit done by Deloitte, and it's also important to keep in mind in this context that always the Claimant has responded to questions and requests with respect to these issues from the Respondent. 14:36:28 14:36:31 14:36:35 14:36:40 14:36:44

And there were never -- in my respectful submission, the idea that a Claimant 14:36:48 14:36:51

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needs to file every single one of their invoices when they make a claim and file it with their memorial is simply inconsistent with their practice, international arbitration. 14:36:54 14:36:57 14:37:00 14:37:04

It is fair to respond to the other side when they raise questions, and that's what's been done in this particular case, but any suggestion that there's actually an onus in a memorial to do something like that is, again, in my submission, not consistent. 14:37:06 14:37:07 14:37:10 14:37:13 14:37:17 14:37:20

And it's important in that respect, again, to note that my friend, Mr. Spelliscy chooses -- he chose to put his questions to Mr. Low in cross-examination. He did not ask Mr. Mars, for example, about the particular arrangements for paying, the list of the $10,000 per month payments and how those were allocated. He didn't ask Mr. Baines about the allocations with respect to the Control Tech company. 14:37:22 14:37:24 14:37:30 14:37:34 14:37:39 14:37:43 14:37:46 14:37:50 14:37:53

He chose to put the questions to Deloitte and there's -- if he had put them to the witnesses who were actually making those arrangements and incurring those expenses, in my submission, he would have obtained relevant answers to his questions. And, again, I would submit that 14:37:56 14:37:59 14:38:02 14:38:05 14:38:09 14:38:12

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the Tribunal, in the absence -- in the case of only partial information, I suggest that you should be very cautious about making any particular determination on that basis. 14:38:14 14:38:18 14:38:22 14:38:24

With respect to the LC, again, there is no ability -- just to make sure this is clear on the record -- there's no ability for Windstream, prior to May 2017, to terminate under 10.1(g). As I said before, to do so or to suggest that that should be the resolution of this matter, that Windstream should give this up in the absence of any step being taken from the OPA, in terms of termination, and really, given the fact that in this particular case, we still have Canada saying on behalf of Ontario, "Well, we're not going to do anymore science in the near term." And what does the "near term" mean? And is this project, you know, really dead? 14:38:27 14:38:31 14:38:35 14:38:38 14:38:48 14:38:50 14:38:53 14:38:58 14:39:01 14:39:05 14:39:10 14:39:13 14:39:16 14:39:18

So, to move on to the cost issue -- and I want to take a moment on this point, the Turbine Supply Agreement, if we could -- if I could hand up to you, the -- it's important to look at the agreement and take you to the provisions that Mr. Spelliscy didn't take you to, and you saw this in one of the witnesses. 14:39:20 14:39:23 14:39:26 14:39:31 14:39:37 14:39:40 14:39:43

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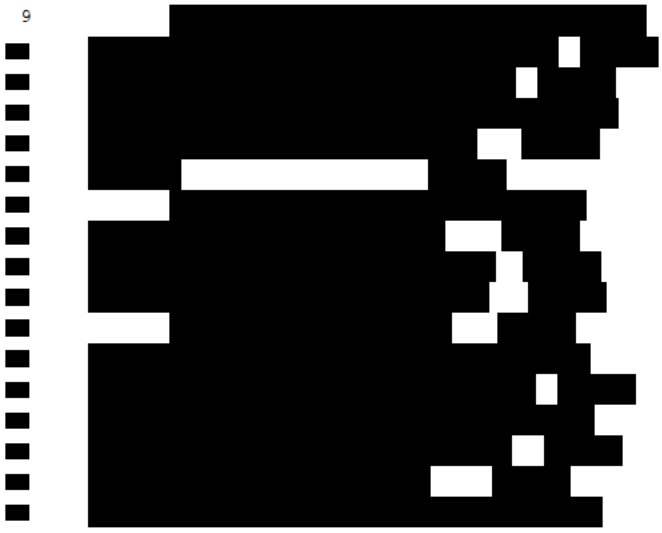
MR. SPELLISCY: Do you want this confidential? 14:39:50 14:39:51

MR. TERRY: Sure, if we can do it quickly. 14:39:52 14:39:54

--- Confidential transcript begins 14:39:54

MR. SPELLISCY: I don't think it counts against your time. 14:39:57 14:39:57

MS. NETTLETON: Yes. 14:39:59



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14:41:24

Now, with respect to the slide at 190, this is the one where Mr. Baines is raising questions with respect to the Conference Board of Canada Report and the Vestas capital cost. Again, here's another example. My friend could have asked Mr. Baines about it. He didn't. 14:41:25 14:41:28 14:41:30 14:41:32 14:41:37 14:41:40

And with respect, you have to treat with great skepticism, assessments now that you should make determinations on the basis of that letter when it's -- there's never been -- it's never been put to a witness. 14:41:41 14:41:43 14:41:47 14:41:49 14:41:52

Finally, on the market comparables point, the evidence -- the uncontroverted evidence is that Mr. Guillet put -- put an estimate in terms of market comparables for a project at the -- at 14:41:54 14:41:59 14:42:02 14:42:09

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stage before it had all its permits somewhere between 0 and $60 million. 14:42:13 14:42:17

And we've had, you know, arguments as to whether the project is in late stage or in Euros -- whether it's a late stage or an early stage project. 14:42:20 14:42:21 14:42:23 14:42:26

Now, Mr. Guillet, from his perspective, may have said, well, it's on -- it's on the spectrum; we go all the way to zero for this project, but Mr. Guillet admitted he hadn't read the FIT project. Didn't know about the Crown land release process. 14:42:27 14:42:29 14:42:32 14:42:36 14:42:43 14:42:45

He didn't know about -- as Ms. Powell said, the first step is to get a FIT contract and then the agencies MNR will work with you as well as -- Lawrence said, going through the site release process. 14:42:47 14:42:50 14:42:53 14:42:56 14:43:00

The whole process here, as Sarah Powell said, was flipped, it wasn't site access first; it was power purchase agreement. And it was a very good power purchase agreement. So keep that in mind, again, when you are considering market comparables, that when you're looking at the range that Mr. Guillet has set out -- and bear in mind that, to the extent he's saying it should be in the 14:43:00 14:43:03 14:43:05 14:43:09 14:43:11 14:43:15 14:43:18 14:43:20

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lower end of the range on the basis of a European perspective as to whether site access had been secured or not, consider that he doesn't have the relevant information as he himself acknowledged to be able to assess this in an Ontario context under a FIT contract. 14:43:23 14:43:26 14:43:28 14:43:33 14:43:35 14:43:38

Those are -- subject to any questions you may have -- those are our submissions. 14:43:43 14:43:44

PRESIDENT: Any questions? 14:43:49

Okay. Thank you very much, Mr. Terry. 14:43:52

MR. SPELLISCY: I will request just a couple of minutes to discuss with my colleagues. 14:43:57 14:43:58

PRESIDENT: Sure. 14:44:00

[Counsel confer] 14:44:01

--- Confidential transcript ends 14:44:08

PRESIDENT: Okay, Mr. Spelliscy, please. 14:46:39 14:46:40

REPLY SUBMISSIONS BY MR. SPELLISCY: 14:46:40

MR. SPELLISCY: Thank you. I will not try to address all of what my colleague, Mr. Terry, has raised in his rebuttal. 14:46:42 14:46:47 14:46:50

I think that most of it is addressed already in the documents and the pleadings on the record, so I don't intend to rehash old ground here. 14:46:53 14:46:55 14:46:57

I would suggest to you, when he asks 14:47:02

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the five questions about Minister Wilkinson and his decision, I would suggest to you when you go back and look to the documentary record, you will actually see, as Mr. Neufeld walked you through, that it is consistent with the story that we're telling. The timing is consistent. The content of the communications are consistent. 14:47:04 14:47:10 14:47:13 14:47:16 14:47:20 14:47:22 14:47:25

We walked you through some of that. I don't intend to go through it again, but I think you also have to pay attention to those dates. 14:47:28 14:47:30 14:47:35

For example, at the end, he brought you to and referred to a comment by Marcia Wallace in talking about how our timeline could square because she had a meeting on January the 6th. 14:47:37 14:47:39 14:47:42 14:47:45

It squares perfectly. 14:47:48

Mr. Wilkinson testified that he got the briefing note in his package on the evening of January 6th. 14:47:51 14:47:54 14:47:57

There would be nothing about what his decision was at that time. He hadn't seen the briefing note yet, and he hadn't met with his Deputy. So, go back and look at that timeline, pay attention to days, pay attention to weekends, when meetings would occur. You've got that evidence from Minister Wilkinson, and I would ask you to review it 14:47:58 14:48:00 14:48:03 14:48:06 14:48:09 14:48:12 14:48:15

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carefully. 14:48:18

Because what I would suggest to you to you is that the Claimant talked about the failure to present or the failure to bring questions to witnesses. 14:48:19 14:48:21 14:48:25 14:48:26

The person who made the decision, who says he made the decision, he was here. 14:48:27 14:48:28

They questioned him, not for very long. The other two individuals from the Ministry of the Environment, Marcia Wallace and Doris Dumais, they were here. They didn't question them for very long. 14:48:32 14:48:35 14:48:40 14:48:44 14:48:46

The Claimant is more intent on telling a story based upon how it would like to interpret the documents and then suggests that we haven't put the questions to the right witnesses. 14:48:47 14:48:49 14:48:52 14:48:54

I would urge you to go back and look at the transcript, from the beginning this has been told as the story of a Ministry of the Environment decision. 14:48:56 14:48:58 14:49:01 14:49:04

You had people from the Ministry of the Environment, including the very Minister who testified and swore he made the decision, who came here. Pay attention to that testimony, and then look at the documents in that regard. And I will 14:49:04 14:49:06 14:49:08 14:49:10 14:49:14

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

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

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

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

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Look at what Mr. Low said. What 14:54:24
Mr. Low said is the project only had nominal value 14:54:26
as of May of 2012 because it could not be developed; 14:54:29
the FIT contract had no value as at that date. 14:54:32
There was no reason not to seek relief under 14:54:35
10.1(g). 14:54:46

On the issue of sunk costs. 14:54:48

At one time we talked about the audit. 14:54:59
We also talked, again, about things being put to 14:55:00
certain witnesses. With respect to Control Tech it 14:55:02
was put to Mr. Baines, and he explained, "I wasn't 14:55:04
only working for Wolfe Island Shoals." That's where 14:55:07
the quote in my slide came from, we did put it to 14:55:11
him. 14:55:15

But I would put to you that the role 14:55:15
of a damages expert is to understand the basis of 14:55:17
his cost evaluation. We asked Mr. Low because he 14:55:23
submitted an opinion these were sunk costs. We have 14:55:27
the documents in the record. We have the document 14:55:29
that says it's a memo; it's dated the right date. 14:55:29
We see the costs before that. We eliminated those 14:55:34
costs. 14:55:37

We have documents showing what they 14:55:38
were doing, the allocation of time. The documents 14:55:40
are clear. And if the Claimant wants to claim some 14:55:42

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costs, it bears the burden. And I would caution you 14:55:45
that my colleague, Mr. Terry, said at some point, 14:55:47
"If there is only partial information, you should be 14:55:49
cautious." 14:55:54

You should be cautious when there is 14:55:55
only partial information. And it is the claimant's 14:55:56
burden to prove to you its loss. You cannot assume 14:55:59
in favour of the Claimant. The Claimant bears the 14:56:03
burden, in the words of Jerome, full stop. 14:56:06

I will come to the last issue which 14:56:13
I will address, which is Mr. Baines' letter; and 14:56:14
there was a question, again, that we should have put 14:56:20
it to Mr. Baines. 14:56:22

I urge you just to read the letter. 14:56:23
It is clear on its face as to what he thinks of the 14:56:25
report that was being prepared and that was being 14:56:29
relied upon by the Claimant extensively at this 14:56:32
arbitration. 14:56:35

There is no need to ask Mr. Baines 14:56:36
a question about a contemporaneous document produced 14:56:39
to us that is clear, that contradicts the very story 14:56:42
that they're offering you here. 14:56:47

Thank you. That's all I have. If 14:56:51
there are questions, I'd be happy to answer them. 14:56:54

PRESIDENT: Thank you very much. 14:56:57

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Thank you, Mr. Spelliscy. 14:57:02

That concludes the substantive part of 14:57:13
the hearing. 14:57:15

We had flagged a few items for 14:57:16
discussion. I believe there are at least three. We 14:57:20
invited the parties to discuss and see whether there 14:57:24
would be any need for post hearing submissions, 14:57:28
that's one item. Then we should discuss cost 14:57:32
submissions, and a more mundane subject of 14:57:37
corrections to transcript, which you may wish to 14:57:42
leave for the parties to see how they want to go 14:57:48
about this. 14:57:50

On these three items, may we start 14:57:52
with the post hearing briefs. The Tribunal's 14:57:54
feeling -- 14:57:58

MR. SPELLISCY: Could I add one more 14:57:59
item to the agenda that I don't think -- 14:58:00

PRESIDENT: Sure. 14:58:02

MR. SPELLISCY: -- either party 14:58:02
covered in their submissions, but we should for the 14:58:03
Tribunal, which was question 7 on the questions the 14:58:04
Tribunal posed to us, which was really more of 14:58:06
a procedural question about the deliberations of the 14:58:08
Tribunal. 14:58:11

PRESIDENT: That leaves -- 14:58:12

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MR. SPELLISCY: I would be happy 14:58:13
and -- and the consideration of legal authorities. 14:58:14
I would be happy to give you our view on that. 14:58:17

PRESIDENT: That could be discussed 14:58:20
first. It is sort of linked to the post hearing 14:58:20
issue as well. 14:58:24

So, maybe we can discuss those 14:58:25
together. 14:58:28

The Tribunal's feeling certainly is 14:58:28
that in our view there is no need for post hearing 14:58:30
submissions unless the parties have agreed otherwise 14:58:35
whether that there are any specific issues you would 14:58:39
like to address. 14:58:41

The case has been thoroughly briefed 14:58:42
in terms of law and facts. We have a sense that the 14:58:45
issues have been set out for us as clearly as they 14:58:49
can be. But we are happy to hear how the parties 14:58:51
feel about this. Mr. Terry? 14:58:57

MR. TERRY: I think our -- I think all 14:59:01
three of us, Tribunal, ourselves, and my friends, 14:59:04
are of the same view with respect to post hearing 14:59:06
briefs that -- and of course I'll let Canada speak 14:59:09
for itself, but based on our discussions we don't 14:59:14
feel they are necessary in this case. 14:59:23

PRESIDENT: Mr. Neufeld? 14:59:24

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MR. NEUFELD: We agree and Mr. Terry was correct in stating our view. We had some quick discussions. The reason we set up our hearing this way was to have a break before our closing submission, which was quite helpful in organizing our thoughts, and we thank the Tribunal for the questions again because that was also very helpful. So given the format and your willingness to accommodate us in that regard, I think that's what helped us to fully brief the matters. 14:59:26 14:59:28 14:59:30 14:59:34 14:59:36 14:59:39 14:59:42 14:59:43 14:59:47 14:59:50

PRESIDENT: Okay, thank you. So we are on the same page, on that particular issue. 14:59:54 14:59:55

Then there is the question of -- question 7, we haven't heard the parties' views on those. Maybe Mr. Terry first. 15:00:00 15:00:01 15:00:07

MR. TERRY: From our perspective, we don't have any concerns with the Tribunal consulting legal authorities as suggested. 15:00:09 15:00:11 15:00:15

MR. SPELLISCY: Certainly our perspective as well is that the Tribunal is free to consult legal authorities, consultation with the parties on those authorities we think is advisable. 15:00:19 15:00:20 15:00:24 15:00:26

The only caution that we would draw is, I think in our view there's a difference between consulting legal authorities and consulting such 15:00:29 15:00:31 15:00:34

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authorities and pursuing a theory of the case that was not offered by either of the parties. I think certainly in the latter case consultation would be required. 15:00:37 15:00:40 15:00:43 15:00:45

PRESIDENT: Yes, the Tribunal's proposal was actually -- and we don't know yet where we end up in the deliberations, but the proposal was simply to flag to the parties that, if there are legal authorities that the Tribunal may wish to consult, if they are not on record we would convey the information to the parties and ask them to comment, if they wish, on any of those authorities and their relevance to the case. 15:00:45 15:00:47 15:00:50 15:00:52 15:00:57 15:00:59 15:01:03 15:01:05 15:01:09

That was the thinking. Certainly there was no thinking that the Tribunal would develop its own case theory; it was a rather more limited purpose simply to allow the parties to comment, in case there is any need for reliance on the authorities. And as you remember, this question was raised, I believe, in relation to the minimum standard issue only. 15:01:11 15:01:14 15:01:17 15:01:22 15:01:26 15:01:29 15:01:32 15:01:35

So, if there is an agreement on that, we will note that for the -- it will now be recorded in the transcript, as well. 15:01:40 15:01:44 15:01:48

Then the question of cost submissions. 15:01:52

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I don't know whether the parties have had a chance to consider this, Mr. Terry. 15:01:56 15:01:58

MR. TERRY: We haven't had any discussions yet. Of course, we're happy to take direction from the Tribunal or we could have discussions and then follow up with the Tribunal on this issue. I'm happy to do whatever makes sense and is most efficient. 15:02:04 15:02:05 15:02:11 15:02:13 15:02:15 15:02:19

MR. NEUFELD: Likewise, we're always happy to discuss. One thing we note is that they're often quite helpful after the submissions have been -- or after the decision has been rendered, so that, perhaps, is a first step to -- before deciding whether cost submissions will be filed, but we're happy to continue the conversation with Claimant counsel. 15:02:25 15:02:26 15:02:28 15:02:31 15:02:36 15:02:41 15:02:44 15:02:47

MR. TERRY: But that might be an appropriate approach. In this case, I think it's partly reflecting Canadian domestic practice in terms of costs quite often we find this an effective way to deal with it. 15:02:49 15:02:50 15:02:54 15:02:57 15:03:03

PRESIDENT: You mean that the cost submissions will be made only after the award has been rendered? 15:03:05 15:03:06 15:03:08

MR. TERRY: Yes. And there may well 15:03:10

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be also discussions between the parties, but, again, we're happy to seek your guidance and if that's problematic from the Tribunal's perspective we're happy to discuss it further. 15:03:16 15:03:20 15:03:22 15:03:26

PRESIDENT: Without consulting my colleagues I would say that we prefer to have -- we would prefer to have the cost submissions now. 15:03:28 15:03:29 15:03:32

What we could do is the usual two rounds. One other question is whether you would like to make full cost submissions or simply statements of costs, that's perhaps one thing, which we can leave for the parties to discuss and agree. 15:03:37 15:03:40 15:03:42 15:03:44 15:03:49

The second is the deadlines, which we could discuss now if there is -- for reasons of efficiency we could agree on the deadlines, whether you need three weeks, for instance, first-round, a week for the second round, in terms of efficiency, or we can leave it for the parties to agree. 15:03:54 15:03:57 15:04:01 15:04:03 15:04:06 15:04:12

MR. TERRY: I think it might be useful having a discussion, because I think whether or not we just file costs or actually file cost submissions, it may increase the length of time that's required for doing it. 15:04:14 15:04:16 15:04:18 15:04:22 15:04:24

PRESIDENT: Okay, so we'll leave it for the parties. We are encouraged by the level of 15:04:27 15:04:29

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cooperation that we have seen so far. We have no doubt that you will be able to agree on the deadlines for the submissions, and the only deadline we could perhaps fix is for the parties to come back to the Tribunal for a proposed timetable for cost submissions. And we can throw, perhaps, the issue of how to deal with corrections to the transcript into the same pot. 15:04:31 15:04:34 15:04:36 15:04:39 15:04:42 15:04:46 15:04:48 15:04:50

And where are we now? We are on Friday -- perhaps it is -- is ten days a reasonable period of time for the parties to agree? 15:04:53 15:04:55 15:05:03

MR. TERRY: It sounds reasonable to us. 15:05:07 15:05:09

MR. NEUFELD: Sure, we can agree. 15:05:10

PRESIDENT: So that would be Tuesday -- in March, I believe, still. 15:05:12 15:05:13

MR. TERRY: March -- 15:05:26

PRESIDENT: March 8th. Tuesday March 8th, so agreed timetable from the parties on cost submissions as well as the nature of the submissions, whether it's submissions or statements of costs. 15:05:27 15:05:29 15:05:35 15:05:37 15:05:39

And then proposal how to deal with corrections to the transcript, including the timetable for that; is that agreeable? 15:05:41 15:05:44 15:05:48

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MR. TERRY: That's agreeable to us. 15:05:55

MR. SPELLISCY: That's fine, yes. 15:05:56

PRESIDENT: Okay. And do we have anything else? We have already actually asked the court reporter to produce a one consolidated transcript which will be sent after the hearing, so it will be everything from Day 1, so that you don't need to compile your own version, so that can be then made available, not only to the Tribunal but also to the parties. So maybe logistically easier. 15:05:57 15:06:00 15:06:09 15:06:12 15:06:14 15:06:18 15:06:22 15:06:25

Anything else? 15:06:30

MR. TERRY: We have one small issue, probably best discussed first with my friends. We realized today that there was -- that there was actually a typographical error which actually has some significance in terms of the meaning of the word in one of our witness statements, so we'll discuss with our friends and see if we can find a way to resolve it. 15:06:32 15:06:34 15:06:38 15:06:42 15:06:45 15:06:47 15:06:49 15:06:53

It is a witness statement that's been filed, and, unfortunately, to our -- in an expert report, and unfortunately we should have corrected it while the witness was here. We didn't. In any event, I'll discuss with my friends and see if we can make any arrangement with respect to this 15:06:54 15:06:57 15:06:59 15:07:02 15:07:06 15:07:08

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matter. 15:07:10

PRESIDENT: Okay. It is usually the word "Not missing" in these instances. Okay, very good. 15:07:10 15:07:11 15:07:16

If there is nothing else, it just remains for us to thank counsel, the parties, the experts and the people who have been attending the hearing very patiently over the last two weeks, as well as the court reporters, and the secretary of the Tribunal, of course. 15:07:17 15:07:22 15:07:25 15:07:30 15:07:34 15:07:37

And especially we would like to thank the parties for the level of -- high level of cooperation shown throughout the proceedings. It has been exceptionally pleasant from a professional based on, at least on my own prior experience in these proceedings, we are very grateful for that. 15:07:42 15:07:46 15:07:49 15:07:54 15:07:58 15:08:01

We are also grateful to the parties for the very thorough closing submissions made today. They will greatly assist the Tribunal in the deliberations, and we can only say that the parties are in very good hands. No better job could have been done to brief the Tribunal on the issues and in terms of presenting the evidence. 15:08:05 15:08:07 15:08:10 15:08:14 15:08:16 15:08:22 15:08:25

The Tribunal will start its deliberations, and we can assure that we will try to 15:08:27 15:08:30

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complete the award and the deliberations diligently. We have a certain time program. We should call for the confidential go into confidential for this part of the discussion, perhaps not, but we have -- we are aiming at producing a decision as a matter of months, rather than years. 15:08:36 15:08:40 15:08:45 15:08:48 15:08:51 15:08:56

But more seriously, the aim is to have a draft award concluded, finalized hopefully by the end of the summer, and we will see then how long it takes to finalize it. That's also a matter for the -- for the Tribunal members to see how we proceed. 15:09:01 15:09:03 15:09:11 15:09:14 15:09:16 15:09:24

But, that is the goal. So hopefully within a few months we will have the award. 15:09:25 15:09:29

Anything else my colleagues would like to add? 15:09:32 15:09:35

MR. TERRY: May I add, I expect Canada would want to as well, express my thanks and great respect to all the Tribunal members and the secretary for what I have found to be an exceptionally well-run hearing and appreciate the care. I know all four of you, as well as the reporters were working extremely hard all the time, and my only regret is that you likely didn't have much time to get to know our city, and you're here 15:09:36 15:09:39 15:09:42 15:09:45 15:09:48 15:09:52 15:09:56 15:09:58 15:10:04

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at an interesting time of the year when the weather 15:10:07
isn't quite as good as it's been at other times. 15:10:10
But it has been a very, very pleasant 15:10:14
experience, and on behalf of Torys team and our 15:10:16
clients, and our assorted experts and others, I just 15:10:20
wanted to give our heartfelt thanks to all the 15:10:23
Tribunal members. Thank you, and the secretary. 15:10:26
Thanks very much. 15:10:28
PRESIDENT: Thank you. 15:10:29
Yeah, we are grateful to the City of 15:10:30
Toronto for organizing the weather that certainly 15:10:31
didn't create a distraction during the hearings. 15:10:35
Thank you very much. 15:10:38
MR. NEUFELD: I'd like to echo those 15:10:41
thanks as well, please. Thank you to the Tribunal, 15:10:43
to Ms. Nettleton, for not just running an efficient 15:10:45
hearing but also an efficient arbitration, you know, 15:10:49
very, very grateful for that. 15:10:52
I'm grateful to John, Myriam, Nick 15:10:55
Emily, Chris, Rose, whole gang at Torys. 15:10:58
It has been pleasant to work through 15:11:03
issues ourselves without having to take them to the 15:11:04
Tribunal. I think we are very grateful for that. 15:11:06
And I would also -- this is a little 15:11:10
self-serving -- but I'd like to thank the team that 15:11:13

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I have because I'm extremely privileged to be able 15:11:16
to work with very, very competent and capable 15:11:19
individuals at the Trade Law Bureau of Canada. 15:11:25
PRESIDENT: Thank you very much. On 15:11:29
that happy note we will close the hearing and we 15:11:30
wish safe travels to those that aren't going to stay 15:11:33
in Toronto and enjoy the weekend here. Thank you 15:11:37
very much. 15:11:41
--- Whereupon the proceedings concluded at 3:11 p m.

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