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(Hansard)**

Thursday 16 May 2013

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Jeudi 16 mai 2013

**Standing Committee on
Justice Policy**

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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON JUSTICE POLICY

COMITÉ PERMANENT DE LA JUSTICE

Thursday 16 May 2013

Jeudi 16 mai 2013

The committee met at 0830 in room 151.

MEMBERS' PRIVILEGES

The Chair (Mr. Shafiq Qadri): Colleagues, I call the meeting to order of the Standing Committee on Justice Policy.

MR. JOHN KELLY

The Chair (Mr. Shafiq Qadri): I invite our first presenter to please come forward: Mr. John Kelly, counsel, crown law office, civil division, the Ministry of the Attorney General. Welcome, Mr. Kelly. I invite you to (a) be seated, and (b) be sworn in.

Mr. John Kelly: Sure.

The Clerk of the Committee (Ms. Tamara Poman-ski): Do you solemnly swear that the evidence you shall give to this committee touching the subject of the present inquiry shall be the truth, the whole truth and nothing but the truth, so help you God?

Mr. John Kelly: I do.

The Chair (Mr. Shafiq Qadri): Thank you, Mr. Kelly. As you know the protocol, I invite you to begin your five-minute opening address now.

Mr. John Kelly: Thank you, Mr. Chairman. My name is John Kelly and I am counsel at the crown law office, civil division, of the Ministry of the Attorney General. I joined that ministry's division in June 2010 upon retirement from private practice, where I was senior counsel at Lang Michener in Toronto in the commercial law group.

I am here at the invitation of the committee, and as you know, as a lawyer, I have an obligation to preserve the privileges and confidentialities of my client. I have received my client's instructions that I am entitled to discuss the matters relating to these documents with you without in any way waiving any other privilege that would exist for these documents.

Thank you, Mr. Chairman.

The Chair (Mr. Shafiq Qadri): Does that conclude your opening remarks, Mr. Kelly?

Mr. John Kelly: It does.

The Chair (Mr. Shafiq Qadri): Thank you. We'll now begin with the NDP. Mr. Tabuns.

Mr. Peter Tabuns: Mr. Kelly, thank you for being here this morning.

Mr. John Kelly: Thank you.

The Chair (Mr. Shafiq Qadri): Mr. Tabuns—I'll give you your time back in a moment.

I just wanted to inform you, Mr. Kelly, that the committee respects what you've just said with reference to the privileged documents and so on. I just wanted to inform you that as a parliamentary committee, our privileges actually trump those.

Mr. John Kelly: We understand that.

The Chair (Mr. Shafiq Qadri): Yes. Mr. Tabuns, go ahead.

Mr. Peter Tabuns: Thank you. Mr. Kelly, were you given a package of documents by the Clerk?

Mr. John Kelly: No. I have documents that I understand were sent to the committee. They may be the same.

Mr. Peter Tabuns: This is a package of documents that will be circulated to everyone in the committee. You have an item here—well, even before I go to this, why were you assigned this case?

Mr. John Kelly: We had a call from counsel for TransCanada, who alleged that an agreement had been reached between the government and TransCanada with respect to the Oakville plant, that negotiations had been ongoing and were unsuccessful, and that they wanted to meet with certain representatives from the Attorney General's office to discuss this matter prior to making a decision as to whether to commence litigation against the government.

Mr. Peter Tabuns: And who in the government assigned you? When you say, "We had a call," you mean the government of Ontario.

Mr. John Kelly: Yes. I was asked by the assistant deputy Attorney General to meet with these people for the purpose of discerning what their issues were.

Mr. Peter Tabuns: Okay. How long was your involvement?

Mr. John Kelly: In total?

Mr. Peter Tabuns: In total.

Mr. John Kelly: I believe, according to the notes I have, I had my first telephone conversation with Mr. Barrack in May 2011. I carried on in different capacities through the negotiation of the final agreements. I was not involved in the negotiations with respect to final agreements, but from time to time, copies of materials would come to me.

Mr. Peter Tabuns: So you were involved with the Oakville gas plant, TransCanada Enterprises, until the final agreement was reached with them.

Mr. John Kelly: In different levels of involvement, yes.

Mr. Peter Tabuns: Okay. My first document here: On April 15, 2011, you met with the OPA and their lawyer from Osler. Halyna Perun, director of legal services, notes that knowing what was said apparently to TransCanada and when is a critical factor. Why is that? And that's actually the fourth paragraph down.

Mr. John Kelly: Well, obviously, in order to determine what the government's position is with respect to the allegations being made, it would be necessary to meet with the appropriate witnesses to determine what their versions of events were.

The Chair (Mr. Shafiq Qaadri): Sorry, Mr. Kelly, can you try just aiming yourself at the microphone there?

Mr. John Kelly: Yes. I'll aim myself this way.

Mr. Peter Tabuns: In the same email—and it's the third line above "Thank you" there—she notes that TransCanada Enterprises could name individuals in the lawsuit. Do you know who it was feared might be named and on what basis?

Mr. John Kelly: Not at that time, no.

Mr. Peter Tabuns: Did you know at a later time?

Mr. John Kelly: I had a meeting, as I indicated, in early June with counsel for TransCanada. They provided a number of names of people with whom their clients apparently met.

Mr. Peter Tabuns: Can you remember those names and give them to us?

Mr. John Kelly: I remember Craig MacLennan being one person from the Ministry of Energy. I remember Sean Mullin from the Premier's office; Jamison Steeve from the Premier's office, and Ben Chin from the Ministry of Energy. Those are the names that I recall.

Mr. Peter Tabuns: Okay. So that same document number 1, the second page is an email from you to Halyna Perun. You ask for a range of information to be secured in interviews with key people. Did you get those interviews?

Mr. John Kelly: I did.

Mr. Peter Tabuns: And who carried out the interviews?

Mr. John Kelly: I was there with Dennis Brown, senior counsel at the crown law office, as well as Darrell Kloeze, who took notes of meetings.

Mr. Peter Tabuns: Okay. And which persons were interviewed?

Mr. John Kelly: We interviewed, as I indicated, Craig MacLennan, Sean Mullin, Jamison Steeve and Ben Chin by telephone.

Mr. Peter Tabuns: Okay.

Mr. John Kelly: He was in British Columbia.

Mr. Peter Tabuns: What was your conclusion when you had reviewed their information?

Mr. John Kelly: What do you mean by "conclusion?"

Mr. Peter Tabuns: Did you conclude that they had said to TransCanada Enterprises, "We will preserve value," or "We will make you whole."

Mr. John Kelly: Well, Mr. Tabuns, my function was not to come to any conclusion. My function was to gather the evidence that was available. This was at the very preliminary stages. As you can appreciate, there was no pleading in the form of a claim. There was no production of documents. I'm sure there were probably hundreds, if not thousands, of other emails and so forth. I was really there to find out on a preliminary basis what their position was.

Mr. Peter Tabuns: I'll come back to that in a little bit.

On May 25, and this is document 2 from you to Halyna Perun, you wrote reporting a call with TransCanada Enterprises lawyers Finnigan and Barrack, in which "they confirm the govt. cancelled the contract," and that TCE was told it would be "made whole." Were you surprised at their statements?

Mr. John Kelly: At this stage, I wasn't surprised about anything. I was brand new to the file.

Mr. Peter Tabuns: What did you see as the legal consequence if what they were saying to you was true?

Mr. John Kelly: At that point, I had no idea what the contract value was because I hadn't even received it at this point. I just got a telephone call, and obviously I was recording for her—Halyna, who I was reporting to in this matter—what I'd been told.

Mr. Peter Tabuns: Setting aside the value of the contract, if those statements were true, what were the implications for the government's legal position?

Mr. John Kelly: Well, again, not knowing at this stage all the details of the contract, which I subsequently did review, it wasn't clear to me what an equivalent value would be, what "keeping whole" would mean in terms of—I didn't even know at that stage how long the contract was.

Mr. Peter Tabuns: On May 26, you wrote an email, document 3, to Carolyn Calwell and Halyna Perun in which you say TCE has indicated they've "assembled all their correspondence with ... the minister's office, OPA and the PO" about "the alleged agreement by the govt" on not using their full defences, that TCE was facing barriers to completion. Did you ever get the correspondence?

Mr. John Kelly: No. As a matter of fact I didn't get their correspondence because, ultimately, this matter went to arbitration on certain terms.

Mr. Peter Tabuns: Okay. We on this side have never seen their records of the exchanges with the Premier's office and otherwise—

Mr. John Kelly: We were read—at the first meeting with Mr. Barrack—notes from Christopher Breen, whom we understood was one of their PR people, who had taken notes in the meetings with these individuals. So we did have that.

Mr. Peter Tabuns: But you didn't have any other emails, letters, other exchanges?

Mr. John Kelly: Other than the documents which are in the binder that we sent to your committee, that's what I had.

Mr. Peter Tabuns: Okay. Document 4 is a slide deck prepared by the legal services branch, Ministry of Energy: TransCanada Energy and the Southwest GTA Clean Energy Supply Contract, Options for Arbitration. I've taken out two pages. Are you familiar with this slide deck?

Mr. John Kelly: I can't, in honesty, tell you if I am. I don't remember.

Mr. Peter Tabuns: Okay. This was put together some time in that May or early June period when you were assessing options. There were a few options: no arbitration, arbitration on damages and then arbitration on all the issues.

Under the "no arbitration" option, one of the disadvantages is that "Evidence will be required around the conversations between representatives of the crown and TransCanada in and around October 2010."

Could you speak to the kind of risk that was presented by that disadvantage?

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Mr. John Kelly: Actually, now that I'm looking at this document, I'm fairly certain that I have not seen it. I don't know who prepared this, but it comes from the Ministry of Energy. I'm not entirely sure, but obviously there was an anticipation that there would be evidence on record with respect to conversations that took place about this matter. That's really all I can say.

Mr. Peter Tabuns: So you wouldn't know the scale or nature of the risk at this point?

Mr. John Kelly: No. Not at this point, no.

Mr. Peter Tabuns: Did you know at a later point?

Mr. John Kelly: I formed a more fulsome view of the matter as my investigations went on and I was able to look at the few documents that we did have. I certainly didn't come to any final legal opinion on the matter, for the reasons I've described.

Mr. Peter Tabuns: And what was the opinion you held as you went further along?

Mr. John Kelly: It seemed to me that there was a reasonable prospect of satisfying a trier of fact of some kind—subject to, again, examinations for discovering evidence to the contrary—that there was a form of agreement, certainly not crystallized, that the government would provide some form of equivalent contract to the Oakville contract, whatever that was. In the sense of keeping the TransCanada Corp. whole, I think my impression was that it was to be an alternative plant of some form.

Mr. Peter Tabuns: Okay. In the second deck slide—

Mr. John Kelly: Option 2?

Mr. Peter Tabuns: Yes. "Option 2: Arbitration on Damages."

Mr. John Kelly: Yes.

Mr. Peter Tabuns: They talk about the advantages, and the disadvantages are that this "Creates highest financial exposure for the province and the OPA"—down at the bottom of the page.

Mr. John Kelly: Yes, I see it.

Mr. Peter Tabuns: So this would be a higher risk than going to trial?

Mr. John Kelly: Well, again, without the benefit of full discovery, production of documents and so on, it's very difficult to answer that question.

I see, at the top, it talks about, "Arbitration on damages ... with concessions that there are no limitations to damages" to be claimed, "and no defences based on TransCanada's inability to obtain permitting."

I expect that the disadvantage they're referring to is that if that was the way in which they were to proceed, and if TransCanada could establish all the damages it asserted, that would be a risk.

Mr. Peter Tabuns: Right, and the fact that there would actually be no defence at all on the part of the government or the OPA—

Mr. John Kelly: Well, no, that's not right. You certainly would be entitled to challenge their damages. As matters went forward, in fact, I learned that the OPA did have experts who were quite prepared to challenge the extent of the damages, which formed the basis of the ongoing negotiations. They had those defences. The defences they were talking about, as I understood it, were section 14(1) of the contract and the permitting issue.

Mr. Peter Tabuns: Right. Document 5, notes of a meeting with Finnigan and Barrack from TransCanada Enterprises on June 2, 2011. We've seen these quite a few times; you were part of that conversation.

Mr. John Kelly: I was, sir.

Mr. Peter Tabuns: They note that "preservation notices" were sent to TransCanada staff. This is underneath "Without prejudice," about six lines.

Mr. John Kelly: Yes.

Mr. Peter Tabuns: "They sent preservation notices to 82 people within" TransCanada Enterprises—"ask that we take the same step."

Would you, just for the record, explain what a preservation notice is?

Mr. John Kelly: A preservation notice is something that is sent to appropriate personnel who have, or could have, information or become witnesses with respect to the matters in issue. The instruction is to preserve the documents—in electronic form, hard copy, whatever—which may be in their possession with respect to the matters in issue.

Mr. Peter Tabuns: Did, in fact, the government of Ontario take that step?

Mr. John Kelly: My understanding—I have a note from the beginning of my notes on that, that I asked for one of my associates to call to the Ministry of Energy and follow up with that matter in terms of presentation. Now, you have to remember that we had received a PACA notice—

Mr. Peter Tabuns: Could you explain what a PACA notice is?

Mr. John Kelly: It's a notice that is required to be given under the proceedings against the crown 60 days before commencing litigation, in order to give the crown an opportunity to examine the issues raised in the notice.

Mr. Peter Tabuns: So when you receive that notice, you do everything you can to preserve the evidence on your side.

Mr. John Kelly: I, of course, being fairly new to the government, understood that what would happen is that our director—at the time it was Craig Slater—would then send the standard notice that the government has to the Ministry of Energy, to their legal services people, who would then know who to send it to in the Ministry of Energy—who was involved in this matter.

Mr. Peter Tabuns: So preservation notices would have just been sent to the Ministry of Energy, not to the Premier's office, given—

Mr. John Kelly: No, it's entirely possible that that could have happened as well, because at this point in time, the Ministry of Energy would have much more knowledge about who was involved in the matter, apart from the two or three people we heard about. I understand that ultimately these individuals were screened from the file at the Premier's office.

Mr. Peter Tabuns: Yes, they were screened. You didn't have anything to do with sending the preservation notice other than—

Mr. John Kelly: Just on instruction.

Mr. Peter Tabuns: Just on instruction. Did you know who would be sent preservation notices?

Mr. John Kelly: No, my understanding was that it would go to the legal services group at the Ministry of Energy, who were directly involved in this, and it would go out from there.

Mr. Peter Tabuns: And the preservation notices are quite standard: "Preserve everything in your files, electronic and otherwise, that have bearing on this matter."

Mr. John Kelly: Yes, they are standard.

Mr. Peter Tabuns: Okay. Would full-scale deletion of emails by people involved in this matter have been a violation of such an order or such an instruction?

Mr. John Kelly: I have no knowledge of deletion of anything, sir, so I'd be speaking to a hypothetical question.

Mr. Peter Tabuns: And I'm putting it as a hypothetical question because I know you don't have knowledge. But would it have been in violation of a preservation notice?

Mr. John Kelly: If a preservation notice had been sent, as requested, and someone got it who was involved in the file, it would be improper to delete the emails or other documents.

Mr. Peter Tabuns: And it would have been improper because it puts Ontario's legal case at risk?

Mr. John Kelly: It could. It depends on the various sources of documents. As you know, in this day and age, you can get copies of just about anything from anywhere.

Mr. Peter Tabuns: Okay. Just, for your information, an affidavit from cabinet office noted that Chris Morley's email was destroyed June 2012; Jamison Steeve's email—he was referenced in this committee—entirely gone August 17, 2012; and Sean Mullin's email, deleted

August, 17, 2012. None of the records from this period exist at this point.

Not that you had any control over it, but if a preservation notice had been sent, an awful lot of information is gone.

Document 6: On June 6, Halyna Perun copied you on an email to Malliha Wilson, in which it stated, "That Premier's office is the client."

You were copied on this. What does that mean? Sorry, we go down to the second paragraph, point (1): "That Premier's office is the client."

Mr. John Kelly: If I could just have a moment to look at the context.

Mr. Peter Tabuns: Sure.

Mr. John Kelly: Being relatively new to government at that time, it was not clear to me who the client is. When you're at the Ministry of the Attorney General, you're often asked to represent various ministries. This apparently was the information provided by Halyna to Malliha Wilson, that apparently the Premier's office would be the client.

Mr. Peter Tabuns: And did it seem odd to you that the Premier's office was the client as opposed to the Ministry of Energy?

Mr. John Kelly: At that stage, with my extremely limited knowledge of government, I really didn't have an opinion at all. I just wanted to get on with doing the job.

Mr. Peter Tabuns: And at a later stage, when you understood the workings of government?

Mr. John Kelly: At a later stage—my involvement in the matter throughout, as we went through arbitration, was to act for the Ministry of Energy.

Mr. Peter Tabuns: So you didn't have any ongoing work done with the Premier's office?

Mr. John Kelly: No. Once we completed our interviews with the gentleman I referred to, that was the end of my involvement with the deal.

Mr. Peter Tabuns: Okay. In document 8, you're asking about the role of certain staffers. This is the second page of document 8, at the bottom: "We would want a witness statement from each of the people who were involved." Now, you have previously named a number of staff—Sean Mullin, Craig MacLennan, Jamison Steeve. Was there a reason that you, in particular, were interviewing them?

0850

Mr. John Kelly: I was asked to be involved in the matter, in the investigation of the allegations.

Mr. Peter Tabuns: You note in here that they need to be informed. "Failure to be accurate and honest will not be in their interest in the long run." Can you explain?

Mr. John Kelly: It's fairly standard, as far as I'm concerned. Whenever I meet with a witness, I'm simply asking them to give me the truth as they understand it, and obviously, it's not in anyone's interest to have misinformation because it just interferes with the process of getting resolution.

The Chair (Mr. Shafiq Qadri): One minute.

Mr. Peter Tabuns: And did you believe that they were open and forthcoming with you?

Mr. John Kelly: Because we were at the beginning of the process and we didn't have an opportunity to see any documentation, for example, that would directly contradict at that stage, I had no reason to believe that they were being in any way obstructive with me.

Mr. Peter Tabuns: Did you, at a later point, see correspondence or information that indicated there was a contradiction between what they had said to you and what was the case?

Mr. John Kelly: Well, as you know, there's a binder here with any number of documents that we've provided. In my experience, witnesses anywhere in this country and other countries see and hear things differently to some degree, so there's always a variation as to what they say occurred and the manner in which it occurred, and that happens with all of us. Other than that, it appeared to me that they were attempting to tell me what occurred.

Mr. Peter Tabuns: In document 9—

The Chair (Mr. Shafiq Qadri): Thank you, Mr. Tabuns. To the government side, Mr. Delaney.

Mr. Bob Delaney: Thank you very much, Chair.

Good morning, sir. Thank you for coming. I want to start by asking you about the decision to renegotiate with TransCanada to find an alternative to the Oakville plant. From the documents that I've seen and the testimony that we've heard so far, it's clear that the best path forward, for both the OPA and the government, was to renegotiate an alternative site with TCE rather than rip up the original agreement. Is that your understanding as well?

Mr. John Kelly: That's my understanding of what they believed to be the case, yes.

Mr. Bob Delaney: Okay. If the government had simply walked away from the contract, was there a significant risk of litigation?

Mr. John Kelly: Yes.

Mr. Bob Delaney: Okay. Could a potential result be extensive damages awarded against the government in the event of that litigation?

Mr. John Kelly: Again, as I've indicated earlier, depending on the documents that were produced, depending on the experts' reports with respect to damages, the result could vary greatly. Obviously, the two parties would be taking different positions on damages, but there's always that risk.

Mr. Bob Delaney: Could you expand a little bit on the risks and the damages?

Mr. John Kelly: Well, for example, I read in the materials that TransCanada expected a 9% return on its operations, and it believed that the OPA was offering a 4% return with respect to the Cambridge plant. Now, what I know about returns on rates of interest you could put in a thimble, so all I can tell you is that as I understand it from the experts, that's a very significant amount of money, that difference.

Mr. Bob Delaney: Okay. So, from what you're saying, it would have been quite difficult for the province

to have avoided litigation if it had simply terminated the contract?

Mr. John Kelly: I'm fairly satisfied there would have been litigation, yes.

Mr. Bob Delaney: So the company in this case had done nothing legally wrong, and there was a binding contract in place at that time; right?

Mr. John Kelly: As I understood it, they were proceeding with their obligations. There were various clauses such as force majeure clauses that extend out over a period of some three years, and I was aware that there was a permitting issue in Oakville. So it wasn't an easy ride going through the process, but they were continuing on to try to complete their obligations.

Mr. Bob Delaney: So under the circumstances at that time, really the only way for the government to be sure to avoid running the risks of litigation was to either reach a settlement on damages or to renegotiate a new plant with TransCanada Energy, to find a new project?

Mr. John Kelly: Assuming that TransCanada was not in breach of its agreements. There are provisions in the contract that deal with the event of termination and what kinds of claims for damages can be made, for example, section 14. But we certainly did read in the materials that there were, depending on estimates, \$30 million to \$40 million in sunk costs. There were turbines worth, depending on estimates, \$250 million to \$350 million. That's not the kind of thing you would normally walk away from.

Mr. Bob Delaney: The concern, then, that TransCanada Energy would initiate litigation is raised numerous times throughout these documents at different stages in the process. It seems, from the documents and from the testimony, that there was a concerted effort by those on the side of the government and the OPA to avoid litigation if they could. Is that your understanding?

Mr. John Kelly: That was my understanding.

Mr. Bob Delaney: Okay. In your experience in litigation, would it be fair to say that the province would have been likely looking at fairly protracted, difficult and very risky litigation should it have chosen that route?

Mr. John Kelly: I would say, with respect to certain claims for damages, there would certainly be considerable risk attached, and it would certainly be prolonged. This would have been a major piece of litigation, undoubtedly, with thousands, if not more, documents to review and witnesses to examine.

Mr. Bob Delaney: If TransCanada Energy had initiated litigation against the province over the Oakville plant and had been successful, could we have potentially been looking at greater cost to taxpayers?

Mr. John Kelly: I did not get involved in the calculation of damages because, of course, that was a matter for the people who were negotiating the resolution, ultimately. But certainly if their claims as to the cost that they are incurring had been established, there would be substantial damages, if they were successful.

Mr. Bob Delaney: Over and above, then, the risk of damages, could you speak to the costs of the process of litigation itself?

Mr. John Kelly: In my experience, after 40 years of litigating, if you can avoid litigation, you should. It's a process that's fraught with risk. You have witnesses who you think are going to say one thing and it turns out they don't. Evidence that you're given isn't always exactly the way it turns out to be. And you are, in this particular case, risking exposure of extremely sensitive commercial information, for which there would have to be special sealing orders and all forms of injunctions with respect to disclosing because TransCanada's methods of calculating its profits were involved in this process.

Mr. Bob Delaney: Okay. Thank you. I'd like to ask you more specifically about negotiating versus tearing up or abrogating a contract. When Deputy Lindsay was here before the committee not too long ago, he said, and I'm going to use his words; this is a bit of lengthy preamble, then: "If you have a contract and you don't honour the contract, the party on the other side can sue you for breach of contract and the damages would be all the benefits they were hoping to procure...."

He then went on to say, "if you simply throw this into a court proceeding, what happens is you end up paying whatever costs without getting any electrons. So is there a better way to resolve this? TransCanada is a reputable company and our electricity system needs good suppliers out there, so maintaining good relationships with suppliers was part of the consideration. Paying costs and getting no electricity would not be a very good business decision. So try to avoid litigation was the strategy and get maximum electrons for minimum cost was what we in the OPA were trying to do."

Would this be, in your recollection, an accurate representation of the approach the government took at this time to avoid litigation?

Mr. John Kelly: I was not involved in the government process of making decisions with respect to the matter. I was simply there to attempt to assess the evidence that was available to me. Those decisions were made by politicians.

Mr. Bob Delaney: Okay. In terms of the decision to relocate the Oakville plant—and we're all aware there was strong local opposition and also that the municipality had enacted bylaws to try to stop construction. Chris Breen from TransCanada Energy was here to testify a couple of weeks ago, and he told the committee about all the channels they would have used to deliver on their obligation to build the plant. For one, he had notified the province about the mechanisms they could use to overrule the municipal bylaws that were enacted, and they were fighting the bylaws in a number of courts. Mr. Breen testified that they were confident they would eventually get the bylaws overruled at the OMB, the Ontario Superior Court or Divisional Court, or if needed, they were prepared to appeal decisions to ensure the gas plant got the approvals.

0900

As an excerpt from his testimony, he said, "What I would say is that TransCanada were confident that they were going to eventually get to build the project on the

Ford lands, but clearly we had some work to do at the Ontario Municipal Board and the various courts that I had mentioned earlier." He also said, "We had a contractual obligation. It was very clearly spelled out in black and white that that was our responsibility: 'You have to go through every possible channel to deliver on your obligations in this contract.' And we would have done that."

Were you aware of the various channels that TransCanada Energy had been using to overturn the bylaws?

Mr. John Kelly: No, sir. I wasn't involved in that part of the case.

Mr. Bob Delaney: All right. In the event that TransCanada Energy had successfully overturned the bylaws and building permits had been issued, would the force majeure clause have been waived?

Mr. John Kelly: Well, force majeure only applies in the event that you're unable to obtain the various permits that are necessary for various reasons set out in the contract.

Mr. Bob Delaney: Okay. Had the permits been issued, would the sunk costs have been higher if the decision was made to cancel the plant after construction had started?

Mr. John Kelly: Could you ask me that again?

Mr. Bob Delaney: Had the permits been issued that TransCanada Energy—

Mr. John Kelly: For construction, yes.

Mr. Bob Delaney: Yes—would the sunk costs incurred by TransCanada Energy have been higher if the decision to cancel the plant had been made after construction had started?

Mr. John Kelly: Well, on the face, it would appear evident that if they were continuing to incur expenses to build the capital structure, they would have more loss. There would be more cost.

Mr. Bob Delaney: And presumably those costs, had that have happened, would have—

Mr. John Yakabuski: Point of order, Chair.

The Chair (Mr. Shafiq Qaadri): Mr. Yakabuski.

Mr. John Yakabuski: Is it not possible that Mr. Delaney could actually ask factual questions instead of coming from some hypothetical universe at all times—

The Chair (Mr. Shafiq Qaadri): I thank you for your incentive, Mr. Yakabuski.

Please continue, Mr. Delaney.

Mr. Bob Delaney: Thank you. We do know that TransCanada Energy was doing everything in their power at the time to get the plant through the approvals process. From your perspective, was having discussions with them on the front end to avoid increased sunk costs and to get a relocated facility out of the agreement prudent and sensible in the circumstances?

Mr. John Kelly: Well, again, my role in this matter was simply to gather evidence with respect to the allegations that were made. I wasn't involved in the thought process as to why they had negotiations or what their concerns were with sunk costs, other than what I've told you.

Mr. Bob Delaney: Well, I'm asking the questions because in the opinion that you prepared, you reference there being—your words—a “lack of certainty” and possibly different interpretations of one clause or another. When you—

Mr. John Kelly: That's actually not my opinion. That was done by a group of people downstairs who are specialists in preparing opinions.

Mr. Bob Delaney: Okay. Thank you. Would this then speak to the difficulty of predicting where a court might land on one issue or another?

Mr. John Kelly: It all depends on the evidence that's available before the court at the time of the actual proceeding.

Mr. Bob Delaney: Could you speak to the benefit of having, then, certainty through negotiation as opposed to the uncertainty of litigation?

Mr. John Kelly: In this particular case, a decision was made, obviously, to go through the arbitration process and ultimately to resolve the matter. The benefit of the arbitration is that you know what the terms and conditions are under which you're arbitrating. In this particular case, as you've seen, there were two matters that were agreed upon that would not be raised as defences. So that's one form of certainty. You're unable to determine what the arbitrator will finally decide. It's anyone's estimate based on the evidence available.

The problem with a litigation process would be not only the uncertainties that we talked about, but you don't get to choose your judge in litigation whereas you do get to choose your arbitrator, so at least you have a better sense of the person you're dealing with at the time. After that, it's a matter of how the evidence comes out.

Mr. Bob Delaney: Okay, yes, that's a good point. Several witnesses have testified before the committee regarding the meetings between some members of the Premier's office staff with TransCanada Energy. Their testimony lines up with some of the notes that we've seen taken from their interviews with you and with your colleagues on this file. Jamison Steeve told the committee, and I'll use his words, “My discussions with TransCanada were exploratory in nature...” Sean Mullin confirmed by saying, “We were not authorized to ... and we did not engage in” any negotiations. Chris Breen from TransCanada confirmed that they were not negotiating directly with the company.

We know that no offers were made and no deals were reached during these meetings, and the former Deputy Minister of Energy, David Lindsay, testified, “I don't think they actually had a deal. If they had a deal, why are we going through all of this process?” What I'd like to ask you—I'm assuming—is this your understanding as well?

Mr. John Kelly: My understanding on the totality of the documentation was that the parties agreed, by October 7, 2010, that the plant would be cancelled and that TransCanada would be entitled to the anticipated financial value of the contract. I haven't seen anything that specifically indicates what that value is, other than to

say that it appears from the documentation that the parties hoped that another plant would be the equivalent value of the undertaking at Oakville.

Mr. Bob Delaney: Okay. Mr. Steeve and Mr. Mullin were later screened off because of the high risk of litigation with the company. Is that correct?

Mr. John Kelly: It's what I understand.

Mr. Bob Delaney: Okay. In fact, that's what former secretary Shelly Jamieson told the committee. She said, “This decision was made because their earlier involvement with the proponents made them potential witnesses in threatened litigation resulting from the decision to cancel that particular contract,” which, I gather, is what you've been saying as well.

Mr. John Kelly: Yes.

Mr. Bob Delaney: Okay. There has been a bit of discussion around the terms “keeping whole,” with regard to the proponent. What does that statement mean to you?

Mr. John Kelly: I think I've indicated what my understanding of that statement is.

Mr. Bob Delaney: Okay.

Mr. John Kelly: It's simply that the discussions that appeared to have been under way between the parties had as their object the ability, if possible, to find another plant or location where, for example, the turbines could be used and another generation facility could be built to be the equivalent of what they anticipated they would be doing in Oakville.

Mr. Bob Delaney: Okay, thank you. Mr. Tabuns earlier asked Chris Breen about this statement. The Premier's office staff have said a number of times that they were only in meetings with TransCanada Energy to listen to a concerned stakeholder and did not promise to keep anyone whole. Mr. Breen confirmed that this statement was indeed used by TransCanada Energy executives. So the transcript, in part, was Mr. Tabuns saying, “One matter that comes up with us fairly regularly is this whole question of keeping TCE whole or close to whole. Was this something that was put forward ... from the Premier's office?”, to which Mr. Breen from TransCanada Energy said, “This was put forward by TransCanada.... Our executives who came to that meeting were very clear. They said, ‘We have a contract. We're seriously advising you against cancelling it, but if you do cancel it, we expect to be kept whole.’” Was that consistent with your interviews with Sean Mullin, Jamison Steeve and Craig MacLennan when they were screened off the files?

Mr. John Kelly: They advised me on a number of occasions that there were statements by TransCanada that they expected to be kept whole with respect to the contract, yes.

Mr. Bob Delaney: Okay. On the topic of these interviews—by the way, how am I doing on time, Chair?

The Chair (Mr. Shafiq Qadri): Three minutes or less.

Mr. Bob Delaney: Thank you. On the topic of these interviews, you spent quite a bit of time with these three individuals, discussing their meetings with TransCanada Energy?

Mr. John Kelly: I would have thought that the meetings were about an hour each.

Mr. Bob Delaney: Okay. Were the individuals cooperative in these meetings?

Mr. John Kelly: I have no reason to think they were being unco-operative.

Mr. Bob Delaney: Did they provide you with all the information you asked for?

Mr. John Kelly: They gave us the answers to the questions we asked.

Mr. Bob Delaney: Okay. We've heard a lot about the possibility of these negotiations ending up in arbitration if discussions had broken down. What was the outcome?

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Mr. John Kelly: The parties ultimately agreed to arbitrate the issue of the damages, if any, suffered by TransCanada as a result of the cancellation of the plant.

Mr. Bob Delaney: Chair, the next set of questions I have would require a little bit more time than what remains, so we'll stand down the remainder of our time.

The Chair (Mr. Shafiq Qadri): Thank you. Mr. Delaney, just before I offer the floor to the PC side, I'd just like to mention that I do have to join with Mr. Hudak and Mr. Yakabuski in inviting you to please stay on the straight and narrow, so I'd invite you to listen to both of our opinions. With that, I'd offer the floor to Mr. Fedeli.

Mr. Victor Fedeli: Thank you, Chair. Good morning, Mr. Kelly.

Mr. John Kelly: Good morning, sir.

Mr. Victor Fedeli: Thank you for being here. You have a package from our side as well?

Mr. John Kelly: I have something called "PC DOC."

Mr. Victor Fedeli: You've got them. Under PC doc. 1—and sorry, Rob, that we continue to call it that. You'll see in the first paragraph, second sentence—this is an email from you to Halyna Perun: "In essence, they confirm that the government cancelled the contract and communicated that fact to TransCanada before the Minister of Energy was advised. Apparently the chief of staff (or equivalent title) in the PO told one [of] TransCanada's senior people at the time they indicated the plant would not proceed" and "that TransCanada would be 'made whole' as to damages."

You're sharing this information with legal counsel in the Ministry of Energy and Infrastructure. Would this have been the first time, in your opinion, that Halyna Perun would have understood that the government cancelled the contract, that someone in TransCanada said they would be made whole and that her minister wasn't aware of it?

Mr. John Kelly: I had no idea what knowledge Halyna had. I had met her very briefly before this as my representative—

Mr. Victor Fedeli: You were new at this time; right?

Mr. John Kelly: Pardon me?

Mr. Victor Fedeli: You were new at this time?

Mr. John Kelly: Yes.

Mr. Victor Fedeli: Okay.

Mr. John Kelly: New to the file, yes, and a year in the position, yes.

Mr. Victor Fedeli: Two paragraphs down, it says that "negotiations as to damages are 'an unmitigated disaster.'"

The next paragraph says, "They have indicated"—this is TransCanada—"that the problem is that Colin Andersen at OPA is being very confrontational and that he and whoever is advising him doesn't know anything about the proper calculation.... Apparently counsel are not involved in these discussions."

Would you know if Colin Andersen was being confrontational because he knew this was a bad deal that was being proposed and he didn't want to go ahead with that? Was he being directed by the government as to what to propose?

Mr. John Kelly: I have no idea, sir, because this is May 25, the first time I had a conversation about the file.

Mr. Victor Fedeli: Okay. We've got correspondence coming up that you and I will talk about in a couple of minutes that will clarify that, I'm quite positive.

Mr. John Kelly: Thank you.

Mr. Victor Fedeli: The next document we see is June 2. Go to page 3 of that. It's page 3 of four, right at the top: "TCE responds angrily." I'm not sure who took the notes, but I think this is Halyna Perun, says, "I have MB"—I presume that is Michael Barrack—"says TCE 'blew a gasket'—we already have a deal—go talk to your bosses."

Do you have any understanding of what they were referring to here?

Mr. John Kelly: I did not at that time.

Mr. Victor Fedeli: Now do you know?

Mr. John Kelly: I have an understanding.

Mr. Victor Fedeli: What do you feel that understanding is?

Mr. John Kelly: It appears that on October 5, there was a meeting with the Premier's office, Mr. Mullin and Mr. Jamison Steeve, where again there were discussions about being kept whole and so forth and the fact that a statement was going to come out terminating the Oakville gas plant and that TransCanada would be receiving a letter that they had been asking for. Then I understand that the TransCanada representatives went to meet with the minister and perhaps an assistant—I can't recall—at which point, apparently TransCanada got the sense that the minister was saying, "We'll let you know in a number of months what will happen. Thank you for your co-operation." That was not the way they understood the discussions that had taken place in the Premier's office, and they reacted with some irritation.

Mr. Victor Fedeli: Let's talk about the letter you were referring to. This is a letter from the OPA to TransCanada.

Mr. John Kelly: Yes.

Mr. Victor Fedeli: Was the OPA, in your understanding, satisfied with writing that letter? You may or may not find that here in this particular chronology.

Mr. John Kelly: No, there's nothing in here that I am aware of about that. There may be something later.

Mr. Victor Fedeli: Okay. A little bit down you'll see, "Don't know if the OPA board approved the letter." Do you know anything about that?

Mr. John Kelly: No, I don't.

Mr. Victor Fedeli: Okay. That leads me to my question. What legal authority would the province of Ontario or the Premier's office have to instruct the OPA to terminate a contract and write that letter?

Mr. John Kelly: Fortunately for me, I have no idea. I literally don't—

Mr. Victor Fedeli: Fortunately for you?

Mr. John Kelly: I understand that there has been evidence before this committee that if the government wasn't onside with this project going forward, there would be insurmountable obstacles. That is the nature and extent of my knowledge of public law.

Mr. Victor Fedeli: That's fair enough. Fortunately, that you don't know is a great answer, by the way. It saves a lengthy discussion about the fact that they have no authority to instruct the Ontario Power Authority.

So you don't know anything about the Ontario Power Authority board's involvement or approvals along the line? Would you have any knowledge of that whatsoever?

Mr. John Kelly: Other than what I read from time to time about the board. There are a few memos that I see about the board. I had no involvement with them or any—

Mr. Victor Fedeli: What would you have read from time to time about the position of the board?

Mr. John Kelly: I'd have to look at the actual documents, and if they're in here, I'm happy to do that. I just recall that there had to be, as I understood it, reference of this October 7 letter to the board at some point. Whether there was and how it happened, I wasn't involved in that.

Mr. Victor Fedeli: On PC doc. 3, we're into the notes of the Mullin meeting.

Mr. John Kelly: Yes, sir.

Mr. Victor Fedeli: This will bring us to page 4 of 26, PC doc. 3, 4 of 26.

Mr. John Kelly: Yes.

Mr. Victor Fedeli: In your estimation—you know, somewhere down there it talks about—this is a quote from Mullin's notes, I believe: "We said 'we know you have a contract and we know you would expect to keep the value of the contract.'"

In your opinion, who offered to make TransCanada whole? In your opinion now, knowing today, maybe not in May when you first suited up for this, but today, after all that has been said and done, how would TransCanada have felt they had a position that they would be made whole?

Mr. John Kelly: I can't speak to what TransCanada thought or why they thought it. All I can tell you is, based on the notes that I have, the indication was that there was a desire, if possible, to keep them whole in the sense of giving them an alternative plant.

Mr. Victor Fedeli: And who would that have come from?

Mr. John Kelly: My understanding is that any discussions in that regard came from instructions Mr. Steeve and Mr. Mullin would have received from the Premier and from the minister. That's what they told us.

Mr. Victor Fedeli: In Steeve and Mullin's negotiations with TransCanada, page 6 of 26, about halfway down: "Pourbaix said that they expected to be kept whole or close to whole." Here's where it goes on to say, "I remember thinking later that he was negotiating against himself"—obviously, rather than with them—"by saying 'close to whole.' Our answer was 'we hear you,' in the sense that 'yes, we know that's what your expectation is.'"

They were feeling pretty good at that moment in respect to—instead of TransCanada negotiating with Mullin and Steeve, they say he was negotiating against himself by first saying he wants to be kept whole and then offering "close to whole." Would you agree that is what that refers to or implies?

Mr. John Kelly: I'm not in a position to do so. I can only tell you that this is what we recorded him saying at the time, telling us what Mr. Pourbaix had said.

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Mr. Victor Fedeli: So who is telling this at the moment? Who is saying this?

Mr. John Kelly: I think this was our meeting with Mr. Mullin.

Mr. Victor Fedeli: Up at the top, it says, "DK notes of Mullin meeting."

Mr. John Kelly: That's Darrell Kloeze, one of our lawyers who was taking the notes.

Mr. Victor Fedeli: So he took the notes of Mullin talking to you and others. Can you just repeat that, then? After "Any discussion about what should be in the letter," just that—

Mr. John Kelly: I'm sorry, you lost me as to where you are.

Mr. Victor Fedeli: Still that same one that I was reading, about halfway down: "Any discussion about what should be in the letter?"

Mr. John Kelly: Oh, yes. Well, as you can indicate, and it speaks for itself, he said, "they expected to be kept whole or close to whole." And as you said, Mr. Mullin advised us at the time that he thought he was negotiating against himself by saying that.

Mr. Victor Fedeli: As opposed to negotiating with Mullin and Steeve at that moment.

Mr. John Kelly: If that's what he was doing.

Mr. Victor Fedeli: Okay.

Mr. John Kelly: And to be fair to them, he did say throughout these notes that they were not there to negotiate; they were there to listen.

Mr. Victor Fedeli: However, he says that he was negotiating against himself, as opposed to negotiating with Mullin and Steeve at that point?

Mr. John Kelly: Well, he didn't say that. He said, "I remember thinking later that he was negotiating against himself by saying 'close to whole.'" That's all he said.

Mr. Victor Fedeli: As opposed to with Mullin and Steeve at that point.

The next page, page 6 of 26: This is “Mullin to some excerpts from Breen’s notes,” it says. “Pourbaix says he wants to keep TC whole: yes, he said that.” Where would this have been said, then? Can you understand where that would have been said?

Mr. John Kelly: Can I just have your indulgence for a moment.

Mr. Victor Fedeli: About one, two, three, four—this is the fifth dash down, after “Refers”—

Mr. John Kelly: Yes. This is the October 1 meeting. It refers to it above. There were two meetings in particular: October 1 and October 5. This is apparently the October 1 meeting, where Mr. Pourbaix is alleged to have said—

Mr. Victor Fedeli: To who?

Mr. John Kelly: Well, to Mr. Mullin, and I believe Mr. Steeve was there with him. I don’t know if anyone else was.

Mr. Victor Fedeli: Okay. And what does it say? What does that sentence say?

Mr. John Kelly: It says, “Pourbaix says he wants to keep TC whole,” and the answer from Mr. Mullin was “yes, he said that.”

Mr. Victor Fedeli: So that’s Mr. Mullin saying, “yes, he said that”?

Mr. John Kelly: Yes.

Mr. Victor Fedeli: Okay. If you go to PC doc. 3, page 9 of 26, we’re at the Jamison Steeve testimony now, according to that page.

Mr. John Kelly: Just a point of clarification: There was no testimony, just taking notes.

Mr. Victor Fedeli: Oh, the notes. So 9 of 26 indicates it was Jamison Steeve; 11 of 26—this is about a third of the way down; it’d be the third reference, now. “Refers Steeve to excerpts from Breen notes,” the second dash: “if we have to back away from the contract, the money that you have already put into it becomes a political liability.” Would that have been Steeve saying that?

Mr. John Kelly: Yes, sir.

Mr. Victor Fedeli: Okay. Down three more dashes: “Five people, no public servants, will make the decision.” Do you know who the five are?

Mr. John Kelly: No.

Mr. Victor Fedeli: Okay. The next one: “political problem with political solution”—who’s saying that?

Mr. John Kelly: We were quoting to Mr. Steeve from Mr. Breen’s notes, and his response was, “that seems in line with what I might have said,” and goes on from there.

Mr. Victor Fedeli: So that would be Steeve who might have said that—

Mr. John Kelly: That was my understanding.

Mr. Victor Fedeli:—“political problem with political solution.”

The next sentence from the July 15: “presentation to political staff.” What does that imply?

Mr. John Kelly: I don’t know.

Mr. Victor Fedeli: Okay. That’s fair.

Flip a couple of pages to 13 of 26. We’re still at the Steeve meeting. We’re down one, two, three, four—the fifth dash after “Was there any discussion.” Is this Steeve saying, “they had rights under the RFP, they would want to be made whole or ‘close to whole’”?

Mr. John Kelly: Can I just have a moment to read above?

Mr. Victor Fedeli: Yes.

Mr. John Kelly: My understanding of this is that he is advising them that the contract’s not going to go forward, because they apparently “did not need the power,” is what he says here. Then we asked if there was any discussion about what TransCanada would do, and his response was that TransCanada had rights under the request for proposal, the contract, and “they would want to be made whole or ‘close to whole.’”

Mr. Victor Fedeli: Okay. The next page, 14 of 26, third dash: “They wanted to be kept whole or close to whole.” Again, who is saying that?

Mr. John Kelly: Your indulgence for a moment.

My understanding is that these are statements being made to Mr. Steeve by the people from TransCanada. It looks as if they’re talking about some difficulties in the US with public pushback on their projects and the fact that the contract was being cancelled wasn’t a shock. They didn’t want to resort to legal action—they had a long history of investing in Ontario—but they wanted to be kept whole or close to whole.

Mr. Victor Fedeli: Okay. Page 15 of 26, the second line in, “We were told that TC received assurances that they would receive the value of the contract, and TC would lay low. They wanted a letter from us.” Again, is that Steeve?

Mr. John Kelly: I understand it is, being told by TransCanada that they were given assurances they’d receive the value of the contract.

Mr. Victor Fedeli: Page 17 of 26: Does this acknowledge that this is now the Ben Chin conversation?

Mr. John Kelly: Yes, these are the notes from Ben Chin’s conversation.

Mr. Victor Fedeli: Okay. Page 18 of 26—some of this is old news to us in the room here, but I do need to hear it from you. Page 18 of 26, I think we already covered this, but this is now Ben Chin corroborating the same discussion. It says, “Duguid gave them a political spiel. TC apparently blew a gasket and said ‘we got a deal with the PO, go talk to them.’” Is that Ben Chin referencing this?

Mr. John Kelly: If I could just have your indulgence for a minute.

I think he indicates in the first bulleted paragraph that we said to him, “We thought you might be the person who spoke to” Mr. “Steeve.”

Mr. Victor Fedeli: Yes.

Mr. John Kelly: He said, “No, but I do know that story second-hand, Breen told me later on,” so I’m not sure that he knew it at the time.

Mr. Victor Fedeli: That’s fair. Down at the bottom of page 18, talking about article 14 of the contract, it says,

“Mike Lyle” OPA “was having trouble with the ‘kept whole’ language.” Do you know what Mike’s difficulty with that was?

Mr. John Kelly: I didn’t speak to him directly about that.

Mr. Victor Fedeli: Do you know now?

Mr. John Kelly: I have a belief.

Mr. Victor Fedeli: What is your belief? What is your—

Mr. John Kelly: I think the problem is that article 14, of course, appears on its face to prohibit recovery of net profits.

Mr. Victor Fedeli: So why would you think they were instructed to recover net profits if article 14 doesn’t instruct them to do so—

Mr. John Kelly: Well, I have no knowledge.

Mr. Victor Fedeli: —or instructs opposite of that?

Mr. John Kelly: I have no knowledge of that.

Mr. Victor Fedeli: So article 14 clearly indicates that they don’t have any rights to those profits?

Mr. John Kelly: On its face, that’s what it says. I know that TransCanada didn’t accept that position, but that’s what it says.

Mr. Victor Fedeli: And Mike Lyle, with the OPA, is concerned that when they write that letter, they will tie OPA’s hands and commit them to those profits; is that correct?

Mr. John Kelly: I have no idea. I didn’t speak to him about—

Mr. Victor Fedeli: Have you ever seen the letter?

Mr. John Kelly: Which letter? Sorry.

Mr. Victor Fedeli: The October letter that OPA actually issued.

Mr. John Kelly: The October 7 letter?

Mr. Victor Fedeli: Yes.

Mr. John Kelly: Yes, I have.

Mr. Victor Fedeli: And does it commit to those extra profits?

Mr. John Kelly: It doesn’t in fact address it that way. It says that they understand that they will receive the anticipated financial value of the contract, whatever that is.

Mr. Victor Fedeli: Is that in the spirit of article 14 or opposite of that?

Mr. John Kelly: Well, it appears that a government decision was made with respect to the resolution of this problem. I can’t speak to why that decision was made. Article 14 says what it says.

Mr. Victor Fedeli: I’m sorry?

Mr. John Kelly: Article 14 says what it says on its face.

Mr. Victor Fedeli: So article 14 says, “Not necessarily”; the government says, “Do it”; and OPA put it in the letter. Is that a brief summary?

Mr. John Kelly: Article 14 simply talks about whether they’re entitled to loss of profits in the event of a breach of the contract, and after that—

Mr. Victor Fedeli: And what was the summation of article 14?

Mr. John Kelly: It essentially says that if there is a breach of the contract, neither party is entitled to, among other things, loss of net profit.

Mr. Victor Fedeli: So article 14 says—

The Chair (Mr. Shafiq Qaadri): One minute.

Mr. Victor Fedeli: Thank you, Chair.

Article 14 says that in the event the contract doesn’t proceed, neither party is entitled—

Mr. John Kelly: To net loss of profits.

Mr. Victor Fedeli: —to net loss of profits. The government instructs OPA to make the offer that does indeed give those profits to TransCanada—not necessarily profits. What’s the actual wording?

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Mr. John Kelly: It’s “the anticipated financial value.”

Mr. Victor Fedeli: Anticipated financial value. Okay. Page 19 of 26: We’re now at Craig MacLennan.

Mr. John Kelly: Yes, sir.

Mr. Victor Fedeli: Halfway down, the little check mark—not the big check mark; the little one—“we are not lawyers, we did not realize that we were making a significant jump from the contract.”

Mr. John Kelly: Yes, sir.

Mr. Victor Fedeli: Is that referring at all to this as well?

Mr. John Kelly: Yes. At the top of the page, we asked him, “How did we get from the wording in the contract, that assumes no damages?”—

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Fedeli.

Mr. Victor Fedeli: Thank you very much, Mr. Kelly. We’ll be back.

The Chair (Mr. Shafiq Qaadri): To Mr. Tabuns of the NDP, 20 minutes—or 10 minutes. Sorry.

Mr. Peter Tabuns: Thank you. Actually, do you want to just finish your answer there?

Mr. John Kelly: I was just going to say that we asked the question, “How did we get from the wording in the contract, that assumes no damages are available, to the wording in the termination letter?” And this was a part of his response.

Mr. Peter Tabuns: And that is, “we are not lawyers, we did not realize that we were making a significant jump from the contract”?

Mr. John Kelly: That’s correct.

Mr. Peter Tabuns: When the word “we” is used, we’re talking about the Premier’s office staff?

Mr. John Kelly: Mr. MacLennan is with the Minister of Energy.

Mr. Peter Tabuns: Yes.

Mr. John Kelly: He’s chief of staff.

Mr. Peter Tabuns: Yes, he seemed to be working with the group of Jamison Steeve, Sean Mullin, Ben Chin.

Mr. John Kelly: My only understanding was he was the chief of staff for the Minister of Energy, and we met with him separately.

Mr. Peter Tabuns: On that same page, Craig MacLennan is quoted as saying, “decision made to offer

up in the letter some language that would satisfy” TransCanada “and stave off a lawsuit.”

Mr. John Kelly: I’m just trying to find it.

Mr. Peter Tabuns: That’s the large check mark that Mr.—

Mr. John Kelly: Yes, that’s what he said.

Mr. Peter Tabuns: So effectively at this point, even if they had not previously said, “We’ll keep you whole,” when they were giving instructions on writing the letter to the OPA, they abandoned a very big chunk of the contract that would have protected the OPA and Ontario’s interest.

Mr. John Kelly: I can’t speak to that from the wording of this statement that he made.

Mr. Peter Tabuns: The only thing we can conclude from this is “we are not lawyers, we did not realize that we were making a significant jump from the contract.”

Mr. John Kelly: That’s what he said.

Mr. Peter Tabuns: Okay. Going back to the filed documents—

Mr. John Kelly: Your documents?

Mr. Peter Tabuns: Ours, yes. Again, this ground of Jamison Steeve’s notes. It’s document 9, then go through to the—

Mr. John Kelly: That’s Craig MacLennan, according to mine.

Mr. Peter Tabuns: I’m sorry?

Mr. John Kelly: The “9” at the top right corner says “Craig MacLennan.” I thought you wanted—

Mr. Peter Tabuns: Yes, I’m sorry. It does, but there are all of the interview notes in here—

Mr. John Kelly: I see.

Mr. Peter Tabuns: —and if you go through the interview notes, you will come to the meeting with Jamison Steeve.

Mr. John Kelly: I have it.

Mr. Peter Tabuns: Page 7. Oh, no, I’m sorry. Page 6 first.

Mr. John Kelly: Yes.

Mr. Peter Tabuns: A third up from the bottom: “Did any of you say ‘yes, we will keep you whole?’” Jamison Steeve here is saying, “I can’t believe either Sean Mullin or I said ‘sure we will keep you whole.’” Do you see that?

Mr. John Kelly: I do.

Mr. Peter Tabuns: The next page—effectively, you’re going back again and asking them the same question, or whoever was doing—BK was perhaps asking the questions.

Mr. John Kelly: No, I’m responsible.

Mr. Peter Tabuns: You’re responsible. Do you sometimes go back and ask the same question a few times to see what kinds of answers you get?

Mr. John Kelly: I have done that from time to time, sir.

Mr. Peter Tabuns: You have. And you may have done it on this occasion. Sort of mid-page: “As far as giving them an assurance that they would be kept whole?”

“I remember Alex Pourbaix saying it”—I assume this is your notes of Jamison Steeve’s words—“I might have repeated it, an acknowledgment but they might have thought I had direction.”

Mr. John Kelly: Yes.

Mr. Peter Tabuns: In some ways, I see this as, “Oh, maybe I did say ‘you will be kept whole.’” How did you interpret his comment?

Mr. John Kelly: I, at the time, didn’t interpret it at all. I was just recording what he was saying to us. Subsequently, of course, more information became available. As you can see from below, he also says, “We would try to negotiate alternative sites, and nobody wants to litigate.”

Mr. Peter Tabuns: Correct.

Mr. John Kelly: So again, that assisted my impression on the balance of the documentation that an effort was going to be made to try to find an alternative site that would be of equivalent value.

Mr. Peter Tabuns: When I look at the note that was just brought up about Ben Chin, it’s pretty clear that where the chief of staff to the Minister of Energy was going and where the principal private secretary of the Premier was going was, “We’re going to give you a deal that makes up for cancellation of this one.”

Mr. John Kelly: Well, in fairness, Mr. MacLennan, in his notes, indicated he didn’t think that they were going to get a contract of equivalent value. He actually said that the Cambridge plant was not the same value as the Oakville one, but he understood that that might be acceptable to TransCanada. That was his evidence—his statement to us, pardon me.

Mr. Peter Tabuns: Although, in the end, the language that was given in the letter to TCE, TransCanada, by the Ontario Power Authority set the stage for TransCanada to say, “We are going to be kept whole.”

Mr. John Kelly: That was their position, yes.

Mr. Peter Tabuns: In document 11—this is your email to a number of people in justice. The main paragraph, second line: “I think it could be argued that the govt. offered to make TCE whole when it terminated the Oakville plant ... by finding another gas plant from which it could make the profits and in return, TCE promised not to sue, issue a press release or otherwise embarrass the govt.” On that basis, do you believe the government offered to make TCE whole?

Mr. John Kelly: No. What we were talking about was a discrete legal issue, and the legal issue was whether or not, as a result of the alleged conversations, it was possible to argue that a second contract had been entered into—in other words, that the first one had gone by the wayside and a second one came up. I, of course, came up with this brilliant concept of a second contract, and I was promptly put in my place by the people downstairs who I mentioned before, who actually know what they’re talking about. So they dealt with that in the opinion that has been sent to the committee.

Mr. Peter Tabuns: But when you say “could be argued,” would that be language that would indicate

before a judge that the other side would have a strong position to argue?

Mr. John Kelly: No. This is something that I was thinking might be available to the government side with respect to a second contract. Apparently, I was wrong.

Mr. Peter Tabuns: Okay. In the DK notes, Mr. Kloeze, document 9, page 8 of meeting with Steeve—

Mr. John Kelly: I'm just looking for the document. Oh, I see, Steeve, yes. Page 8, did you say?

Mr. Peter Tabuns: Page 8 of the Jamison Steeve notes.

Mr. John Kelly: All right. Yes, sir?

Mr. Peter Tabuns: Steeve says that he was unable to make a financial offer.

Mr. John Kelly: Can you just direct me to—

Mr. Peter Tabuns: “Did you make an offer of \$650 million?”

“no, that would have required approval from the Premier.”

Mr. John Kelly: Yes.

Mr. Peter Tabuns: At the same time, yesterday, Michael Killeavy, senior OPA official, indicated Craig MacLennan was instructing the OPA to make two offers, one on March 28, 2011, and one on April 21, 2011. Does it make sense to you that Craig MacLennan was getting the OPA to make these offers; Jamison Steeve didn't seem to feel he had authority to do this?

Mr. John Kelly: I actually had no knowledge of any of those matters, I'm afraid.

Mr. Peter Tabuns: None?

Mr. John Kelly: No.

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Mr. Peter Tabuns: Okay. Last section, document 7: These are the first two pages of the arbitration agreement between TransCanada Enterprises and the government of Ontario.

Mr. John Kelly: Yes, sir.

Mr. Peter Tabuns: The third “whereas”: “Whereas respondents have agreed have agreed to pay TCE its reasonable damages arising from the termination of the CES contract, including the anticipated financial value of the CES contract”—effectively, this is saying, “We're making you whole,” is it not?

Mr. John Kelly: No, it says what it says on the face of the document. It would have to be determined what the anticipated financial value was, first of all, and then a calculation would be done by experts as to how much that money really was. Then, an arbitrator would have to decide between two competing views as to what that amount was. There was considerable uncertainty at the time I was last involved as to how much the loss was.

Mr. Peter Tabuns: But from the beginning, one of the key lines has been “the financial value of the CES contract.” It's recognized that that's what is going to come to TransCanada.

Mr. John Kelly: The anticipated financial value.

Mr. Peter Tabuns: Yes.

Then, in the sixth and seventh paragraphs—

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Tabuns. That's 10 minutes; sorry for not giving you the one-minute warning. Mr. Delaney.

Mr. Bob Delaney: Just to follow up on some of the earlier questions, most of them by Mr. Tabuns, pertaining to a document preservation notice: Do you have any personal knowledge of whether a preservation notice was sent to the people in question?

Mr. John Kelly: No.

Mr. Bob Delaney: Did you see a document preservation notice?

Mr. John Kelly: I don't recall that we did, because we then subsequently got involved in the extensive negotiations with respect to arbitration.

Mr. Bob Delaney: Okay, so would it be fair to categorize conversations around a preservation notice as being hypothetical?

Mr. John Kelly: I don't think that they were hypothetical. I think that the intention was that if this matter was going to go to litigation, we were going to be preserving documents, and we'd also have to preserve them for the purpose of arbitration. But as it turns out, of course, the arbitration was only on the issue of what the damages were.

Mr. Bob Delaney: Okay. In the memorandum written by the Crown Law Office, it talks about different approaches to interpret article 14. You testified earlier that TCE, for instance, did not interpret it in the same way as the Ontario Power Authority. Would it be fair to say that such a clause could be interpreted differently by various parties?

Mr. John Kelly: I didn't have the opportunity to find out what TCE's interpretation of article 14 was, or whether they were going to take the position that it was somehow waived altogether and therefore not applicable, because we got into the arbitration, which didn't involve article 14; it just involved the issue of damages.

Mr. Bob Delaney: Okay. I believe Mrs. Albanese has a few questions.

The Chair (Mr. Shafiq Qaadri): Mrs. Albanese?

Mrs. Laura Albanese: I want to just ask a few questions on the topic of commercially sensitive information. As you may be aware, in May 2012, Mr. Leone and the estimates committee asked for all correspondence within a specific time frame in the Ministry of Energy and the OPA, related both to the Oakville and Mississauga plants. At the time that the motion was passed, complex and sensitive negotiations were ongoing with both companies.

I would like to ask you: If the OPA's and the province's negotiation position was prejudiced because the company had access to confidential and privileged information, what would that have meant for the taxpayers of Ontario?

Mr. John Kelly: I can't speak to what it would have meant for the taxpayers. I can only tell you that at the time I was involved in the matter, when we were under way in the arbitration, the parties had agreed in the arbitration to keep all information in the arbitration

confidential. One of the reasons was that extremely sensitive financial information from TransCanada, and possibly from the Ontario Power Authority, would be exchanged in this arbitration in order to come to a determination as to what the value was, if any, of the loss suffered by TransCanada.

If that information became public, so that the competitors of TransCanada had access to it, it's conceivable that it could have done great damage to the corporation.

Mrs. Laura Albanese: Okay. We asked the same question to the former secretary of cabinet, Shelly Jamieson, when she testified. She said, "It would have harmed the negotiations for sure. Nobody likes to ... have all their paper about what they're talking about out before the conclusion of the deal. It's just not good practice in terms of negotiating a deal, and sometimes in our bid to publicly disclose things, we actually hurt ourselves. So I would have been concerned about that in any negotiations. We also asked the Auditor General, and he responded that it's like in poker: You don't show the people around the table your cards. Would you agree with those comments?"

Mr. John Kelly: The position that's taken in an arbitration is that the parties agree to have an issue between them decided by an arbitrator, and in my experience, it's most often based on production of documents and expert evidence as to damage. All of these sensitive documents would be on the table in the arbitration, but with the knowledge that they wouldn't be exposed to public review because, for example, as I understood it, the way in which TransCanada calculates its profits was contained in that information.

Mrs. Laura Albanese: So in effect, it would have been a significant risk to the taxpayer if those documents had been made public before the two deals were finalized.

Mr. John Kelly: I certainly think that was a concern that was expressed by a number of people at the time.

Mrs. Laura Albanese: Generally speaking, as a lawyer, can you tell the committee what you think the importance of solicitor-client privilege is?

Mr. John Kelly: How much time do you have?

The Chair (Mr. Shafiq Qadri): Four minutes.

Mr. John Kelly: As a street lawyer, I must tell you that I gained a few years in my life when I heard about the auditor and the committee on estimates and this august body. Solicitors are not in the habit of speaking about their clients' affairs to anybody, so to learn that there was this power to produce these documents before this committee was a revelation, to say the least.

We in the profession think that the preservation of solicitor-client privilege is essential to the ability to communicate with your client and act in its or her or his best interests.

Mrs. Laura Albanese: Thank you. I guess that ends my questions, unless Mr. Delaney has any further ones.

The Chair (Mr. Shafiq Qadri): Mr. Delaney?

Mr. Bob Delaney: Just something, Chair, that I'd like to comment on. Mr. Fedeli had questioned the witness

about what Mr. Duguid knew as of October 5 regarding the cancellation of the Oakville plant. Mr. Duguid, in fact, had testified before the committee. He and his office were absolutely part of the decision and the ongoing announcement, but what he testified is that he had worked closely with the Premier's office on that file. When he described why he stayed so—

Mr. John Yakabuski: Is there a question here, Mr. Delaney?

Mr. Bob Delaney: I'll get to it, thanks, and I don't need any help.

When he described why he had stayed so high-level during the October 5 meeting, Minister Duguid said, "I, as minister, meeting with the CEO of TransCanada ... was not at liberty to disclose the fact that, 48 hours later, we were about to make an announcement. That's not to say that the CEO of TransCanada did not have some information that he may have obtained or may have received from the Premier's office, and that would have been fine. But as minister, I did not want to get on to that slippery slope of giving information to the CEO before it would be appropriate."

Chair, I thought that was appropriate to put on the record with regard to some of the earlier comments made. We are done with our time. Thank you.

The Chair (Mr. Shafiq Qadri): Thank you, Mr. Delaney, and thanks to you, Mr. Yakabuski, for your continued help in this committee in its deliberations.

Mr. Fedeli.

Mr. Victor Fedeli: Thank you, Chair; much appreciated. I always enjoy a long tale in revisionist history myself, Mr. Kelly, but let's stick to the facts.

We're still on PC doc. 3. I'm now on page 26 of 26. I was finishing up with the Ben Chin notes that DK took.

Mr. John Kelly: Yes, sir, I have it.

Mr. Victor Fedeli: Halfway down page 26: "Do you know what the words 'kept whole' were supposed to mean? ...

"I was dealing mostly with Sean Mullin from the PO, and Jamison Steeve to some extent

"Both Jamison and Sean told me about their conversation with Alex Pourbaix, and Pourbaix wanted to be kept whole or close to whole."

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Let's jump right down to the bottom of that page. I'm reading from DK's notes. "We have some understanding that there were meetings on Oct. 1 and 5, and TC"—TransCanada—"saying 'you promised to keep us whole.' Did Jamison or Sean say to you what their response was?"

The answer is:

"—my understanding was that they agreed" TransCanada "should be kept whole."

The next sentence was:

"—I was told that by Sean Mullin."

Is that an accurate reading of what is in this record?

Mr. John Kelly: To the best of my knowledge.

Mr. Victor Fedeli: Thank you. PC doc. 4.

Mr. John Kelly: I have it.

Mr. Victor Fedeli: In bold it says, “Page 3 paragraph 6 ‘—that he may have said words to the effect that we (the government) will try to keep you whole—”

Was that a change? Is what is in bold a change?

Mr. John Kelly: What it is is there was a chronology. I think it’s produced to the committee. It may be in these documents somewhere. I was commenting on the draft of the chronology from my memory of what was actually said. We all tried to go through our notes and determine the exact wording. But I was just giving him my observations.

Mr. Victor Fedeli: PC doc. 5, there’s that area, (1), that talks about the OPA not directly engaging in direct discussions with TCE prior to October 5. Then it says, “Therefore, the ‘October negotiations’ have to be broken down into two stages: (1) the two meetings that the PO had with TCE on October 1 and 5, and whatever agreement was reached there, and then (2) the intense negotiations around the wording of the termination letter between OPA and TCE between October 5 and 7, which crystallized the agreement reached with the” Premier’s office “and resulted in the termination letter.”

The next paragraph, second sentence: “The ‘made whole’ language comes from meetings between ... Pourbaix of TCE and Jamison Steeve of the” Premier’s office “on October ... 5, and Steeve does acknowledge that he may have come close to making the representation that TCE would be ‘made whole.’”

In that first sentence you call them “October negotiations.”

Mr. John Kelly: Actually, I don’t. This is Mr. Kloeze.

Mr. Victor Fedeli: This is Mr. Kloeze, the gentleman who took the notes.

Mr. John Kelly: Correct.

Mr. Victor Fedeli: Is it his interpretation that there were indeed negotiations taking place?

Mr. John Kelly: I don’t know that that was his opinion. He may have been repeating what he was told or what he understood he was told—

Mr. Victor Fedeli: By whom?

Mr. John Kelly: At the meetings between Steeve, Mullin and the others from TransCanada.

Mr. Victor Fedeli: That the “October negotiations”—he’s referring to the meetings that the Premier’s office had with TCE, and the negotiations of the latter, then.

Mr. John Kelly: Well, as he says, the OPA didn’t directly engage in discussions with TCE before October 5. Between October 5 and October 7, the record indicates that there were extensive negotiations leading up to the final letter of October—

Mr. Victor Fedeli: And before October 5, it was negotiations with the Premier’s office, the representatives from the Premier’s office and TCE? Is that what he’s referring to?

Mr. John Kelly: If there were negotiations, yes.

Mr. Victor Fedeli: Okay. Doc. 6, the fourth paragraph—this is from you, now: “I think it could be argued that the govt. offered to make TCE whole when it terminated the Oakville plant (the ‘make whole’ being

understood to be the net profits over the life of the contract).” Is that your understanding, then? You felt that way on July 7? You’d been there a couple of months by now.

Mr. John Kelly: No. What I said was, assuming that this is the scenario that unfolds, that somebody offered to make whole, my understanding, as I’ve said before here, was that that was in the sense of providing another plant of equivalent value.

Mr. Victor Fedeli: The last sentence: “In any event, it probably doesn’t matter as I agree the government induced the breach of the TCE contract with OPA.” What do you mean by that?

Mr. John Kelly: Well, my understanding of the facts was that the Premier’s office indicated through Mr. Mullin and Mr. Steeve at some time between July 15 and October 5, most likely October 1 from what I’ve read, that the contract was not going to go ahead. So as a matter of law, there is a suggestion that the government—as opposed to the OPA, who was a party to the contract—by actions that the government took, induced the breach of the contract between TCE and OPA.

Mr. Victor Fedeli: On doc. 8, we’re now getting into a little bit about—how’s my time, Chair?

The Chair (Mr. Shafiq Qaadri): About four minutes left.

Mr. Victor Fedeli: Let’s just jump to doc. 9, if you don’t mind. I want to get into the money. You’re copied on this letter from Ms. Wilson?

Mr. John Kelly: I am.

Mr. Victor Fedeli: It says, “When you interview your witness tomorrow morning, can you try and find out if an offer of \$680 million was made to other side, or if any monetary offer at all was made.”

Did you determine that?

Mr. John Kelly: I don’t remember right now. In one of the interviews with Mr. Mullin or Mr. Steeve, that question was asked, and the answer was no. No such offer was made. It’s in your materials here. I just haven’t found it right—

Mr. Victor Fedeli: Okay. Can you confirm that Mullin ever turned over his notes of his meetings with TCE to the Attorney General, as was requested?

Mr. John Kelly: As it turns out, he did. We thought, in the materials that we have, that we had Jamison Steeve’s notes. It now appears that certain of those pages are in fact the notes of Sean Mullin. The reason we didn’t know is, they didn’t come in a separate package.

Mr. Victor Fedeli: Do we have those?

Mr. John Kelly: You do, in the black binder that was sent to you—to the committee. Under 1(b)—

Mr. Victor Fedeli: I’m sorry?

Mr. John Kelly: Under 1(b), which is—

Mr. Victor Fedeli: Oh, we have it as a CD.

Mr. John Kelly: You have it?

Mr. Victor Fedeli: Yes.

Mr. John Kelly: The second page—there are numbers 1, 2, 3, 4 at the top, handwritten notes. Those are Mr.

Mullin's, apparently. Also, at tab D, as in "David," the handwritten notes are apparently those of Mr. Mullin.

Mr. Victor Fedeli: Okay. On doc. 11—it is from a Dermot Muir.

Mr. John Kelly: If I could just have your indulgence for a moment. I have it, yes.

Mr. Victor Fedeli: You're included on that. It talks about attached is "a new draft arbitration agreement in which the OPA is a party." Is this anywhere where the additional monies are offered? This is around July 28.

Mr. John Kelly: No. There were various versions of the arbitration agreement. We all made comments on what's appropriate in terms of putting it in the agreement, but there was nothing with respect to that, no.

The Chair (Mr. Shafiq Qaadri): One minute.

Mr. Victor Fedeli: Thank you.

On doc. 11, page 2, this is from David Livingston: "Further to our conversation on Vapour a week ago"—you do know what Project Vapour is, I presume.

Mr. John Kelly: I actually didn't at the time, but—

Mr. Victor Fedeli: So he's sending you—did you ask him what he meant by that?

Mr. John Kelly: No, I didn't. I just assumed, because he was sending this to me, it had something to do with the Oakville gas plant.

Mr. Victor Fedeli: Okay. I'm trying to get to that \$680-million offer. You're not familiar with that offer whatsoever?

Mr. John Kelly: No. The first time I ever heard it was the reference by the assistant deputy to request that this be asked about. She did say in her memo that her understanding was that there was no such offer, but she wanted to cover off to make the inquiry.

Mr. Victor Fedeli: Had you heard of the \$712-million offer before?

Mr. John Kelly: Only by reading material here. Certainly I never heard anyone—

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Fedeli, and thanks to you, Mr. Kelly, for your testimony and your presence before the committee.

There is an issue before the committee with reference to more documents to be kept in confidence and so on. I will invite our able Clerk, Ms. Pomanski, to elaborate.

The Clerk of the Committee (Ms. Tamara Pomanski): We had received a bit more documents from cabinet office. It's just in a sealed envelope. It's with respect—again, it was a request to make it confidential.

In terms of it, I can just let you know exactly what it is. It's official records of cabinet meetings, within the period specified by Mr. Fedeli's motion of April 23, at which the Oakville and Mississauga gas plants were discussed, including full, unredacted, annotated agendas and summaries of decisions.

However, the majority of the information outlined in these documents is not related in any way to the Oakville and Mississauga decisions, as per Cabinet Office.

I have that little envelope in my office, waiting for direction.

The Chair (Mr. Shafiq Qaadri): I presume, before the committee, a similar decision: What do we do with the documents? If you want them—do they have to sign a receipt for these things?

The Clerk of the Committee (Ms. Tamara Pomanski): Whatever they want to do.

The Chair (Mr. Shafiq Qaadri): Yes. Anyway, there's a whole protocol. We don't have to decide that immediately. We still have a meeting, as you know, next week.

Yes?

Mr. Victor Fedeli: Chair, how many pages have we got?

The Clerk of the Committee (Ms. Tamara Pomanski): It's a little envelope like this. It's not that big.

Mr. Victor Fedeli: So 30 or 40 pages?

The Clerk of the Committee (Ms. Tamara Pomanski): Yes. It's not that big.

The Chair (Mr. Shafiq Qaadri): I'll let that sit with the committee until next week? Yes? All right. Therefore, committee is adjourned until next week.

The committee adjourned at 1000.

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