In the matter of an arbitration
under the Rules of Arbitration of
the International Centre for
Settlement of Investment Disputes

Case No. ARB/14/14

ICC Hearing Centre
112, avenue Kléber
75016, Paris

Day 4                      Thursday, 15th September 2016
Hearing on Jurisdiction and Liability

Before:

PROFESSOR PIERRE MAYER
PROFESSOR BRIGITTE STERN
PROFESSOR EMMANUEL GAILLARD

EUROGAS INC and BELMONT RESOURCES INC
Claimants
-v-
SLOVAK REPUBLIC
Respondent

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HAMID GHARAVI, EMMANUEL FOY and ELLEN-LOUISE MOENS, of Derains & Gharavi International, appeared on behalf of Belmont Resources Inc.

STEPHEN ANWAY, DAVID ALEXANDER, ROSTISLAV PEKAR, RAÚL MAÑÓN, MARIA POLAKOVA and EVA CIBULKOVÁ, of Squire Patton Boggs, appeared on behalf of the Respondent.

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NOTE: Since at the Paris hearing a dispute occurred between the Parties regarding translation of certain mining terms (such as: banská činnosť, ťažba, dobývanie), in order to ensure that correct mining term used by a Slovak speaking witness is noted in the transcript, the Parties agreed to add after English version of the mining term used by an interpreter, a Slovak language version that was actually used by a witness in the following form: “In Slovak language version:...”.
THE PRESIDENT: Before we resume the cross-examination of Mr Corej, the parties, or at least one of them, wished to know whether we had specific points on which we would like to hear them tomorrow. No, we don't make a list of specific points, just two messages. The first one is maybe to insist on legal issues both of Slovak and Utah law. And second, although it may be obvious, but it seemed to us that in the opening statements that were arguments that were, if not entirely new, not really developed in the memorials and to which there was no opportunity to answer yet, and we would like to have detailed answers on these points. That's all.

So we resume.

MR PETER COREJ (continued)

(Evidence interpreted)

Cross-examination by DR GHARAVI

Q. Good morning.

A. (In English) Good morning.

THE INTERPRETER: Perhaps we could check whether Mr Corej is hearing the interpreting. (Pause)

DR GHARAVI: Sir, could you tell us at what date the exploration rights were assigned to Economy Agency?
A. (Interpreted) Good morning, ladies and gentlemen.

Exploration (in Slovak language version: ťažobné) rights for the Economy Agency were assigned
by tender. There was an order of bidders established in
the tender, which I think was held sometime in
April 2005. I don't remember the exact date. It might
have been 21st April.

Q. Could you kindly turn, sir, to tab 37. It should be
C-33. You must have the Slovak version before you.
It's the first bundle. It's the Supreme Court decision
of 2007 this time. So tab 37, Exhibit C-33. The part
that is highlighted should say:

"The regional court also stated that on April 21,
2005 a tender procedure was held ..."

Then it continues to say:
"... and to the winning company in a letter number
... which also ..."

PROFESSOR STERN: Which page?

DR GHARAVI: It's the second page.

A. Yes, I see it.

DR GHARAVI: The second page on the left, Professor.

Page 2. More towards the bottom, there is a sentence
that starts with:

"The Regional Court also stated that on April 21,
2005 ..."

Then it states that:
"... the winning company in a letter number [whatever] ... also announced that a corresponding change in the mining areas record ... will be carried out on April 22, 2005."

I wanted to make sure that that was in line with what you just said. Would you agree with me, with the court, the chronology? Do you agree with the court chronology?

A. You mean the one stated here in writing?

Q. Yes, that it was --

A. I suppose, yes, once that's been written by the Supreme Court, I would suppose they should not make a mistake in that.

But let's try to agree on one thing, so we don't catch each other on dates, because it's 2016 now, so I apologise for not remembering some of the days precisely going back ten or more years. It's just a side comment. Thank you.

Q. I appreciate this.

Then I would like you to look at the two first documents in the pochette: it's R-0249 and R-0250. The reason I bring these two documents to your attention is that yesterday, as far as R-0250 was concerned, the draft contract with Transunited and Economy Agency, you seemed to indicate that it may not be April 22nd 2005,
but in May, and I showed you that even the Slovak
version said April 22nd 2005.

I wanted to bring R-0249 to your attention because
there is another draft contract that is dated May, which
may lift your confusion; namely that there were two
draft contracts negotiated, one on April 22nd 2005, and
the second dates May 2005. Does that fit your
recollection of the events?

A. No. I think I did say this yesterday. I'm not sure
where you are going with this. I have explained
completely clearly my opinion and my position in this
regard; I don't know what else is this fact going to
show.

There are two draft contracts here which -- one
submitted by I don't know which company, I have never
seen this company before. I knew EuroGas or [Belmont]
Resources. And then there's a counter-draft or proposal
of my company, and I think I explained to you the date
yesterday already, and also the fact that I could not
have known on 22nd April that this is [Trans]united
Corporation company, because I only could have found
that out once the draft contract was delivered to me.
Otherwise there would be EuroGas contract or Belmont, as the title on
the draft contract.

So I could not have known in advance that this is
going to be this company, and which I point out completely is unknown to me; I am not even familiar with the owners or anything else about it. And I was not willing to go into cooperation with some shell corporation whose portfolio I'm completely unfamiliar with. I was never given a record or extract out of business register, or anything like this, which would show me what company is this.

And that was one of the reasons why I have strictly defined myself vis-à-vis Mr Rauball and I have excluded completely any cooperation with him, and it was an effort of trying to get me into a dead end, to bring me into complicated problems.

Q. Sir, you are going on and on and on to talk and answer something that I have not asked yet. I am asking you whether that lifts your concern regarding the dates.

If you turn to your second witness statement at paragraph 42, you mention, "After exchange of drafts of the cooperation agreement"; then you have a footnote and you refer to these two contracts. So I was just reminding you that there were two drafts of contracts: one dated April 22nd and the other one May. That's it. And my question was whether you recall that that enabled you to fit the dates right. That's it.

Now, the question I have for you is: would you agree
with me that whatever means the shareholder of Rozmin had or did not have were superior than the financial means of Economy Agency? Otherwise you would not, immediately upon securing the exploration rights, enter into, I would say, extensive discussions for over a month period with them.

A. I think I explained this clearly enough yesterday. Let me try again. These are two draft contracts here: one submitted by Transunited and the other one I submitted. Since there was no agreement reached, no merger reached, neither one of these draft contracts was signed, I didn't have the smallest reason to continue in negotiations.

One thing else I'd like to point out: never before, even in this case, was it that I would contact Rauball myself as the first one, or Belmont or EuroGas. It was all the other way round: them contacting me, asking me for some kind of services or advice or assistance.

So I have nothing else to add to that.

Q. But you entertained those discussions and you exchanged drafts, proposals and counter-proposals, as stated at paragraph 42 of your witness statement, and as you confirmed this morning. You said there were proposals, counter-proposals and discussions, obviously over a month period. That was the point that I wanted to
If you have anything to add, please do so; otherwise I will move to my next question.

A. All I can add is that the talks were underway, but from the content thereof I understood clearly that there is no serious interest but it's only a speculative nature of talks, trying to gain dobyvacie rights and trade them, which was not my aim. My goal was to achieve -- which I have ended up achieving later on -- something I don't have to be ashamed of.

Another comment, if I may. I think that Rozmin had other options as well. They could have transferred their excavation area to another entity within the deadline. They could have done another thing: to participate in the tender. There is a catch: if they did succeed in the tender, they would never be able to be assigned again the same excavation area. So if they didn't want to participate themselves, Rozmin, in that new tender, by not participating at all they have as though confirmed the fact that it was legitimate that they lost the excavation area by [their] own inactivity.

So they were obviously trying to find another company, and they tried to use me for that purpose, for me to win the tender on their behalf and then give it to them back, or sell it to them; which did not happen
because I understood the trick they were trying to pull.

And after such experience even from the past, I have
refused completely to go ahead with this.

That's all I can say to that. For me, the chapter
with regard to Mr Rauball and Agyagos and the EuroGas
company and Belmont is over.

Q. I had put to you a question on the financial means,
comparing the financial means of Economy Agency and
Rozmin. That was my previous question. And I am going
now to try to compare the intention of Rozmin with the
intention of Economy Agency to move forward the project;
the intention, obviously, of Rozmin before the
termination of its exploration rights, and the intention
of Economy Agency as of the time it tendered and then
won the tender.

I put to you -- would you agree with me? -- that
Rozmin, who had entered a contract with Siderit, and the
contract was in performance, had the intention to carry
out the works themselves; whereas you, Economy Agency,
you never had such intention, because as soon as you got
that tender, you were negotiating with others, including
these two companies, to transfer the rights, as you
ultimately did, to VSK. Would you agree with what
I just said?

A. I absolutely disagree with your interpretation, because
first of all, you put into one question -- I would have
to give you ten answers. So it would be good if we
could fragment the questions bit by bit, instead of
asking one lengthy question, so I could give you short
answers.

Q. I can break it down if you want.

A. But I can say this very clearly and briefly.

Rozmin had the excavation area available to it since
1997. I, as Peter Corej, was since 1997 still at all
major decisions present. Rozmin until the time of the
tender, which was seven or eight years later, had done
what they had done, and I know what I have done because
I was managing my work in person. There was
a construction site built up, the ramp was built,
93.3 metres, there was explosive storage built and that was it -- the
works ended.

Something else I have to say. The financial
situation was so critical that Rozmin was not capable of
paying even for services we have performed for them for
guarding the area for security.

In 2004, that year in question when Siderit came
in -- I don't know if it was exactly 2004, it might have
been 2003; don't take me for that exactly -- I was
summoned to the police department in the city of
Rosnava. I was shocked by finding that the location
I have built, which was handed over to Rozmin, was completely burglarised: everything was stolen, electrical cables and equipment was stolen. So you are telling me Siderit was going to continue in this burglarised construction site?

One thing I would like to say --

Q. Sir, so that you understand my question --

A. Let me finish, please.

Q. Could you allow me to clarify, then you can move on. I'm not talking about the technical means, the financial capacity. I'm talking about the intention: the intention of you, Economy Agency, to carry out these works directly, not via another company. Not get the tender, dump it on somebody and continue as a director of that company; to do it yourself. And I'm putting to you that you never had the intention to carry out this project yourself, as Economy Agency or as Mr Corej; that the intention was to get the tender and dump it on somebody and have that company continue.

Now, please, I apologise to have interrupted you, but I wanted you to answer that question, not a side question.

A. You know, one serious thing I have to say. I'm a technician, I'm an engineer, and that's my engineering thinking. Most of you here are lawyers, and you think
as a lawyer, and you ask me some question while answering the question and at the same time not letting me explain it to you.

I don't know to what extent you are familiar with or who of you present here are familiar with my design project which I have submitted. If you were familiar with it in depth, there is a business plan part of my project. And I remember very well because I put it together, and my wife as an experienced economist was doing the economic part. Which is a significant and substantial part with any project: to have a good, decent business plan, with economic side to it as well. And it clearly declares in which way and with whom the mining works I'm intending to open. It is written there that I will do it with my own capacity, own machinery, and that is something I tried to stick with.

The second thing is that after the tender I was approached by a company who was second in the order of the bidders asking me whether it would not be possible to join our forces into cooperation. And when I talked at length with the owner of the company, I understood that this is a different situation entirely, that these people are truly interested in going into this. That is why I have decided then to go and join forces with them.

That's where I have something to say about the old
Siderit. My father was building Siderit. My father was a mining engineer, he was one of the directors in this company, and that's why I respect this company. It is difficult for me to talk about this now because Siderit would get into similar trouble as we did.

Q. Sir, I would move on on this subject a bit --
A. I'm sorry, I forgot, I got interrupted in my train of thought, trying to say as well, speaking that I am an engineer.

At the end of the day, that Siderit that you have been declaring about, that Siderit at a certain given time approached me, Mr Engel trying to participate in the project. They wanted to do parts of the project, it's a fairly broad project, and I did agree with that. There were negotiations which took place, there were drafts contracts, draft agreements reached.

However, at the moment when work was supposed to have begun, I think it was around 15th September, I think it was in 2006/07, Siderit was supposed to enter the site and commence working. It was Friday, I remember exactly. The management from Siderit, whom I am very well familiar with, they came to the site and I asked them, "Gentlemen, why didn't you start and commence working?" And they said, "Peter, look, we're not prepared, we don't have the machinery. We need to
wait a couple more weeks".

So on my own risk, I gave instruction to my staff and they came to the site and started working immediately. So neither Siderit nor anybody else but Rima Muran, with own staff, my company I used to own, commenced work. And there is a relevant -- it can be proven with relevant data. So I have commenced the first digging works with my own staff and my own equipment.

So that is all about Siderit what I have to say. So that's the type of management, how capable they were. Today they no longer operate. And my father used to build it, so I have a very close relation to the company. My father used to work there for 30 years, used to have 900 employees, and my father was managing the entire large company.

Q. Sir, if you had to describe your profession, how would you describe it? If I [ask] you what's your job, if you say, "I'm a technician", yes, but what's your job? Because I have engineer, technician. When I refer to your letters to the government badmouthing us before our rights were revoked, trying to secure as a lobbyist, intermediary, I have contractor, I said wheeler-dealer with the receipt for a million. How would you describe yourself?

A. You know, I understand that this is a court hearing and
dispute, but in civilian life I'm a sportsman, I'm an athlete, and I respect my opponents. With regard to my profession, I'm a mining engineer, yes, who for 36 years has been working in this business. And I'm also a doctor of mining sciences; that's just a side comment.

As a young boy -- I was maybe 34 -- I have handed over the job of chief engineer in the company of 400 employees. It was a mining engineering company where I was given the job of a manager. And just for consideration, at that time Dr Rozloznik was in a similar job: he was the head of a geology department managing 20 people. I was managing 400 people. That's a major responsibility. So that is when I have grown into a sense of responsibility, into an ability of humility and decency. And I am not ashamed of my job, of my profession. I'm doing it all my life, and I'm happy that I can still continue to do it today.

If those people had at least elementary character features I was referring to earlier, we would not be here today trying to tackle this problem.

Q. Who, the others? The same ones that you were negotiating with once you got the tender? Are you talking about the same people --

A. I meant specifically Mr Rauball and Mr Agyagos, who seem
to be experts each on their own field, because

Mr Rauball in my opinion never has even been at this

site; and as I know, Mr Agyagos was there once in 2000,

if I remember correctly, when there was an official

opening with all of the generals in mining business.

And he was asked by journalists: how does he picture the

next continuation and opening and exploitation of the

business? He said, "I don't understand this business

because I'm a plumber by trade". So this is the kind of

people who were trying to manage this business.

I think I have proven one thing, and I have proven

that for the first time: the opening of the deposit when

the ramp was being built, after experience with the

ramp, I have decided for another way of opening, through

the adit, and if the money would have been available,

the ramp would have been completed, believe me. As

I have declared, I have completed my declarations.

Q. Let's move on to whether or not your company Economy

Agency, or the one you merged with, managed to meet the

deadlines of the 2002 amendment. The question to you

is: did you or VSK or Economy Agency manage to extract

minerals within three years; that is, [before]

April 22nd 2008?

May I suggest that it's a clear no, based on your

[first] witness statement, which talks about, at
"The works were completed some time in 2009 and in this period, I presume in April, the first ton of talc was extracted."

A. During this time there was a tender for designation of the mining excavation area to another organisation? I don't think so. That means the merged company, Economy Agency and VSK, had met all the requirements. That is a question to State Mining Authority and professional supervision, whether the deadlines were okay. The only thing I can say from the technical point of view -- and please pay attention to what I say: VSK Mining, if not by itself but through its subcontractor Skanska, had drilled 4,160 metres in 24 months' time. That was the length of the adit. I don't think anything else needs to be said to that. It was 24 months. That was a high pace of work. If such pace had been from the very start, it would have been operating a long time ago. But the effort initially was zero. Not from me. I got myself into an incredibly complicated situation as a result back then.

Q. Sir, you have engaged extensively in your witness statements to say what "dobývanie" means; the 2002 amendment, you gave your view on this. And I apologise,
I'm not going to let you off on this question, whether you complied with the 2002 amendment, as you construed it, against Rozmin. Did you start extraction [by] April 22nd 2008? And I guess the answer can only be no, because you claim you did it in April 2009.

A. My answer is as follows. Mining activity and activities performed by mining means, there is a supervision always by State Mining Administration. Was (as heard in Slovak) dobývací area removed from VSK Mining due to the deadlines not having been met? Was there a new tender called to assign mining (in Slovak language version: dobývací) area to another company?

There was not. So I therefore declare all the deadlines were respected, they are valid. Because otherwise the Mining Administration would have proceeded in the same way as they have proceeded back in 2004 and 2005, when the tender took place in 2004 and 2005 consequently.

Q. That's why we are here: because we are submitting to you that that amendment was applied against us differently than the way it was applied to you. That's the whole point; that's why we are here. If it was just to declare --

MR ANWAY: Mr President, there is again a premise in that question that the 2002 amendment even applied at this time.
DR GHARAVI: Let the witness say it. He is the expert.

MR ANWAY: There is a presumption in one of your questions with a false factual premise. It is not appropriate to put the question to the witness.

DR GHARAVI: No, let him. That's a new argument that we hear from you.

THE PRESIDENT: The point has been clarified, so we can move on.

DR GHARAVI: When did extraction start? Can you prove that it started even in April 2009? What proof can you bring us?

A. It's not my job to give you any evidence. I don't see why I should give you any evidence here. I was not the owner at that time of the company anymore. I was a technical director responsible for something else entirely, for technical issues, for supervision over the project which I have designed myself.

One more comment, if I may. Certainly this was not the only situation when a tender was called. There was a modus operandi in other cases. And myself, as member of the execution of the Slovak Mining Chamber, had participated in other tenders on behalf of the Slovak Mining Chamber. And I can confirm that this was not the only case that, due to inactivity of a company, a new tender would be called to reassign the excavation area.
to another company. I know this exactly, and I can
confirm this in relevant cases. I was a member of such
commission in two cases personally.

So by saying that this was only specifically
designed against Rozmin is completely untrue. And you
had the head of the Main Mining Office; you could have
consulted this with him. So I don't know what else
I can say to that.

Q. Do you think the 2002 amendment applied in 2005, 2006,
2007, when VSK was undertaking those works?

A. No, because there was an amendment, I'm not sure in
which year -- 2005, if I remember correctly -- there was
an act amendment in the way that the deadlines were
changed for underground exploitation (in Slovak language version: dobývanie) from three to five
years. And with above-ground, it stayed the same: for
three years, I think. So underground excavation differs
from the above-ground operation, obviously.

So when -- it just occurred to me now -- when during
that time there was an amendment of the law, which it
did, then VSK Mining did not have the obligation by law
to start excavating within three, but within five years
instead.

Q. What law do you say was that? And when did it come into
force, do you recall?

A. You had the MMO head here who was responsible for this;
you could have asked him. I don't know exactly. It might have been 2007, I'm not certain. I suppose there are many acts which govern this business, and mining acts and decrees, I'm sorry to say there are really a huge number. I'm not familiar with all of them. But when I need something, I know where to look for it and how to look it up.

Q. Is that the 2007 law explaining what "dobývanie" means as it was reported in 2011? Meaning that "dobývanie" was explained only in 2007, and that the same law where it explained it, it extended the deadline to five years? Is that the one you are taking about?

A. I suppose.

Q. Okay. Now let us assume that the 2007 law that clarified the meaning of "dobývanie" in 2007 and extended it to five years, whether you complied with that, and assuming it was applicable to you, so it goes to April 2010. And I asked you: what proof can you give me that the company started extraction? And you answered, I think, "I don't have to give you proof", but then you went on. So you don't want to give me the proof, or you don't know because you were a technical director? What is your answer?

A. I will answer you very gladly. At that time company VSK Mining existed legitimately. So if you need to know
some details with regard to activity of that company,
you should approach the owners and managers of the
compny, because I at that time was the technical
director responsible for technical implementation of the
mining works, and that was the alpha and omega of my
activities of my job. It was totally not my job to be
observing deadlines or transfers and legal issues which
the company could have handled differently by their own
management. I was not an executive officer of the
company. What I wanted is what I was doing: being
a technical director, responsible with the supervision
authorities, making sure that the quality and the
dimensions as I have initially designed were also
performed for the mining works.

And I have to say that is exactly how things were
done. So the adit was dug 4,160 metres, 320-metre
chimney; the toughest mining work ever in Slovakia --
maybe in Central Europe -- over the past 20 years, which
is not simple mining operations, and we have been able
to stay within deadlines and now we are excavating. Why
was it not possible, having had all licences, all
permits before, all equipment and people, abilities?
Why we were not able to do that with Rozmin?

Q. Yes, but we're past that stage. You have to get over it
at one point. What about your heart? Doesn't your
heart, your desire, or as a citizen, tempt you to wish
to find out when exactly the deposit went into
extraction?

You say all this you wanted to do, but it's not
an abstract project. It has an end goal, which is to
extract talc. You are a citizen of the country, you are
an industrial player there. You were the director of
the company at least; I know you were not the owner.
You were the director of the company. How could you not
know, answer my question, when the mine started
extraction?

A. I think that the first tonne was excavated -- and
I think I mentioned the specific date -- April 2009.

Q. Yes, but that's your word. That is the same word you
have for the 1.5 million deutschmarks. What evidence
can you give me?

Let's move to the next exhibit, C-306. You see,
because all I'm left, when I ask these questions, is
with your statement, moreover which is qualified as
"I believe". So I look at the press, and what do
I have? I have a September 30th 2011 -- and this time
it is not the World Bank report on corruption or
European Commission; it is Rosnava, C-306, dated
September 30th 2011. Okay? That's your country. And
if you go to the second page -- it should be the last
So if you look at it -- I start again. All I'm left with is the information I can find online. So Rosnava, that's in your country, September 30th 2011, which is way, way past the even the five-year deadline. I turn to the second page, and it says:

"The company has invested more than €20 million ..."

Of course, that's not your company but the company that you handed it to:

"... into extraction of talc ... Since 2006 it has driven a 4.2 kilometer long tunnel leading to the deposit and 320 meter ventilation shaft. The necessary infrastructure for the mine has also been built ... "While preparation work was being done, the company employed 41 people. When talc starts to be extracted..."

When talc starts to be extracted. When talc starts to be extracted.

"... the company should hire a further dozens of people to work in the mine and the treatment plant. Further jobs should be created at contractors."

Of course, it didn't say three times "When talc starts to be extracted"; I am just emphasising. Yes, it's a problem?

A. This is not a problem at all, because over the ten years
there were a series of such articles, 30 of them, published by Mr Rauball. In the majority of these articles, nonsense was published, and personal invectives and personal attacks on myself and my family.

So I don't really attribute much value to these articles. This is published by journalists who can write anything, and basically they give their own meaning to things they don't understand. Please understand, I am a technical expert who is truly familiar with the matter, and I don't really put much weight to such articles.

Q. But you told me that you don't know precisely when there was extraction.

And this article, why Mr Rauball? I mean, what does it have -- it talks about the main shareholder. If you look at the first page, there was a discussion with Robert Schmid, general director of Schmid Industrieholding and VSK Mining's shareholder. The title is a very complimentary one: "Hungry Gemer clearly has the world's largest talc deposit!" Then it goes on, you see it says, besides creating jobs and other benefits for the local region, employment, it says your achievements, 4.2 kilometres. This is a good, congratulations, nice article.

Anyway, unless you have something to add, I want to
put a final conclusion that I draw from all this. Do you have something to add on this or should I move?

A. I don't think it is necessary to comment on it any further. I believe that I gave you quite a broad answer, I gave you my opinion, my position on this, and there is nothing else I could add.

Q. Good, good. If I sum it up --

A. Please understand, please permit me a few words. Because if we go into technical details, we would definitely spend much more time here than these hours, but I'm not sure this would be of interest to the members of the Tribunal and we would unnecessarily burden them with this.

There are certain details and differences in understanding what the term "dobývanie" or "excavation" means, in your perspective and in my perspective. But this is for an expert discussion, which definitely is not suitable for this environment and I don't think it is needed. Journalists' articles, well, please take them as a certain make-up story of journalists who don't truly understand the technical side of this.

Journalists barely cover, whoever wrote this.

What is rather interesting and perhaps shocking [to me]: at the end of every article it says what treasure is this deposit, what an incredible sight this is to see.
And yet if they would approach the site and if they would talk to me, I would definitely explain it to them -- and I think Dr Rozloznik would give them the same answer -- this is not exactly the case, this is a very complicated problem, because it is not a pure deposit, this is not just a vast bulk of pure talc, it is a complicated deposit and the whole mining (in Slovak language version: ťažobný) process will have to be floated. So it is definitely a complicated situation.

So whoever writes that this is the best deposit in the world -- Mr Rauball likes to pretend it's the best deposit in the world -- well, these people are very far from the truth.

Q. Again, sir, you have to focus with me. The article quotes Robert Schmid, which is VSK Mining's main shareholder. It quotes him:

"We have just completed extensive exploration ..."

It doesn't talk about extraction.

Okay, I will move on to the conclusion I draw on this. Before I do so, you say you were the technical director of VSK until 2012. When did you start: 2005, as technical director?

A. I suppose 2005.

Q. So 2005 to 2012, okay. And you never held any shares at VSK, did you?
A. No.

Q. The conclusion I draw from this -- and I leave aside Rozmin -- is that the government gave a company, Economy Agency, a mine deposit, whereas Economy Agency never had itself -- I am talking itself -- the financial means nor the intention to carry out the project, and ultimately it landed in the hands of someone that had not reached extraction even six/seven years after. That's the conclusion I draw from this, and I have nothing else to say but to put that conclusion to you. And I think you have already answered everything, but if you want to add ...

A. Well, sir, counsel, have you ever been there, seriously? I would truly recommend you to see it in person, to talk to those people who understand the issue truly, who technically have to solve daily challenges, and you would understand how complicated this project is. And one thing: the Government of the Slovak Republic did not give anything out as a gift, nor did it take anything away from anyone. Rozmin, by its lack of activity -- and everyone knows this in the industry, and I do hope that even people here understand it finally -- by their lack of activity and lack of responsibility reached a status quo where a new tender procedure had to be initiated in order to award the excavation area to
another organisation. If they had behaved responsibly, decently, and if they would continue financing the activities, I can guarantee you we would reach the deposit eventually.

It's not about the Slovak Government taking something away or giving something out as a gift. The Mining Act which is in force and which we have to respect -- everyone has to respect it, everyone who works in the mining industry -- clearly states under which conditions any organisation can have the mining (in Slovak language version: dobývací) area, and under which it does not have any mining (in Slovak language version: dobývací) area -- nothing else, nothing more -- for a given excavation area.

And I can only testify that I have worked in this industry for 36 years, and up to this date I am still responsible for some serious projects. So much for my side.

DR GHARAVI: What I have learnt by listening to the witnesses of the Slovak Republic is precisely, sir, that there is no talk. The law is the law; there should not be any explanation of the law. And that after a deadline is a deadline. And you receive a letter, and there is no talk, you move. That's what I understood. And I see that this was not applied to your company, even if we take the five-year deadline. You never
received this letter: clack, go.

That ends my examination, sir, and I thank you very much.

THE PRESIDENT: Re-direct?

MR ANWAY: We have no questions, Mr Chairman, thank you.

(9.54 am)

Questions from THE TRIBUNAL

PROFESSOR GAILLARD: Mr Corej, speaking for myself,

I understand your answers as to the press regarding the question of the date of the first extraction of talc, as opposed to excavation, the first time you extract talc, and I understand your answer to be that you don't think that what is said in the press is reliable. But my question to you is: what is your personal understanding of the date of extraction in this project?

A. "Tazba" and "dobývanie" mean the same. In technical understanding of mining are ťažba and dobývanie the same. I prefer to use the term "tazba", because in Slovak normal jargon we used to talk about "mining (in Slovak language version: ťažobné) companies", we never talk about "excavation companies". So that's why I use the term "tazba" and not "dobývanie".

I personally think that the key term -- and please don't take my word for granted; I am not an official state representative, nor am I an official
representative of the company, I am just a technical
director -- I think that the key deadline was
April 2009. This is when the first tonne of the mineral
was excavated.

PROFESSOR GAILLARD: So your answer is that the first tonne
of talc was excavated in April 2009? That's your
answer?

A. I think so, yes.

THE PRESIDENT: No other question following this one? No.

Then thank you, Mr Corej, for having come and
answered these questions. So now you are free.

MR COREJ: Thank you very much.

THE PRESIDENT: Now we go to the experts. The first one is
Ms Jarvis, and then maybe a little later, or coming in
at some point, Mr Gardiner; is that right?

MS BURTON: Mr Chairman, we have decided that we will take
them at the same time. (Pause)

(10.03 am)

MS ANNETTE W JARVIS (called)

MR SAMUEL P GARDINER (called)

THE PRESIDENT: Good morning, Ms Jarvis and Mr Gardiner. So
you have presented expert reports in this case and you
are going to be asked questions, but first can you read
aloud, please, the expert declaration, each of you.

It's individual.
MR GARDINER: I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.

MS JARVIS: I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.

THE PRESIDENT: Mr Anway, your -- no?

MR ANWAY: We have no direct. Thank you, Mr Chairman.

THE PRESIDENT: No direct. Then Ms Burton.

(10.04 am)

Cross-examination by MS BURTON

Q. Good morning.

A. (Mr Gardiner) Good morning.

Q. We've never met, Mr Gardiner. I've known Annette for a number of years. So my first question is going to be: how do you want me to address you? Do you want me to address you by your first name, or as Ms Jarvis and Mr Gardiner?

Q. Do you have a preference?

A. (Mr Gardiner) "Sam" is great for me.

Q. "Sam"?

A. (Ms Jarvis) Whatever you feel comfortable with is fine.

Q. Alright, thank you.

I'm going to be questioning you today on your two expert reports. You are going to notice that my client
and I disagree with some of your conclusions. By doing so, I mean no disrespect to either one of you.

My first question is: I noticed that neither of your reports contained in them a list of the sources of information on which you relied in making your conclusions. Was that intentional?

A. (Ms Jarvis) I think what they list is in the statements of fact it lists every document that we reviewed for, you know, making those conclusions. So in the reports themselves is a list of all of the documents we reviewed in making these conclusions.

Q. So rather than have a separate list, would it be accurate to say your footnotes where you reference your documents contain the universe of information on which you relied to reach your conclusions?

A. (Ms Jarvis) Yes.

Q. Is that true for you, Sam, also?

A. (Mr Gardiner) Yes.

Q. Now, Annette, you're certainly recognised as an expert in bankruptcy law; and Mr Gardiner, you're here to testify with regard to your conclusions as a corporate attorney. Is that right?

A. (Mr Gardiner) That is right.

Q. You have to give verbal answers, Annette.

A. (Ms Jarvis) Yes.
Q. However, I would take it neither one of you is an expert in international law; is that correct?

A. (Ms Jarvis) That is correct.

A. (Mr Gardiner) That is correct.

Q. So you're not here to provide any opinions today regarding any of the issues that are before the Tribunal under international law as they relate to the Bilateral Investment Treaty between the United States and the Slovak Republic; is that correct?

A. (Ms Jarvis) That is correct.

A. (Mr Gardiner) That is correct for me as well.

Q. I want to talk with Annette first about some bankruptcy issues. Although it's set out in your report, I think it might be helpful to the Tribunal to just go through the basics of the Bankruptcy Code and Chapter 7, so that's what I will do first.

You state in your report that a bankruptcy case is commenced when a petition is filed. So if you would take a look, there should be a bundle -- we call them "binders" -- that might be of -- those are your reports, but there should be some exhibits, a bundle of exhibits there. (Pause)

If you take a look at item number 2 in that bundle. It will be tab 2, and it's Exhibit R-85. It's tab 2 in your bundle. This is the petition that was filed on
May 18th 2004 commencing the involuntary Chapter 7 case of the 1985 company known as EuroGas Inc; is that right?

A. (Ms Jarvis) Yes, that is correct. As I stated in my report, there are two ways that a bankruptcy can be commenced: one, a voluntary petition that is filed by the debtor, the company themselves; and the other is an involuntary [one] that is filed by creditors. An involuntary petition is sort of like commencing a complaint saying there's a reason for them to be in bankruptcy under the statute, and then the court makes a determination as to whether in fact the involuntary petition is correct and the company should be put into bankruptcy.

Q. And that eventually did happen --

A. (Ms Jarvis) Yes.

Q. -- with regard to this particular --

A. (Ms Jarvis) Yes.

Q. Now, the other thing I need to tell both of you is we can't speak at the same time, due to the recording equipment. So I will try not to interrupt you, and request the same back.

Property of the estate, let's talk about that a minute. The Bankruptcy Code has various lists within Section 541 of what constitutes property of the estate; I don't think we need to cover all of those today. But
just for the Tribunal's edification, property of the estate includes all legal and equitable interests of the debtor in property as of the date that the case is commenced; you would agree with that?

A. (Ms Jarvis) Yes.

Q. So with regard to the 1985 company's bankruptcy case, its bankruptcy estate would include all property, legal and equitable interests it owned in property, as of May 18th 2004; would you agree with that?

A. (Ms Jarvis) That is correct.

Q. With regard to other types of property, certainly property of the estate also includes property that the estate itself acquires; do you agree with that?

A. (Ms Jarvis) Yes.

Q. As examples. It may be easier for the Tribunal to understand this concept if we take a look at a bankruptcy filing by an individual person. If an individual person files bankruptcy on January 1st of a year, he is employed, he gets a pay cheque on February 1st, that pay cheque income is not going to be property of his Chapter 7 bankruptcy estate; you would agree with that?

A. (Ms Jarvis) Right, if it's earned after and it's with an individual afterwards, then it would not be property of the estate.
1 Q. But with regard to a corporate entity, if the trustee is authorised to operate the business -- and you discuss this a little in your report: that in a Chapter 7 for a corporate debtor, a trustee may request permission from the court to operate the business. And if he or she does, revenues generated during the time the case is pending will be property of the estate?

2 A. (Ms Jarvis) Correct. And under a Chapter 7, they could only operate it temporarily.

3 Q. Right. So property that the estate obtained is going to be property of the estate. Another example would be if the trustee sells an asset -- for instance, the trustee in this particular case sold some interest in corporate entities, and the proceeds that he received from the sales of those entities were property of the EuroGas 1985 company bankruptcy estate; is that right?

4 A. (Ms Jarvis) That's correct.

5 Q. And that would be because the other principle is proceeds of property of the estate are also property of the estate; is that right?

6 A. (Ms Jarvis) That's correct.

7 Q. Property of the estate remains property of the estate until the trustee administers it in some fashion: he sells it, he abandons it, he destroys it, some type of administration. Would you agree with that?
A. (Ms Jarvis) Property of the estate remains property of the estate until it's administered by the trustee or abandoned, or relief from stay is granted.

Q. Or foreclosed?

A. (Ms Jarvis) Well, relief from stay.

Q. Yes, relief from stay is granted. And a creditor that has a lien on the property forecloses on it would be another example.

A. (Ms Jarvis) Yes.

Q. A debtor's status, I want to talk about this for a minute. A corporation files bankruptcy, and its assets are property of the estate. But its status as a corporation is not itself property; would you agree with that?

A. (Ms Jarvis) If you are asking me, for instance, if the company as it is remains as it is when it becomes a debtor, the change is that in a Chapter 7 case with a corporation, once Chapter 7 is filed, the officers and directors no longer have any control over the corporation; that vests solely in the trustee.

Q. That's not quite my question. A corporation files bankruptcy. The bankruptcy trustee can sell its accounts receivable, its real estate, its equipment, its machinery; but it can't sell the corporate status to somebody?
A. (Ms Jarvis) No, the corporation is as it is when it files bankruptcy.

Q. Right. A debtor in bankruptcy has an obligation under the Bankruptcy Code to file schedules of its assets; you would agree with that, I'm sure?

A. (Ms Jarvis) Yes, that's correct. Section 521 requires that of every debtor that files. And whether they are involuntarily filed or they file themselves, they must file a statement and schedules of assets and liabilities.

Q. And those are reflected by specific forms that the debtor is to fill out and file with the court; is that right?

A. (Ms Jarvis) Right. There are standard forms they have to file. They have to file them under penalty of perjury.

Q. And those forms request certain information: list your real estate, list your cash, list your bank accounts, list your accounts receivable. Machinery, equipment, interests and other entities are all among the types of property that have to be placed on those forms and filed with the Bankruptcy Court. Is that right?

A. (Ms Jarvis) Right. In fact, the law is very broad in what has to be included, what property has to be included in the statements and schedules filed with the
Q. Okay. So in this particular instance you would expect, had the 1985 company filed schedules, it would have listed as an asset in its bankruptcy estate its stock interest in an entity known as EuroGas GmbH?
A. (Ms Jarvis) That is correct.

Q. Often corporations have affiliates: they have subsidiaries, they have parent corporations. Let's take a series of corporations, and we're going to assume they are in the United States, just to make it easier, and they are all filing bankruptcy, and they are affiliates. So you have the parent corporation. It files bankruptcy. You would expect that on its schedules it would list its stock interest in the subsidiary that it owns?
A. (Ms Jarvis) That is correct.

Q. And then with regard to the subsidiary -- it files bankruptcy at the same time -- you would expect that it would list its assets: its equipment, its machinery, whatever it specifically owns?
A. (Ms Jarvis) That is correct.

Q. But you would not expect the parent corporation to list the machinery, equipment, and other assets of the subsidiary on its own schedules; isn't that correct?
A. (Ms Jarvis) Yes, that's correct.
Q. So in this particular case, with the 1985 company, while
you would have expected it to list in its schedules its
interest in EuroGas GmbH, you would have not expected it
to list EuroGas GmbH's stock interest in Rozmin?
A. (Ms Jarvis) That's correct.
Q. And you would not have expected the 1985 company's
assets schedules to include Rozmin's assets -- its
mining rights, its permits, et cetera -- that it owned
in the Slovak Republic?
A. (Ms Jarvis) That is correct.
Q. You also mention in your report, Annette, about the
automatic stay, and that the automatic stay goes into
effect when a case is commenced. Describe what the
automatic stay is for the Tribunal.
A. (Ms Jarvis) The automatic stay is a statutory injunction
that goes into place when a bankruptcy is filed. So it
prevents suits from being continued against the debtor,
it protects property of the estate, it protects acts
against property of the estate. So it's called
a "breathing spell", in order to allow the debtor to
reorganise or to liquidate in a bankruptcy. It protects
the debtor and its assets.
I would add, too: as an injunction, what the law
says is that, if someone violates the stay, then
whatever they do in violation of the stay is void
ab initio, so of no effect.

Q. The automatic stay goes into effect the minute, the second that the petition is filed; is that correct?

A. (Ms Jarvis) Correct. It's statutory, so as soon as the petition is filed, it goes into effect.

Q. So with regard to EuroGas, the 1985 company, the automatic stay with regard to its bankruptcy proceedings commenced on May 18th 2004, when the involuntary petition was filed; would you agree with that?

A. (Ms Jarvis) There is some split in the circuits on the issue, when you have an involuntary petition, whether the stay goes into effect when they are determined to be a debtor, which would have happened in October or on the date the petition is filed. But in the Tenth Circuit that is decided that it goes into effect on the day the petition is filed.

Q. Right. So in this instance that would have been May 18th 2004?

A. (Ms Jarvis) That is correct.

Q. The automatic stay does not last forever, and there are specific provisions in the Bankruptcy Code for when the automatic stay terminates. You would agree with that statement?

A. (Ms Jarvis) That is correct.

Q. For example, specifically the Bankruptcy Code provides
that as against property of the estate, the automatic stay terminates when the property ceases to be property of the estate?

A. (Ms Jarvis) That is correct.

Q. Yes. So that could occur by the trustee selling an asset, abandoning an asset, or a creditor obtaining relief from the automatic stay to take action against the asset?

A. (Ms Jarvis) That is correct.

Q. And the automatic stay as against the debtor itself terminates when the debtor's discharge is denied or the case is closed?

A. (Ms Jarvis) That is correct, because there are parts of the stay that protect the property of the estate, then there are parts of the stay that protect the debtor.

Q. It might be helpful to give some context to the Tribunal by discussing the different types of bankruptcies that can be filed. They are hearing about one, but I think it would be good to give context of others.

For example, there is a chapter in the Bankruptcy Code called Chapter 11, which would provide for a type of reorganisation either of a business's affairs or even an individual's affairs; is that right?

A. (Ms Jarvis) Yes, that's correct. Chapter 11 allows either individuals or companies to file and they can
either reorganise in some way, coming out as an entity that remains in effect, or they can liquidate in a Chapter 11, at least a company can.

Q. Then there is a Chapter 12, which is specifically for farmers, family farmers; is that right?

A. (Ms Jarvis) That's correct.

Q. And a Chapter 9 which is for municipalities filing bankruptcy?

A. (Ms Jarvis) That's correct. That's correct.

Q. Chapter 13, which is for individuals who want to have a court-supervised plan of repayment for their creditors; is that right?

A. (Ms Jarvis) Right, it has to be individuals with regular income, and they can then pay out their creditors over a period of years under a plan confirmed by the court.

Q. Then Chapter 7, which is what the 1985 company was placed into, is designed to liquidate a debtor's assets and then distribute that money equitably among creditors; is that right?

A. (Ms Jarvis) Right. And when a Chapter 7 is filed, a trustee is immediately appointed. The trustee takes complete control over the assets of the estate. That's different than a Chapter 11, where a debtor themselves, if the company files, remains in possession unless the court decides a trustee should be appointed. In a 7,
a trustee is immediately appointed that takes complete
close of all the assets in the company.

Q. A Chapter 7 trustee, such as the one that handled the
1985 company's case, has a number of duties that are
spoken out in the Bankruptcy Code; is that right?

A. (Ms Jarvis) That's correct.

Q. And among those duties is to collect and reduce to money
the property of the estate for which the trustee serves
and close the estate as expeditiously as compatible with
the best interest of parties in interest?

A. (Ms Jarvis) That is correct.

Q. I'd like to have you take a look at your first report,
which should be there in front of you, and specifically
paragraph 31. Tab 13, I'm sorry.

You state in paragraph 31 of your first report that:
"In its SEC filings, EuroGas I also reported various
information about its direct and indirect interest in
Rozmin s.r.o. (the EuroGas GmbH interest in Rozmin and
the 57% interest purchased by EuroGas I from Belmont
Resources Ltd., being referred to hereinafter as the
'Slovakian Talc Mine Interests')."

Do you see that there?

A. (Ms Jarvis) Yes, that's correct.

Q. I don't see a footnote that would refer the Tribunal to
the sources of information on which you base that
A. (Ms Jarvis) There are SEC reports in the statements of fact, there are several referred to.

Q. Can you point us to the SEC filings that are in your report that you used to come to this conclusion?

A. (Ms Jarvis) There are various 10-K filings that are referred to. There's 2007, 2008; there's some other ones, I think, in 2004, 2003. So there are various ones.

Q. Alright. So what we will need to do then, since you didn't point people to a specific source of information on which you base this conclusion, is we will need to go through your footnotes in other parts, find the SEC filings, and then figure out what information is in those that would support this conclusion?

A. (Ms Jarvis) Right. This was meant to -- you know, what the SEC filings showed were an investment in these interests. It's an indirect investment. But that's what this was meant to capitalise, is that there was disclosed in the SEC filings that EuroGas I had an investment in the Rozmin talc mine. It was an indirect investment.

Q. Indirect. And from purposes of scheduling assets on the asset schedules in a bankruptcy case, we had discussed earlier you would have expected that the 1985 company
would have listed its interest in GmbH on its schedules, but not GmbH's interest in Rozmin on its schedules?

A. (Ms Jarvis) That is correct. But when you're talking about an investment that you have, an investment right, that would have to be disclosed on the schedules. So like, for instance --

Q. Well, let me stop you there.

A. (Ms Jarvis) Okay.

MR ANWAY: Mr Chairman, I'd ask that the witness be allowed to complete her answer.

THE PRESIDENT: Please.

A. (Ms Jarvis) So, for instance, the way you determine property of the estate is you look at the property under the law that applies to determine if the debtor has a property interest. If that property interest exists, then it needs to be -- then you look at whether that fits within the definition of "property of the estate".

So let me give you an example. In the Dittmar case, which is set forth in my report -- it's a Tenth Circuit case, a case that has direct authority over the Utah court -- there was an issue that came up whether stock appreciation rights that were given to employees were a part of their bankruptcy estate. The issue that came up is these rights were given orally before the bankruptcy was filed by these individuals, but they
weren't actually documented till a year after they had actually filed. So the issue came up whether those were property of estate, whether they should be listed, were they actually an asset.

The lower court had looked at the Kansas law that said: these are not -- they are oral promises, they are not property of the estate, you know, therefore they shouldn't be included. But the Tenth Circuit said: no, no, because these are rights under collective bargaining agreement, that's governed by federal law. Under federal law, these rights belong to these debtors at the time that an oral promise is given as part of the collective bargaining agreements, and therefore they have a right that has to be listed.

The way it works in this case is that -- so when you look at what is property of the estate, a right under the investment treaty would be determined under international law. So however the investment is defined under international law would be what the right is that the debtor has. And then you look at: is that property that fits within the very broad definition of "property of the estate", and is it property of the estate? In this case, the investment that was made -- the investment right under this treaty -- would have been property of EuroGas I under international law, and
therefore it would be property of the estate under 541.

MS BURTON: We'll talk about that. First, can you point to me what footnote in your report refers to Exhibit C-1?

A. (Ms Jarvis) Can you tell me: which document are you referring to?

Q. The bilateral investment treaty.

A. (Ms Jarvis) I have not referred to the bilateral investment treaty.

Q. So by your earlier testimony, you have not relied on the bilateral investment treaty in reaching your opinion?

A. (Ms Jarvis) Whatever rights there are, Slovakian rights belong, right.

Q. My question earlier was: what sources of information did you rely on in reaching your opinion? And you said: those that are reflected in the footnotes. So I am taking you at your word that if it's not reflected in your footnote, you didn't rely on it.

A. (Ms Jarvis) Right, but the footnotes -- the SEC does refer to an investment. And what I was explaining is: that investment, whatever it is, would be part of the property of the estate, and it is defined by whatever law governs it.

Q. Property of the estate -- let's talk about that -- is determined not by bankruptcy law but by non-bankruptcy law; is that right?
A. (Ms Jarvis) Well, no. It's a two-step process, and that's what Dittmar explains. You first look at what the property rights are under the law that governs that property. So sometimes it's state law, sometimes it's federal law. In the United States in this case it would be international law that would determine what property rights, what assets belong to the company. And then you look at whether those fit in: are they contingent? Are they unliquidated? Would they fit into the broad definition of "property of the estate" under Section 541 of the Bankruptcy Code?

Q. So the first step is: determine what the property right is under applicable non-bankruptcy law?

A. (Ms Jarvis) Yes.

Q. Whether it's state law, federal law or international law. And then take that property right and determine whether or not it constitutes a legal or equitable interest of the debtor in property as of the date the bankruptcy is commenced?

A. (Ms Jarvis) That is correct.

Q. So let's take a few examples then that might apply. If the debtor owns real estate, you would agree with me that in general, in the United States, property rights in real estate are governed by state law?

A. (Ms Jarvis) That is correct.
Q. If the debtor owns patents or trademarks, its property rights in those assets will be determined by applicable federal patent and trademark law?

A. (Ms Jarvis) That is correct.

Q. With regard to the 1985 company's interest in EuroGas GmbH, which was an Austrian company, its rights as to distributions, and whatever rights it has in that asset, would be governed by applicable Austrian corporate law?

A. (Ms Jarvis) That's correct.

Q. Then with regard to EuroGas GmbH, its interest in Rozmin, in what property rights that gives it, that would be governed by applicable Slovak corporate law?

A. (Ms Jarvis) Right, so you go up the chain.

Q. Right. And whatever property rights under the bilateral treaty, the investment, as it is defined under the bilateral treaty, will be determined by international law?

A. (Ms Jarvis) That's correct. What the investment is is determined by international law.

Q. So the first step is to determine under applicable non-bankruptcy law: what's the property interest? And then determine: is that property interest a legal or equitable interest of the debtor in property as of the date the bankruptcy was commenced?

A. (Ms Jarvis) That is correct.
Q. Okay.

THE PRESIDENT: Can I interfere and ask a question?

MS BURTON: You may interfere all you want.

THE PRESIDENT: But what if a right under international law appears after the bankruptcy was started?

A. (Ms Jarvis) That is answered -- actually there is in the report, although the question wasn't asked, but this is in the Gache case, which is a Southern District of New York case. And it cited to Segal v Rochelle, which is a Supreme Court case, the highest court in the land, a 1966 case which was decided under the old Bankruptcy Code, which is still valid today.

In that case what happened is there was a piece of real estate that belonged to the estate, it was property of the estate as of the date it was filed. During the bankruptcy case -- this was a corporate Chapter 7 case -- a litigation arose. So it arose afterwards, but was related to the real estate. And the court found -- and relying on the Supreme Court case of Segal v Rochelle -- that when property is acquired or arises post-petition, but is derived from assets that were assets of the estate at the time of filing, then that is property of the estate.

There is also a second case cited in the report, the Brumfiel case, which is from the Tenth Circuit Court of
Appeals. There are three Brumfiel cases. This is the Tenth Circuit case, where Judge Matheson, who wrote the opinion, said that even though the debtor had claimed that this lawsuit arose after the bankruptcy filing, her Chapter 7 petition, that in fact, because it was derived from her, or was a potential at the time that they filed, and derived from her foreclosure action that she had reported, that it was property of the estate.

In that case Judge Matheson also explains that it's very, very broad: what needs to be disclosed is property of the estate, and that includes all potential claims. So if the debtor had any idea that they might have a potential cause of action, the Tenth Circuit says: that has to be disclosed in the schedules.

In this case we have the possibility of a potential cause of action. Assuming that the debtor had some idea -- which I understand that the evidence has shown -- that they had the possibility of losing their licence after the filing of bankruptcy, then that would be a potential claim that they would have to disclose in their schedules. And in fact, when the schedules were ordered to be filed in this case, which was January 28th 2005, the revocation of the licence had already occurred. So that definitely would have had to be included on the statements and schedules.
Property, when you're talking about the Brumfiel case, in that case the debtor owned real estate; is that right?

A. (Ms Jarvis) Yes.

Q. Which had a lien on it, a mortgage on it?

A. (Ms Jarvis) Yes.

Q. She had a claim -- or asserted she had a claim -- against her mortgage company which she did not list?

A. (Ms Jarvis) That is correct.

Q. And after her case was closed, she sought to assert that claim against the mortgage company. And it was held that she should have listed that claim on her schedules because it was an asset of her estate?

A. (Ms Jarvis) That's correct. She had listed the real estate and the foreclosure action, but she had not listed her claim that she might have against the lender.

Q. And the foreclosure action was pending on the date that she filed her bankruptcy case?

A. (Ms Jarvis) That is correct.

Q. So her counterclaim would have also been in existence at the time of her bankruptcy filing?

A. (Ms Jarvis) That is correct.

Q. Now, you're not here to testify on the nature and extent
of whatever the 1985 company's property interest may have been in its investment for purposes of this bilateral investment treaty; is that correct?

A. (Ms Jarvis) If you're asking me whether I'm here to testify under the international treaty what the interest is, no, I am not. Whatever it is, that would have been property of the estate.

Q. If it was, if there was an interest --

A. (Ms Jarvis) Whatever was there, yes.

Q. So when we talk about the first step, that first you determine what is the property interest, and then you take the second step once you determine what that property interest is, then you determine whether or not it constituted a legal or equitable interest of the debtor in property as of the date the petition is filed.

And you're here to testify to the second step, not the first step; isn't that correct?

A. (Ms Jarvis) Right, I'm not determining whether this is -- whatever rights there were under, you know, the international treaty, those would have been property of the estate.

But there are kind of two issues though. One is: whatever the investment rights are, those would have been property of the estate, and anything that derived from that would be property of the estate. But there is
also the claim itself that is being made, and that would
also independently -- that's the point that was made in
the Brumfiel case -- that would be property of the
estate that would have to be listed, because that's
a potential claim.

Q. Let's back up. You're not here to testify that the
debtor, the 1985 company, as to what the nature and
extent of its property interest was in the investment
under international law?

A. Right. I am here to --

Q. You're not doing that -- just let me --

A. Whatever their interest is under the treaty --

MR ANWAY: Ms Burton, please let the witness finish her
response.

A. Whatever their interest is under the international
treaty, that is property of the estate.

MS BURTON: So you're already jumping to the conclusion that
there's only one step: if there's an interest under
international law, then it's property of the estate.

You're making that conclusion?

A. (Ms Jarvis) As long as it fits into the 541 definition,
that's right. If it's contingent, it's unliquidated;
it's a very, very broad definition under the Whiting
case, which is cited in the report, a Supreme Court
case.
Q. But you still have to make the analysis of whether or not, whatever the property interest is under international law, is that a legal or equitable interest in property; and you have to make that analysis first, before you conclude whether it's property of the bankruptcy estate?

A. (Ms Jarvis) Right, you determine you have some right under some law, and then: is that a legal or equitable interest? Is it contingent, fit under the 541? Then if so, it becomes property of the estate.

Q. Now, we also need to keep in mind -- I don't want to belabour it too much -- but property acquired by the bankruptcy estate is property of the estate, right?

A. (Ms Jarvis) That is correct.

Q. But in general, property acquired by a debtor following the bankruptcy petition is not property of the estate?

A. (Ms Jarvis) Well, when you -- I mean, you have to distinguish between individuals and corporations.

Q. Let's do that.

A. (Ms Jarvis) Because when an individual files a Chapter 7 case, the individual still has a life in existence outside the trustee. So, for instance, a trustee can abandon property to an individual and the individual can maintain that property. So say the trustee abandons the house of the individual: the individual can take that
house and live in that house and use that house, it becomes their property, and contemporaneously with the Chapter 7 going on.

But in a corporate case, when a corporation files, the trustee becomes the debtor, becomes the corporation. There is no existence of the corporation outside of the Chapter 7 case, because both the Supreme Court case in Weintraub, which is in the report, as well as the CW Mining case, which is the Tenth Circuit case in the report, once a trustee is appointed, then the trustee becomes the only person that can control this company. They are the company. There is no company outside of that.

In fact, in the CW Mining case the debtor tried to appeal, and the court said, "You cannot appeal because the debtor doesn't exist, the corporation doesn't exist except in the form of the trustee". So the trustee has complete control over all assets in the corporation itself.

Q. The trustee has control but I'm not talking about the trustee; I'm talking about property rights.

A. (Ms Jarvis) Right. But I think, you know, in that instance I don't see how a company can acquire rights that aren't acquired by the trustee, because the trustee is the only party that can act for the corporation.
Q. But you do not know when the property right -- if there was one -- in the investment arose under international law. You're not here to testify to that?

A. (Ms Jarvis) No, I'm not here to testify about that. If it arose, if there was a right that existed at the time that they filed bankruptcy, that right became property of the estate. If there was a right that arose or a property right that arose after the filing that is derived from the right at the time that it was filed, then it is property of the estate.

Q. I would agree.

A. (Ms Jarvis) If there was a potential claim or, you know, possibility that was existing at the time of the filing, then that is property of the estate, as long as the debtor -- is the way the Tenth Circuit said in the Brumfiel case -- had enough information to know that there was some potential that a claim could arise in the future.

Q. So if the property right in the investment existed on May 18th 2004, it was property of the estate; correct?

A. (Ms Jarvis) Yes, any property right that they had would have been property of the estate.

Q. If the property right arose after that date, but was derivative of property of the estate, in the sense the proceed, then it would be property of the estate?
A. (Ms Jarvis) Well, a proceed, it's not that narrow, because when you look at the Gache case, Southern District of New York, it was litigation that arose out of a real estate property interest. So it's not just proceeds. And Segal v Rochelle, the Supreme Court case, explains that. It's something that arose because you had some interest at the time of the bankruptcy filing.

Q. As you had said, "derivative"?

A. (Ms Jarvis) That's a term that is used. There is also "related"; there are a variety of words. But "derivative" is the most common term used because it needs to relate to the property as it existed when the bankruptcy was filed.

Q. So if it existed on the date of the filing, or arose afterwards but is related or derivative of property that was owned on the date of the filing, it would be property of the estate?

A. (Ms Jarvis) Right. Or if it's a potential claim that arose -- you know, that at the time of the filing there was some potential or possibility of a claim, that would also be property of the estate.

Q. Again, related to property of the estate?

A. (Ms Jarvis) Well, no, that is independent. You know, there is property of the estate and property that's derivative of that, or that comes out of that, that is
property of the estate, even if it arises after the bankruptcy filing.

Q. Mm-hm.

A. (Ms Jarvis) But then there is also the separate issue that was raised by the Tenth Circuit in the Brumfiel case, which is: if you have a potential claim, that has to be disclosed. That is property of the estate.

Q. But in Brumfiel, that claim was related to property of the estate: her home, right?

A. (Ms Jarvis) That's correct. That's correct. But for instance I think it's the Stephens case, the District of Utah, that also talks about this very broad definition: that if there is a claim that is potential at the time of filing, it has to be listed as property of the estate.

Q. I think we've confused you enough. I'll move on.

THE PRESIDENT: I'm sorry, can I ask a question here.

Suppose the debtor has a house, it exists at the time the bankruptcy starts, then there is a fire, and it's caused by the fault of someone, so it could give rise to damages. That right to damages, would you think it is property of the estate or not?

A. (Ms Jarvis) Yes, it would be.

THE PRESIDENT: Thank you.

MS BURTON: Because it's related to property of the estate?
A. (Ms Jarvis) Yes. Right, exactly. So even though the event happened after the bankruptcy was filed, it was related to property of the estate, it is property of the estate.

THE PRESIDENT: Sorry.

MS BURTON: No, that's okay, thank you.

I don't see in the first report, Annette, a reference to the ownership interest in GmbH as being property of the estate. Why is that?

A. (Ms Jarvis) Well, directly, I think this wasn't -- I mean, it was defined, you know, as whatever that interest is, you know, reported, so not specifically identified, I think. I think we identified it in the second report.

Q. You did in the second report, which is ...

A. (Ms Jarvis) And let me explain why that is: because in the first report the issue was dealing with the merger. That was the way that it was explained by the Claimants: that the right under the investment treaty went from EuroGas I to EuroGas II, through a merger. So I dealt with only the merger theory.

In the second report, then the Claimants had claimed that actually it came through a sale of GmbH to McCallan. And that's why we addressed that in the second report, because that now became the focus,
whereas in the first case it was simply a merger theory.

Q. Alright. So that answers my question on why GmbH is mentioned in the second but not the first.

A. (Ms Jarvis) Yes, that's correct.

Q. At the time the 1985 company filed bankruptcy, it had been dissolved administratively by the State of Utah; is that right?

A. (Ms Jarvis) Right. And in fact the two years had passed for reinstatement, so it could no longer be reinstated.

Q. Right. You discussed in your first report, at paragraph 54, that the functions of dissolution and reinstatement are governed by state law?

A. (Ms Jarvis) That is correct.

Q. The bankruptcy of the 1985 company would not have made the company more dissolved than it already was under state law?

A. (Ms Jarvis) No, it's dissolved. But I think there is the issue of whether a bankruptcy acts as the wind-up. Where you have a dissolved company, the company can only wind up; that's all they can do. Statutorily, that's what they are allowed to do.

I think that was the point of the case in Texas, the Liberty Trust case, that the District Court was making there, is that a bankruptcy can be the wind-up, because the trustee now becomes the substitute for the officers
or directors of the corporation. Their job is to liquidate all the assets of the estate and distribute it to creditors. So there is the possibility that in essence this is the wind-up under state law, because that's essentially what the trustee was supposed to do.

Q. A dissolved company can file a Chapter 7 petition as part of its wind-up?

A. (Ms Jarvis) Yes.

Q. Or be placed into involuntary --

A. (Ms Jarvis) Right, and it can wind up in a Chapter 7, where it's now distributing. And in fact when you do file a dissolved company in a Chapter 7, it is wound up in the Chapter 7.

Q. It can sue and be sued?

A. (Ms Jarvis) Yes, it can sue and be sued. You mean a dissolved corporation? Yes.

Q. Yes. And, Sam, this is also your area too, so feel free to step in. You agree that a dissolved company under the dissolution statute has standing to sue and be sued?

A. (Mr Gardiner) Yes, I do.

Q. Going back to just some post-petition events, Annette, the 1985 company filed bankruptcy on May 18th 2004, and in early January 2005 the Slovak Republic terminated Rozmin's mining rights. As a result of that, Rozmin commenced litigation in the Slovakian court system to
seek reinstatement of those rights, and asserting claims
that it was entitled to have those back.

Rozmin's claims that it pursued in the Slovakian
courts you would agree were not property of the 1985
compny's bankruptcy estate, would you?

A. (Ms Jarvis) Right. Unless they fit under the
international treaty rights, no.

Q. Okay. So you would agree that Rozmin's action in
pursuing those claims did not violate the automatic
stay?

A. (Ms Jarvis) That is correct.

Q. Because those rights were its rights, not the 1985
compny's rights?

A. (Ms Jarvis) Right. If they are not the rights pursued
under the investment treaty that belong to EuroGas I,
then they would be rights they can pursue on their own.

Q. So going back to dissolution, the company had been
dissolved by the time it had filed bankruptcy, beyond
the reinstatement period. The bankruptcy did not change
that status as a dissolved corporation; you would agree
with that?

A. (Ms Jarvis) Yes. The Bankruptcy Code -- dissolution is
a state law concept and it has to be done under state
law.

Q. Okay. I'm having a bit of trouble finding it, maybe you
can find it for me: I'm looking for your reference to Thornton v Mankovitch. Is that in your first report or your second report?

A. (Ms Jarvis) I think it might be in the second report.

Q. Tab 14. (Pause) Perhaps we could take a --

A. (Ms Jarvis) Wait, wait.

Q. Did you find it?

A. (Ms Jarvis) Yes. Thornton v Mankovitch is actually in the first report on page 40, in footnote 143.

Q. Ah, here we go. What's the relevance of this decision to your opinion if the 1985 company's ability to be reinstated had expired when the bankruptcy was filed?

A. (Ms Jarvis) The point of this section is -- this is really a kind of odd situation, there is very little case law on this. But the issue is whether a company that has been dissolved -- so it can't be reinstated, so it's not able to continue in business under state law, it can only liquidate -- then files a Chapter 7 and is liquidated, is wound up in the Chapter 7, whether they have a life beyond that.

There are very few cases that deal with this.

I think really the only case is the Liberty Trust, where you actually have a corporate debtor that is trying to continue business or deal with assets outside of a Chapter 7. In that case what happened was the
Chapter 7 trustee made the decision that there were
certain contracts that weren't worth it to the estate,
so he rejected or terminated those contracts and then
abandoned certain assets that he felt were not of value
to the estate. The principal of the debtor then,
supposedly under the name of the company itself that was
in Chapter 7, took those assets and started running its
business again on the side.

So the trustee went in to ask the court, "Can the
debtor do this? Can they take these assets that I have
decided are abandoned, were not worth it, they don't
create any value for the company, and run those on the
side?" And the District Court -- it was not
a bankruptcy court that made this decision -- said, "No,
you can't do that, because the assets have to be wound
up, basically, and dealt with in the bankruptcy case".

Now, the District Court I think in that case made
a mistake in saying that it was dissolved by means of
the bankruptcy. That clearly is not true. And if you
look at another case cited, the CVA construction case,
where a bankruptcy court in Texas said it can't be
dissolved through bankruptcy but did not disagree with
the fact that a company that goes through bankruptcy
that's been dissolved cannot further act. In fact, in
the CVA case the Bankruptcy Court said, "Gee, we've got
to figure out if these insurance policies actually
t vested and happened before the case went through
bankruptcy, after it's been dissolved, or they may not
be able to operate in them".

When you look through the cases, we haven't been
able to find any cases -- nor have the Claimants cited
any cases -- where a company that has been dissolved
under state law and cannot be reinstated, and then has
gone through a Chapter 7, has been able to be operated,
to either sue or -- they can be sued, because once you
come out of bankruptcy as a corporate Chapter 7 debtor,
you don't get a discharge. So to make sure they can't
continue to operate, you can be sued, but can't
administer assets, actually sue on assets and administer
assets that the Chapter 7 bankruptcy case did not.

There's only one case where that was done, it was
a Wyoming case, I think it was Catamount, that was cited
by the Claimants. In that case, while the
post-Chapter 7, post-dissolved company brought a suit,
that suit was in defence of suits that were being
brought against it. So in that case they had
a homeowner, they built a home, there was a construction
defect case, and they were going to be sued by that
debtor or that claimant. And so they sued their
subcontractors to get reimbursement for that, because
they blamed the subcontractors for actually what they
were going to have, a claim against them.

But there's no cases that have had
a post-dissolution, post-Chapter 7 corporation actually
administer assets, so sue on assets, continue with
assets, because these cases, I think, say -- and this is
one of them -- that there is a wind-up that occurs in
the 7, and the post-Chapter 7 corporate debtor,
post-dissolution corporate debtor cannot act any
further, except to be sued.

MS BURTON: This would be a good time to take a break,
I think, if we could, because we've been going a while.

THE PRESIDENT: Very good. 15 minutes. So we come back at
11.20.

(A short break)

(A 11.22 am)

THE PRESIDENT: We can resume. Ms Burton.

MS BURTON: Thank you, Mr Chairman.

We were discussing Thornton v Mankovitch and you
also mentioned Liberty Trust. I take it you based your
conclusion, which is at paragraph 72 of your original
report, that:

"... once EuroGas became a Chapter 7 debtor and went
through the Chapter 7 Bankruptcy Case emerging without
a discharge, it ceased to exist as an entity with any assets ..."

A. (Ms Jarvis) Right. You've got to remember that EuroGas I was already dissolved and couldn't reinstate under Utah law when it went into bankruptcy. Then in Chapter 7 all of its assets were wound down and liquidated; it came out without assets. There's also the additional issue of they never filed statements and schedules. So because of that, no, if there was anything, nothing could be abandoned.

Q. Have you, since preparing your first report, checked to see how many courts have cited the Thornton v Mankovitch opinion for the proposition that as a defunct corporation following bankruptcy, a corporation ceases to exist? Have you looked for those?

A. (Ms Jarvis) You know, I've looked for cases. Like I said, this is very rare, it doesn't happen very often, there's only a few decision which are in there, so it's not what I would call a settled area of bankruptcy law. I believe that, you know, in this instance -- it's my opinion that in this instance, where -- and these cases also look -- we go back to state law. So I believe in this instance, when you look at those cases that are saying that if a company, you know, goes through a Chapter 7, and in this instance where they
have already been dissolved they cannot reinstate, so
their assets are wound down, that this company would not
have any assets left to pursue.

Now, this also deals with -- I know the Wyoming
case, the Catamount case, talked about looking at state
law. So if you now take this and look at state law, the
wind-up activities were completed in the Chapter 7 case,
and there are the cases under state law, the Hilcrest
case and the Holman case, that say: after some period of
time, the wind-up has to complete. And therefore this
would be consistent with those state law cases as well.

Q. Okay. So just for your information, yesterday I went
online and checked to see if any court in the country
has cited Thornton v Mankovitch for the same proposition
on which you rely on it, and I find none.

A. (Ms Jarvis) Yes, it's rare, a rare situation.

Q. The two Utah cases you just mentioned that you relied on
in your opinion were cases that were decided under
a prior statute?

A. (Ms Jarvis) Hilcrest wasn't, but Holman was.

Q. Then Liberty Trust, which is another case on which you
rely for your conclusion, I have a copy of that at
tab 16 in your bundle, and it is RA-016. If you go to
page 4 of 6, I think we find the language which you
quote in yours. But I want to start at the last
sentence there on page 4 of 6, where it says:

"The consequence of denying discharge to
corporations and partnerships in a Chapter 7 proceeding
is to render such entities 'defunct'."

Which is the word you're using in your report. And
then the court goes on to state:

"The Court assumes that 'defunct' depicts a status
akin to that of a dissolved corporation or partnership,
and so interprets [it] in this case."

What I want to talk to you about is taking
a hypothetical of a corporation that is in good
standing. So the opposite of being dissolved, in our
parlance in Utah, is that the corporation would be in
good standing; is that right?

A. (Ms Jarvis) Yes, right.

Q. And because corporations are creatures of state law and
not bankruptcy law, to determine a corporation's status,
you go to the State of Utah's website and look at the
particular page on that website from the Utah Division
of Corporations; isn't that right?

A. Yes.

Q. We will take a corporation, we'll call it Jarvis
Corporation, and it's in good standing with the State of
Utah. I see that online: corporation is in good
standing. Jarvis Corporation, for whatever reason, is
placed into Chapter 7 bankruptcy, and six months later its case is closed. Following that closure, if I were to go back to the State of Utah's website, the Division of Corporations page, and look up Jarvis Corporation, it would reflect that the company was in good standing, would it not?

A. (Ms Jarvis) That's correct.

Q. And that's because dissolution or good standing are creatures that are determined by the State of Utah, not by the Bankruptcy Code; is that right?

A. (Ms Jarvis) Right. And that's why I said that with this case, the one thing I disagreed with him about was this statement that he made that the company was dissolved under state law because they had gone through Chapter 7. And in fact the Bankruptcy Court in the CVA construction case said they thought that was wrong; and they were right, in the sense that you can't dissolve a case (sic) by going through bankruptcy.

However --

Q. Excuse me, I think you meant "corporation".

A. (Ms Jarvis) You can't dissolve a corporation by going through bankruptcy; that has to be done by state law.

However, I don't think that the Bankruptcy Court disagreed with the proposition that it was problematic, once a case has been liquidated under 7, to administer
assets thereafter, which is why it avoided making a statement about that finding, the contract in question, to have been dealt with prior to the filing of the Chapter 7.

Q. So I want to give you another hypothetical relating to Jarvis Corporation. It's in good standing, it owns real estate. It files bankruptcy, Chapter 7. It lists the real estate on its schedules, fully disclosed; there's no issue with regard to disclosure. For whatever reason, the bankruptcy trustee does not administer that real estate, and that real estate is then abandoned, on the closing of the case, to Jarvis Corporation. Is it your opinion that Jarvis Corporation cannot sell that real estate?

A. (Ms Jarvis) You know, I would say: in that situation I assume the corporation is still in good standing, so it's not like this situation. And the trustee, their job was to sell anything of value; but, for whatever reason, they decided not to sell this. Then I think the corporation could, as finishing the wind-up activities, sell that.

Q. Well, it's still in good standing with the State of Utah.

A. (Ms Jarvis) Yes. I mean, I guess it could reinstate itself.
Q. No, it's in good standing to begin with.

A. (Ms Jarvis) Oh, right. Okay, right. So it could sell it, yes.

Q. Right, it could.

At paragraph 65 of your first report you quote from the Senate report with regard to Chapter 7 and the reason why Congress made the decision to deny the Chapter 7 discharge to corporations, and you state that the change in policy -- because previously they could get discharges --

A. (Ms Jarvis) Yes.

Q. -- and that the reason that was changed was to avoid trafficking in corporate shells.

It would seem to me, if that's the policy, that a corporation -- and we will start with one that's in good standing -- that files bankruptcy, for whatever reason its assets are not administered, or an asset is not administered, it gets abandoned, that that corporation would be free under state law to sell that asset and do what it can with the proceeds.

A. (Ms Jarvis) I think --

Q. You would agree with that?

A. (Ms Jarvis) This is not the case here. But I agree that if a corporation was in good standing, they went through a Chapter 7 for whatever reason, they would come out
without a discharge, meaning they still owed all their debts, had to pay all their debts. But if they had assets they wanted to reinstate, or they wanted to continue in business because they were still in good standing, they could do that.

Q. They could even continue in business?
A. (Ms Jarvis) Right. So they become defunct when they are winding up in a bankruptcy, when there is nothing left. And in this case they were dissolved before they went in.

Q. So let’s change the hypothetical. Jarvis Corporation is dissolved, and it is beyond the statutory reinstatement period. It files bankruptcy as part of its winding-up. Its officers and directors, or board of directors, decide that filing a Chapter 7 will be helpful to winding up. And you agree that they can do that?
A. (Ms Jarvis) Yes.

Q. It has real estate. The trustee, for whatever reason, doesn’t administer that real estate, and it is abandoned back to the corporation.

Is it your opinion that because Jarvis Corporation is dissolved and has now gone through Chapter 7, that it can do nothing with that real estate?
A. (Ms Jarvis) I doubt this situation would ever occur because if the real estate had any value, the Chapter 7
trustee would sell it, they would administer it. That's
their job: to take all the assets and administer.

But if that would happen -- so it's dissolved, it's
gone through Chapter 7, but there's something left; it's
been properly scheduled, but was abandoned for whatever
reason -- then I think they could sell it, just
finishing the wind-down.

Q. They could still, as part of the winding-up activities
under state law?
A. (Ms Jarvis) Right. But they can't create new claims or
whatever. But they could, yes.

Q. Sam, I don't want you to feel left out of all this.
A. (Mr Gardiner) Thank you.

Q. Although maybe your preference would be to be left out!
Your expertise is in corporate law; is that right?
A. (Mr Gardiner) That's right.

Q. So I'd like to talk to you specifically about the Utah
dissolution statute. That's really where my questions
for you are going to be focused.
A. (Mr Gardiner) Okay.

Q. Specifically I want to talk to you about Section 1405 of
the Utah corporation statute, which is tab 8, R-19.
I asked Annette to explain to the Tribunal a bit and we
walked through the basics of the Bankruptcy Code, so
that the Tribunal could have an understanding of
bankruptcy law. And I want to do the same with regard
to the dissolution statute with you, on the effect of
dissolution.

So with regard to the 1985 company, can you tell the
Tribunal why it was dissolved?

A. (Mr Gardiner) Yes, I can. The company was dissolved
administratively because it failed to file annual
reports with the Division of Corporations, which it was
required to do. And if you continue to fail to do that,
you will eventually be administratively dissolved, and
you will receive a notice from the Division of
Corporations that you have been dissolved.

Q. I don't know if you have any sense of the percentage of
Utah corporations that get dissolved in any particular
year for failing to file an annual report?

A. (Mr Gardiner) I don't have any idea what the percentages
are.

Q. It seems to me it is something that could easily fall
through the cracks. You get the annual report request;
particularly if it's a small company, they are busy,
somebody is sick who is supposed to handle it, it gets
lost in the cracks; and lo and behold, the company ends
up getting dissolved.

A. (Mr Gardiner) Yes.

Q. Have you ever seen that?
A. (Mr Gardiner) Yes, I have seen it.

Q. In a prior life I represented a lot of small companies as debtors in bankruptcy, and it wasn't all that unusual for them to come in and say, "My company needs to file a bankruptcy", and I would have to tell them, "Well, there might be a different route to go because your company has been dissolved by the state". Do you see instances where the principals of a company don't even know it's dissolved?

A. (Mr Gardiner) I see instances where principals of companies find out that they are late in filing an annual report; that happens commonly. Instances where they have been formally administratively dissolved, I've seen that less.

Q. But in any event, the State of Utah has enacted Section 1405 for purposes of winding up and liquidating a company's assets. That does not prevent a dissolved company from entering into contracts or transactions, so long as they are designed to wind up and liquidate the company's affairs. Is that an accurate way to describe it?

A. (Mr Gardiner) Well, that's an interesting question. And I would have answered that question, "Absolutely, yes", except I just read a case that came out on September 1st from the Utah Court of Appeals. It's called Wittingham
LLC v I think TNE Partnership, or something like that.

It's a brand new case.

Q. Can you give us the citation to that?

A. (Mr Gardiner) It's back in the room. I didn't memorise the citation, but I have it back in our breakout room.

I could go get it for you.

MS BURTON: Would the Chairman allow a brief recess to allow him to go get that case?

THE PRESIDENT: Will you find it very quickly?

MR GARDINER: Yes, I can find it very quickly.

THE PRESIDENT: Well, why not?

MR GARDINER: One minute and I'll come back with the citation. I just wasn't allowed to bring it in here with me. (Pause) Thank you. I have that citation here.

MS BURTON: Okay. You don't have a copy of the case?

A. (Mr Gardiner) I have an electronic copy of the case.

Q. Okay. What's the citation?

A. (Mr Gardiner) 2016 UT App 187, or 2016 Utah App Lexus 193, or 820 Utah Advance Report 68.

Q. Okay. And what's the name?

A. (Mr Gardiner) The name is Wittingham LLC v TNE Limited Partnership.

Q. Did that involve Section 1405 of the Utah Corporations Act?

A. (Mr Gardiner) The case involved -- it's a partnership,
so it refers to the partnership statute. It refers to the case Orvis v Johnson, which is referred to in our report and in the Claimants' -- or the Snell & Wilmer report.

Q. Can you point to me where in your report the reference is made to Orvis v Johnson?
A. (Mr Gardiner) Certainly. Let me just remove this for second. I know it's referred to at least twice, but I look at footnote 71.

Q. First off, first report or second?
A. (Mr Gardiner) Second report.

Q. So that's going to be tab 14. And it's going to be footnote -- which one again?
A. (Mr Gardiner) Footnote 71. So page 29 of the second report.

Q. You rely on it for the proposition that, "a dissolved company's powers to enter into contracts 'may only be used to wind up and liquidate such company's business'"?
A. (Mr Gardiner) Right.

Q. Okay.
A. (Mr Gardiner) So Orvis v Johnson stands for the proposition -- that also refers to a partnership rather than a corporation, but I think we would agree it's relevant to a corporate context. Orvis v Johnson relates to the proposition that a contract entered into
by a dissolved corporation is not necessarily void, but
may be voidable by the third party or by the party that
entered into that contract with them.

This new case that just came out overturns that
principle and says that a contract entered into by
a dissolved corporation is void, referring back to
a 1919 Supreme Court case. I can't remember the name of
the case.

Q. When you refer to "Supreme Court", I'm assuming you're
referring to the Utah Supreme Court?
A. (Mr Gardiner) The Utah Supreme Court. Yes, I am.

Q. So that particular decision held that a contract entered
into by a dissolved corporation is void?
A. (Mr Gardiner) Is void.

Q. So how does a dissolved corporation wind up?
A. (Mr Gardiner) I think that's a good question. And I'm
reading the case. And certainly the statute that you've
pointed out refers to a dissolved corporation being able
to wind up its affairs, that's what our statute says,
and it says it's able to dispose of its assets and those
types of activities. So I'm not sure how it all works
together, but I wanted you to be aware of that case and
what it says.

Q. If we could take a look at -- of course, you're kind of
surprising all of us, including you, I know.
A. (Mr Gardiner) I learned about this case within the last 24 hours.

Q. Okay.

A. (Mr Gardiner) And it's dated September 1st 2016; that's when it was filed.

Q. Right. Let's start with your analysis that you submitted, that's been submitted to the Tribunal. I'm wondering if you can point to the case authorities which you relied on in connection with your conclusion that dissolved companies can enter into transactions in the course of liquidation, provided they are in furtherance of winding up and liquidation. Were there any court opinions you relied on?

A. (Mr Gardiner) Thinking back, I believe at the time we wrote the report we thought cases like Orvis v Johnson supported that proposition; maybe not directly, but at least indirectly. And then relying on the statute, which says corporations that are dissolved, in the process of liquidating their assets and winding up, have to be able to dispose of their assets. Candidly, I don't know how you do that without being able to enter into a contract to do so in certain circumstances.

Q. This changes the landscape, I think, of your opinion. I mean, how does this new opinion from the Utah Court of Appeals change your opinion?
A. (Mr Gardiner) About what?

Q. The ability of a dissolved corporation to be able to enter into contracts for the purpose of winding up and liquidating its affairs.

A. (Mr Gardiner) So my opinion is that ultimately Utah courts would have to figure this out, and the Utah Supreme Court, if it ever looked at this again, would in essence overturn this new case.

Q. You disagree with it?

A. (Mr Gardiner) I disagree with it.

Q. And your sincere belief is that the court in Wittingham v TNE has come to the wrong conclusion?

A. (Mr Gardiner) Not the wrong conclusion; they just -- they actually, if you read the case -- and I know you haven't had that opportunity yet -- they actually indicate that -- I can't remember if it's in a footnote or another section of the case -- but they indicate that they, in essence, hope that the Utah Supreme Court will look at this some day and correct itself.

A. (Ms Jarvis) Let me also just add: this doesn't affect our opinion about merger, that this --

Q. Sure. I know that.

A. (Ms Jarvis) -- that it can't be affected as a wind-down.

So ...

MS BURTON: Obviously if they can't do anything, they can't
merge. But that opinion I would imagine is -- well, I'm
not going to ...

I would like to make a suggestion, since this is
a surprise for all of us: that we take our lunch break
and allow my corporate expert and me to review that, get
a copy of the opinion, and maybe we can discuss it with
Mr Gardiner after the lunch break.

THE PRESIDENT: I think it's a good idea.

I seize this opportunity to ask a question about the
word "void". What exactly does it mean in US law? Does
it mean that it is automatically void, and even if
no one has requested the contract to be annulled or
voided, it's void, or the opposite?

A. (Mr Gardiner) I think it means just what you said.

THE PRESIDENT: Okay, thank you.

MS BURTON: Well, he said, "Is it one thing or the
opposite?", and you said, "It's just what you said".

A. (Mr Gardiner) Well, the first -- well, it's void,
meaning it's an invalid contract --

A. (Mr Gardiner) -- automatically. There is another
concept that you would read in the Orvis v Johnson case
that talks about a contract being "voidable", in which
case it isn't automatically void. But if it's void,
it's automatically void.
THE PRESIDENT: Thank you.

(Mr Gardiner) My apologies for not being clear.

THE PRESIDENT: No, no, I understood.

MS BURTON: Thank you. What time do you want us back?

I think we're going to take the lunch break. Is it noon? I wanted to get this new opinion and read it with my expert, and then come back and question him on it.

THE PRESIDENT: We could go on with something, yes, and then during lunch you see that and come back to it afterwards. Because it's not even 12.00.

MS BURTON: I do have one other area to question him, and I will do that, and then we can -- if that would be fine?

THE PRESIDENT: Yes.

MR GARDINER: May I just say, would it be helpful if I emailed to someone a copy of the case? I have an email. So I'm happy to email it to anyone.

MS BURTON: If you could email it to Mr Merrill and me,

I would appreciate that.

MR GARDINER: I am more than happy to. I'm not sure I have your email addresses right here, but if you want to give them to me, I'll email it to you immediately. (Pause)

So let me discuss with you then your reliance on the doctrine of ejusdem generis in connection with Section 1405 of the corporation statute. I believe it
starts on page 27 of your rebuttal report.

A. (Mr Gardiner) Okay, yes.

Q. Tab 14. I understand that you're contending that the catch-all provision in Section 1405, every other act necessary to the winding up of the corporation's business, is limited in some way by the sections that precede it. Is that correct?

A. (Mr Gardiner) Yes, that's my view.

Q. For the Tribunal's understanding, Section 1405 is tab 8 (R-19), if you want to take a look at that.

So this particular statute states that:

"A dissolved corporation ... may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

"(a) collecting its assets;

"(b) disposing of its properties that will not be distributed in kind to shareholders;

"(c) discharging or making provision for discharging liabilities;

"(d) distributing its remaining property among its shareholders according to their interests; and

"(e) doing every other act necessary to wind up and liquidate its ... affairs."

You cite at footnote 66 in your report the opinion of the Utah Supreme Court in State ex rel AT for this
1. proposition. Do you see that there?

2. A. (Mr Gardiner) Yes, I do.

3. Q. I'm puzzled why you would use an opinion that is interpreting a criminal lewdness statute in order to come to the conclusion that this doctrine should apply in connection with a corporate wind-up. Can you tell us why that is?

4. A. (Mr Gardiner) Certainly the cases are different. But the concept of ejusdem generis, when it relates to what happens when you're referring to a list of specific things and then a very broad term to follow them, that broad term ought to be qualified by the list of things that it relates to, we wanted to provide some support for that idea. And we thought it provided some support for that idea, even though the facts are unrelated.

5. Q. The doctrine of ejusdem generis is a doctrine to assist with statutory construction; would you agree with that?

6. A. (Mr Gardiner) Yes.

7. Q. When it comes to determining when the doctrine of ejusdem generis should be applied, would you agree that a pronouncement from the United States Supreme Court would be instructive?

8. A. (Mr Gardiner) I would agree.

9. Q. I pulled a few cases, and I'm not going to belabour
them, but it appears to me -- and I want to see if you
agree with me -- that the doctrine is used to assist in
statutory construction when the words of the statute are
not clear. Would you agree with that?

A. (Mr Gardiner) I haven't read the Supreme Court cases, so
I can't agree or disagree.

Q. Right. The United States Supreme Court, in its decision
in Norfolk & Western Railway v American Train
Dispatchers, at 111 Supreme Court 1156, basically
stated --

MR ANWAY: Is this in the record?

MS BURTON: No.

MR ANWAY: So the witnesses haven't had an opportunity to
study this case for the proposition that you are about
to --

MS BURTON: It's true. So you would object?

THE PRESIDENT: Do you object?

MR ANWAY: I think if there were cases that these experts
should have read so they could address what Ms Burton is
about to put to them, they should have been put in the
record before now.

THE PRESIDENT: I think that's correct.

MS BURTON: Alright. Then I will not belabour the point.

Even though you've got this new opinion that you say
may change the landscape, before this opinion came out,
you would have come before this Tribunal and said:
a dissolved corporation can enter into transactions and
contracts so long as they are designed to further the
wind-up and liquidation; is that right?
A. (Mr Gardiner) I would have, yes.
Q. In fact in your rebuttal opinion at paragraph 51, you
actually had the opinion that:
"Companies can enter into transactions whose
practical, economic effect would be substantially the
same as a merger -- although not technically
a merger ..."
Do you see that opinion?
A. (Mr Gardiner) Yes.
Q. I take it by that that you would agree, at least until
this new opinion came out, that a dissolved corporation
could enter into a contract under which it transfers all
of its assets to another entity which assumes all of its
liabilities?
A. (Mr Gardiner) Yes.
Q. Okay. And would you agree that in that event the
transaction could include the issuance of shares by the
new entity to the shareholders of the dissolved entity?
A. (Mr Gardiner) What could happen is the issuance of new
shares to the corporation that sold it the assets, and
then that corporation in turn possibly could distribute
those shares to its shareholders.

Q. Right. So that at the end of that transaction, on the books of the new entity that has acquired the assets and assumed the liabilities, its shareholder list would reflect the shareholders of the dissolved entity?

A. (Mr Gardiner) Yes, that's right.

Q. You indicated in your opinion that the joint resolution -- which is at tab 6, C-57 -- did not actually effect a transfer of assets and an assumption of liabilities?

A. (Mr Gardiner) Yes, that is my opinion.

Q. I take from the fact that your footnote for that references only the joint resolution that it is the joint resolution on which you base that opinion?

A. (Mr Gardiner) Which footnote are you referring to?

Q. 61. You state that:

"... the Joint Resolution contemplates the potential transfer of assets ... [but] there is no evidence that any actual transfer ... ever occurred."

A. (Mr Gardiner) Correct. Companies can resolve to do all sorts of things, but that doesn't mean they've done them. A board of directors can approve an action, and then two days later un-approve that action.

So to get something done, certainly board approval is an important part of the process. But then you have
to do it, which in the case of an asset transfer is:

execute an instrument of transfer, like a bill of sale, or assignment agreements, or other related documents. And if there were to be an assumption of liabilities, there would have to be an agreement by which a company assumes the liabilities of another company.

That didn't happen here. I've never seen any indication, in any of the documents that have been presented to me at least, to indicate anything like that ever happened.

Q. Okay. I take it you did not, as part of your research and investigation, speak with the principals of either the dissolved entity or the 2005 company to ascertain what their intent was with regard to the joint resolution?

A. (Mr Gardiner) I did not speak with them.

Q. And you were not here in the hearing room when Mr Wolfgang Rauball testified to the intent of the parties to this joint resolution?

A. (Mr Gardiner) I was not here.

Q. Would you agree that in ascertaining the terms of an agreement, the intent of the parties is an important consideration?

A. (Mr Gardiner) It's relevant, but not as important as actually entering and executing an instrument of
transfer to make a transaction happen.

MS BURTON: With the exception of questioning him relating to this new opinion, I am done.

THE PRESIDENT: Right. So we will take the break now for lunch, and then we can come back to the issue.

One hour, so 1.05.

(12.05 pm)

(Adjourned until 1.05 pm)

(1.09 pm)

THE PRESIDENT: When you're ready.

MS BURTON: Mr Gardiner, I've had a chance to review this opinion in Wittingham which you indicate may affect your opinion.

A. (Mr Gardiner) I don't think it significantly affects the overall conclusions in our opinion.

Q. We'll talk about that further in a little bit. I just want to, now that I have had a chance to review it, be able to ask you about it.

It appears that it dealt with a dissolved partnership?

A. (Mr Gardiner) Yes.

Q. There's a different statute for partnerships than for corporations, right?

A. (Mr Gardiner) Agreed.

Q. This particular partnership, while dissolved, borrowed
money and used it to pay a lien on one of its assets, on
its real property?

A. (Mr Gardiner) That's how I understand the facts to read
too.

Q. The real estate was in the name of the dissolved
partnership, and the dissolved partnership purported to
give a deed of trust to the lender; is that how you read
it also?

A. (Mr Gardiner) Yes, that's how I read it.

Q. Then after the dissolved partnership received the funds
and paid them over to someone else, the lender wanted to
foreclose its lien against the real property; am
I reading that right? Is that your understanding too?

A. (Mr Gardiner) I think so.

Q. And the court held that the lender could not foreclose
because the transaction under which the dissolved
partnership borrowed the money and gave the lien was
void because the transaction occurred while the
partnership had been dissolved, or after its
dissolution?

A. (Mr Gardiner) Basically, yes, agreed.

Q. While this decision specifically dealt with
a partnership, the ruling was based upon a Utah Supreme
Court opinion relating to dissolved corporations, right?

A. (Mr Gardiner) Right, the Houston opinion.
Q. And the Utah Supreme Court held that contracts entered into by dissolved corporations are void in Utah, no matter how inoffensive the subject matter?
A. (Mr Gardiner) That's what the case says.
Q. So this opinion in Wittingham comes from the Utah Court of Appeals, which is a lower court from the Utah Supreme Court?
A. (Mr Gardiner) Yes.
Q. And previously, as cited in both your opinion and the Snell & Wilmer opinion, the Utah Court of Appeals, in Orvis v Johnson, had held that contracts entered into by dissolved corporations are merely voidable at the counterparty's option?
A. (Mr Gardiner) Right.
Q. But the Court of Appeals is disavowing its prior decision in Orvis in this new opinion in Wittingham?
A. (Mr Gardiner) That's how I read it.
Q. And it's doing so because it determined that the Utah Supreme Court's opinion in Houston has never been overruled?
A. (Mr Gardiner) Yes, exactly. That's what it says.
Q. The Utah Supreme Court, in Houston, held that contracts entered into by dissolved corporations are wholly void?
A. (Mr Gardiner) That's what it says.
Q. Alright. "Void" meaning they are never enforceable,
I take it is what --

A. (Mr Gardiner) That's what I think "void" means: they are invalid.

Q. From the beginning?

A. (Mr Gardiner) From the beginning.

Q. Just as Ms Jarvis testified that acts taken in violation of the bankruptcy stay are void from the very beginning, this new opinion you have brought to our attention indicates that contracts entered into by a dissolved corporation are void from the beginning?

A. (Mr Gardiner) I think it's worth noting that that partnership had been -- I think it says it was dissolved in 2007, and that this contract or this loan was entered into over two years later. So ...

Q. After the --

A. (Mr Gardiner) After the period in which it could have reinstated, potentially, as a partnership.

Q. The Houston opinion was rendered in 1919?

A. (Mr Gardiner) (Nods head)

Q. You have to give verbal answers.

A. (Mr Gardiner) Yes, it was.

Q. Thank you. Section 1405 postdates 1919, so that legislation was enacted after the Houston opinion. What is your opinion as to the effect of the legislator's enactment of Section 1405 on the Houston ruling?
A. (Mr Gardiner) Well, I believe that the statute is important, and the statute matters and has to be dealt with. So I believe that whoever is looking at this again and dealing with the statute -- which this case doesn't deal with, because it doesn't deal with the corporate statute. If a case comes up later in which 1405 comes up, that's going to have to be an issue to be dealt with.

THE PRESIDENT: If I understand correctly, it's a question of void or voidable? Or that's one of the issues?

A. (Mr Gardiner) Yes.

THE PRESIDENT: What would be your guess -- You seem to say: we don't know, we have to wait until the issue comes again.

A. (Mr Gardiner) So my personal opinion is that if this issue came before a court having to do with a dissolved corporation that was involved in the process of liquidating and winding up its affairs, under this statute which we have before us, which allows it to do things like collect its assets and dispose of its properties, the court is going to permit that corporation to dispose of its properties. That's my personal opinion. But that hasn't been addressed in the courts yet.

THE PRESIDENT: But what about the contracts that the company is not allowed to do: would they be considered
void or voidable?

A. (Mr Gardiner) I think they would have to be allowed to enter into contracts to dispose of their assets. I do think that. In which case they would either be valid contracts or, at a minimum, voidable contracts, but not void.

THE PRESIDENT: Maybe these cases are not relevant to what I am going to ask, but I ask it all the same: there are still contracts that the company is not allowed to enter into?

A. (Mr Gardiner) Yes, there certainly are contracts they cannot be allowed to enter into. Those ones would be void.

THE PRESIDENT: Would be void?

A. (Mr Gardiner) Yes.

THE PRESIDENT: Okay, thank you.

A. (Mr Gardiner) And by the way, my views are separate from the fact that this is the law that's come down, and the law is what it is now. Apparently we have to deal with the fact that we have a case that says these contracts are void. My view is one thing, and the law that we have to abide by says that these are void.

THE PRESIDENT: Thank you. Sorry.

MS BURTON: No, I want to follow on from that line of questioning.
If we take this opinion, and in particular the Houston opinion, and we compare that to Section 1405, I think, if I understand what you're telling us, your opinion is that once this is revisited by the Utah Supreme Court, your opinion is that it's likely the Utah Supreme Court would determine that contracts which are entered into and which are not in furtherance of a winding-up and liquidation would be void; is that right?

A. (Mr Gardiner) Yes, that's right.

Q. But that contracts entered into by a dissolved corporation which are in furtherance of winding-up and liquidation will be, at worst, voidable; is that right?

A. (Mr Gardiner) Yes.

Q. And could very well be enforceable?

A. (Mr Gardiner) Possibly.

Q. So when I'm reading this opinion, paragraph 7 in Wittingham, it refers to "limited circumstances in which the contracts of a dissolved partnership would be valid", your opinion is that if the Utah Supreme Court revisits this issue with regard to corporations, that the "limited circumstances" set out in Section 1405 could be those that are valid contracts?

A. (Mr Gardiner) Well, my opinion is that's what I think the court ought to do. Whether that's what the court
Q. Who would have thought the Utah Court of Appeals would have done this, huh?
A. (Mr Gardiner) I was surprised by this.
Q. The elements of a contract under Utah law, they require:
an agreement and consideration; more than one party; and offer and acceptance of consideration. Is that right?
A. (Mr Gardiner) That sounds familiar, yes.
Q. If you take a look at, in your bundle, tab 6, which is C-57.
A. (Mr Gardiner) I have it.
Q. This is the joint resolution.
A. (Mr Gardiner) Yes.
Q. And I simply want to have you confirm that it is signed by the directors of both the dissolved entity and the 2005 entity.
A. (Mr Gardiner) That's what it says.

MS BURTON: That concludes my questioning, Mr Chairman.

Questions from THE TRIBUNAL

PROFESSOR STERN: Yes, I have just a question. How do you draw the line between contracts in furtherance of winding-up and the ones which are not in furtherance of winding-up? Could you elaborate a little bit on that?
A. (Mr Gardiner) Certainly.
A company that's dissolved has one purpose, and that's to wind up its affairs, that's to cease operations and extinguish its assets, so that all of its liabilities can be paid, and if any assets remain after that, those can be distributed to the owners of the business, and then it can stop doing anything at that point. So that's liquidation, and the process of winding-up is the process of doing just that: of taking actions to cease operations and to extinguish assets. So that's what we focus on.

So there's a variety of things that can happen, but most typically a company that's dissolved will find ways to sell its assets, and that's primarily what it will do, and then use the proceeds to pay creditors, and hopefully at the end of the day there's something left to pay shareholders.

PROFESSOR STERN: For example, transferring its assets to another company could or could not be in the winding-up process?

A. (Mr Gardiner) You could transfer assets, in my view, to another company, if you receive valid consideration for those assets. That would be disposing of those assets in a manner that's consistent with Section 1405, which is our dissolution statute.

A. (Ms Jarvis) And I would just add that when disposing of
those assets, the monies you get would be distributed to
the creditors of that company and, if there's anything
left over, to its shareholders.

PROFESSOR STERN: But I guess they are borderline cases
where you have to decide whether it is for the purpose
of winding-up or not, I imagine? Or is it quite
clear-cut?

A. (Mr Gardiner) Sorry?

PROFESSOR STERN: Is it quite clear-cut, or are there some
contracts that could be seen as in furtherance or not?

A. (Mr Gardiner) Okay. I think it's pretty clear-cut. For
example, in my view a merger is something different from
winding up a corporation, because a merger actually is
a means by which the business of a company is continued,
and it continues on, rather than ceasing operations and
ceasing the process. A merger, that's what that does.
So a sale of assets is different from that.

So I think it's actually pretty clear-cut. It's
pretty easy to decide, in my view, what is a transaction
that is in the process of liquidating and winding up
a company versus what isn't.

PROFESSOR STERN: Thank you. That clarifies.

THE PRESIDENT: Re-direct?

DR GHARAVI: I apologise, Belmont has questions.

THE PRESIDENT: Oh, sorry.
Cross-examination by DR GHARAVI

Q. Sir, I just want to make clear: I'm within the context of the opinion you expressed, not what the law says; even less now.

Your opinion, as I understand it, is that a dissolved company can dispose of its assets as long as it is for winding-up purposes, and that is, you say, at best or at worst -- I don't know how you qualified it -- voidable; correct? That's how I understood it.

A. (Mr Gardiner) I think that under this case that we've just been talking about, that there is risk now that a court would say somehow that even that type of a transaction would somehow be void. I think that's what the case says.

Q. Okay.

A. (Mr Gardiner) What my personal opinion is: that what should be is that a corporation should be able to dispose of its assets --

Q. Okay.

A. (Mr Gardiner) -- consistent with the statute, and if it is doing so in a manner that's consistent with its mandate to liquidate and wind up its affairs, then, at best, such a transaction or a contract entered into in that situation would either be enforceable or, at worst,
voidable, but it shouldn't be void. That's my opinion.

Q. That's how I understood it.

A. (Mr Gardiner) Okay.

Q. Within that context, you were put, I think, a question, and you clarified what the law says about "dispose". You said: "dispose" means basically, as I understand it, sell, and certainly not merger. Is that correct?

A. (Mr Gardiner) That's my view, yes.

Q. And if you cannot merger, you cannot close on a transaction to purchase, I guess; that's even worse.

A. (Mr Gardiner) Sorry, say that again?

Q. If you can only dispose, and dispose is not merger, then even less can you buy or close on something to purchase?

A. (Mr Gardiner) You could -- yes, I guess the answer to your question is: buying an asset after you're dissolved would be inconsistent with liquidating and winding up.

I would point out though, when a company is administratively dissolved, there's a two-year period in which that company can be reinstated. And the statute says -- a different statute than 1405, I think it's 1422 -- says that if a company is reinstated within that two-year period, then all actions taken from the date of the administrative dissolution until that reinstatement, those actions are ratified and completely valid. So
that creates a question that actions taken immediately
after administrative dissolution, and for the two-year
period thereafter, certainly can be ratified and made
valid if a company does a reinstatement.

Q. What about, within your scenario, if the purchase was
intended for purposes of continuing purchase of majority
shares and continue investing in and managing the
company? Would that change your answer for the
two-year...?

A. (Mr Gardiner) It wouldn't change my answer if the
company did in fact get reinstated as a valid
corporation. Frankly, if it did anything in that
two-year period and was reinstated, any action it would
have taken, whether it was for dissolution or for
anything else, by the statute it would be a valid
action.

Q. I am still within the context of your opinion, and not
the court decisions. Take the scenario that a dissolved
company, after being dissolved, enters into a contract
to dispose of its assets, and assume that that is
voidable. My question is: who is the aggrieved party?
Only the aggrieved party can ask for performance;
correct? It's only the aggrieved party?

A. (Mr Gardiner) It's only the aggrieved party who could
seek to ask a court to say, "I want this contract to be
DR GHAJARI: Thank you.

THE PRESIDENT: Re-direct?

(1732 pm)

Re-direct examination by MR ANWAY

Q. Good afternoon, Ms Jarvis and Mr Gardiner.

Mr Gardiner, let me start with you. The new opinion that you brought to our attention today, do you think that strengthens the conclusions you reached in your report or weakens them?

A. (Mr Gardiner) Overall, by the way it reads, it strengthens.

Q. Why do you say that?

A. (Mr Gardiner) Because my portion of the report focuses on the merger and whether a merger occurred or not. And if we assume for the sake of argument that a contract was entered into for a merger, this case supports the conclusion that that contract would be void.

Q. And you had other reasons in your report to conclude that it was --

A. (Mr Gardiner) Yes.

Q. -- void, but this provides you an additional reason; is that how I understand your answer?

A. (Mr Gardiner) My answer is: it provides an additional reason that I wasn't aware of when we wrote the report,
Q. One issue is, of course, the alleged merger. The other issue is, as you well know, in this case there's an issue of the transfer of a 57% interest pursuant to an SPA dated March 2001.

Does this new case, in your view, apply to a transaction like that, or do you think there are differences with that type of transaction as to what was at issue in the case?

A. (Mr Gardiner) I do think there are differences, in that in this case -- meaning the present case -- the March 27th contract preceded the administrative dissolution of the 1985 company, or EuroGas I, as I call it, and then EuroGas I was administratively dissolved on July 11th 2001.

Q. I see. So in the new case you cited today, the contract was executed after the company was dissolved?

A. (Mr Gardiner) The contract was executed before.

A. (Ms Jarvis) Sir, I think you meant in the new case?

Q. Sorry, yes, that's correct. That was my question. In the new case that you brought to our attention today, the contract was executed after the company was dissolved; and not only that, it was also --

DR GHARAVI: That's an argument, "not only that but also".

MR ANWAY: It's a statement of fact.
DR GHARAVI: There is a problem, Mr President, because that
sale purchase agreement does not really arise. I didn't
mention the sale purchase agreement. So I have no
objection that my colleague mentions that, but he then
has to characterise it carefully, accurately, meaning
the contract entered before the company was dissolved,
but not closed at the date of when the company was
dissolved. So I have no objection, but you have to
adequately define the chronology of the events, in
a non-leading way.

MR ANWAY: Mr Gardiner, with respect to the SPA --

A. (Mr Gardiner) The March 27th SPA?

Q. -- what do you understand to be the relevance of
March 2001?

A. (Mr Gardiner) March 2001 is the effective date of the
SPA.

Q. Do you know whether that contract was signed before
EuroGas I was dissolved?

A. (Mr Gardiner) My understanding is it was signed before
EuroGas I was administratively dissolved.

Q. In the new case you brought to our attention today, was
the contract at issue signed before or after the
company was dissolved?

A. (Mr Gardiner) It was signed after the partnership was
dissolved.
Q. In the new case that you brought to our attention today, was the contract signed before or after the two-year period for which the company could seek reinstatement had expired?

A. (Mr Gardiner) It was signed after two years.

Q. Going back to some of the questions from the Tribunal, is the fact that in the new case you brought to our attention the contract was signed after the two-year reinstatement period relevant to your assessment as to whether this ought to be the law or not, or how issues like this might be considered in the future?

A. (Mr Gardiner) I think it is relevant. I think it is relevant in the sense that I think it's unclear how a court would deal with a corporation or another entity that (a) has entered into a contract before it was dissolved, but perhaps not fully performed, or (b) entered into a contract during the two-year period in which it could be reinstated. The present case, or other cases that I am aware of, don't deal with those facts.

Q. You have noted that in your own personal view the court perhaps should have reached a different conclusion. Is this now binding law in Utah, notwithstanding your opinion on that issue?

A. (Mr Gardiner) In my view, it is binding law.
Q. You were shown a document just a moment ago which is at tab 6 of Claimants' bundle: it's the joint unanimous consent resolution, C-57. You've read this document?
A. (Mr Gardiner) Yes, I have.
Q. You note that throughout document they use the phrase "Class 'F' reorganization". My question is whether a type-F restructuring, as the Claimants use that phrase, can merge two corporate entities.
A. (Mr Gardiner) No, it can't.
MS BURTON: Objection. We did not ask him questions with regard to class F and merger. It's outside the scope.
MR ANWAY: That's okay, I have the answer.
In your view, Mr Gardiner, does this joint unanimous consent resolution merge two corporate entities?
MS BURTON: Objection. Outside the scope.
MR ANWAY: Mr Chairman, the witness was asked specifically about this document, and there is no question that one of the issues in this case is whether it in fact merged the two corporate entities. You will recall the witness specifically said that it required an instrument of transfer, and one of the issues during that cross-examination was whether this was such an instrument.
THE PRESIDENT: You can have the question.
MR ANWAY: Thank you.
In your view, Mr Gardiner, does this joint unanimous consent resolution effectuate a merger?

A. (Mr Gardiner) No.

Q. Why?

A. (Mr Gardiner) This joint resolution reflects the intentions of the two boards of directors to do something to, in essence, combine the two corporations and make them into one, without complying with merger statute or without at least providing evidence of actual transfers of assets or contractual assumptions of liabilities. It also contemplates that the new EuroGas entity would simply treat the outstanding shares of the prior EuroGas entity, or EuroGas I, as I call it, simply treat those shareholders as its own, which in my experience as a corporate lawyer, I don't know how you do that. One company can't, just by a resolution -- and by the way, the directors are the same on both sides, right? -- decide that the shareholders of one company are now the shareholders of another company. That just doesn't work, at least in Utah corporate law.

Q. How do companies merge in Utah?

A. (Mr Gardiner) They enter into an agreement: we usually call it an "agreement and plan of merger". And they agree to file articles of merger with the Division of Corporations, and they file them. The public gets
notice of the fact that these corporations have merged.
And the merger is effective once those articles of
merger have been filed.
Q. So the merger cannot take effect before the articles of
merger are filed?
A. (Mr Gardiner) No.
Q. Ms Jarvis, I think I'm going to turn to you now.
Ms Burton took you through hypotheticals concerning
Jarvis Corp; do you recall those?
A. (Ms Jarvis) Yes.
Q. Could you tell us why you think this case is different
than the hypotheticals Ms Burton gave to you?
A. (Ms Jarvis) Well, as we said particularly in the
rebuttal opinion, this is a case of a corporation that
was dissolved, and after two years could not be
reinstated, then filed bankruptcy. It filed bankruptcy,
it did not file any statements and schedules. And under
bankruptcy law then nothing, no assets could have been
abandoned and could be within the corporation's control
after the bankruptcy had concluded. So there would be
nothing to administer at that point.
Q. And this may be a question for Mr Gardiner as well, but
since it does bear on bankruptcy, I'll ask it to you:
could a merger operate, executed after a bankruptcy had
been concluded but that purported to apply retroactively
during the bankruptcy, is that something that could be
valid in Utah?

A. (Ms Jarvis) I think Sam has stated that under Utah
corporate law, it cannot. You cannot have a retroactive
merger. It has to be at the time that the articles of
merger are filed. And if you're asking for something to
come in effect at the time the automatic stay is in
place, that would be void. Any act taken in violation
of a stay is void ab initio, absolutely void.

Q. Now, in her questions today Ms Burton focused almost
exclusively on EuroGas GmbH, the Austrian entity. Are
there other assets or interests you know of owned by
EuroGas concerning this talc project, aside from
EuroGas GmbH?

A. (Ms Jarvis) Well, my understanding from reading the SEC
documents is that there is an issue with respect to the
57% that was bought from Belmont. And while I can't
opine exactly when that, you know, was transferred,
because that would be a subject of Canadian law, which
is what would determine when it was transferred, but as
I explained with other assets of the estate, if at the
time of the bankruptcy filing under Canadian law --
which is what you would apply -- this was an asset of
the estate, then it would become property of the estate
at that point in time.
Q. Do you know whether, if that 57% was transferred, it would have been held directly by EuroGas I or through GmbH, the way the 33% was?

A. (Ms Jarvis) My understanding is it was directly by --

again, from reviewing the SEC documents and other public filings.

Q. There was also some discussion about how causes of action that may arise after a bankruptcy is commenced can relate back to an existing asset. I just wondered if you could provide a bit more of a fulsome explanation about how that actually works.

A. (Ms Jarvis) Because there are some causes of action that arise that are property of the estate that aren't connected with another asset.

One of the examples would be the Stephens case, which was decided by the District Court in the District of Utah, so a court that is the appellate court and the court of original jurisdiction for the Bankruptcy Court in Utah. In this case, the Stephens case, the court was actually applying judicial estoppel, meaning: can this claimant actually bring this claim in their court? But in doing, so they interpreted -- and had to interpret -- what was property of the estate.

The facts of the case are such that the claimant had an employment claim, but the claim didn't arise until
after she filed the Chapter 7 bankruptcy. However, before she filed that bankruptcy, there were clearly issues that had happened that she thought it was a possibility that this could be a claim at some point in time. So at the time she filed the Chapter 7 bankruptcy, she knew there could be a claim that would arise, and that claim actually didn't arise until after the bankruptcy was filed. She did not list this on her statements and schedules.

So the District Court looked at whether that was an asset of the bankruptcy estate, and found, again interpreting the potential claims, that from decisions of the Tenth Circuit in that case -- they looked specifically at the Eastman case -- said: this is a potential claim and was a potential claim at the time of the filing of bankruptcy, should have been listed as an asset of the bankruptcy. Because it was not listed as an asset of the bankruptcy, it was not abandoned and it could not be pursued by her.

And in addition to that, she was judicially estopped, meaning because she took the position that this didn't belong to her in the bankruptcy, she could not now say that it belonged to her thereafter when she sued.

Q. Again, this might be a question for either of you.
Ms Burton raised the question about a share transfer and, Mr Gardiner, I think you replied that as winding-up activities, a dissolved corporation could sell its assets and receive back the shares of the buyer.

Could you tell the Tribunal why you think this case is different from that scenario, if you do think it is different?

A. (Mr Gardiner) Well, in this case there was no actual issuance of any shares by what I call EuroGas II to EuroGas I; there was just a statement that it would deem the shareholders of EuroGas I to be the shareholders of EuroGas II. And like I said before, that's not a concept that makes any sense to me under US or Utah corporate law; that's not a valid way to acquire shareholders or to issue shares.

Q. Ms Jarvis, one of Ms Burton's questions to you revealed that there were two cases on which you had relied for a particular proposition. Counsel can correct me if I'm misstating this. One of them relied on a prior statute and one of them relied on a current statute. And I had noted in the Claimants' Reply memorial there seemed to be some suggestion that you had relied on an incorrect statute. Could you just address that for the Tribunal?

A. (Ms Jarvis) Yes, the two cases were cited in the original opinion to talk about mergers and whether
mergers could happen beyond the two years of reinstatement, and the law did not change with respect to one or the other. So it didn't matter that they were under the old law or the new law, because under both laws the time for reinstatement -- there was a period of time where it used to be one year, but then it became two years, and during that two-year time is the only time that a corporation can reinstate. Once it passes that two-year period, it cannot reinstate. And that's the same under both laws.

Q. So in your view, is the fact that one case relied on a previous statute relevant?
A. (Ms Jarvis) No.

Q. Why?
A. (Ms Jarvis) Because again, the law hasn't changed with respect to a merger. Can a merger occur beyond the two-year period? No, it cannot. The only thing that changed was the wind-up period beyond that, where you cannot merge but where you can sell off other assets; the time period was taken from that.

But actually, because one of the cases is a new case under the new law, there is still the issue that there is, at some point in time, a time where the wind-up period cannot go beyond. So I think the Hilcrest case, which I believe is under the new act, said: ten years
after the company was dissolved, too late to now raise
and try to pursue an asset. So it would be an equitable
standard, but at some point it's too late to even pursue
wind-down activities. They have to complete at some
point.

Q. Mr Gardiner, I don't know if I have already asked this
question; I'm sure I will be told if I have. You had
noted before about statutory merger. Is there any other
way to merge in Utah lawfully?

A. (Mr Gardiner) I am not aware of any other way.

Q. Ms Jarvis, a number of questions asked to you by
Ms Burton concerned trustees' control over property and
abandonment. Does the trustee have complete control
over whether property is abandoned?

A. (Ms Jarvis) No. Under the abandonment statute, there
are three ways that property can be abandoned. The
first is: the trustee can file a motion to abandon, or
a notice of abandonment. But the Cook case, the
Tenth Circuit case cited in my opinion, is very, very
clear that the trustee has to be precise about noticing
what asset is going to be abandoned, giving notice to
all the creditors, give them an opportunity to object,
before an asset can actually be abandoned.

The second way that an asset can be abandoned is
another party -- not the trustee -- can ask that the
court order the trustee to abandon the asset. That can be done, but again it has to be done by motion, there has to be notice given to parties. There's a rule, Rule 6007, that makes it clear that these have to be noticed because they are serious issues that the court has to decide.

The third way for assets to be abandoned: very, very clearly they have to be scheduled, so they have to be filed in the statements and schedules, and then the trustee has to have not administered them during the bankruptcy case; and then, when the case is closed, then they are abandoned by operation of law. But no assets that are not scheduled can be abandoned by operation of law.

MR ANWAY: I have nothing further.

THE PRESIDENT: Thank you.

(1.52 pm)

Questions from THE TRIBUNAL

THE PRESIDENT: Mr Gardiner, a contract, having not as its object the liquidation, is entered into on a certain date, it is executed by the parties; then the company who is one of the contractors is dissolved; and after that the contract is closed. What's the effect of the dissolution in that situation on the validity of the contract?
A. (Mr Gardiner) In your hypothetical it's closed within the two-year period of reinstatement or not?

THE PRESIDENT: Within. But there is no reinstatement at any time.

A. (Mr Gardiner) Okay. Well, my view is that, consistent with Section 1405, when a company is able to dispose of assets -- well, first it says it can collect its assets and then dispose of them, and then it also indicates it can take care of or satisfy obligations. In my view, the closing of a transaction pursuant to an agreement that's already been entered into would be consistent with the dissolution and winding-up procedures permitted by Section 1405.

So I believe they could close the transaction, and that that closing would represent valid actions, because that would be moving the company towards winding up and proper liquidation of its assets. It's entered into a contract. What does it do? It has to do something to get to the ultimate point of ceasing its operations and winding up. So I would say it could take those actions to close the transaction.

THE PRESIDENT: Thank you. Any follow-up question?

DR GHARAVI: Yes, I want to be more specific on a follow-up.

(1.55 pm)

Further cross-examination by DR GHARAVI
Q. Have you read the SPA?

A. (Mr Gardiner) I have looked at the SPA. I did not read it carefully.

Q. Take my representation -- and it's an undisputed point -- that it was signed between the parties, EuroGas I and Belmont, before EuroGas was dissolved, okay? The closure date is after the company EuroGas was dissolved.

Now please listen to me carefully, because there is a contract, as you mentioned, to dispose. This one is to purchase majority shareholding in a company that is abroad as an ongoing project. Is that considered -- according to your opinion again; I'm leaving the court aside -- a voidable-only contract that falls within the spirit of the winding-up?

A. (Mr Gardiner) I'd like to answer that question. Could someone tell me which tab Section 1405 is? I just found it: it's tab 8 (R-19).

So my answer to your question is: I think it could do that -- in other words, it could still close that transaction -- because subsection (c) of 1405(1) says a permitted action after dissolution is:

"... discharging or making provision for discharging liabilities ..."

I view that to contemplate performing obligations
under a contract. So even if the contract entered into prior to dissolution involves the acquisition of an asset, still the company is bound by that contract, has a duty to perform, and the statute permits "[the] discharg[e] or making provision for discharging liabilities", and I view "liabilities" to include contractual obligations. As it moves forward toward liquidation and winding-up, it has to take care of its obligations, and one of them is to close transactions it has previously agreed to enter into.

Q. But what about if the closure date has not arrived even? A. (Mr Gardiner) Nothing changes in the analysis I just stated. The closure date is when it is. It has an obligation. I didn't read the contract carefully, but I assume it had conditions involved which needed to be satisfied in order for a closing to occur. When those conditions were satisfied, it would have been legally obligated to close the transaction, and I don't think it would be viewed as inconsistent with the statute to proceed to do that closing.

Q. And it could issue cheques after the company is dissolved?

A. (Mr Gardiner) When you say "issue cheques" ...?

Q. Issue cheques: take its chequebook, EuroGas I, and I issue a cheque to Belmont.
A. (Mr Gardiner) If that's consistent with an obligation it has, particularly one that it entered into prior to being dissolved, then I would say yes.

Q. And it could issue new shares as well?

A. (Mr Gardiner) Again, issuing new shares, I also agree it could do that, in particular in the fact that the action was occurring within two years after the administrative dissolution, because within that two-year period, again, if it were to reinstate, everything would have been permitted. Ultimately in this case it wasn't reinstated, so there might be a question as to whether at that point there's a problem with the shares. But I think at that point in time of closing, prior to that two-year period being ended, it should be able to have issued those shares, and that's what I believe it did.

Q. What about if under the SPA -- assume with me; I'm not saying that is the case. Take another SPA with the same chronology. There is no obligation on the part of -- no obligation, no consequence?

A. (Mr Gardiner) No obligation to close?

Q. Yes.

A. (Mr Gardiner) So you're proposing a hypothetical where there is an SPA entered into, but --

Q. And EuroGas I can take the position not to close.

A. (Mr Gardiner) Can take the position not to close. In
a strange hypothetical of a company entering into an SPA which then it doesn't have an obligation to close, I guess in theory you'd have to reconsider whether it could close in that particular case if it had been dissolved. However, even if it did, and it did reinstate within the two-year period, that would be perfectly fine.

Q. Yes, but the assumption is that it has not been reinstated.

A. (Mr Gardiner) Okay.

Q. What is the statute of limitations in all this?

A. (Mr Gardiner) You know, I'm not sure what the statute of limitations is in all this. I could look that up, but I don't know off the top of my head.

Q. And whether or not one party is aggrieved or not, does it change any of your answers?

A. (Mr Gardiner) If one party is aggrieved or not?

Q. You say it can discharge its obligations. Who is the aggrieved party in the context of a situation that you describe when reading the statute, as part of its obligation to discharge? Who is the aggrieved party in that context?

A. (Mr Gardiner) Well, an aggrieved party would be if a company -- let's take your example or this case. The SPA was entered into. EuroGas had an obligation to
issue shares. The closing was to acquire the 57% and
issue shares, right? That's the transaction. So if it
didn't issue the shares but acquired the 57%, then
I guess it would be Belmont that's the aggrieved party.
Q. And if the aggrieved party is not requesting at a point
of time that EuroGas I discharge its obligations, when
it learns that the company is dissolved --
A. (Mr Gardiner) Well, I don't --
Q. Sorry, I apologise, I don't want to interrupt you,
I just want you to focus.
Assume Belmont learns that EuroGas I is dissolved,
and from the moment it learns, it is not requesting
EuroGas I to discharge its obligations. How could then
EuroGas I perform under a contract, under the provision
you read?
A. (Mr Gardiner) If EuroGas I has an obligation under the
contract, absent, like, an agreement to modify the
contract, but it has an obligation to close, then
I think the statute would still permit it to close.
Because in the facts you present to me, Belmont might
say for a time, "Oh, we don't want you to close", but it
could change its mind; or Belmont could go bankrupt and
someone, some trustee or some other party, could take
control and say, "Why didn't you pursue remedies?"
So I think it would still, under the statute, not
be -- somehow the fact that Belmont isn't demanding performance, I don't think that would impact EuroGas I's ability or permission under the statute to close the transaction, because it still has a liability under the contract. It doesn't matter to me whether or not Belmont is asking for them to perform or not.

A. (Ms Jarvis) Can I answer that too? I think part of what you're asking is: if a contract is voidable, you know, then the other party has the right to void it. And I think what you're saying is: could Belmont have, you know, refused to close or accept the consideration? I think it is possible that this contract is voidable, but then Belmont could not have accepted the consideration and disposed of it, because at that point the contract is no longer voidable.

Q. I understand. But stay with me on that scenario. Imagine Belmont learns five years after that that contract, SPA, at the time of closure, EuroGas I was dissolved, okay? And it takes the position, the assumption, that full performance, the obligations in full had not been discharged by EuroGas I --

A. (Mr Gardiner) Had not been?

Q. Had not. Had not. In full.

Could Belmont take the position, "Oh, I learned today that at closure date your company was dissolved,
14:05  and I don't want to exercise my right to obtain
performance"? Then you have no obligation to discharge
any liabilities. How could you, EuroGas I, then
exercise that voidable possibility?

A. (Mr Gardiner) Well, I find the hypothetical a little bit
difficult to follow. You're talking five years later?

Q. Yes.

A. (Mr Gardiner) I don't think it -- in my view, I don't
think it changes anything, unless EuroGas and Belmont
have agreed to -- well, okay, you say five years later.
No, it's still a contract that was entered into before
the dissolution occurred.

Q. Yes, but obligations were not discharged.

A. (Mr Gardiner) Obligations were not discharged. Then
there's a question after two years whether or not some
of those obligations could -- it depends on what those
obligations are as a question, maybe whether some of
those obligations could be discharged. But there's also
a possibility they could be. I don't think it's clear.

DR GHARAVI: Okay.

THE PRESIDENT: No further question? Thank you very much.

MR GARDINER: Thank you.

THE PRESIDENT: Where are we now?

MR ANWAY: So Mr Anderson is the next witness, and he is
ready.
THE PRESIDENT: Okay. We started one hour ago, so we will proceed. (Pause)

(R.1 pm)

MR JOHN ANDERSON (called)

THE PRESIDENT: Good afternoon, Mr Anderson. You have been called here to testify as an expert witness. Can you read the statement in front of you aloud, please.

MR ANDERSON: Yes, Mr Chair. I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.

THE PRESIDENT: Thank you.

Any direct?

MR ANWAY: None, Mr Chairman.

THE PRESIDENT: Maitre Gharavi.

DR GHARAVI: Thank you, Mr President.

(2.12 pm)

Cross-examination by DR GHARAVI

Q. Dear colleague, Mr Anderson, good afternoon.

A. Good afternoon.

Q. I will start with your first testimony and the CV.

Prior to your CV, a curiosity at paragraph 2: you cite Chambers Global's rankings guide. Is that something important in Canada that people rely on? Because here it depends on the event and who thinks that it is important or not. So you listed it, and I am asking
you: is that something important?

A. It depends what you mean by "important". But yes, it's a lawyer rating service that is becoming more important in Canada, because they put out a specific Canada guide since the time of this expert report, and our belief is the clients look to this expert guide when they need an expert, in order to assess who are the best people to hire.

Q. Clients, I can understand. But what about if you go before a Canadian judge, for example? If he asks for your expert opinion, would you put that credential forward: "I'm listed in the Canada section of ..."?

A. Yes.

Q. You would? For example, for arbitration you have I think superstars band 1, and you have all the members of the Tribunal; then you have bands 2, band 3, band 4, where you have people like me, and stuff like that. Where are you in that?

A. In the Chambers, I can't recall, to tell you the truth.

Q. I think I looked: you are in band 4. Do you recall?

A. I don't recall. My marketing department handles where we are in these rankings. And I know new ones came out in the last month or so, and I didn't look.

Q. You mean you may have been better ranked before?

A. I have no idea.
Q. Moving on to publications. First, I see you are
a transactional lawyer; correct?
A. That's correct.
Q. You are not a litigator, are you?
A. No. No, I have never appeared in court, and this is my
first time as a witness. So when you say, "Do you
normally put these accolades after your name?", and
I said, "Yes", I'm guessing, because I have never done
this before.
Q. I see also that you have a number of publications, but
they are transactional-related publications. For
example, you cite a number of them. The question I have
is: have you ever written on contractual law questions,
questions of interpretation? Have you written a book or
an article on this subject?
A. No, I have not written a book or an article on the
subject of contractual interpretation.
Q. And I assume you have never acted as an arbitrator or as
a judge?
A. I have never acted as an arbitrator or a judge, and I've
got a lot of sympathy for them, having had to try to
figure out what's been going on here.
Q. I have also sympathy for you, because you take a little
bit the shoe of a judge, basically, in your two
opinions, which say, "A judge would have construed this
situation as follows".

A. Correct.

Q. Isn't that what you do?

A. Correct.

Q. So you're kind of a novel -- how do you say? -- it's your bizutage. Anyway, you offered that to us.

So what I would like to do, dear colleague, is to engage with you in three ways, to see: (1) whether you identified the right principles to carry out what your mission is; (2) whether you applied these principles; and (3) whether you have applied these principles correctly.

So I will start with whether or not you have identified the required principles. At paragraph 10 of your first statement, you mention "Governing Legal Principles", and you say:

"Under British Columbia law, the interpretation of a contract is an objective exercise. Courts applying British Columbia law will, you start:

"(a) initially interpret a contract by giving the words of a contract their ordinary meaning ..."

Okay?

A. Correct.

Q. Then I would like to pause there for a second and then go to paragraph 16. And I read paragraph 16 in conjunction
with 10(a), because at 10(a) you identify a principle, and then you identify other principles that allow you to step away a little bit from (a).

A. Correct.

Q. My understanding is that you say: well if I interpret the contract by giving the words of the contract their ordinary meaning, it would lead to this result; yet for the reasons, and based on the principles -- I am not here to discuss yet the fact details -- but based on these principles, I think it would not be sound to give the words their ordinary meaning.

A. Yes, I'd say, summarising, that it would lead to a commercial absurdity.

Q. I understand. Let's go through the three reasons you state. You say:

"(a) the Purchase Price ... could all be sold for less than the specified threshold of ... 3 million ... and then the condition would never be capable of being satisfied" -- then you say -- "in particular, the Purchase Price Shares, since they were all sold for less than the specified ... 3 million, could not thereafter generate any additional proceeds for Belmont to achieve the ... 3 million threshold ..."

Correct?

A. Correct.
Q. Then you say:

"(b) the Share Purchase Agreement contains no positive obligation on the part of Belmont to use reasonable efforts to sell the Purchase ... Shares with dispatch, or at all -- with the potential illogical result that the 57% ... would never be transferred, despite EuroGas having delivered the Purchase Price Shares and otherwise having fully complied with its obligations under the Share Purchase Agreement ..."

And then:

"(c) in each of the above circumstances, EuroGas would have paid the NRAR, the Purchase Price Shares, and given the covenants regarding other royalties and registration rights, all as consideration under the Share Purchase Agreement, and would receive nothing in exchange."

Here I put to you: aren't there principles that allow a court to correct or remedy any of the alleged pathologies you have described, other than by deviating from the ordinary meaning of the contract terms? And allow me to elaborate. For example, if somebody has paid not the full amount, and the other party, such as Belmont, has kept the shares in the whole amount, isn't it a principle of unjust enrichment? On (b), isn't there a principle of good faith that the judge could
exercise in applying whether or not a party performed
those terms?

A. Well, I think --

Q. Or abuse of law?

A. So I think unjust enrichment is actually a remedy that
people seek when they're wronged, whereas when we're
trying to interpret the contract to determine whether
people are wronged or not in the first place, we need to
understand what the contract requires people to do.
I don't see unjust enrichment as being a statutory
interpretation principle or a contractual interpretation
principle.

I think the other comment that you made, that courts
will impose in certain circumstances an obligation on
parties to undertake their obligations in a reasonable
fashion: yes, I've certainly heard of that, and it's
often imposed that where one party is required to
provide a consent, for example, the courts will imply
an obligation that that consent is not to be
unreasonably withheld. So, yes, there is, in
interpreting a contract, the imposition of
a reasonableness standard, to answer the second part of
your question.

Q. Because, you know, what I understand is that what you
say here is that the contract terms could be clear, but
it would generate this result, and this result would not
be fair, basically, and that's why you go around it.
You don't say: well, it's unclear, let me go and do
an interpretation. You come and say: this is clear, but
it would lead to this, which I don't think is correct
because then the one party could not sell the shares, or
would sell them at a lower price, and then Belmont could
keep the shares and the amount, and that would be
unfair.

Hence I say there are remedies available if some
party, in interpreting, applying the contract terms,
abuses of it, or that application leads to an injustice.
A. So just to be clear, you said two things. First, there
is no abuse if you look at the specific words that were
here. What I'm pointing out is that if you look at
these specific words, they could lead to a commercial
absurdity. In effect this is, one could argue,
a gambling contract: will you be able to sell these
shares for $3 million? If yes, I get something; if no,
I lose. That's not a commercial transaction, right?
That's a commercial absurdity.

So the principles of contractual interpretation
require a court to depart from the plain meaning of the
words where it would lead to a commercial absurdity.
Q. But looking at it step by step, (a), (b), (c), for
example the (b). What would be the commercial absurdity
of (b):

"(b) the Share Purchase Agreement contains no
obligation on the part of Belmont to use reasonable
efforts to sell ..."

Isn't that implied? Or if it's not implied,
wouldn't a good faith requirement by the court ensure
fair application of the strict terms of the contract?

A. Well, there is no strict terms of the contract requiring
any sale. Indeed, the contract in other places
contemplates there will be no sale.

Q. Okay. But a certain amount needs to be achieved;
correct?

A. But the contract suggest that there need be no sale
whatsoever, and the investor could retain the share
ownership because they think it's a wonderful thing to
retain.

Q. Who do you call "the investor" here?

A. This would be the vendor, Belmont, who is now the
investor in EuroGas and the investor in the talc project
to the tune of the 12 million shares that represented
approximately 10%, I seem to recall.

Q. That would be an abuse of law if you would do that,
wouldn't it, if the other party could put up the
consideration and Belmont, by way of playing with the
shares, would end up benefiting from the shares and the
amount that it has partially received? Or if EuroGas
wishes restitution, it could argue unjust enrichment,
for example, and Belmont would restitute. So that's why
I am puzzled.

A. So, as I say, unjust enrichment is a remedy. When we're
trying to figure out what the contract means in the
first place we don't come up with constructions that
necessitate the reliance on an unjust enrichment remedy
to correct the deficiency.

Q. But I thought that your plain interpretation of the
contract led to a clear result, from which then you
derogue because you think that it is absurd.

A. Yes, that's exactly what I said: because it leads to
a commercial absurdity. Not because it's unfair or
something else. Because it leads to a commercial
absurdity.

Q. Okay. But what I'm saying: that there is no commercial
absurdity if there are remedies under the law that could
correct the pathologies; that the absurdities are not
absurdities.

A. No. No. As I've told you, that's not the approach
that's taken.

Q. Okay, that's not the approach. Well, we differ on that
approach, because then the principles of unjust
enrichment, abuse of law, good faith would not be --

MR ANWAY: Mr Chairman, I think the witness has answered
this question repeatedly. Is there a new question that
he needs to --

DR GHARAVI: Sir, I was going on. I said I differ --

MR ANWAY: Right, but --

DR GHARAVI: What "but"?

MR ANWAY: I'm looking for questions to the witness, rather
than --

DR GHARAVI: Well, it's a --

MR ANWAY: -- argument and speeches from counsel.

DR GHARAVI: It's a back-and-forth.

THE PRESIDENT: I think Mr Anway is right in principle.

DR GHARAVI: Okay, I will move on. I was moving on.

THE PRESIDENT: Although of course it is difficult sometimes
not to have a reaction to on answer one doesn't like.

DR GHARAVI: Paragraph 10. I go back to paragraph 10.

A. Yes.

Q. Then let's see the principles you apply. The first one
was "[giving] the words of a contract their ordinary
meaning", okay? Then you go on and say:

"(b) have reference to the contract as a whole in
interpreting the words of a contract -- individual words
and phrases must be read in the context of the entire
document ..."
Okay? Then you go:
"(c) examine the factual circumstances that gave rise to the contract to assist in interpreting the contract; ambiguity is not a prerequisite to considering the surrounding circumstances, but these circumstances must not overwhelm the meaning of the contract; and

"(d) give commercial efficacy to the parties' agreement in business settings. Interpretation which is commercially absurd should be avoided, but the purpose of the interpretation is not to rewrite the contract nor relieve a party from the consequence of an improvident contract."

On (d), I understand the latter part of the sentence:
"... but the purpose of the interpretation is not to rewrite the contract nor relieve a party from the consequence of an improvident contract."

It is precisely what we were discussing. Basically you are saying: yes, you should engage in interpretation, as long as it is not commercially absurd. But you cannot use the commercial absurdity opt-out, because:
"... the purpose of the interpretation is not to rewrite the contract nor relieve a party from the consequence of an improvident contract."
Correct?

A. Correct.

Q. So at least on that we agree?

A. Yes.

Q. There are footnote references to the cases. Have you read these cases?

A. Yes.

Q. There is no footnote when you say "interpretation which is commercially absurd". I don't find any support for that.

A. So that's footnoted to Scanlon; is that right?

Q. Is the gentleman a colleague who wrote the report with you?

MR ANWAY: It's an associate.

DR GHAHARI: Okay. Even if he was, I had no objection. I was just trying to find out. Don't be sensitive.

A. I don't know who this person is, to tell you the truth. I have met him, but --

Q. Okay. But even if it was your assistant, partner, brother, he would be welcome, as far as I'm concerned.

A. Thank you. So I see that we here cite page 744 at 770 --

Q. When you see "here", what are you citing? Can we start with the case?

A. I am looking at Scanlon v Castlepoint.
Q. But here you're saying:
   
   "... commercial efficacy to the parties' agreement in business settings."

   I was talking about the commercial absurdity.

A. Okay, so that's Jedfro. Is that footnote 12?

Q. I found your reference to absurdity only in your second report, and that was Consolidated-Bathurst v Mutual Boiler at page 7 of your second report. If you go to (d), you cite:

   "... unrealistic result or commercial absurdity ..."

A. Sorry, which paragraph did you say?

Q. Page 7 at (d).

A. Paragraph (d), yes.

Q. Here you say "unrealistic result or commercial absurdity", and this is the first backup that I found, but it's in your second report. And I understand you refer to Consolidated-Bathurst v Mutual Boiler. Is that the reference you provide?

A. Yes, that's the reference that's provided on page 7, correct.

Q. Okay. I understand that it's for point 7, but it's a case law that you rely on to say that you get out of the strict interpretation of the contract, plain meaning, when it's absurd; correct?

A. I wouldn't say "get out of". I'd say it's one of the
rules that's applied; yes, that's correct.

Q. Okay. Have you read that case?

A. Consolidated-Bathurst?

Q. Yes.

A. Yes.

Q. Does it concern the sale purchase agreement?

A. No. This is a case from our Supreme Court of Canada that involved the purchase of a contract of insurance, and was related to claims under that contract of insurance and what was being purchased and what was not being purchased.

But this case is the sort of thing that you learn about in law school. In fact, I was taught it in 1989, and it's one of the leading authorities in our country on contractual interpretation, and is cited in hundreds if not thousands of other cases, and followed. It is the highest authority in our country since the appeal to the House of Lords was done away with.

Q. I am not challenging that. But sometimes when I read cases -- I was at law school, and I realise now that I knew them better when I was at law school. Can we read that together?

A. Certainly.

Q. It's RL-0084. You qualify an insurance contract as a purchase contract? I was curious to see the
qualification of that. A purchase contract. Is it a purchase contract or is it an insurance contract?
A. Well, let's go see it.
Q. Okay. (Pause) Are you waiting for my question?
A. Yes. You said you wanted to lead me somewhere.
Q. Oh, I'm sorry. Just by courtesy I was waiting for you; maybe you had something to say. I understand it to be an insurance contract; correct?
A. Yes.
Q. And I see that there is a difference as to what is covered or not under the insurance, okay?
A. Correct.
Q. It says at page 2, in the middle of the first paragraph:
"The insurer, as was its right, sought in the terms of the contract to limit its exposure to accidental loss, and did so by seeking to confine the definition of accident."
And the insurer was relying on corrosion, saying the word "corrosion" in essence excludes accidental loss. And then the court said:
"Such an interpretation would necessarily result in a substantial nullification of coverage under the contract."
Because then it would then defeat the interest of the person who was covered, because it means that he
would not get coverage basically. That's why I don't understand even the relevance of this. Basically they are interpreting what is covered under insurance or not.

A. They are interpreting a contract, a contract of insurance, correct.

Q. I understand. I understand. Yes, but you can always make an analogy with any case. But would you agree with me that the analogy is quite weak?

A. No. As I say, this is a leading authority in Canada, not for insurance cases only, and it's something that you can find referred to in hundreds if not thousands of cases, as I said. So this is ...

Q. So there is no misunderstanding, I value very much the Supreme Court, I value very much that everybody relies on this. But is it a reference to point out that an absurd result really would allow you, in the same way you are doing, to leave the ordinary meaning of a contract? Maybe I can move on and say: look, are they really looking at the question of absurdity? They are looking for the true intent of the parties, if you look.

A. Yes, that's what the quote says, absolutely.

Q. Okay. So it's more the true intent --

A. "... advance the true intent of the parties at the time of entry into the contract."

Consequently, a literal meaning should not be
Q. I will come back to this. But just for the sake of time, I will move on a little, and then go to the end of footnote 12.

A. In report 1 or 2?

Q. 1, I apologise. Footnote 12.

A. Footnote 12, yes.

Q. In your paragraph 10, you say: first of all you look at the clear meaning. Then you say you have recourse to something else. You list commercial absurdity, for example, tests. You cited the case we just read. And then as to the limit of the recourse to the commercial absurdity and to the business settings, you say: but watch out, you can look at commercial absurdity, business efficiency.

"... but the purpose of this [exercise] is not to rewrite the contract nor relieve a party from the consequence of an improvident contract."

And you cite Jedfro, which you should have at RL-0088, which is the second and last case. I read page 3 of that decision:

"As a result, the appellants should not receive the return of their initial investment in the joint venture, as the monies were formally forfeited by the foreclosure... on the note and the trust deed. The doctrine of
unjust enrichment also did not apply; the appellants chose not to pay and suffered the consequence the law prescribed."

So the feeling I have -- I come back to the answer the President said I didn't like -- is, you know, you go into the ordinary meaning; you can opt out of it by using other principles in certain circumstances. One is commercial absurdity, and we saw the case you rely on. Then you say: even commercial absurdity should not be used to restore the bargain, and when you look at the case that is cited, it's what we were discussing, isn't it: that there are even remedies such as unjust enrichment. That could address any concerns you identified at paragraph 16?

A. I thought in this particular case they said those weren't available. But this is not a case that I have cited as being on all fours with our situation. This is again a case where we're drawing from the general principles of contractual interpretation, and so ...  

Q. I'll move on to another related topic. But the feeling I have when I read the case law you cite: that those terms, clear terms that you want to deviate from, you want to deviate from certain of these clear terms based on pathologies, and the cases you cite show that there are remedies under the law to allow these pathologies to
be addressed, and it cannot serve as an excuse for you
to undo the clear meaning of a contract.

A. No, that's -- I'm not aware of any case that says:
ignore the rule of contractual construction because it's
possible that there's a remedy in some other manner.
We're still trying to determine what the contract
requires in the first place, before we even get to the
question of: is there a remedy, based on what we now
understand this to mean? So I'm still on the principle
of: what does this really mean, what was the intent?

Q. Okay. I then want to a little bit engage further with
you on the different principles you set out. Don't you
think you have left other principles out?
A. Yes, there's lots of principles that I didn't think were
applicable, contra proferentem probably being a key one.

Q. Okay. But can we start with the question what is the
intent, what was the intent of the parties?
A. Certainly.

Q. Why don't you put that? I mean, every case law,
especially the Supreme Court that you've been
identifying, lists that as the primary thing somebody
looks at: the intention of the parties. And I see here
that you engage in an interpretation to deviate,
moreover, from the clear terms of the contract, and you
don't even have intention of the parties nowhere listed
A. Well, in Canada, in British Columbia, the
intention of the parties is to be determined from the
four corners of the document. We've got a rule against
parol evidence and the like. So that you're not
supposed to go and say, "Gee, what I intended was the
result of X". We're supposed to look at the contract
and determine from the contract what a reasonable person
would determine to be the intent of the parties and what
they were trying to achieve. We then have the principle
that allows us to go beyond and examine the factual
circumstances, where that's of assistance to determine
the intent of the parties, and we have done that.

Q. I understand that the judge would not take for granted
what one party says about its intention. But am
I correct or not that a judge will ask the parties what
was their intention?

A. No.

Q. It would not?

A. Typically not. As I understand the law, the
determination of the intention of the parties is
an objective exercise, not a subjective exercise. And
hence we don't call you as a witness to tell us, "What
did you think you were doing here? What did you want to
achieve?" The approach is to determine what a party
reading this would expect you to have wanted.

Otherwise -- I don't want to speculate as to why we have that rule, but I'm sure there are reasons for it.

Q. Let me move a little bit forward. What about the position of the parties at the date of the dispute; don't tell me that the judge is not interested in that?

A. The position of the parties --

Q. ... of the parties on the intention of the parties. The position of the parties. There is a dispute, and the parties to the contract say, "I meant that, and now I think it means this and I want this". Isn't that relevant?

A. I think the Jedfro case that you sent us to look at is an example of where that's exactly not relevant. Didn't that case involve the joint venture that one of the partners wasn't contributing and said, "Gee, I want this to be at an end", and, "We don't want this joint venture to exist", and --

DR GHARAVI: Stop there. Stop there, stop there. Exactly, exactly.

MR ANWAY: He should be allowed to answer his question.

DR GHARAVI: I apologise, it was not to interrupt him. You can finish, but I was interested in one sentence --

MR ANWAY: No, I think he needs to finish now, before another question or comment is made.
DR GHARAVI: Please do. Please do. I apologise. It was not to stop you from talking. Please do.

A. So in that case the position of the parties was that, "We don't want this contract to be afoot, we would like it to have been dealt with in the past", and court said, "No, you didn't do that. This contract is still in effect and you didn't terminate it or waive it or vary it, and we have interpreted it to say one thing and that's what it says".

So coming to the court later and saying, "I wish my situation was different", or, "I would like my situation to be X", that is not relevant in assessing what this contract meant on the day it was signed.

Q. I understand. But in that case there was a motion to oppose; correct? That's why there was a dispute.

A. Yes.

Q. Okay, so that's my point. Maybe I should have gotten there sooner.

Maybe before we discuss that, who has standing in Canada? For example, if there was EuroGas and Belmont in a dispute, and if they agreed on the interpretation of the contract, and then the Slovak Republic comes in, gets some sort of standing, what would be the burden of proof? Who would have the burden of proof to say the position of the parties is not as they state it, but as
the Slovak Republic or a third party says? Could it do that? What is the burden of proof? Who has the burden of proof and what is the threshold?

A. You know, I think we're getting into an area that's outside my expertise. As I told you, I'm not the sort of person that litigates contracts at the end of the day; I'm the sort of person that puts contracts into place. And so my specialty is writing these contracts and understanding what they mean on day one. So, honestly, I can't tell you who, five years later, has standing to bring a case in British Columbia to assess a contract.

Q. Let's say you write a contract, you negotiate a contract with your client, with another party, the two of you agree, and then a third party that claims to be impacted challenges the effect you want to give now to the contract, saying its meaning is different than the two parties to the dispute. Do you know who would have the burden of proof and what is the threshold that would be applicable in those circumstances?

A. As I said, no. I certainly can think of examples that I have heard of. For example, our Canada Revenue Agency will often say that, "We think the outcome of this particular transaction is X and you need to pay some tax", and the parties can say, "No, we think it's Y and
we don't have to pay tax", and there will be a court
case about that. But I don't know who bears the burden
of proof and what sort of standing the CRA has to bring
that case; I just know it happens. But that's, as
I say, not my area of expertise.

Q. I am embarrassed to suggest to you -- because I'm not
qualified; that's what my understanding is, simply, so
I don't want to misrepresent -- my understanding is that
the burden of proof would be on the third party, and
that burden of proof would need to meet the threshold of
fraud or collusion, which is huge, huge, assuming
statute of limitations are met. Would that --

A. As I say, I am no expert, and you said you aren't
either, but I can't believe it needs to be fraud.
Because I know as a fact that our CRA reassesses and
attacks many commercial transactions on the basis that
we think this had a particular result that leads [to]
tax payable.

    And they're not alleging fraud. Fraud is something
that's really, really, as you say, up there, hard to
prove, and has consequences if you allege fraud and
don't prove it.

Q. But tax administration is a creature of its own. In all
countries, I think: thank God, they can re-qualify the
parties.
I will move on to the other standards. Don't you think a judge would consider who drafted the contract?

A. Yes, that's the contra proferentem rule, correct.

Q. And whether one party is a professional, or both of them, or businessmen, would they consider that a little bit?

A. Certainly they assess -- that's part of the factual circumstances: are these sophisticated businesspeople or they not? Yes, absolutely.

Q. Have you considered that?

A. The contra proferentem rule I have not been able to apply to this because I don't have all the facts. This is why I said I have a lot of sympathy for our panel, because when I was given the task of trying to assess what this is and what it means, I found myself missing many facts, one of which is: where did this contract come from?

I've got a press release on February 14th by Belmont saying, "We've got a deal", and I've got a press release April 27th saying, "I've received signed agreements", and I presume the signed agreements they're talking about is the March 27th SPA. But I haven't seen any evidence as to who drafted it, where it came from, whether it was a lawyer, whether it was businessmen. And, you know, I wasn't here for the testimony of the
other witnesses, but hopefully they could tell us who
drafted this and where it came from.

Q. That's what my point is: who has the burden of proof?
The question of burden of proof is not addressed.
Contra proferentem is not listed as a principle. I see
the position of the parties, and the specificities of
a case that there is a third party involved is not assessed in
the principles, and then whether or not the signatories
are businessmen or not is not identified.

Then may I suggest that you didn't set out also
whether the correspondences and the amendments are
relevant? Wouldn't the correspondences and the
amendments to the SPA be relevant?

A. Well, I'm not sure what correspondences and amendments
you are referring to.

Q. I don't want to interrupt you. I am not saying whether
you applied it or not. I'm identifying the principles
that you state. Then we will go to whether or not you
applied these principles --

A. Sir, absolutely, if the contract is amended, then the
contract is amended. There are many, many principles,
and that's why it takes three years to get through law
school: to understand all these principles. When I am
asked a precise narrow question as to what this contract
means, I pull out the relevant provisions -- that
I think are relevant in my opinion -- and lay them out
and give you the resulting conclusion.

So, yes, I'm sure that we could spend a lot of time
finding in a contractual interpretation textbook many,
many, many principles that aren't here.

Q. I will move on, for the sake of time, to whether or not
the principles were applied. I kindly ask you to turn
to tab 76 that's in opening bundle 1. It's R-0106.

(A pause)

A. R-0106, bankruptcy filing docket; is that correct?

Q. Yes. In your first report, did you take into
consideration what is said here by the representatives
of EuroGas? You can read it: that they owed
$1.6 million, and they think it would be lost if no
payment is made.

A. Which page?

Q. It should be the tab pages: 04-2807 ...

A. I've got a page 68, 69, 70, 71.

Q. It should be 71.

A. Thank you:

"Question: Now, you're buying this Rozmin talc
deposit from Belmont?"

"Answer: Correct."

"Question: And you did that by issuing 12 million
shares ...?"
"Answer: No. There was subsequently going to need to be issued 12 million shares, but they haven't been issued. They would prefer the cash at this point."

I have not seen this before, so I have not taken this into account. When was this --

Q. Could you proceed a little bit, and read again, take your time:

"Question: And now you owe another 12 million, if they're willing to take it, or they want 1.6 million Canadian dollars?

"Answer: Correct.

"Question: Do you have the ability to pay that $1.6 million?

"Answer: Right now, no.

"Question: ... is it true that your testimony was that you had four to six weeks to pay that or the talc deposit would be lost?

"Answer: There's a very distinct possibility ..." That's what I was talking about: the intention of the parties.

A. When was this?

Q. In 2004 before the bankruptcy.

A. In 2004, so three years after the contract.

Q. Yes. So you have the buyer declaring before bankruptcy proceedings that if it doesn't pay a certain amount,
those shares will be lost. That's why I was asking you
whether you considered the parties' position, the
parties' intention, and then all the correspondences.

A. Well, as I say, I have not looked at this. I question
its relevance, given it was three years later and this
contract of 2001 may well have been amended by that
time. And lastly, to tell you the truth, I don't even
know what this means, "We could lose it". If I don't
pay my mortgage, the bank will take the house that
I own, but ... So I don't see that this is of relevance
in terms of trying to assess what the legal position of
the parties was at the time of the 2001 contract.

Q. Mr Anderson, you are moving ahead, and I don't want to
interrupt you, not because my learned colleague Mr Anway
may object but just by courtesy towards you, because you
are a dear colleague. But question one was whether or
not you identified all the principles; then two, whether
you applied them; and three, whether you applied them
correctly, and there you get to the relevance. But I am
at stage two, and my understanding is that when you
issued your report you did not consult that. And I will
now move on to another topic.

A. Correct. My report identifies what I consulted and does
not identify what I did not, because I didn't know
whether it existed or not.
Q. Tab 66, which should be C-343, January 18th 2005.

A. Correct, I have that.

Q. May I suggest that you didn't take that into consideration --

A. Yes, I did.

Q. Not in your first report. I'm talking about your first report.

A. I will have to check. But I certainly saw this and read this, yes. And this was certainly part of the voluminous statements made by the parties, some of which were more or less clear.

Q. My question was simply for the first report, and my understanding is that it was not considered in your first report.

What about tab 76, August 25th 2008, C-344?

A. Yes. Once again, I don't want to separate between report 1 and report 2; I think of them altogether as my opinion. But certainly I have seen this and considered it; perhaps in the second, perhaps in the first, but certainly within the totality.

Q. Okay. But certainly not in your first report where you reached a conclusion; correct?

A. Both reports reach the same conclusion.

Q. I understand. But it's hard, I suggest to you, when you write the expert opinion for a party, then to change
that, isn't it a bit more difficult?

A. No, I --

Q. You would be fine with --

A. -- I'd be happy to change it. When I was originally -- if you gave me facts, like, I'd love to get more facts.

The financial statements of Belmont say it received the repricing of a warrant valued at somewhere between $100,000 and $200,000 as consideration for this transaction. I see that referred to nowhere in the SPA; I see it referred to only in these financial statements. Clearly I don't have all the facts.

Q. Yes.

A. Once I have all the facts and it leads me to a different conclusion, absolutely I will provide a different conclusion.

Q. Well, let's pause here, whether you would provide a different conclusion. You say you are not an expert, could not answer the question of burden of proof and the fact that there is a third-party element, so I leave that aside. But based on the two documents that I just read, the three of them -- one of them you said you didn't [see], whether it was in your first or your second report, which is the bankruptcy?

A. Correct, the bankruptcy I never saw.

Q. The two others that you saw in your second report?
Q. Can I show you now two other statements. One is page 180 of Day 2 of these proceedings.
A. Do I have that?
Q. Yes, you should have in the pochette.
A. Page 180.
Q. This is Mr Rauball on the stand, and he was asked, page 180:
"Question: Do you think today you, Belmont, EuroGas I, EuroGas II, EuroGas V, VI, anyone that you are aware of, has any claim to the ownership of the 50% shares of my client, Belmont?"
And the answer is:
"Answer: Honestly, no."
Then a follow-up question:
"Question: How about the money you paid?"
Basically, you know, it's one of your hypotheses where you conclude that there could be an injustice, and you use that to part from the clear meaning of the terms. The answer is:
"Answer: That will be a situation which the lawyers will have to sort out. I myself am not the guy who initiates lawsuits. On the other hand, it is very difficult to initiate a lawsuit because Belmont could argue that we were in default of the payments,
et cetera, so they could come with a damage lawsuit.

It's a very difficult question right now."

And before you answer the question that I will put
to you, could you look also at what is said during the
testimony of Mr Agyagos. He was asked:

"Can you offer any us explanation as to what that
mean, 'The company holds the Rozmin ... shares pending
settlement of the amount of guarantee shares'?

Then he explains this had never happened:

"Nothing ever happened."

Then on the right hand column, 11:56, page 95:

"When you issued those, did anyone at the stock
venture exchange ..."

"When you issued those" is in reference to the
letter I mentioned, you know, I read to you previously
which was one of the three exhibits I asked you to
consider. It is at tab 66/67. Do you remember?

A. Yes, the two press releases saying, "We think we own
this or we own this, and we are challenging the
expropriation", yes.

Q. Yes. Then he says:

"When you issued those ..."

In reference, "those", to tab 66 and the following
one, namely tab 67:

"... did anyone at the stock venture exchange --
EuroGas I, EuroGas II, Mr Rauball, anyone in the
world -- challenge the fact that this was inconsistent
with your financial statements?
"Answer: No.
"Question: Today, is anyone apart from the Slovak
Republic alleging that you do not own full ownership of
the 5[7]% shares?
"Answer: Slovak Republic is --
"Question: Except the Slovak Republic. I'm asking
you: does anyone in the world --
"Answer: No, no."
So do all these things change your conclusion? You
have EuroGas I, during the bankruptcy proceedings,
saying, "Well, I have to pay, it's going to be lost".
Then there is evidence it was not paid. Then you have,
during that process, Belmont sending a press release to
the world -- the world; it's not a private transaction
between two parties -- saying, "I own these shares".
And then in these proceedings, both of them -- now one
is EuroGas II, but the signatory of the SPA is
Mr Rauball -- both of them are saying, "There is no
claim". So does that change your conclusion?
A. No, not at all. This is a statement that was made --
this one was made fifteen years after the fact; the ones
in 2005 and 2008 were made five to eight years after the
fact. The question I've been asked and my conclusion is based on what was the state of affairs in 2001/2002, when this contract was entered into and performed.

The statements made ten years later, who knows what they're made on the basis of and why. I could certainly understand, for example, someone saying, "Gee, if this is owned by EuroGas I, it's owned by EuroGas I creditors", or some such thing, "and it is better to be owned by Belmont". So I am not saying anybody is lying, but I could certainly see that people would allow the changes in the factual matrix over the last fifteen years to colour their perceptions.

Q. Yes, I understand that's what you're suggesting, but I have two things to say in response to your suggestion. It's that to some extent we could entertain that suggestion, if I had not shown you other documents, namely EuroGas I, within the bankruptcy proceedings, also taking that position openly before the trustee that initiated bankruptcy proceedings, giving us access to documents to follow up, and it says --

A. Yes, but those statements were three years after the fact. As I say, we look to contemporaneous statements, we look to immediately subsequent statements to try to ascertain the position of the parties. We don't tell people, "Wait ten years to bring this lawsuit and we'll
15:06 see what you say over the course of the next ten years".

We assess what the facts were and what the contract
provided for in the context of that factual matrix.

Q. But then I come back, if you would do that, that there
must be a threshold, frankly. I'm not talking here
about a third party; I'm talking about the judge, with
the two parties, trying to re-qualify. The threshold
must be very high. I mean, you have both parties now,
a few years, before a Bankruptcy Court, taking this
position that the transaction was not complete.

Do you agree with me that at least you should apply
a different threshold?

A. You know, I'm sure that you and Mr Anway and the panel
understand a threshold that should be applied in this
hearing; I honestly do not. All I was asked was: based
on all these facts that you have, tell us what you think
the conclusion is, and that's what I've done. And
whether that's sufficient for this panel or meets
a particular burden of proof, I don't know.

Q. Okay. Now you have all these elements, now that you
have all the elements, don't you think that at least it
attenuates what you have said in your report, because
you know that you have both parties that take this
position? You know ...

A. No. As I say, it's a matter of weight.
Q. Okay.

A. And if you showed me things from 2001, 2002, 2003, I'd be much more interested, and say, "You know what? Maybe I need to reconsider". But when you show me things from 2005 and 2008, I'm not particular interested, and a BC judge wouldn't be particularly interested. And that's what I'm trying to assess: what would the BC judge applying BC law, what conclusion would that person reach?

Q. Yes, but even if you add the ones in 2002/2003, don't you remember that those financial statements had provisions that Belmont was keeping the shares as a guarantee, and other correspondence showing that the transaction had not been completed? It used the words "to be completed", "We have to do this to complete the transaction".

So even if you take that into consideration, the whole thing, don't you think you are doing something wrong?

A. No, no, not at all. When you read my report, I think it's crystal-clear that there are post-closing obligations that were secured by the retention, the security arrangement of retaining the 57% shares in a trust or escrow. And that was to secure not an obligation to actually receive 3 million cash, but to
receive the 4.1(b) and 4.1(c) shares.

It may be that in 2003/2004 the parties reached different agreements -- I will agree with you -- that say "Gee, maybe you will keep those 3.2 million shares and we will give you half of the 1.6 million". Yes,
I agree the contract may have been amended.

But my question isn't: where were we in 2009? The question I have been asked is: what was the position of the parties at the time of this contract?

Q. I understand that, sir. But the other problem that I have combined with this, the problem that I set out at the beginning, is that you are saying that the terms of the contract are very clear. And if the terms of the contract are very clear, they actually lead to the statements that I just read from the parties and the one of EuroGas before the Bankruptcy Court. So that's the second problem I have: that you want to get out of the terms of the contract, based on the principles of absurdity and others that you are applying. So it's not just one problem; it's the way also you want to get out of these.

A. Am I allowed to see a monitor? Because that was a lengthy question that had a few parts.

MR ANWAY: I also don't think there was a question.

DR Gharavi: I can repeat --
A. I had a number of comments in there; in fact, so many that I've lost track of them. I guess the thing that really jumps out at me is: you've just made a statement that, for example, a businessman's suggestion that he may lose shares in 2004 in bankruptcy proceedings is consistent only with one conclusion, where it could be a whole variety of things that causes a businessperson to say, "Maybe I will have these shares, maybe I won't".

Q. No, that's not what I --

A. And in addition, I am certainly aware of amendments that were made to the transaction after 2001. Other people can comment on whether those were validly made or not, whether the company even existed when it entered into them. I will leave that for other people; that's not my expertise. I am just focused on what happened in 2001, what was the position of the parties.

Q. I understand.

A. And I'm not trying to avoid anything; I'm trying to interpret what was actually intended here.

Q. I'm not saying, sir, you are trying to avoid. Let me put it a different way.

My understanding is that you considered the terms of the contract in 2001 -- I am back with you in 2001 -- clear. But you say: based on certain principles -- and I have questions as to whether or not these principles
are complete, but leave that aside -- based on these principles, if I were to interpret the clear terms of the contract this way, it would cause these problems. Therefore, I reach another conclusion.

And I read to you that those who are parties to the agreement don't see any problems with the pathologies you have identified to search for another interpretation. So unless you identify a public policy problem in the terms, the way [they] are construed, I just cannot understand even your philosophy, your approach. Can you ...

A. So I guess, first, the statement you've made is that I am looking -- once again, I don't have a monitor -- but I am looking at the clear words of the contract. No, what we are talking about here is just the words of Section 6. I am also applying the rule whereby I interpret the contract as a whole.

And I am certainly alive to and giving absolute effect to 4.1(b) and 4.1(c), which are the mechanisms that are referred to throughout the materials, that have been described to the shareholders in approving this transaction, that entitle Belmont to receive additional shares; not a particular amount of money but a particular amount of shares. And I am interpreting all of that together so that it hangs together and gives
us a rational result; as opposed to treating Section 6
on its own as if it raises a separate right on the part
of Belmont in terms of what it is entitled to receive
under the contract.

I don't know who drafted this contract, I've told
you that before, and I can't apply the contra
proferentem rule. But I think whoever drafted this, to
be blunt, did a very sloppy job. And the best thing
I can do is to try to tie 6 to 4 to make it all hang
together.

Q. A sloppy job for whom? I'm 100% convinced that if one
of the parties had recourse to your services, it would
be excellent. But a sloppy job for whom? Can you say
who is the aggrieved party here, based on the plain
meaning of the terms?

A. I'd say a sloppy job in terms of having a contract
that's clear and understandable, and doesn't require
flying me from British Colombia to sit here today to
talk about what this might mean.

Q. But who bears today, based on the facts, the flaws that
you identified, the sloppiness you identified?

A. The parties.

Q. Why Belmont? Because when you opt out of the clear
terms of the contract, you identify three reasons; all
of them are adverse to the purchaser. And the case law
then you cite says you have principles of unjust
enrichment, and it adds: unjust enrichment is not
a principle that you can use to modify the bargain
for -- I would understand it -- the sloppiness.

A. The sloppiness affects both parties, I think. Today we
find ourselves in a situation, I assume, where we're
trying to say that [EuroGas] owns the shares. I think
if [EuroGas] eight years ago or ten years ago was
arguing that it should own the shares, it might not own
the shares as a result of somebody then attacking this
contract on a variety of bases: ambiguity; Section 6
being severable because it's an illegal gambling
contract on its face; who knows? Right? The ambiguity
benefits no one. The ambiguity allows people to, yes,
say what they want, take different positions from time
to time, but it doesn't benefit any party.

Q. Okay. Identify a problem for Belmont. What would be
the problem? It owns the shares, it keeps the shares,
and it waits for performance. So why is it at risk?

A. It's at risk because the contract could be such that
it's not entitled to receive $3 million in cash; it's
entitled to receive exactly what it told its
shareholders, which is additional shares. It had
a right to ask for those additional shares, and if it
did or didn't, it either got additional shares or it
didn't get additional shares. But it's got no 57% in Rozmin shares anymore.

Q. And meanwhile it retains the shares?
A. In your interpretation, perhaps; in my interpretation, no.

Q. Okay. Let's go to that at Article 6.1, if you could kindly look at the SPA. I can identify the tab for you: it should be tab 57, R-0107.
A. Yes, I'm there.
Q. Okay. I am at "Closing", okay?
A. Article 6, yes.
Q. Okay. You agree with me that it addresses closing, right? This we can agree on; correct?
A. Yes, it's titled "Closing", yes.
Q. So based on the facts that you have -- not the facts that you have only in your first report, not only the facts you have in your second report, but the facts that you have today -- did the transaction close?
A. Yes, I think so. All the evidence I have is that it closed. I don't have a piece of paper that specifies the closing date; I wasn't able to find that anywhere. But the only thing I could find is that the parties seem to have issued the shares and agreed a closing occurred on July 16th 2001, and I base that on the financial statements of Belmont that suggest the 12 million shares
it received became tradable on July 16th 2002. So I am assuming that's not a coincidence, that there's some sort of -- without being a US law expert -- some sort of one-year hold period, and that's why they've identified July 16th.

Q. That's your assumption?

A. That's certainly an assumption, absolutely.

And secondly, you typically -- once again, who knows what rules were broken or bent -- but typically, you don't file and receive your TSX final approval on a transaction until it's closed, and the July 18th press release of Belmont said, "We have received our final approval of the TSX VE".

Q. Okay. That's another assumption as well?

A. I'm assuming that things were done properly, yes. I'm saying that in the ordinary course, that final approval is not given until a closing has occurred.

Q. Then how do you read the other correspondences, even in the financial statements, that the shares are held in guarantee until realisation, the term "until realisation" is used; then "transaction to be completed"; then the letters between counsel from different parties alleging breach? You recall that there is also a letter from Belmont saying, "We have the right, we will exercise our right to dispose of the
A. Yes, there's lots of talk about foreclosure and all these things. And as I say, that's entirely consistent with the position that these shares were held as security for the post-closing obligations, which is exactly what my report says and exactly what the financial statements say.

Q. Did you see any request for closure?
A. Sorry?
Q. Did you even see any request for closure?
A. For closure or for foreclosure?
Q. For closure, not foreclosure.
A. No, I did not see a request for closing this transaction.
Q. Okay. Let's look at Article 6, if you don't mind, and let's go over it. There is reference to the terms of the trust, so the shares being placed into trust; correct?
A. Mm-hm.
Q. Were they placed into trust?
A. With a solicitor of Rozmin; is that correct?
Q. Yes.
A. I don't know.
Q. Well, you don't want to ask? It's not of interest to ask that? Did you try to find out?
A. I don't know that I'm allowed to phone up the witnesses and ask them what happened. I'd be given the facts --

Q. No, but the counsel you can --

A. Oh, yes, I asked. I asked for all the documents and the like, and I was told that there was no response that was available to me. Mr Anway would know better than me. But I put together lists -- he asked me and I put together lists of requests, and I was told, "Sorry" --

Q. And the answer you got is what?

A. I was given a small subset of what I had asked for, and was told that the rest was unavailable or did not exist or was not being produced.

Q. No, I'm not talking about documentary evidence. I'm talking about: did you ask whether there was a trust in place?

A. Yes, I asked for evidence of all these things.

Q. Okay. And when you don't see it, that means what:

either one party is hiding, or it means that no? Does the fact that there was no trust here, the trust provision was not complied, does it change any of your conclusions?

A. To tell you the truth, no, because in my mind I'm looking at this, as I told you, as a secured interest, and the way -- certainly Slovakia law probably has some bearing on this -- but the way you would perfect that
security interest, both in British Columbia under our
Personal Property Securities Act, as well as,
I understand, in the -- I'm no US lawyer, but under the
UCC is by possession. So whether you possess the shares
yourself or have them in a trust or escrow held by
a lawyer, that is security, or can be security, and
that's the way I've interpreted this.

Q. What about the 100,000? I read in your first report
that you assume that it was not important, it was
waived. That's your --

A. Or paid, yes.

Q. You made that assumption?

A. Either paid or waived, I said.

Q. So you're happy with that assumption?

A. Well, then your Reply said, "No, no, only 76 has been
paid" --

Q. And you're happy with that?

A. -- and my reply to that said: well, the financial
statements say it has been paid, 100,000 net, 96
recovery, 150,000 Canadian dollars. So when I look at
the financial statements, not only do I see what I think
is payment of the NRAR -- I'd love to get more facts --
I also see a repricing of a warrant, and I have no idea
whether an agreement was made between the parties as to
why this warrant was repriced and that had a value of
$120,000 in the financials.

Q. Come back to your table. That was in one financial statement, and there were shares, they was value placed on those shares, and there was an amount of 100,000 and there was an amount next to it. But weren't those projections?

MR ANWAY: Why don't we go to that document?

A. Yes, I'd like to look at those financials, because I had read it not as a projection --

DR GHARAVI: Well, you cited them. I would be happy. And then to the best of my recollection, it uses the word "guarantee", moreover, down there.

MR ANWAY: Mr Chairman, I would ask that the document be put to the witness.

THE PRESIDENT: Wait until the witness has seen the document.

A. There's a whole variety of financials, but I think the 2002, which is R-0114.

DR GHARAVI: It should be in the same binder, because in the opening I raised those as well. It's in chronological order, so if you go back, you will see that probably. (Pause) We'll find it for you.

A. I've got R-0114 at tab 17 of this binder. (Pause) I'm looking at 2002 compared to 2001, and there's subsequent ones as well, but --
THE PRESIDENT: Where do we find that?

DR GHARAVI: It's tab 58. It's R-0114. (Pause) Are you there? It should have even a sticker?

A. Yes.

Q. Do you have it?

A. Yes.

Q. Okay. So we're talking about R-0114.

A. Correct.

Q. Okay.

A. Oh, but this is just an extract. This isn't the full set of financials. Because this transaction is both under "Significant Accounting Policies" and under note 3, "Disposition of Subsidiary".

Q. Anyway, you mentioned this table and I think you were referring -- maybe I'm wrong -- to this table. And for me, I see that has "expectations not realised", and in any event there is settlement of the amount in guarantee. Then you go on to the next tabs, it still doesn't matter: it says "pending realisation", and then the correspondences are self-explanatory.

If you move with me to a final topic: it is precisely the closure. So you mention in July 16th?

A. That's what I've been able to piece together. But I'd be happy to see additional evidence that suggests something else.
Q. But that's on the assumption of the Canadian Venture Exchange --
A. Final approval.
Q. -- resolution of the deal; correct?
A. Final approval, yes.
Q. Okay. Let's go back to the SPA, if you don't mind. It's [tab] 57 (R-0107). So Article 6 says:
"Within 30 days of the ... approval by the Canadian Venture Exchange of the transactions described in this Agreement the Vendor shall deliver in trust ..."
Which it didn't do:
"... the Shares ..."
Okay?
A. Yes.
Q. So the Canadian Venture Exchange, if you then move to tab 71, R-0217, it says:
"The Annual General Meeting of Belmont was [approved] ... on July 16 ...":
Correct?
A. Mm-hm.
Q. So that was the special resolution for the sale by Belmont. Then on July 18th:
"The [Canadian Venture Exchange] has accepted for filing the share purchase agreement ..."
So it's July 18th; correct?
A. That's the final approval, yes, that you file for and obtain after your transaction is completed.

Q. So when could you close? What's the earliest day that it could have possibly closed, based on Article 6?

A. Well, there's an approval by the Canadian Venture Exchange on May 16th, the conditional approval, which is the approval you normally close on.

Q. Yes.

A. So I guess the earliest date would have been July 16th, which is 30 days later. This transaction was also --

Q. In May? 30 days later than May is --

A. Sorry, June 16th. My mistake. So June 16th is 30 days after May 16th.

But this transaction, as you will know from the information circular sent to the Belmont shareholders to approve the transaction, identified this transaction as a -- I will colloquially call it a "fundamental transaction", but it was a transaction that involved the sale of all or substantially all of the assets of Belmont. The information circular identifies 57% of Rozmin as constituting 90% roughly of its assets.

So as a corporate matter, this transaction could not be completed until that shareholder approval had been obtained. And that shareholder approval, as you've pointed out in this exhibit, there's a press release
saying that shareholder approval was obtained July 16th; and as far as I can tell, people closed immediately after receiving that.

Q. Based on everything you just said, different assumptions in your interpretation -- correct? -- it closed on July 16th?

A. That's the best I have been able to ascertain, because the July 18th final approval would not be given until it had closed, and --

THE PRESIDENT: Sorry. We will have to make a break soon, so chose the right time.

DR GHARAVI: Thank you very much, Mr President.

So based on your assumptions, interpretations, you conclude that July 16th 2001 is the closure date under Article 6.1?

A. That's the best I have been able to ascertain, yes, on the evidence I have seen.

Q. Okay. Have you considered that on July 11th -- I guess you have, because you have been sitting in the room now for some time -- that EuroGas I was dissolved?

A. No, I'm not a US law person so I haven't considered that.

Q. Let me make an assumption. May I assume that you don't think that that changes your conclusions?

A. Someone will have to tell me whether it changes my
Q. I'm asking you objectively. You're here as an "independent expert". I'm asking you, as the independent expert that has been produced by Respondent, whether or not you think that there could have been a closure on July 16th when the purchaser was a dissolved company since July 11th.

A. So I guess there's two answers to your question. The first answer is the factual answer, which is: did people actually issue shares? Did they do something to complete this transaction? All evidence points to: yes. Indeed, the financial statements are replete with not only having received the shares but having sold them and realised some amount of money. So did it happen? Yes.

Was it legally authorised to happen? That's the second part of your question. Once again, I always hesitate to wander into areas I don't know anything about. But I heard people sitting here a little while ago say that you can do things within two years of the date you're dissolved, and those are, if you reinstate, are just fine actions. So I would have -- once again, I'm treading into territory I'm not an expert in. But it sounds to me like it is authorised.

THE PRESIDENT: I think he should not be brought to that territory.
DR GHARAVI: I understand. I understand. I am going to a territory under Canadian law, if you allow me.

THE PRESIDENT: First we will take a break.

DR GHARAVI: Okay.

THE PRESIDENT: 15 minutes, so 3.50.

DR GHARAVI: Thank you.

(3.35 pm)

(A short break)

(3.54 pm)

THE PRESIDENT: Yes, go ahead, if you're ready.

DR GHARAVI: I was on the question of dissolution --

A. Yes.

Q. -- that occurred on July 11th. I do not want to address the consequences in relation to Utah law. But in relation to Canadian law, how does that impact Article 4, the "Covenants, Representations and Warranties", when it says:

"The Purchaser covenants, represents and warrants to the Vendor that now and at the Closing:

"(a) it has the full authority to enter this Agreement ..."

A. Well, if I understood the Utah law correctly, Utah law permits, during the two years following dissolution, an entity to complete contracts and complete its obligations. That's what I heard Sam say. So this says
to me that if that's true, this representation is true.

THE PRESIDENT: He shouldn't be asked these questions because he doesn't know.

DR GHARAVI: Okay, but I was trying to analyse this under Canadian law. If the answer is that this has to be viewed in conjunction with Utah law, which I understand --

A. That's correct.

Q. -- I'm happy to move on.

THE PRESIDENT: Yes, but on Utah law he is not an expert.

DR GHARAVI: Mr President, I agree with you on that. I didn't ask him: where are the acts that a dissolved company can do under Utah law? I said: what is the impact under Canadian law, based on Article 4? And he answers that it relates to Utah law. So once he gave me that answer, I move on to my next question.

THE PRESIDENT: But he says things on Utah law which I think he tries to guess. But that's not relevant.

DR GHARAVI: That's why I said I completely agree with you, I am moving on to my next question.

THE PRESIDENT: Okay.

DR GHARAVI: Because he linked that to Utah law. So once he pronounces that it depends on Utah law, I go to the next subject.

What about the Canadian Venture Exchange
approbation? Does the fact that the company is
dissolved, the purchaser, have any impact on the
approbation under Canadian law, or does that also relate
to Utah law?
A. What do you mean by "approbation"?
Q. Well, on July 16th -- look at 6.1. It says:
"Within 30 days of the date of approval of the
Canadian Venture Exchange of the transactions described
in this Agreement ..."
And on July 16th the Canadian Venture Exchange
approved the transaction.
A. Well, sorry, on May 16th, I think we said, the Canadian
Venture Exchange gave its approval, and on July 18th it
gave its final approval, yes.
Q. Yes, yes. Well, is there any consequence, or potential
consequence, on the validity under Canadian law of that
resolution, final resolution?
A. Final approval of the Canadian Venture Exchange?
Q. Yes, yes.
A. It depends, I imagine, on Utah law.
Q. Okay. What about --
A. Just so you understand and it's clear, and I haven't
seen the approvals, but on May 16th the stock exchange
would review the transaction and identify its
requirements to allow it to be completed. And it would
say, "You need to do X, Y, Z. Go get your shareholder approval, go do this, go do that". And if you do all those things, you are allowed to close. And then on the 17th you would go to the exchange and say, "We've closed and we've met all of your conditions", and the exchange would then issue its final approval.

So I guess it depends: what did Belmont tell the exchange? Did Belmont tell the exchange, "Oh, by the way, this company was dissolved under Utah law, but don't worry, that has no legal impact because we, Belmont, have obtained a Utah opinion"? I don't know.

Q. Forget about Utah law. Let's say it's Congo, or another country, the purchaser comes from Congo, so that we're not under Utah law. And assume that under Congo law, the purchaser, once it's dissolved, cannot carry out the transaction. Would an approval of the shareholders' meeting of a public company to proceed with a share purchase agreement be affected in any way under Canadian law?

A. The shareholder approval, no. But the actual completion of the transaction, if you're saying you're trying to complete a transaction with somebody that doesn't exist and has no ability to exist, then I would think the answer should be no, because you're missing one of the key elements of a transaction: a party.
Q. But the resolution itself would not be affected under Canadian law by the fact that -- I'm working on the assumption that the company did not know about the fact that it was dissolved. Wouldn't a resolution under Canadian law be affected?

A. No, so the resolution -- so the directors have the power to do whatever they want to do --

Q. Yes.

A. -- subject in the statute to half a dozen exceptions. One of those exceptions is that directors do not have the power to sell all or substantially all the undertaking of the company without first receiving a special resolution of the shareholders.

Q. Okay.

A. And so the directors were unable to complete this transaction until the shareholders authorised the directors to do so at the shareholder meeting on July 16th.

Q. Okay. But the authorisation to do so, is it impacted by the fact that they did not know before giving the authorisation that the purchaser was a dissolved company under Congo law that could not proceed? Would that, under Canadian law --

A. No. The shareholder approval is a box that has now been ticked: the directors have the ability to enter into and
complete the transaction. But if you're saying that there is no party in existence on the other side of the transaction, then how can you transact if the party doesn't exist?

Q. Okay. But I just want to, a last time, make sure that you are with me. You're saying that the authorisation given without knowledge that the purchaser is dissolved, is not, by this fact alone, void? You're saying it becomes impossible to perform because the purchaser is dissolved. Those are two separate things. But is your testimony that under Canadian law, that consent given is not void because --

A. That's correct.

Q. What?

A. That's correct: the consent is not void.

Q. Is not void?

A. Is not void.

Q. Is voidable?

A. It's given. It's not voidable, it is given.

Q. It is given irrespective whether the authorisation was given that the purchaser was dissolved; that's your testimony?

A. The authorisation was authorising the directors to sell all or substantially all of the assets to a party on the terms identified in the share purchase agreement, as
transcribed into the information circular. The question is --

Q. What about the directors? Let's take it to the next step. Okay, the authorisation was given to the directors to enter into the contract. How about the directors' closure? Is the closure which occurred, according to you, void because the directors who closed, according to you, at the time did not know that they were dealing with a dissolved company which, under Congo law, could not carry out the transaction?

A. Well, as I say, if you're saying that the thing did not exist, then yes, it's a nullity that did not exist. You and I can't reach an agreement if you don't exist.

Q. No, I'm talking about the consent, the consent of the seller. Is it the consent that is --

A. I'm saying the shareholder approval is done. The directors no longer have an impediment to their power to enter into and complete this transaction. However, the question of whether the contractual counterparty is existing and able to complete the transaction is a question in this case for Utah law, or in your hypothetical is a question for Congo law: does this person exist?

Q. That was not my question. But I will ask it within the context of the Canadian Venture Exchange approval. The
16:05  Canadian Venture Exchange final approval of a public
2       company, isn't it void for public policy reasons
3       because --
4   A.  No.
5   Q.  Well, if you start with a "no" before I ask my
6       question --
7   A.  It's not void.  For public policy reasons it's not void.
8   Q.  Or voidable?
9   A.  No.  You've got to remember: the final consent is not
given prior to completion of the transaction, it's given
after completion of the transaction. It is telling the
exchange, "We have completed the transaction". And the
exchange says, "Great": tick, stamp, you're done.
14   Q.  It is telling them.  But at the time imagine that the purchaser
doesn't know that it is allowing a listed company to
close a sale purchase agreement with a company that is
dissolved. Don't you think that's material information?
18   A.  If the approval to close was given on May 16th, if
19       I have my date correct, the final approval is not
a permission to close. The conditional approval is the
permission to close. The final approval is something
that's saying, "We have closed our file; the transaction
is completed". That certificate or approval is issued
on the basis of what Belmont told the TSXV, as it's now
called.
If what you're saying is: we lied to the TSXV, and
does that vitiate the TSX's closure of their file and
their approval --
Q. Not lying. It's that it was not disclosed by the
purchaser, and that the seller didn't know; and as
a result of that, the securities [exchange] did not know
that, and this is a listed company. I cannot understand
how this could not --
A. Well, no, you either close or you don't. And if there
is a party to close with -- which is a question of Congo
law -- and you have closed, you have told the exchange
you have closed, and the exchange says, "Thank you very
much". If there's no party in existence and it's
impossible to close, and you tell the exchange,
"I closed", clearly you were wrong if it's impossible to
close; and yes, the exchange would have issued their
approval and closed their file on the basis of your
incorrect representation to them. You should have said,
"I'm sorry, we haven't closed because the counterparty
has disappeared".
Q. Forget about whether or not the purchaser, once
dissolved, can or not carry out the transaction. So
whether it's Congo law or Utah law, it doesn't matter.
Assume it can carry out the transaction to close, once
dissolved.
The mere information, new information that was not disclosed to the shareholders, the directors that entered into the company, or the Canadian Venture Exchange that gave its final approval, wouldn't that by itself be a material element that would void or render the approval voidable? Because it would allow then a listed company, with all the consequences to the shareholders, to enter into a transaction not knowing that it is entering into that transaction with a dissolved company.

THE PRESIDENT: If you understand, you will answer. But then you will not ask the same question a fourth or fifth time.

A. I think maybe I can make headway this time though, because I think I've got a way to address this. Perhaps you misunderstand the nature and scope of the TSX's approval.

DR GHARAVI: Maybe. And the approval of the shareholders --

A. The TSXV only regulates those people who obtain a listing with the TSXV, and it prohibits people from undertaking material fundamental transactions without getting their approval. If you violate that, and do it without getting their approval, their only remedy is not to say that the transaction you completed is void. Their only remedy is to say, "I don't like you anymore."
I am de-listing your shares because you don't follow my rules".

So the TSXV -- the Canadian Venture Exchange at that time, or the Vancouver Stock Exchange before then -- has no power, unlike a court, to void or rescind or otherwise impact a transaction.

Q. Then you can complete the answer with respect to a company, Belmont. Try to help me. I retain you. I say to you, "I entered into a contract with a purchaser. Once I entered into the contract, I didn't know that that company was dissolved. And I don't care if that company can carry out or not the transaction, but I would never have closed with a company like that had it disclosed that it was dissolved". Under Canadian law, do I have a remedy for that?

A. Yes, to sue that company --

Q. Sue to do what?

A. I don't know what damages would flow. But you would argue that there has been some breach of the reps and warranties or covenants in this agreement, and you would sue to recover damages.

Q. Or to get out of the contract?

A. I don't know whether this is a situation that would entitle you to rescind.

Q. Now, coming back on Article 6, I want to engage with you
on your interpretation as of the date the contract was
entered into. If I read Article 6, "Closing", it says:
"... the ownership of the Shares shall not pass to
the Purchaser ..."
Okay? And if I turn to the next page, it says:
"... unless and until the Vendor has received 125%
of its initial investment ..."
And it has a set amount.
A. 3 million Canadian, yes.
Q. I cannot find anything clearer. It says it has to go
into a trust. The trust was not there. Then it says
the ownership of the shares shall not pass to the
purchaser. Then it says "unless and until".
So can you explain to me why practically you would
want these clear provisions not to apply?
A. So this goes back to exactly what we were talking about
half an hour ago --
Q. Yes. From a practical perspective, if you can --
A. Absolutely. So to me this is a bet as to whether or not
these shares, if they were sold, would achieve 3 million
in sale proceeds. And if they don't achieve 3 million
in sale proceeds, there is no ability to improve or
supplement the proceeds that were received, there is no
ability to give additional shares. I have sold the
purchase price shares, the 12 million shares. I have
received X; hypothetically, let's say 1.5 million.

I have received 1.5 million. I guess I've got no further obligations because I did not receive 3 million.

So where is the ability, the guarantee that everybody talked about in all the disclosure? When this deal was sold to the shareholders, nobody talked about Article 6; everybody talked about 4.1(b) and 4.1(c).

They said, "We've got to guarantee these shares? We're guaranteed to get money out of them, because if they're sold" --

Q. Can you just --

MR ANWAY: Mr Chairman, I think the witness should be allowed to finish his answer.

DR GHARAVI: At what point in time are you talking about when you're talking about the guarantee? I'm with you in 2011.

A. Let's go to 2001. Let's go to the shareholders' circular. The shareholders were described this transaction and told, "Please approve it". The shareholders were told in a proxy circular that, "This is what the deal is: we are selling our 57% interest". We can actually go to that document if you like, but let me paraphrase for now, and then we can go to that document.

The shareholders were told, "I, Belmont, want to
sell all or substantially all of my assets", this 57%.

"I am selling it to EuroGas. EuroGas is giving me
12 million shares, they are giving me 2% royalty, they
are giving me a variety of things. And good news,
shareholders: if these shares go down in value, and they
reproduce 4.1(b), and if I sell the shares for less than
3 million, they reproduce 4.1(c)". The circular says,
"This is what happens, shareholders".

Nowhere in the circular does it say anything about,
"Oh, but if we sell all the shares for $1.5 million,
nothing happens, we've just won our gambling bet".
That's not what the deal was. That's not what's been
described to shareholders. Before we even close the
transaction, we described something different.

PROFESSOR STERN: Can we have the reference for this
circular?

MR ANWAY: R-0109.

DR GHARAVI: I am with you. You are a practitioner;
correct?

A. Yes.

Q. I am at Article 6. What I see in the hypothesis that
$3 million are not reached: I do not see why the parties
could not implement remedies to cure that. This is what
I don't understand. You can go to (c), you can issue
shares, you can pay an amount --
A. But it doesn't say that. It doesn't say, "Please sell your shares and, if there is a shortfall of less than 3 million, then the shares will be released if the purchaser pays more cash". It doesn't say that here. What it says in 4.1(b) and (c) is nothing about topping up with cash. It says: pay an additional number of shares, calculated based on a historical price that bears no relationship to what you might sell them for. And those aren't purchase price shares. Those aren't the 12 million.

So this just does not work, and that's why I have come to the conclusion that this is sloppy shorthand for people to refer back to 4.1(b) and 4.1(c). And that's what the circular says.

Q. But sloppiness is something; practical possibilities to remedy it in practice are another.

A. Yes, and that's exactly what my expert report goes into. We use these rules of interpretation to start with the plain meaning. And when that arrives at an unreasonable result, or a commercially inappropriate result, we then go to the intent.

As I say, in this R-0109 on page 8, when Belmont was describing this transaction to its shareholders at the end of the second paragraph on page 8, the last sentence, it says:
"The value represented by the Payment Shares shall be guaranteed by the following formula ..."

And then (a) and (b), and it reproduces 4.1. It doesn't say anything about, "Article 6 sort of gives us this strange unknown top-up", or something. It says nothing about that.

Q. Yes, but it has the ownership of the shares that do not pass Belmont. So the sloppiness basically that you are describing is the problem of the purchaser that could be remedied either by the issuance of new shares to meet that, the payment of the amount; or, if it is with a counterparty that is a seller that is acting in bad faith, avoiding performance, by an action before the courts, either for restitution or unjust enrichment or other things. That's the --

A. But you are falling into the trap of rewriting the contract that we have agreed a long time ago, under principle 1, what are the principles: that we don't rewrite or redo a contract for parties. And that's exactly my point. We're not redoing this contract.

Article 6, if you read it, has a brand new right, that nobody talked about anywhere, to realise 3 million, and is not capable of remedy in the contract itself. But what is a real remedy, and is capable of -- without correcting or rewriting the contract for these parties,
4.1(c) and (d) provide for exactly what you're saying
the court should write into the contract.

Q. It says, "in the event the Vendor is unable", 4.1, then
there are shares that are issued to meet the 3 million
threshold.

A. Correct. Yes, I agree, 4.1(c).

Q. So the sloppiness that you identify is expressly
provided at (c). So I just don't understand what's the
problem, why you need to rewrite, first.

A. Well, you need to rewrite. You're the one that said: we
need to add to Article 6 the ability to top up in cash,
so that somebody gets cash.

Q. I said: if there are problems that you need to cure.
But if it's the 3 million shortfall, there is no
problem; it's written. 4.1: you issue shares to meet
the 3 million. And in practice that's what happened:
they tried to issue shares to meet that threshold. So
what sloppiness?

A. But there's nothing -- so you realise $1 from the sale
of the shares, you give me the notice as required within
the one year, and I give you, let's assume, 12 million
more shares, because the price, for some odd reason, is
back to where it was. What's happened now? Have you
realised 3 million from your sale of the purchase price
shares within the first year? No, you have not. You
have realised $1 and you have a batch of top-up shares.

Q. Okay.

A. What does Article 6 say happens? Article 6 says: you have not received your $3 million and so you haven't transferred the shares. That's the commercial absurdity. And that's why I'm saying that 6.1 -- this is not hard stuff, right? This is like: let's look at this, it's obvious that they've --

Q. Start again. You issue shares. At the time you issue shares, do you know that this is not ridiculous, that it cannot be $1 amount? You have an idea, because the shares exist, right, they're quoted?

A. Yes.

Q. So on its face, if it was $1, that would be absurd perhaps. But you have an existing base, and there is no bet. It protects the seller to make sure that it hits at least this amount, okay? And if it doesn't hit that amount, there is an express -- why rewrite the contract at 4.1(c)? Okay?

A. So at a minimum, you are asking me to rewrite this to say: the vendor has received 125% of its initial investment, equal to Canadian 3 million, through the sale of the purchase price shares, together with any other shares that are issued by the buyer under 4.1(c) or 4.1(b), and the vendor has an additional year period

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during which to reasonably sell those shares and realise these proceeds. So you're asked me to add a whole paragraph to Article 6, instead of looking at paragraph 4.1 that says exactly what happens.

Q. Sir, I'm not asking you to rewrite anything. There are two issues. I'll get to the rewriting part. One: why do you need rewriting if Article 6 is clear? I'm reading it, and I think in your expert report you agree that it's clear. So you say:

"... the ownership of the Shares shall not pass to the Purchaser ..."

And then it goes on to say:

"... unless and until the Vendor has received 125% of its initial investment equal to CDN $3,000,000 ..."

Then there is a hypothesis: if that 3 million is not provided for. You say: okay, then that would lead to a problem. But that problem -- assuming it is one -- that would allow you to read out of the terms of the contract is set out at 4.1(c), namely you issue shares and you hit that. So why do you need to rewrite?

A. Hold on a second. Purchase price shares, how do you hit 3 million from the sale of the purchase price shares?

You've already sold them for 1.5.

Q. "... then the Purchaser shall within 10 ... days of the written request by the Vendor issue such additional
common shares to compensate for any shortfall ...
"
A. But those aren't purchase price shares.
Q. Yes, so?
A. So how can you satisfy the clear condition that says:
I have realised 3 million from the sale of the purchase price shares?
Q. By applying the express remedy provided in the contract under 4.1, which is a warranty.
A. So the point is --
Q. It's a contract as a whole. I didn't sign this page.
A. I agree the contract is read as a whole and that's exactly why I'm tying Article 6 to Section 4, because Article 6 cannot be a stand-alone provision, it can't be a separate remedy. If it is, it's a gamble, it's a bet.
Q. Okay.
A. Will these shares sell for more than 3 or not?
Q. I already addressed the thing of the bet, because you cannot characterise it, as a practitioner, as a bet, because the company is listed, so you have a share and you know it's not going to be $1. So that think, the $1 hypothesis --
A. Well, it is a bet. What happened? It turned into 1.5.
Q. Okay. Then let's go to the final hypothesis that you would need to rewrite that because of sloppiness. Okay, I'm engaging with you now on the theory of sloppiness
and you would need to rewrite, and that, according to
you, would prevent further application of the terms of
the contract.

Now, Belmont, I submit to you, is very protected by
this contract. It's a very good contract for Belmont.
Why? Because it says that: we keep the shares, they
shall not pass until we meet that threshold. Okay? So
we keep the shares, we keep the title, it doesn't pass.

So any sloppiness, assuming that it's not remedied
under the contract -- that would require something
else -- is for EuroGas. It's EuroGas, it's
professionals, and they cannot close. It's their
problem. It's a badly negotiated -- they didn't hire
Mr Anderson. They should have hired Mr Anderson of
Stikeman Elliot, expert, and we will do so in the
future.

A. I guess that's where you and I differ, because I'm
saying -- and hear me loud and hear me clear -- I'm
saying it would not be interpreted to lead to
a commercial absurdity. You're saying: it's great if it
leads to a commercial absurdity because it's in
Belmont's favour, and why would Belmont complain about
that? I agree entirely, I've got no dispute with that
statement. My dispute is: we don't even get there in
the first place because the court would just not say
that this is what this means.

Q. Well, you qualify it as a commercial absurdity, but you have used the word "sloppiness". I would say in the extreme scenario, even with the $1, even if I gained you a few of the $1 shares, it would not be a commercial absurdity; it would be a professional that entered into a sloppy contract.

And I would read to you the decision that you submitted, that:

"In these circumstances .."

The holding is, the doctrine:

"... as a result, the appellants should not receive the return of their initial investment in the joint venture."

It goes on:

"The doctrine of unjust enrichment ..."

Or the doctrine of whatever you want to rely on; on absurdity, I would say.

"The appellants also did not ... the appellants chose not to pay and suffer the consequences the law prescribe."

So it's tough luck. It's a sloppy contract by professionals, according to the case law you cited, Jedfro, RL-0088. And at paragraph 16 of your statement you say: the absurdity theory should not be interpreted
to change the bargain.

A. That's correct. I agree entirely. And as I say, you are trying to change the bargain by changing Article 6 so that it actually makes some sense and works. And my proposition is: no, we don't change it so it makes some sense and works, we don't import reasonableness, we don't import obligations to sell when maybe they want to keep their shares, and that's inconsistent with the remainder of the contract that says you can keep your shares. All of that requires us to rewrite the contract. And my point is: no, the reason it leads to a commercial absurdity is because the person that created the words was sloppy.

Q. To close finally on this, what happens, according to you, now? What do I hold, Belmont, according to you? You see, I am engaging all the way with you. Now you won. What do I hold?

A. I think there's a lot of facts we need to understand. Because you had a right under 4.1(b) and 4.1(c) to sue because your rights were not respected. As far as I know, you did exercise your rights under 4.1(b), and I see evidence in the record that Belmont did that and received 3.83 million additional shares under 4.1(b). Belmont also had the right under 4.1(c) to claim the receipt of additional shares. It either did or did not
do that. If it made the request, and the contractual
obligation was breached by EuroGas, it's open to Belmont
to sue. And it holds as security, in my vision of the
world, the 57% interest that provides it a remedy
against this company that may or may not be able to meet
its obligations anymore.

So just like the bank wants you to pay your
mortgage, and if you don't pay your mortgage, it can sue
you and then take the house away, and realise on that
security, here Belmont was in the position of holding
security over these Rozmin shares.

I wasn't looking at bankruptcy documents, as you've
identified, so I don't know whether it made a claim in
the bankruptcy for its entitlements as against those
shares or not.

Q. Well, you saw the bankruptcy was the other way round.
But I don't want to engage with you again on bankruptcy.
I said: what do I have now practically? I have the
ownership, you agree, on paper, registry. At least you
could agree with me that I hold them, right, Belmont?
A. I agree that Belmont holds it as security, yes.

Q. Okay. So according to you, at the minimum, under
Canadian law I hold them, at the very minimum. I am
with you all the way now, all you want. I hold them as
a security, okay?
A. As security, yes.

Q. As a security, okay. Now, there are a few questions relating to that. I hold them as a security under Canadian law. That means there has been a security arrangement over the shares. And I understand under Canadian law that concept to turn ownership of shares into a security is a complex formal process. Would you agree with me?

A. No. Under the Canadian statute that governs this -- it's actually a British Columbia statute, the Personal Property Security Act, at this time -- the granting of a security interest needs to be evidenced in writing, right here I say (indicating), and can be perfected by possession. And as far as I know, either -- and you have to help me which case it is -- either Belmont holds them or the solicitor for Rozmin holds them, and that is possession on behalf of Belmont. So it's secured as against other creditors.

Q. Okay. There are a number of things you said. First, there was no trust. So let's work on the assumption there is no trust, okay?

A. Okay.

Q. So it's Belmont that holds them directly.

A. Okay.

Q. Then you said another thing: that this document you
pointed to creates a security. That's a problem I have with you. Under Canadian law, how could this document -- what are the terms, substantively and from a point of view of form -- meet the test of security under Canadian law? Can you tell us? And if you don't know, then you can say you don't know.

A. I agree with you that I am not a secured transactions or bankruptcy expert. That's not my field of endeavour. However, in conversations with a variety of my colleagues, they suggested to me that this certainly would be something that could form the basis of a security interest. But I can't tell you that of my own --

Q. Well, that's very --

A. -- belief.

Q. I talked to my colleagues that said that --

A. No, I agree.

Q. -- this could form the basis for a security.

A. Yes.

Q. We are far from this meeting the requirements of security. So once you've said that, I see Belmont with full ownership, when I read this, full ownership, unqualified, of the shares, don't I?

A. Well, you might, but you're not a BC lawyer and you're not a bankruptcy lawyer and you're not a secured
transactions lawyer. So I don't see how you can say
that I read this as not creating a security interest.

THE PRESIDENT: Sorry to interrupt. I'd like to understand
your opinion exactly.

In terms of ownership, in your analysis, who owns
the 57% interest?

A. The beneficial owner is EuroGas.

THE PRESIDENT: Beneficial owner?

A. Yes. So if I can make an analogy, in Canada, when
I want to buy a house, I'm the kind of person that needs
to borrow money from a bank. I then "own" my house, but
that mortgage that was granted to the bank gives the
bank in effect the legal title to that property. And
if, as and when, I fail to make the mortgage payments,
the bank can foreclose. And what I have is called the
"equity of redemption". I am entitled to make the
payments and redeem the interest of the mortgage holder.

I think we can analogise to this situation, where
there has been a title retention by Belmont as security
for the obligations of EuroGas under this agreement.
And EuroGas has the equity of redemption to meet its
obligations and obtain title to these shares, in
addition to its beneficial equitable interest, or not;
and if it doesn't meet it, then there is a possibility
that it can be foreclosed against.
The evidence we have in the case, there is a variety of threatening letters and the like made in 2003 and 2004 that talk about, "We will foreclose. We will sue. We will sell the shares. And if there's a shortfall, we will come back to recover that from you", in a variety of exhibits. I'm trying to remember. One was Paul Fang, a lawyer, fall of 2004, and similar letters between the parties that contemplate exactly what I am describing as being the case.

THE PRESIDENT: Is your interpretation compatible with the words, in a certain situation, "the ownership of the shares shall not pass to the purchaser"? You said it becomes the beneficial owner, but is that reconcilable or not with the sentence I have just read?

A. I think so, because, as I say, this is a title retention mechanism. This clause doesn't clearly go into detail, but provides for the basic title retention mechanism that forms the basis of the security. So that is exactly what I have been saying throughout my report.

THE PRESIDENT: I'm not familiar with these concepts. Where there is a beneficial owner, what is the situation of the other party? How do you characterise it?

A. They are a secured party that holds title as security for the obligations.

Another example that I can give you is a lessor and
lessee of equipment under a capital lease, where there
might be a title retention mechanism and you, as the
lessee, are using your forklift or photocopier every
day. And once you have paid out the lease over time,
you then get title to that piece of equipment to
continue to use it. But during the term of the lease,
if you fail to make payments, there can be a foreclosure
action by the lessor. And you have the equity of
redemption to pay them out, and then you will own the
equipment; or you can walk away, in which case bad
things happen: the property is seized, it's sold.

But, you know, as I told you a few minutes ago, this
is not my area of expertise. I'm not like Annette, a secured
transactions/bankruptcy kind of lawyer that deals with
this.

THE PRESIDENT: Okay, thanks.

DR GHARAVI: Sir, I am on this with you, at the year 2001,
and what I have problems with is then you using
correspondences afterwards, remember because your whole
theory was that 2001 --

A. Oh, yes.

Q. So I don't know why in certain responses, to help you,
you pick and choose certain correspondences in the
future. So focus with me on 20[01], because that is
your theory.
2001, under Article 6, I read to you what we both agree in fact again are clear terms: that the ownership of the shares shall not pass to the purchaser until a condition has been met. You have relied on certain principles of law that you have applied in the way you have to arrive at the conclusion that I, Belmont, today hold the shares -- this you agree under Canadian law -- but as security.

Then I put to you -- this is your case, this is not mine. Because you bounce back to me: you're not a security lawyer.

A. Mm-hm.

Q. It's your case. My case is that I'm a full legal owner based on that clear clause, and I don't need to go to that construction. You use that principle to get out then, to say that it is a security. So you have to prove to me, not me to prove to you, that I hold it as a security.

I asked you to cite the provisions of the law that allow you to say that I am not the legal owner, I am not the beneficial owner and I hold it as a security. And I understand your answer was that, "I did not know. I spoke to a colleague that said this provision may form the basis of an entitlement to security".

Do you have anything to add to convince me that
I hold it as a security?

A. Yes. So I need to correct perhaps either what I said or how you summarised it.

As I said, the requirements are that it be in writing. And you said I pointed to this and which words is it that created it, and I told you that the satisfaction of the clause -- that the grant of security be in writing is satisfied by this. I didn't say that I don't think a security has been granted and that's the conclusion that a court would arrive at.

So I'm convinced that on reading this and the problems in the literal interpretation would cause a court to come to the conclusion that what is really at issue here is there's a guarantee that is represented by 4.1(b) and 4.1(c), and the security for that guarantee is the title retention mechanism in Article 6.

Q. Okay. And under the Canadian law of security, can you tell us what provisions of law that you apply to say that this could, under law, these terms -- not going back to correspondence in the future -- meet the requirements of a security under Canadian law, only as opposed to ...

A. It's a case that I would have to present to you that I don't have with me today.

Q. Okay, so we are in agreement on that.
Finally, I would like to even go a further step with you, to say that I hold it, let's assume, as a security, and the beneficial owner, I put to you, is a bankrupt company since a long time ago. And there is no claim made to me for beneficial ownership, either EuroGas I, EuroGas II, the bankruptcy, the trustee; there is no claim put. And I have exercised it? And written to the world that I am the owner.

What's the solution to this situation under Canadian law and your theory?

A. Well, I think the answer is actually found under Utah law, as opposed to Canadian law.

DR GHARAVI: Okay, which you don't know anything about. So that ends my questioning. Thank you.

THE PRESIDENT: Re-direct?

MR ANWAY: Very short, Mr Chairman.

(4.44 pm)

Re-direct examination by MR ANWAY

Q. Mr Anderson, in preparing your report, did you review any documents signed after the SPA in which EuroGas and/or Belmont characterised their deal?

A. Yes, I reviewed many documents. I think the two principal and most reliable documents, from an evidentiary perspective under Canadian law, are those that are most contemporaneous with the transaction. So
to me the two documents that best represent and are most
helpful in interpreting the contract are the information
circular that was prepared June 8th, I believe, that
outlined for the Belmont shareholders what it is they
were being asked to approve and what the nature of the
transaction was; and the second document is the series
of financial statements that report and record what
happened as a result of the transaction.

Q. In fact I think I am going to take you to those two
documents. But before I do, let me ask you: in all of
those statements that you said you reviewed by Belmont
and/or EuroGas after the SPA was signed, characterising
their deal, did you find those statements consistent?

A. I think prior to 2004/2005 they were quite either
consistent or ambiguous enough that they were capable of
any number of interpretations. After roughly 2005, as
evidenced by the press releases that you brought me to,
certainly I see evidence of Belmont saying, "No, no, we
own the shares", by that time.

Q. In those later statements, around that same time, were
you also noticing inconsistent statements being made,
again around the same time?

A. Yes, there's ...

DR GHARAVI: You are leading in your questions: "Do you
notice again inconsistencies ...?"
MR ANWAY: I don't know if anything in my question suggested what the answer should be.

A. I think, just to identify, within the documents themselves, for example in 2003 when somebody says, "I am going to foreclose or recover these shares", it can be capable of two interpretations: one, "I own the shares", and one, "I hold them as security". So what I was trying to say in the last question: the first time I've ever seen a statement that, "No, no, we hold these shares, it's not a security or anything else", didn't arrive until later; for example, 2006, 2008, 2009, those press releases you showed me or led me to.

However, are there contrary statements that you have shown me from that same time period that you have provided? Yes, I have certainly seen many statements; for example, the one from the criminal proceeding that specifically stated, "No, we have no interest, we sold those shares". So I think there are documents that are on their face contradicting each other later; there are documents that are more ambiguous earlier.

Q. So let's just look very quickly at the two documents you said you found most instructive. The first you said was the information circular?

A. Yes. You'd call it a "proxy circular" in the US. It's the information record that's sent to the shareholders.
so they can -- the legal test is to have sufficient
information to make a reasoned decision.

Q. This is, for the record, R-0109.

THE PRESIDENT: Can you point to us which part of this
document you find relevant?

A. The description of the transaction starts at the very
bottom of page 7, and it's section 1, "Disposition of
the 57% interest held by the Company in Rozmin s.r.o."

It starts out by identifying that a share purchase
agreement has been entered into, and it identifies
Rozmin as being the owner of the talc deposit. And it
goes on to identify the Rozmin interest constituting --
I think I said earlier 90%; here it says 91%, so I was
mistaken -- 91% of the assets of the company. And that
is the reason, I mentioned earlier, that the
shareholders need to approve this: because it's the sale
of all or substantially all of the company's
undertaking.

The transaction is described, and the key point is
that the last sentence at the end of the second
paragraph on the page says:

"The value represented by the Payment Shares shall
be guaranteed by the following formula: ..."

And then it goes (a) and (b), and reproduces
Section 4.1(b) and (c) of the share purchase agreement.
MR ANWAY: Mr Anderson, I'd like to direct your attention to a different paragraph in the document, on page 12. And I am focused on the second full paragraph, the second paragraph from the end of the summary. Do you see that?

A. Yes, I do.

Q. Could you just take a moment and read that paragraph.

A. Yes, I have.

Q. I noted that this paragraph mentions the 125%.

A. Correct.

Q. Do you see in this paragraph any mention -- as we did in Article 6 from the SPA -- that title will not pass unless and until the vendor has received 125% of its initial investment, equal to 3 million Canadian?

A. No, I didn't notice anything anywhere here that talked about the title retention mechanism; although, truth be told, I wasn't so focused on pages 9, 10, 11 and 12, because that's actually a portion of the information circular -- it's a fairness opinion, written by a valuator who is identifying and justifying the purchase price. And so that's not someone that we can rely on to tell us what the legal effect of the purchase agreement is.

Q. Then the second document I'd like to take you to is one that Claimants' counsel took you to, which is R-0114.

These are the Belmont audited consolidated financial
statements for the years ending January 31st 2002 and
2001. Counsel took you to tab -- and I will tell the
Tribunal now, there is no need to do so -- but he took
you to tab 58 to view this document, but that tab only
contains a very small portion of the actual
financial ...

A. That's correct. When I got there, I said: this is
missing note 3 that actually describes the disposition.

Q. Right. So I think it would be helpful if we all looked
at the full document, since you had both referenced it
in your testimony and since counsel took you to it. So
it's R-0114. I don't have it in a bundle.

I am informed this may be in the witness bundle we
had. It was part of Mr Agyagos's cross-examination.

THE PRESIDENT: We have it.

MR ANWAY: Do you have the full exhibit in front of you?

A. I do.

Q. Oh, excellent. Just to speed this up, I know these
pages are not numbered, but if we flip forward ...

Mr Anderson, just before I get to my question, you
indicated you found this document significant. Why is
that?

A. Well, it provided a variety of evidentiary information
for me as to the nature of the transaction and what
happened, given that this is the first set of financials
that were produced immediately afterwards and during the
financial year in which the transaction occurred. And
it deals with the disposition both in note 2, "Significant Accounting Policies", and in note 2(a) it
describes the fact that, as a result of the sale, the
Rozmin results are no longer being consolidated into
Belmont's results because Rozmin is no longer
a subsidiary.

Q. So how did they book this transaction?
A. Well, as a sale, it's no longer a subsidiary; suggesting
that, as I said earlier, the shares are held as security
only.

Q. Can you --
A. And then in note 3, we are now longer just talking about
accounting policies, we are actually giving a lot of
more detailed information about the disposition of the
subsidiary and what the transaction involved and what
was received or not received in connection with the
transaction.

There were two points. I think I was originally led
here to talk about the NRAR, the advance royalties, and
I think there was some debate about whether or not 76 or
some other amount had been received. Note 3(iii) says:
"Payment by EuroGas of $100,000 U.S. as advance
royalties ..."
And it goes on to say:

"... (subsequently net recovery to Belmont of $96,774)."

I think when we originally talked about this, the suggestion was that 100 was aspirational and some other amount was probably received. I don't know what "subsequently net recovery" means, but certainly I see there they have got $96,774.

Then they go on to describe the market guarantee and the fact that the shares of the 57% interest are held as security for that market guarantee.

And then lastly, the piece that had me scratching my head was (ii) at the bottom of this page --

Q. Just so the Tribunal can follow, what page are you on?

A. There is no page number, but I'm in note 3, the second page of note 3, (ii). So note 3 is "Disposition of Subsidiary".

THE PRESIDENT: Which page?

MR ANWAY: Is it the last page?

A. So after the statements, which double-sided is three pages, there are notes to the consolidated financial statements, and note 3 starts at the bottom of the fourth page of those notes. And in between double lines there's a heading: "3. Disposition of Subsidiary".

Q. Can you specify for the Tribunal the subsection you are
A. Earlier, when we were talking about the NRAR, I was on this initial page. I was in (iii), that says: "Payment by EuroGas of $100 million U.S. as advance royalties ..." 

Q. And which provision in the SPA do you think that connects with?

A. The 100,000 NRAR, the non-refundable advance royalty. And then the second thing I was pointing out: that at the top of the next page, under (i), it describes the market guarantee that was provided by the shareholders and summarises 4.1(b) and 4.1(c) of the SPA. (Pause) And then the last thing that I was noting in passing is on this same second page of note 3, at the bottom there's a (ii) that speaks to: "The fair value of the repricing of 2,500,000 share purchase warrants under the agreement has been estimated using the 'Black Sholes' ... model ..." And that is, as I say, something I was uncertain about because it's not dealt with anywhere in the share purchase agreement. But if these financial statements are saying it happened and this is additional consideration that was received, I wasn't sure why this additional consideration was received and whether it has anything to do with the payment of the NRAR or something
else; I just don't know. But clearly there is evidence here that the transaction didn't unfold exactly as the share purchase agreement contemplated.

THE PRESIDENT: Can you tell us what's the reasoning to come to the conclusion that your interpretation is correct, based on this? Because we see what is written, but where's the reasoning?

A. The first note under "Significant Accounting Policies" identifies the fact that the 57% has been disposed of and is no longer being consolidated --

MR ANWAY: And maybe, Mr Anderson, you could point to the specific language to which you're referring.

A. In note 2(a), "Consolidation", there's a subheading called "SSSRO". If you skip after that, there's a subheading called "ROZMIN s.r.o.", and the words underneath that Rozmin heading are:

"The Company sold its 57% in Rozmin s.r.o. effective March 27, 2001. The accounts and operations of Rozmin have been consolidated in the accounts up to the date of disposition."

It goes on to speak to the gain arising as a result of the disposition.

Q. Is there any language on the next page you might point to?

A. And after the table identifying the values that are
being ascribed to the various components of the consideration being received for the 57% interest, it goes on in two key paragraphs to say:

"The Company holds the Rozmin ... shares pending settlement of the amount of guarantee shares to be issued ... and completion of the U.S. registration statement which requires the inclusion of certain financial information from EuroGas."

And the second paragraph that says:

"The Company has recorded the EuroGas transaction as a sale and disposition of a subsidiary and holds the shares as a collateral measure only. EuroGas acquired effective control of Rozmin on March 27, 2001."

So those statements would tie directly into what I was suggesting was the correct state of affairs.

PROFESSOR STERN: Can I just ask a material question. When there is a reference to note 3, does it mean that this is note 3 or does it refer to another document that we don't have?

A. So the title to --

PROFESSOR STERN: Or that I haven't seen at least.

A. So the notes themselves have a double bar, or two bars, one on top and one on the bottom of the note heading. And then where there's a little bold "See Note 3" or "See Note 5", it's a reference to the other notes in
these financial statements. So, as a for instance,
where we were previously, "Note 3" meant: please find
more information in this note 3 about what I've been
describing in note 2(a).

MR ANWAY: Can you explain just again why you think
subsection (iii) under note 3 -- I think it's 3(iii), if
I remember well -- is important to your analysis?

A. Well, that speaks to the receipt of payment. So I think
earlier there was a suggestion that there was just
a hope that payment would be made; whereas the way
I read this, it speaks to a receipt of the payment and
the payment having been satisfied through this net
recovery of the 96,000.

Q. Was that one of the conditions precedent?

A. That's correct.

Q. And your conclusion is based on what?

A. That the conditions precedent to the transfer of the
shares -- being the payment of the NRAR and the payment
of the 12 million consideration shares -- have been
achieved and the remainder of the conditions were
conditions subsequent, that had to be satisfied
following completion of the closing, that were secured
by way of the security interest in the 57% interest.

Q. Is there anything else about this document that you
found particularly relevant to your analysis?
A. No, I think I touched on all of it: the disposition, the
disposition no longer being consolidated because it's not controlled
anymore, the amount of proceeds being received, the
guarantee being identified, the shares being held as
security being identified.

And as I say, the big question mark for me was that
note 3(ii), right after the little parenthetical to
"(See Note 17)", it speaks to the fact that this
repricing had been received, its consideration, and the
value calculated using this particular method of valuing
it.

Q. So that footnote resolved the question for you?
A. Yes.

MR ANWAY: Mr Chairman, I have nothing further.

(5.06 pm)

Further cross-examination by DR GHARAVI

Q. Sir, in this document, in answer to the President's
question about how you read this to support your
conclusion, there's the word "guarantee" here applied,
then "collateral". And is for you guaranteed shares
within that context, followed by collateral measures,
the same thing as security under Canadian law?
A. Yes.

Q. Or these are complete separate things, or you don't
know?
A. No, that's exactly what it suggests to me: that these shares are held as collateral -- i.e. as security -- for the performance of some obligations.

Q. Okay. But for you the terms "guarantee", "collateral" and "guaranteed shares", and then within that context "collateral measure only", means that there is a security --

A. That's correct.

Q. -- that meets the provisions of security under Canadian law? Are you just suggesting that it could?

A. No, this doesn't meet the conditions for the determination of the granting of a security. What I'm saying is this describes the fact that a security has been granted, but not by virtue of these financial statements.

Q. But please reassure me that I understood, after all this, your position in your reports correctly: that this document which you rely on is a subsequent document to the exercise that you proposed to carry out to reach the conclusion? Because every time I pointed you to further correspondences and the statements of Belmont and EuroGas, you told me, "Yes, but those for me, under Canadian law, are irrelevant. I look at the date of the SPA". Did I understand you correctly?

A. I didn't say "irrelevant"; I said the weight to be given
to them is much less.

DR GHARAVI: Okay, thank you.

A. But we started out this question about what are the most relevant contemporaneous documents, and my point was that there's one of these documents that was prepared before the transaction was completed and one prepared -- the next set of financial statements prepared afterwards, and so those are as contemporaneous as I had.

THE PRESIDENT: So thank you. This completes your examination. Thank you very much.

MR ANDERSON: Thank you. Sorry for being so long.

THE PRESIDENT: We have time to start with the next witness. At what time did we break?

MR ANWAY: We had talked about breaking a little early today, but ...

THE PRESIDENT: Do you want a break or not now, a short one?

MR ANWAY: Mr Mañón will be conducting this cross-examination. I think a five-minute break might be helpful, just to organise ourselves and move some files away.

THE PRESIDENT: Okay, five minutes.

MR ANWAY: Thank you.

(5.10 pm)

(A short break)
MR ALEX HILL (called)

THE PRESIDENT: Good afternoon, Mr Hill.

MR HILL: Good afternoon, Mr President.

THE PRESIDENT: You appear as an expert witness in this case. Can you read please the statement in front of you.

MR HILL: I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.

THE PRESIDENT: Thank you.

Direct examination? No, okay. Then cross.

MR MAÑÓN: Thank you, Mr President.

Cross-examination by MR MAÑÓN

Q. Good afternoon, Mr Hill. My name is Raúl Mañón. I will be asking you some questions about your expert reports in this case.

A. Thank you.

Q. I'd like to start first with the cost assessment for the development of the mine in your report. I will be specifically referring to the supplemental report, where I believe you address the issue of cost?

A. I can open the binder?

Q. Yes of course.

A. Which one are you referring to, please?
Q. The supplemental report. I believe that's -- there, that one. I believe that's both.
A. Yes. I just wanted to make sure they were the same.
Q. So what we have done, just to give you a little bit ...
(Pause)
So both of your reports are there, and the binders have some of the exhibits that we're going to be going over. So your supplemental report, page 21. Let me know when you get there, please.
A. Thank you.
Q. At the bottom there's a section titled "Capital Costs".
A. Yes.
Q. And I see you list there a series of costs which you have divided into four categories: "Mining" -- which you take from a prior report, and we'll get to that -- "Capital costs alterations", "Processing" and "End-processing". Do you see that?
A. Yes.
Q. And you have figures on the right-hand side to each of those categories?
A. Yes, noted.
Q. I've made a rough estimate converting all of those into euros, and I come up with about €30 million, give or take.
A. Yes.
Q. Would that be accurate?

A. Yes, I think we came up with the same number into euros, in here somewhere.

Q. Okay. So these capital costs, in terms of the development of the mine, how would you describe them?

A. The development of the mine? This would include putting the ramp in, which you have called the winze; and also putting an adit in, which is the raising. That's the capital development. But I also took out the vent raises, to make a balance between using the numbers that were in the original reports, and made a balance between the two.

Q. Okay. And just for the benefit of the Tribunal, when you say "adit", what do you mean by "adit"? If you can describe it in layman's terms.

A. An adit is a horizontal or a near-horizontal tunnel.

Q. So it would be the opening?

A. It's the opening, yes.

Q. So this envisioned the cost of the opening as well?

A. Yes.

Q. Then I see there the "Processing". This envisioned also the cost of building the processing plant?

A. Yes.

Q. And you need that to actually operate the mine?

A. No, it is in the phased build-up of operating the mine.
Q. Okay.

A. In the initial two years, the processing plant would be under construction and you would raise funds, as normal, basically using minimal processing, selling your crude rock. So this process plant would be built in order to facilitate flotation within year 3 or end of year 2.

Q. Okay. And this processing plant was part of the plan set out by Rozmin at the time? I am going to put a date on that: the year 2000.

A. In the year 2000 it was within their -- they have got several reports. But within their mine approval, no, it's not. This is within their studies. They were carrying out extensive flotation studies, defining the brightness, the whiteness and the recoveries that could be obtained from different products.

Q. Okay. My question was a little bit more general. I just want to know if, generally speaking, this processing plant was something that Rozmin was envisioning as part of its development; not in the technical sense, but the development of the mine. This is something they wanted to do?

A. Yes.

Q. Okay. So in essence they would need the funds, all €30 million, to proceed with all of these plants?

A. No, not all these funds. They would need some of these
funds for the primary development. But as I said, they would instigate production on a basic scale, which is actually what's carried out at the moment. And in the first two years you are actually generating funds to enable you to have capital going forward for the process plant build.

Q. Okay. And what would they need for the initial stages?
A. I think that's the --
Q. For the initial stage, you would need your primary underground development capital.
A. Really, yes.
Q. Okay. And how much are we talking about?
A. You're probably looking at 15-18 million.
Q. Euros?
A. Euros.
Q. Okay. And you need that just to get off the ground?
A. Yes.
Q. Is that it?
A. That's the DEG ...
A. C-0137, yes.

Q. If the Tribunal is there ... I believe it's a stand-alone document that may have been made available for the Tribunal. I'd like to just confirm that they have it. No? Let me see if it's in the bundle. (Pause) I'm sorry, it's Mr Agyagos's binder, and it will be tab 10. (Pause)

C-0137 is titled the Hansa Geomin report. Have you read this report before?

A. Yes, I've read this report.

Q. Can you describe for the members of the Tribunal the nature of this report?

A. It's a feasibility study carried out in 1998. This is a typical feasibility study of the time, 20 years ago nearly. This would be a standard study carried out for raising funds, a standard study for presenting to a bank for an investment, to cover all elements of the business at a fairly general level, defining the deposit, defining how it is going to be operated and defining the costs. It was generally known as a "bankable feasibility study" at that time; a "feasibility study" is the common name. So it would be to raise funds.

Q. Okay, thank you. I just want to ask you a follow-up question, because I'm a little bit confused and I want to make sure we get all the documents right. This is
not Mr Haidecker's feasibility study, is it?

A. No. Are you telling me?

Q. It's a question, yes.

A. No, it's not, is it? No --

Q. I don't believe it is, but I'm asking you.

A. -- it's a different study.

Q. Okay. Do you know who commissioned this study?

A. No, I don't think I do; unless it was Dorfner. But

I don't know.

Q. Okay. Would it surprise you if I tell you that it was

commissioned by Rozmin for purposes of raising funds

with DEG?

A. Not at all.

Q. Okay.

A. Yes.

Q. I'd like to point you to page 33 of that feasibility

study, please. There's a table there under "Total

Investment Cost". Are these the numbers that you

reproduce on the capital costs that we saw on your

supplemental report earlier?

A. This isn't a reproduction. As I've written into the

preamble for those costs, I drew the costs from here,

but also from the three ARP studies and the 2000

internal reports. This is where they are going in 1998.

Every year, in the development of a business, it's like
steppingstones, so you will adapt your business to your latest thinking.

Q. Okay. So back in 1998 these are the capex, so to speak, the costs that were going on?
A. Yes.

Q. Okay. If you look at the paragraph that starts with, "The overall investment cost amounts to", the second sentence in this paragraph reads:
   "This part of the investment is further considered as an initial ..."
A. Sorry, I can't find, "The overall ..."

Q. I'm sorry. Exhibit C-0137, page 33, the paragraph that starts, "The overall investment cost", right after the numbers.
A. Thank you.

Q. Then the second sentence says:
   "This part of the investment is further considered as initial investment cost."
Do you see that?
A. I see that.

Q. Is the term "initial investment cost" consistent with what we had discussed earlier: that funds were needed to get the project off the ground?
A. In this report it's more than that. This is to get the project off the ground, into, like, a phase 1 of
operation, because it included the milling and bagging
plants, primary crushers, secondary crushers and
screens. So you would actually make a refined product.
So it's a step further than initial kick-off. And you
would actually make four different products, really
targeting different industries: one is a paints and
plastics product, one is quite a basic product, and two
will probably head for the paper industry.

Q. Okay. And these costs later increased, I believe. I'm
sorry, I'm likely confused. Is that what you explained
earlier, that some of these costs increased, given the
ARP studies?

A. Given the ARP study, it would be the introduction of
flotation.

Q. Okay.

A. The introduction of flotation -- the deposit does have
wonderful grade products, but like any deposit, there is
a lot of low-grade. And in order to capture a lower
cut-off grade, to maximise the deposit, you would have
to introduce flotation. To do this milling, your
cut-off grade would be over 40%, 40% to 60%. To carry
out a flotation you could take a much lower grade and
maximise your recovery from the deposit.

The deposit within it, if you come to it, the
deposit is weighted into the exploration area as
a high-grade zone of 60%. So the first area they would be mining would fit this scenario, where you could just do milling with the product. So you could mine it, screen it and mill it, and you have an end product that is suitable. This sort of high grading isn't long-life, but this is the reason to introduce flotation. So you would target the same products, but with a floated product.

Another reason to go to the flotation is that they highlighted the pyrite and the graphite within the products. So the graphite and pyrite, into most industries this is not acceptable. So the flotation is necessary to take out the impurities, shall we say, the dirty products.

Q. So it was an integral part of the whole process?
A. What was?
Q. To ferret out the impurities.
A. Absolutely, long-term.
Q. The sentence that follows says:
"Following coverage rates are calculated: ..."
Then it talks about credit financing and equity, and it identifies that 60% of those costs were going to be raised by credit financing, and 40% by equity. Do you see that?
A. Yes, I see that.
Q. Did you consider the ability of Rozmin to raise capital in your report?
A. No, I did not.
Q. So your estimate in the report that we saw, the supplemental report, assumes that Rozmin is able to come up with the capital needed?
A. Yes, my remit only took it to that point. My remit didn't take me on to financing; it wasn't part of my remit.
Q. Okay. And when you said it didn't take it to financing, does it include also you didn't assess the financial risk of the project, or just the -- well, let me put it to you.
A. I assessed the technical risk of the project.
Q. Okay.
A. The financial risk, I had no view of where the financing was coming from, so that was not included in the financial risk.
Q. Okay.
A. Just the technical risk.
Q. Okay, thank you.
Now, sir, you have been sitting throughout this hearing for this week and you have heard the term "de-risked" mentioned frequently. Are you familiar with that term?
A. Absolutely, yes.

Q. Is it an industry-standard term?

A. Terms which mean the same thing, yes.

Q. Okay. What would be your understanding of "de-risked"?

A. You have to be secure in your knowledge, I would say would be a fair assessment.

Q. So would it include being secure on the technical aspects and the financial aspects of a mine?

A. Yes. Under the -- if you come out of [Slovakia], out of the Russian bloc, and you move to things such as the JORC Code, since the 2012 JORC Code almost includes that -- now, pre the 2012 JORC Code, it was a JORC Code of 2004, and the previous JORC Code rules were slightly different. But certainly since the 2012 JORC Code came into place, you would have to de-risk the project financially.

Q. Okay. I'm going to step ahead on some questions I had about the JORC Code, because I saw you mentioned it in the your report.

Could you explain to the members of the Tribunal what the JORC Code stands for and what is its purpose?

A. The JORC Code is -- there's JORC Codes of such different names all over the world and slightly different interpretations and standards all over the world. The western bloc, shall we say, Europe -- well, not Europe,
that's stretching it, but the old Europe -- looks on to
the JORC Code; Canada, Australia, looks on to the JORC
Code.

Previously a technical assessment of a deposit
meant: if you can mine it, then it's approved. But now
the modern JORC Code means that you have to mine it and
be able to sell it. That's the changes in the JORC
Code. Where before the JORC Code was purely all you had
to do was to be able to mine it. That is a very basic
premise.

In [Slovakia] they mainly work under a Russian code,
which is different classifications, but they haven't
moved on to the 2012 JORC Code so much. They're still
mainly working under like a parallel to the JORC Code of
2004, which means: if you can mine it, that's the end of
it.

There's also different interpretations whether it's
an industrial mineral, whether it's diamonds or if it's
a metal. The interpretations are different for the
three classifications.

Q. Now, this JORC Code -- just correct me if I'm wrong --
it has objective standards by which you can define
a "resource" or a "reserve"?

A. Absolutely, yes.

Q. Okay. Who relies on these categories of definition for
"resources" and "reserves"?

A. Investors.

Q. Okay.

A. Whether it's banks or privates. Very much in the western world they rely on the JORC Code. Russia and the old CIS bloc do not rely on the JORC Code. They rely on very much the study we're looking at. Studies like this still pertain in the Russian bloc and in neighbouring countries: a much more simplistic approach than the JORC Code.

Q. Okay. Are you familiar with the PERC, or the Pan-European Reserves and Resources --

A. Yes, JORC really comes as part of that; it's just an umbrella.

Q. Okay.

A. So am I familiar with its interaction? No. But my understanding and behaviour with it, it's an umbrella for different codes similar to the JORC Code. Because still there's codes within Australia and Canada which are identical to JORC, but it's a different name. So it's an umbrella carrying the codes.

Q. So PERC would govern in Europe: Pan-European?

A. I'm not sure of its governance.

Q. Okay. Are you familiar with CRIRSCO?

A. It's similar, it's governance. But equally it's not so
much the governance, it's different banking institutions demand different things. So if you were trying to raise funds in the western area, even if you had a deposit in, shall we say, Russia, or, shall we say, Slovakia, then they would look for JORC Code.

Q. Okay.

A. But if you went to Russian, they wouldn't be looking for a JORC Code; they would be looking for different parameters.

Q. Okay. And would it be accurate to say that JORC and CRIRSCO employ the same kind of definitions for purposes of classifying reserves and resources?

A. To my understanding, yes.

Q. Okay. I'd like to show you some of the classifications in the CRIRSCO standards, just because I think it might be useful. I tend to learn and understand stuff by being very visual.

A. Is it pertaining to this site?

Q. What is?

A. This code. To this country?

Q. To which country?

A. Slovakia. Is it pertaining? The code doesn't pertain to this country; they work under the Russian codes.

Q. Okay. It may not -- well, let me ask you this. Isn't your testimony that western investors would look at the
standards under CRIRSCO?

A. Absolutely. I would agree with you.

Q. Okay, good. I want to take you there, please. It would be tab 54, and this would be Exhibit R-0139. I would like you, sir, to turn to page 6 of that exhibit, if you may.

A. Yes.

Q. Okay. There's a table there at the top, a figure 1 at the top of page 6. Can you describe to us what that figure shows?

A. It's the same as the JORC Code. It's a general indication from having confidence to invest and confidence to operate. So you go from a confident level of having a mineral resource, you then go from a confident level to actually invest and operate, and the "Measured" is how you are operating.

Q. Now, would it be accurate to state that if you go under "Mineral Resources" and then "Inferred", that would be one end of the pendulum in terms of risk associated with a project?

A. No, that's not correct. The pendulum goes further down than that: you have exploration zones, and below that you have exploration potential. So once you get to "Inferred", I would say you're in the middle of your pendulum. You have identified a mineral resource; by
drilling or sampling, you have actually secured that you have a resource.

Q. Okay. So you're telling me then, if I understand correctly, that there are two other categories outside of this figure that are riskier than an inferred mineral resource?

A. Naturally these are not categories in there. But when you know nothing about a location, there isn't a category for it.

Q. Okay.

A. For example, a licence with no drilling would not be an inferred licence. So you would have an exploration licence and there would be no category on it. So this is obviously a lot riskier than having an area that's been drilled and you have moved into -- I won't -- I wanted to use the word "proven". It's not proven, but you have actually drilled and mapped out an area.

It was actually brought up by Mr Corej yesterday. And this is where I've got the same conclusion, which we will get to, I guess. Mr Corej had said he'd worked out that he had got a class 3 classification, which is the Russian classification -- or a Z3 in Russia; we call it C3 -- through his drilling programmes. So he had moved to that classification, and he had moved further by targeting a high-grade area.
So within this deposit you have a big inferred area. "Inferred" doesn't mean you want to mine it yet. "Inferred" tells you you have a very good probability what you see is what you get: it's there. To move to "Indicated", now you have a confidence to go there and mine there. "Measured", you have to actually expose the ore body and sample the ore body to get to "Measured". So this happens when you actually move underground. So once you get to "Indicated", this is when you start developing your business, whether you're going to invest and go underground.

In this case they actually drilled an area of more intensity, which within my report -- which I can draw you to in a minute -- I selected, and it's the definition that came out of the reports from Rozmin: they had an extraction area, which they called the "first extraction area". But this gave a target to start at, which they targeted their incline and they targeted their design. In 2000 they made a design to run a ramp into that area. There was no measured material identified.

Q. So it wasn't even on this graph, on this chart?

A. Measured? No, they did not identify any measured, because you have to actually be underground or expose the ore body.
Q. Did they identify an indicated mineral resource?
A. They had a small area which I have considered as indicated, yes.
Q. Did you see it on their report, using that --
A. They didn't call it "indicated" because they were not working to these standards.
Q. Okay.
A. Yesterday Mr Corej expanded that he had designed a grid and drilled to the grid. The grid is clearly clear on the drill patterns: you can see the pattern he has followed, and then you can see the concentrated drilling to actually up the levels of confidence for one area.
Q. Okay. So you believe it's an indicated mineral resource?
A. No, I believe the vast bulk of it is inferred.
Q. The vast bulk is inferred?
A. The vast bulk is [inferred]. There is a small target -- from memory, it's just over 1 million tonnes -- of indicated.

Once they identified this high-grade area, they then put a very large borehole -- I couldn't actually work it out from the data, but I believe it to be an 8-inch diameter borehole straight into the middle of that deposit on that area. And that 8-inch borehole wasn't really to sample it; they are fully aware of the grades
from the other boreholes in that area. But that was to
get bulk material to bring out and then carry out the
testing and the quality inspection of the products in
bulk. This isn't a borehole just for visual; this is
just to get a bulk sample out to give you the
confidence.

So you would have the primary drilling pattern,
which the grid -- this would then -- they brought to the
attention there was a zone of high grade, so this is now
moving into an indicated. But to give you the
confidence of the indicated, this large borehole
quality, then they could carry out the sampling and
testing of how they could process it and manufacture it.

So this actually brings this area out of the
inferred and puts it into an indicated area, a very
small area.

Q. Very small. Would that --
A. Very small, of about 1 million tonnes. This is compared
to about 1 billion tonnes of the whole deposit. It's
about 1 billion tonnes of mineralised ground.

Q. Okay. And --
A. So just to get the scope of that small area, that's why
I'm just giving the numbers. It's very small. But
there's sufficient tonnes there, if you target and mine
it, that will generate the funds to expand the mine.
Q. Okay. So you say that this small area, as compared to the rest of the deposit, are indicated mineral resources?

A. They were not classified as such by Mr Corej or Rozmin at the time, nor with the current VSK -- VSK's report has classified it as inferred and a target area.

Q. Have you classified it like that in your report?

A. No, I have not done the calculations. But I can see the amount of drillholes there, the quality of the information and the quality of the products, and in my opinion that small area -- could I show you the plan?

Q. Yes, of course. Please.

A. It's in my first report. If you turn to page 7.

Q. Which report, sir?

A. This is my first report.

Q. Okay.

A. Page 7, there's a plan. This just is a general plan showing the boreholes. The red are showing talc and the blue are showing no talc.

Q. Okay.

A. In addition to that, I would point out that there's a couple of holes which are named HO2, HO3. There is an HO1, but I couldn't find it, but the data is there. These are hydrological holes which is also -- this is part of giving confidence of what's going in the
deposit, because one of the big constraints and big
problems in this deposit is the amount of water. So
they had already progressed into tackling how to tackle
the hydrology of the project with those holes.

But if I just move on to page 12 --

Q. In the first report?
A. Page 12 in the first report.
Q. Okay.
A. Figure 5.1 is a repeat of the previous plan that you've
looked at, and I put a little yellow square in the
middle almost. That is what is classified as the "first
extraction area" or the "extraction area". So in the
scope of things, it's a small extraction area. And the
plan below gives a more closer zoom-in showing the
different drillholes within that area.
Q. Okay.
A. Within that plan, hole number 43, looking at it, there's
three in a cluster there which appears maybe as a "Why
drill three holes in one area?", but there's method at
times in madness. 26 was an old hole which showed
good-quality ore. Number 43 was drilled as a check
hole. A check hole is really to prove what you have,
because number 26 was old drilling, from 10/15 years
before. Once they had established that quality and that
grid in that area, they drilled this hole number 45,
which was the large-diameter hole to give you the bulk
to do your testing from.

Q. Okay.

A. Just to take that -- if I then move on. I will come
back. I have taken the drillhole data, and if you look
at figure 6.2, I have mapped out an envelope. I have
not carried out a full, if you like, JORC report, but
I have developed an envelope, which is all part of,
like, the first step.

So you have an envelope there showing the ore body,
and the ore body runs through talc bands which were
400 metres down to 2 metres. The DEG report says it's
an average of 200, but I wouldn't like to support that.
But certainly there is very thick zones. It's like
a layered cake of talc/no talc. It's very banded. But
what it is, it's all part of the folded structure. So
all these bands are in there, captured in there. But
all that zone in there, that was identified by Rozmin,
as been sort of redeveloped by VSK, and VSK have
actually ended up with a larger area of mineralisation
than Rozmin now.

Q. Okay.

A. They have a larger area. So it's about 2.5 kilometres
by 1 kilometre. I think now it's 2.7 kilometres by
1.2 kilometres. So I can understand the excitement
going back when the first borehole went in: it's just colossal. This is the excitement. But the thing is, it's an industrial mineral. This is not gold, it's not copper; it's a metal. It's not diamonds. So it's an industrial mineral. And industrial minerals, you can get prices for some, but in the main industrial minerals is a product of $150-200 a tonne, almost whatever industrial mineral it is.

Q. How does that relate to, for example, risk? And before I let you answer the question, I would appreciate if you were a little bit shorter in your answer, because we have a lot of ground to cover and I want to make sure we get to it.

A. Absolutely.

Q. So in terms of risk, when you say that this is an industrial mineral, this is not gold, does that mean that you need to be a little more certain before you go into a project of this kind than, for example, if you go into another type of mineral, for example gold or diamond?

A. No, quite the opposite. Gold's price is $1,340 an ounce this week, so your investigation to get that right is very heavy. Copper prices is about $4,650. Talc price per tonne is sitting, as a bulk product, at about €130-150 per tonne. So the actual returns per tonne
mined is very different for talc: far, far less.

Q. Far less than gold?

A. Far less. And that's why the levels of scrutiny, if you
like, or the levels of investment -- to raise funds for
a gold mine, you can raise hundreds of millions very
fast. To raise funds for an industrial mineral project
is very hard work, because the industrial mineral
market, a lot of the industry is -- there's key players,
big players. Whether it's phosphate or whether it's
pyrite or china clay or carbonate, there's key players.
But equally then there's only key markets to play it
into; where the metal business and diamonds, this market
is much more open. Gold is a security, diamond is
a security.

THE PRESIDENT: Mr Mañón, there was a perspective yesterday
that we would end today at 6 o'clock. It seems not to
be the case, but can you tell us --

MR MAÑÓN: I could certainly wrap up this specific topic
within 10 to 15 minutes at the most.

THE PRESIDENT: Alright.

MR MAÑÓN: And then we can continue tomorrow, if that's okay
with the Tribunal.

THE PRESIDENT: Okay.

MR MAÑÓN: So I want to go back to this CRIRSCO graph that
we have, which is Exhibit R-0139, page 6. So let's
for a minute that there are other categories that are not listed here that would not be even a resource. So if I am looking at this chart and considering this, and I am considering a pendulum of a risk associated with the development of a mining project, which would be the riskiest category, so to speak?

A. That's a bit of a leading question, isn't it?

Q. I get entitled to do that.

A. What's sitting at the bottom? Well, it's me. Well, it is the inferred, but the inferred is actually -- it's the first serious rank --

Q. I understand, sir. I just want you to focus on this figure.

A. Yes, but it's actually a very unfair question, because it's not showing everything. And to answer that fully I would like to actually read the CRIRSCO report, because I'm sure these other elements are in here.

Q. I don't necessarily think that is necessary, because my question is focused on this one figure. I'm sure that if counsel has some other questions, he can address that --

A. Then it's the inferred -- no, it's not. The exploration results is the lowest.

Q. Okay. And then after the exploration results, we would have what?
Q. The inferred?
A. Because I didn't notice earlier when I looked, but above here you actually have "Exploration Results", which is one of the classifications I gave you earlier, on that chart.
Q. Okay.

Now I'd like to draw your attention to tab 59, please. This document is Exhibit R-0109, and I believe you were present when we were asking Mr Anderson about this document. This is a communication made by Belmont to its shareholders. Are you in front of the document, sir?
A. Yes. Number 59?
Q. 59, correct.
A. Would you like me to read it?
Q. Yes. It starts with "Information Circular".
A. That's the page I have.
Q. Then I'd like you to go to page 10 on that document. Let me know when you are there, sir. (Pause)
A. I am just getting to it. If you bear with me. I have not seen this document before, before I leap into ...
Q. Okay, page 10.
Q. Excuse me?
A. Yes, I'm on page 10.
Q. Oh, good. Can you please go to the [last] full paragraph, that starts with "The mineralization".

(Pause) So if you go to that paragraph and you go to the second-to-last sentence of that paragraph, it starts with "The resource". Do you see that? (Pause)

A. "The resource appears to the writers to correspond to a 'drill inferred resource' ..."

Q. Correct. And that would be the category we were discussing earlier, right? In that figure 1 that we saw, the CRIRSCO standard would be one of the higher risk?

A. No, I think you are misguided. It's not a high-risk category; it is a category. It's like comparing colours: which is the brightest colour? "Inferred" has less information compared to "indicated" and "measured". But to bring a deposit to "inferred" can take years, and can take massive investment, depending on the mineral. But once you've got it to "inferred", you have then the confidence. This is when businesses go to investors.

Q. I understand.

A. Usually a junior company can bring it on to an "inferred" level, even not that far. But a good junior company can take something to "inferred". Then that's the time to start mining, to start developing the deposit.
Q. I understand.
A. If it's not inferred, it's premature to develop the deposit.
Q. I understand, thank you. I'd like to go back to your first report, if I may, page 16, under section 6.4. There are two bullet points. The second one says: "'poorly explored' refers to an area that has some bore holes but not sufficient to clearly define the area, nor establish a resource or minable reserve." Do you see that?
A. Yes.
Q. So if we go back to the CRIRSCO figure that we were at earlier, then according to your assessment, this "poorly explored" area would not even make that figure, would it?
A. Correct.
Q. And this "poorly explored" area refers to the entire eastern area of the deposit, does it?
A. Not the entire eastern area, no.
Q. Okay. Right next to there, on page 17 of your report, there's a graph, and it has what you called earlier an "envelope", I believe?
A. Yes.
Q. Which would be the "poorly explored" in that graph?
A. It's not indicated on that graph. What I have indicated
on that graph is the east and west, to be compatible
with the mapping of Rozmin.

Q. And if you had to identify the "poorly explored" for us
on that graph, which would it be?
A. It would be the core of the east.
Q. The core of the east?
A. The core of the east.
Q. I believe there are coordinates here on that graph. Do
you see it goes from 312500 all the way to 315000?
A. Yes.
Q. The core, would it start at the far end of the left end?
A. What would?
Q. Where would the core start? I just want to make sure
that I delineate the core of the east that you were
referring to earlier.
A. You could say everything to the left-hand side of that
middle hole there (indicating). There would be
a portion --
Q. I'm sorry, if you can verbalise exactly where the line
is.
A. If somebody could tell me the hole number; I think it is
hole number 10. I can look on the plan.
Q. We have coordinates there. If you look at the
coordinates, the top axis.
A. Everything to the east of borehole 40 is definitely
"poorly explored".

Q. But on this graphic specifically, I am trying to map it out on this graph.

A. That is on the map.

Q. I'm sorry, I don't know that my figure shows a borehole number.

A. Yes, there's a number on the top.

Q. So it would be the second borehole from the left?

A. Yes, that's what I was pointing out. Sorry, I couldn't read the number until I got to the chart.

Q. So everything from that second borehole to the left you would classify as "not sufficient to establish a resource of minable reserve"; correct?

A. Correct.

Q. And then everything to the right would be an "inferred" --

A. No, it's not that simplistic. It would be based around the holes. What I have defined is that the eastern area is about half a billion tonnes of mineralised rock. So the east and the west volumes of rock is roughly the same.

But what has been "well explored" is the western area. The western area, which is defined on map 5.1, the western area is certainly "well explored". But the nature of having holes on the boundary, that "well
Q. And when you say "well explored", are you talking about indicated mineral resource?
A. It's in the main because they have carried out a systematic drilling pattern.
Q. So you don't believe that it is an "inferred", that well-mined area?
A. No, no, no. The well-mined area ...
Q. I just want to make sure, the well-mined area for you, if it's an inferred or indicated resource.
A. It's indicated. The yellow area is what I would look to be indicated, with the number of holes there.
Q. So your assessment differs from the document that we saw earlier that Belmont circulated to its shareholders? I have it here. R-0109 says "inferred resource".
A. But indicated is better than inferred.
Q. I understand that. But they didn't tell their shareholders that it was indicated?
A. What they were telling their shareholders: that whole western area was inferred. They were telling their shareholders, from what I read here, that the whole area is the inferred. And that inferred area, I haven't even gone that far to explain. That, in volume, is colossal. I haven't even gone to that extent. I have only picked this small area, which is about 1.5 million tonnes of
talc, and upgraded it because of the concentration of
drilling, also the bulk sampling by the big boreholes,
and then the testing of the bulk sampling, to give me
the confidence that I can actually process it and handle
it commercially.

Q. Okay. I want to go back to R-0109 -- and I think this
is the last topic I am going to address today -- where
we saw that the document says "inferred resource".
Page 10, R-0109. If you want, I will let you read this,
and then I am going to ask you a question. I want you
to tell me there if you see the term "indicated
resource".

A. No.

Q. You don't?

A. I've already read it. "Indicated" is not there. They
are showing that whole area as inferred.

Q. Okay, thank you.

A. But a greater area than I have indicated is inferred.

Q. But it doesn't appear here?

A. Appear where?

Q. In this document R-0109 that we just saw.

A. "Indicated" does not appear in here, only "inferred",
I agree.

MR MAÑÓN: Thank you. I think we are done for tonight,

Mr Chairman.
THE PRESIDENT: Thank you. So we meet tomorrow at 9 o'clock to continue your examination.

MR HILL: Thank you very much. Sorry, is it possible for me to read the CRIRSCO preamble before tomorrow morning, as it's being elaborated on and discussed? Can I have a copy of that, please, to take away?

MR MAŃÓN: Yes, it's part of the record. Sure.

MR HILL: Thank you.

MR MAŃÓN: I think, Mr Chairman, since we are going to be breaking for the evening, if you could instruct the expert not to discuss his testimony.

THE PRESIDENT: I don't give that indication to experts because they are independent.

MR MAŃÓN: Okay.

THE PRESIDENT: But of course you have to ... MR HILL: Who have I got to discuss it with? I could discuss it --

MR MAŃÓN: We could talk about it!

MR HILL: Is that an invitation?

MR MAŃÓN: Certainly not!

Thank you, Mr Chairman.

(6.17 pm)

(The hearing adjourned until 9.00 am the following day)