

To inquire into . . .

(g) all other matters related to the establishment and operation of the Mine which the Commissioner considers relevant to the occurrence

The Westray project was controversial from the outset. Although various companies had been interested in the area, it was Curragh Resources Inc. (Curragh) that eventually put together the pieces, incorporated Westray Coal in November 1987, and began underground development. The proposed mine developed amid firm opposition from the bureaucracy and unwavering support from the provincial government. As development proceeded, it was the subject of continual debate and criticism in the legislature and in the media. It also proceeded with an uncompromising and abusive Curragh negotiator at the helm.¹ For these reasons, it is not surprising that the negotiations for financial assistance between Curragh and the federal and provincial governments proved to be arduous and taxing. In the end, the strong and single-minded political backing for the project overpowered the opposition, and Westray received tremendous financial support from the public sector. Curragh officials managed to secure a federal loan guarantee of approximately \$85 million, a direct contribution against interest, a \$12 million provincial loan, an \$8 million interim loan, and a generous provincial take-or-pay agreement.²

The Pictou Coalfield: The Feasibility Studies

The Pictou coalfield has been the focus of considerable interest and research over the years from both private companies and the Department of Natural Resources.³ Various studies have explored the feasibility of mining the Foord and the surrounding seams and, although it is not necessary to the Terms of Reference of this Inquiry to set out in detail the earlier historical interest in the seam as a resource, we will give some consideration to the studies conducted during the 1980s because the 1988 and 1989 Kilborn studies submitted by Westray to the provincial government as its planning documents relied on much of this data and analysis.

Brinco Mining Limited (Brinco) expressed an interest in Nova Scotia coal deposits in early 1980. In July of that year, Brinco obtained a lease option from the Department of Mines and Energy to explore the pertinent ground – 6,500 acres (2,630 ha) in Pictou County at Westville, which

¹ **Comment** It seems that Curragh chief executive officer Clifford Frame's sense of committed provincial government support encouraged him to adopt an intractable and abrasive stance – as will become evident later.

² "Take or pay" is a means of reducing financial risk for the supplier of a commodity. For example, where an energy supplier (e.g., a coal producer) is required to invest substantial money to satisfy the demands of a customer (e.g., a power company), the supplier will get a take-or-pay agreement from the customer to ensure a reasonable return. The meaning in the Westray context will become clear in this chapter.

³ See Chapter 1, History of Coal in Pictou County, and Chapter 11, Department of Natural Resources, for a review of the geological background.

included the Acadia and the Scott seams – and the company completed a preliminary feasibility study of the area.⁴ Brinco, being fully committed to other development projects at the time, sought a partner for a joint venture, and Suncor Inc. (Suncor) began its involvement in the project. In 1981, Brinco and Suncor were jointly granted a special licence to search and prospect for coal lying deeper than 400 feet (120 m) in the Acadia and Scott seams. Their rights in accordance with the special licence were later expanded to include the Third and the Fourth seams.⁵ Their interest focused on the deep coal under the town of Stellarton and the extension from the Westville coal seams.

In August 1982, Brinco stopped contributing funds, and Suncor acquired the majority interest in the exploration project. At the time, the Department of Mines and Energy was reviewing an appraisal conducted for Suncor by Associated Mining Consultants Limited (AMCL) that indicated a need for further geological and exploratory work. Accordingly, Suncor requested and received an extension of its exploration licence to collect further geological data.

In May 1986, Suncor obtained Special Licence 2/86, which was essentially a renewal and extension of three previous licences held by Suncor. Special Licence 2/86 authorized Suncor to search and prospect for coal lying deeper than 400 feet below the surface in all seams in an area of approximately 14,640 acres (5,925 ha). The licence extended to the eastern limit of the Pictou coalfield and covered all potentially significant deep exploration points. It was for a term of one year, and was renewable for four additional one-year terms by application to the Governor in Council.⁶

Suncor commissioned a series of research and feasibility studies in the area during the mid-1980s. During this period, greater emphasis was placed on the mineability of the Foord seam. Between 1984 and 1986, Golder Associates completed various reports for Suncor, including a review of geotechnical aspects, rock mechanics, and access slope development. Dr Miklos Salamon, the Inquiry's geotechnical expert, concluded that Golder's reviews were the last substantive geotechnical

⁴ Brinco Mining Limited, Acadia Coal Project, Project Status Report, March 1981 (Inquiry file, NSDNR 1). "Inquiry files" refer to material available to the Inquiry but not entered into evidence. For future reference, readers are directed to the Nova Scotia government archives.

⁵ See Special Licence 5/81 (Inquiry file, NSDNR 38). Special Licence 5/81 appears to have dropped the requirement that the coal lie deeper than 400 feet vertical. In a memorandum dated 20 November 1981 (NSDNR 38), Ed Bain, manager of coal development for the provincial government, explained to Wynne Potter, assistant deputy minister, the result of having removed such a clause: companies could access coal between the outcrop and 400 feet in order to bring access slopes to surface; and all coal, including surface coal, was open to the companies. Bain recommended that the wording be changed, so that the companies would not have the right automatically to any potential surface coal reserves on those seams. In May 1982, Special Licence 5/81 was renewed. This version specified that the licence related to coal lying deeper than 400 feet, with reasonable access to coal below 400 feet and extraction of coal above 400 feet that was incidental to the development of the access.

⁶ Norwest Resource Consultants Ltd., "Suncor Inc. Pictou County Coal Project Feasibility Study, volume 2: Mining and Processing" (Calgary 1986) (Exhibit 8, s. 1.6.2).

studies to be done.⁷ Dames & Moore carried out a number of reviews for Suncor in 1986. These reviews outlined potential problems with using a single-entry longwall face, which apparently was the production method being considered by Suncor at the time.

In 1985, Norwest Resource Consultants Ltd (Norwest) completed the “Acadia Coal Project Preliminary Comprehensive Feasibility Study,” supplemented in 1986 by the “Pictou County Coal Project Feasibility Study.” Adrian Golbey, a mine development expert for the Inquiry, reviewed and commented on the 1986 study. He testified that this report was indeed at the level of a feasibility study: it contained an element of marketing, a review of geotechnical matters, an underground mine layout, ventilation calculations, production levels, support mechanisms, and a mining method.⁸ Although Norwest incorporated the work of other consultants in its report, it in effect conducted the final analysis. The report concluded that a mine in the area would be technically feasible, and it recommended a combined mining method: shortwall panels using longwall equipment and room-and-pillar mining.

Meanwhile, declining world oil prices and losses incurred in the development of its tar sands project caused Suncor to close its entire coal department. Suncor began to seek potential buyers for the project, which included the various studies conducted to date, the provincial exploration licence for the area, and the potential for a contract with Nova Scotia Power Corporation (NS Power).⁹

In February 1987, Suncor entered into an option agreement with Placer Development Limited (Placer), which commissioned a further study to be conducted by AMCL.¹⁰ This study was in effect a review of the information gathered by various consultants to date. Golbey believed that it was at the feasibility study level, although it “may not have all the chapters in it.”¹¹ It recommended the establishment of two rock tunnels and a room-and-pillar mine, with partial pillar extraction (de-pillaring) as the main technique of coal extraction. Such an approach was flexible and could accommodate geological disturbances.¹² AMCL concluded that a properly planned and executed ventilation system could cope with expected volumes of methane.¹³ According to Golbey, AMCL’s review was similar to the Norwest plan, except it called for room-and-pillar mining throughout.¹⁴

⁷ Hearing transcript, vol. 14, p. 2373.

⁸ Hearing transcript, vol. 3, pp. 501–02.

⁹ See the following section for a review of the evolution of NS Power’s involvement.

¹⁰ Placer Development Limited, “Pictou Project Feasibility Study” (Vancouver, 1987) (Exhibits 10, 11).

¹¹ Hearing transcript, vol. 3, p. 515.

¹² Exhibit 10.2, pp. 1–2.

¹³ Exhibit 10.1, p. 139.

¹⁴ Hearing transcript, vol. 3, pp. 519–20.

Salamon thought that the Placer report was overly optimistic in some respects. Although it assumed that an overall extraction of 36 per cent of the coal could be achieved, the physical conditions of the potential mine and the planning parameters – great mining depth, excessive working height, a weak and friable (easily crumbled) roof, wide entries, a steep seam, and faulted ground – were, in fact, quite adverse. Salamon concluded that “it is more than likely that the room-and-pillar method as proposed will not be workable under some of the more demanding conditions at Westray.”¹⁵ Placer concluded that the project was viable, and decided to proceed with it.

Shortly after completing this study, Placer amalgamated with Dome, and the board of directors of the new company decided not to go ahead with the Pictou project. Having lost Placer as a potential successor, Suncor again sought a buyer for the project. There is no evidence of any further planning or study having been conducted between Placer’s 1987 feasibility study and the Kilborn study commissioned by Westray Coal in 1988.¹⁶ In fact, as Salamon pointed out to the Inquiry, the Kilborn study largely adopted the conclusions and layout of the Placer report.¹⁷ In short, all the studies commissioned on the project assumed that, while it was technically feasible to mine the seam, the steepness and thickness of the seam, the weak roof strata, and the number of faults would pose particular problems for safe mining.

Although several studies had been made, Salamon expressed some reservation about their definitive nature. He questioned whether there was any continuity of thinking from one study to the next, since a number of different consultants had been involved in the process. He questioned whether consultants proposing changes from the work of previous reports had considered or reviewed the rationale behind such approaches.¹⁸ Salamon’s comments are telling. The mere fact that a number of feasibility studies into the mineability of the area had been conducted did not mean that sufficient mine study and planning had been completed.¹⁹ Presumably, a prudent mine operator and a prudent mine regulator would ensure that adequate mine planning was both a focus and a priority during the early stages of development.²⁰ Unfortunately, Westray management was focusing its energy on immediate financial areas: finalizing a contract with NS Power for the sale of Westray coal and negotiating a financial assistance package with both the federal and the provincial governments.

¹⁵ Exhibit 58.2, s. 7.4.

¹⁶ Kilborn Limited, “Technical and Cost Review of the Pictou County Coal Project” (1988).

¹⁷ Hearing transcript, vol. 14, pp. 2380–81. See Chapter 11, Department of Natural Resources, for a more detailed discussion of the Kilborn study.

¹⁸ Hearing transcript, vol. 14, p. 2378.

¹⁹ See comments on the adequacy of mine planning in Chapter 10, Ground Control.

²⁰ See Chapter 11, Department of Natural Resources, for a review of the department’s responsibility in this regard.

Nova Scotia Power Corporation

The contract finalized between NS Power and Westray for the supply of coal to the Trenton power generating stations had been developing before Westray's involvement in the project. It is clear that, by the 1980s, there was a growing concern in Nova Scotia about the volume of sulphur dioxide emissions in the province.²¹ In fact, during the mid-1980s, Premier John Buchanan attended the New England Governors/Atlantic Premiers Conferences and discussed the environmental effects of, and concerns about, the emission of sulphur dioxide in the mid-western United States – emissions that eventually made their way to Nova Scotia. As a result, the premier signed an agreement with the New England governors and the other Atlantic premiers that set a limit on the volume of sulphur dioxide emissions. Then the Canadian government, with the support of all the provinces, signed an agreement with the government of the United States, again agreeing to set limits on permissible sulphur emissions.²²

These agreements clearly tailored the options available to NS Power, which was planning a new power plant at Trenton. NS Power faced the problem of burning high-sulphur coal from Devco. Foord seam coal, in contrast, had a lower sulphur content, and this attribute was undoubtedly attractive to the power corporation as a means to meet the province's limit on sulphur emissions. At the Inquiry, Senator Buchanan recalled a study indicating that NS Power would either have to use Pictou coal or bring in coal from elsewhere. He testified that, as premier of the province at the time, he could not have contemplated importing coal when the province was rich in the resource.²³ NS Power's only real alternative was to install scrubbers at its plants to reduce sulphur emissions – an expensive proposition.

Evidence suggests that, as early as 1982, NS Power was interested in the Pictou County coal project. In a Department of Mines and Energy memorandum to deputy minister John Laffin dated 15 June 1982, Wynne Potter, assistant deputy minister, reported:

It appears that, like everyone else, Brinco is experiencing severe cash flow problems and Suncor think that Brinco may very well sell their interest in this project. Staff of this department as well as Environment, Development, Nova Scotia Power Corporation and Nova Scotia Resources Limited have had initial discussions with Suncor regarding the ongoing exploration activities and it appears that Suncor intend to proceed with the second phase.²⁴

²¹ Former premier Donald Cameron testified at the Inquiry that Pictou County coal had long been seen as a potential solution to the growing problem of pollution (Hearing transcript, vol. 66, pp. 14399–402). He suggested that eliminating the necessity of scrubbers at the Trenton power plants could mean a saving of some \$125 million in initial construction costs and \$16 million per year in operating costs.

²² Hearing transcript, vol. 68, pp. 14953–55.

²³ Hearing transcript, vol. 68, p. 14956.

²⁴ Inquiry file, NSDNR 38.

That potential market provided much of the impetus for Suncor's exploration in the area. By November 1985, Suncor considered NS Power a possible customer and had held an introductory meeting with its representatives.²⁵ By early 1986, Suncor and NS Power were formulating a letter of intent. In notes of a meeting held on 16 January 1986, P.J. Whalen, Suncor's manager of coal marketing for the Pictou County Coal Project, described the power corporation as interested, eager, and ready to facilitate a joint task force to evaluate the project's development potential:

The Power Corp. is interested in the Pictou County Project and recognizes the opportunity for a mutually beneficial development. Discussions even touched on joint fuel stockpiling and waste disposal. Clearly, there is a willingness to consider a capital expenditure in new NSPC [NS Power] facilities which might surpass the mine development costs . . . Mr Lethbridge [NSPC] suggested that an expedient evaluation of the development potential could be facilitated by a joint task force.²⁶

In a draft marketing report dated 6 March 1986, Suncor stated that NS Power had "provided a letter of intent which has formed the basis of continuing contract discussions."²⁷

When Suncor put the project on the market, NS Power and Suncor were close to completing a coal contract to supply the Trenton power plant. In the mid-1980s, Pat Phelan was director of mining engineering in the Department of Mines and Energy. He told the Inquiry that Suncor relied, in part, on the potential contract as a means of marketing the Pictou project and increasing the viability of the mine.²⁸ Similarly, the power corporation was beginning to rely on a potential mine in the area as a source of low-sulphur coal for the new Trenton power generating plant.²⁹

By August 1987, Suncor was actively pursuing potential buyers for the property before its agreement with NS Power was due to expire. Phelan reported the following activity for August 1987:

Suncor have advised us that there are several other companies potentially interested in taking over the property. NSPC have extended their agreement to purchase coal from the mine until the end of this year. Suncor are actively working to have someone take over the property before the NSPC extension expires.³⁰

The evidence suggests that there were communications between interested purchasers and NS Power to confirm that the power corporation was a

²⁵ Marketing Plan, Pictou County Coal Project, 1 November 1985; Marketing Progress Report to 30 November 1985 (Inquiry file, West Room28 52).

²⁶ Inquiry file, West Room28 52.

²⁷ Inquiry file, West Room28 52.

²⁸ Hearing transcript, vol. 51, p. 11105.

²⁹ Hearing transcript, vol. 51, pp. 11108–09. The quality of the coal to be used in a power plant is important information for its design. NS Power needed confirmation of a source of coal for the new plant at Trenton in order to design the appropriate features.

³⁰ Exhibit 35c.0006.

potential buyer. As well, NS Power approved the initial selection of candidates as acceptable potential developers of the project.³¹

On 9 September 1988, Westray finalized a deal for Suncor's coal rights.³² On that same day, an agreement was also signed between Westray and NS Power, the latter agreeing to purchase 700,000 tonnes of Westray coal annually for the Trenton 5 and 6 coal-burning units.³³ The contract outlined qualities of coal, pricing mechanisms, and production schedules. Clause 2.02 provided as follows:

Trenton Unit 6 is scheduled for commercial operation in November of 1991 and its coal requirements for the First Delivery Year will be reduced to the required stockpile build and about five (5) months of operation. This Contract Year would also represent initial production from the Mine. Accordingly, the guaranteed quantities referred to in Section 2.01 hereof are not appropriate for the First Delivery Year. *The Mine is scheduled to commence production on or about July 1, 1991, and it shall meet the requirements of Trenton Unit 5 from on or about July 1, 1991 and Trenton Unit 6 from the commencement of the Mine production to the end for the First Delivery Year. . . .* Buyer and Seller acknowledge that numerous factors can alter the start-up date for the Mine and Trenton Unit 6. It is the intent of the parties hereto to keep each other advised as to the progress of construction and revised completion dates so as to minimize the effect of any delays in the completion of either of the projects. [Emphasis added.]

Westray failed to meet these anticipated production dates. This failure was due, in part, to the suspension of tunnel development from approximately July 1989 to the fall of 1990 pending the securing of government funding.

In January 1990, NS Power wrote to Westray expressing concern over the long delay in the tunnel excavation and its impact on coal delivery dates. NS Power explained that, in the event of a delay, it would have to extend its contract with Devco to ensure continuity of supply.³⁴ In a letter dated 5 June 1990, NS Power advised Westray that it was "making inquiries which could result in deliveries regarding alternative coal supplies for Trenton 5 and 6 units, until such time as your company can demonstrate it can supply coal in fulfilment of the terms and conditions of the Agreement."³⁵ In a memo to the Curragh head office dated 7 June 1990, Westray general manager Gerald Phillips explained that the main reason for concern on the part of NS Power and the province was that federal funding had been approved in May 1990 and tunnel development had yet to resume. Phillips wrote: "From a schedule standpoint, the tunnel development must start as soon as possible to ensure no further delays occur in our start up schedule of mid-1991."³⁶

³¹ Exhibit 141.11, p. 2.

³² Exhibit 51.21. See the following section for a review of Curragh's involvement in the bidding process.

³³ Exhibit 35a.0105-33.

³⁴ Exhibit 64.10.001.

³⁵ Exhibit 64.10.002.

³⁶ Exhibit 64.10.004.

There is little doubt that the delay in financing and tunnel development led to a subsequent emphasis on production by Westray. Both Donald Cameron, then minister of the provincial Department of Industry, Trade, and Technology, and his deputy minister, Tom Merriam, commented on whether they felt Westray was under any pressure to produce. Cameron told the Inquiry:

I think it's only normal the company wanted to fulfil that contract. . . . I would feel pressure if I had a contract and if, you know, if you don't supply it, you don't have money. . . . I'd be surprised if they didn't feel pressure . . . I think they felt the pressure to go into the Southwest section to produce coal because of that delay. I mean, I'm convinced that's the reason. The only reason. They may not tell you that, but I'm convinced that's the reason.³⁷

Merriam testified that he was not aware of any discussion in which Westray was told that it would be in serious trouble if it did not produce.³⁸ He said, “[T]hey had a coal delivery date that had some significance so that would be the pressure point, if you will, that I assume was foremost in the minds of the company.”³⁹

There is no question about this pressure. The delay in construction due to protracted negotiations with both levels of government created a sense of urgency for Westray. The company's focal point, more than ever, became the production of coal and the satisfaction of the NS Power contract. Westray's push for production militated against adequate mine planning and mine safety.⁴⁰

The Arrival of Curragh

By the fall of 1987, Curragh Resources Inc. (Curragh) was well acquainted with the Pictou County coal project. It is somewhat unclear how Curragh first became interested in the project. The evidence suggests that Curragh's involvement in the bidding process for the Suncor project was tardy. Curragh made a formal offer dated 27 November 1987 to Suncor to buy its interest in the project. Clifford Frame, Curragh's chief executive officer, offered to purchase the project for \$7.5 million subject to the satisfaction of three conditions:

1. negotiation and execution of an agreement of purchase and sale including standard representations and warranties;
2. obtaining by us of an agreement with the Nova Scotia Power Corporation regarding the sale of coal to such corporation; and
3. the granting of a mining licence from the government of Nova Scotia.⁴¹

³⁷ Hearing transcript, vol. 66, pp. 14651–52.

³⁸ Hearing transcript, vol. 72, p. 15747.

³⁹ Hearing transcript, vol. 72, pp. 15746–47.

⁴⁰ These topics are addressed in detail in Chapter 11, Department of Natural Resources, and Chapter 5, Working Underground at Westray, respectively.

⁴¹ Exhibit 51.1.

Suncor accepted the offer, and Curragh gained the rights to the Pictou County coal project.

This offer was preceded by earlier contacts between Suncor and Curragh. The documentation and evidence are equivocal. On 15 July 1990, Nancy Ripley-Hood, solicitor for the Department of Mines and Energy, sent a hand-written memorandum to Laffin briefing him on the proposed take-or-pay contract.⁴² Ripley-Hood recorded information she recalled being told several years earlier by Merriam:

In early September 1988 [*sic*], DC [Don Cameron] approached by CF [Clifford Frame] to undertake the Project. DC was and is convinced this is a good deal – even tho’ TM [Tom Merriam] and the rest of staff are dubious at best. *There is some question whether DC was told to approach CF* ([by Elmer MacKay/B Mulroney Mr. Buchanan]).⁴³

Senator John Buchanan, who was premier of Nova Scotia at the time, had no recollection or knowledge of such an event. He denied suggesting that Cameron contact Frame or anyone else associated with Curragh.⁴⁴ According to Buchanan, he had first met Frame in the fall of 1987 in Ottawa when he was attending a federal-provincial conference. He recalled that Kilborn president Jack Mitchell introduced him to Frame at a lunch meeting. Buchanan said that during lunch he was told that Curragh was negotiating with Suncor for the Pictou County project – something Buchanan testified he already knew. He recalled advising Frame to contact the Department of Mines and Energy, which Frame said he had already done.⁴⁵ Buchanan told the Inquiry that he met Frame a second time in late spring 1989 at a reception in Pictou County where the project was discussed by the mayors, wardens, and local Members of the Legislative Assembly (MLAs), and possibly by officials from the Department of Mines and Energy. He did not see Frame again until after the explosion of the Westray mine. Buchanan said that he had no knowledge of Curragh’s dealings with Suncor or how the company came to be involved in bidding for the property: “No, I haven’t any idea. I suspect in the mining world that companies involved in mining throughout this country, I think they pretty well know what everybody else is doing in the mining business.”⁴⁶

Cameron, as a Pictou County MLA on the government side, had been contacted by Suncor as early as 13 December 1985 about its interest in developing a mine.⁴⁷ Cameron denied making the initial contact with

⁴² For a thorough discussion of this contract, see the take-or-pay agreement section later in this chapter.

⁴³ Exhibit 141.03.067. Emphasis added.

⁴⁴ Hearing transcript, vol. 68, p. 14924.

⁴⁵ Hearing transcript, vol. 68, pp. 14926–27.

⁴⁶ Hearing transcript, vol. 68, pp. 14927–29.

⁴⁷ Letter from Suncor’s project manager to Cameron outlining some discussion points from a meeting they had had that day (Exhibit 141.03.004–05).

Curragh, but was somewhat less explicit in his denial. He testified as follows:

- Q. . . . There had been allegations that you were instructed to get ahold of Mr. Frame or that Mr. Frame was referred to you by various other parties.
- A. . . . Why would I be getting ahold of Mr. Frame when I wasn't even in Cabinet and wasn't even going to run again?
- Q. Do I understand you then to be giving evidence that as of the end of 1987, certainly into the early part of '88, you would have had no involvement with Curragh in relation to its proposal to Westray?
- A. I can't recall.
- Q. When do you recall the first connection between yourself and Curragh as a proponent of the project?
- A. Well, clearly around, you know, the first part of '88 and then I became Minister. Clearly . . . as the Member in the area, I'd be informed what was going on. I mean, by the first part of '88, it was clear the company made an agreement. It was in the paper. They were going to buy the project and proceed. So – but no real formal issues until I became Minister. And then it was ongoing.
- Q. Can you give me the first incident or point in time that you can recall being connected with Curragh or knowing of the Curragh project?
- A. No, I don't want to speculate.
- . . .
- Q. . . . I'm taking it from your evidence that you did not know of Curragh or Curragh's involvement in the project until probably after Curragh had made its offer to Suncor. Is that fair?
- A. I don't want – you know, I took an oath this morning, and I'm not going to lie, but I'm not going to just answer questions just to satisfy you either. I can tell you I wasn't involved in any way until after I became Minister. I might have been as a Member informed about things. I might have met Gerald Phillips in the meantime. I would think it might be likely. Clearly, the papers would have something about Curragh buying the project. I don't know. I didn't review that. If you have some documents, I'll review them and explain them to you.
- Q. When do you recall first meeting Mr. Frame?
- A. My recollection is after the project was well on the way.
- Q. And can you identify that for me? What are you talking about in terms of timeframe.
- A. Well, I would say that maybe the first time I talked to him – the Premier told me to come in his office and they had him on a speaker phone, and there was some other people there. And I think that's – I said, "Hello," that's about it. I didn't know him.
- Q. Can you place that in point of time?
- A. I really can't, sir.
- Q. Would it have been after you went into Cabinet?
- A. I wouldn't even want to – I wouldn't even want to make that claim.
- . . .
- Q. [quoting from Ripley-Hood's memo to the deputy minister in Exhibit 141.03.067] . . . "There is question whether D.C. was told to approach C.F."
- A. Well, I can tell you it's not true.
- Q. All right, in whatever year.

- A. In whatever year. I didn't approach Cliff Frame.
 Q. All right, and by the time you know of Frame, he was in the deal?
 A. Absolutely.⁴⁸

Cameron stated that he had no information confirming or denying that anyone from the provincial government had approached Suncor to discuss Curragh's involvement in the bidding process.⁴⁹

In a 9 October 1987 internal Curragh memorandum to Frame and other Curragh officials about Suncor's Pictou project, the unidentified author comments on the "political front":

Bob Coates [minister of the federal Department of Regional Industrial Expansion] called John Buchanan. He had talked to Thompson, the Chairman of Suncor but didn't get much response – the bidding process has started and it is hard to change.

Buchanan was to call me for another chat but has not done so. Bob says he is very busy but I suspect he doesn't quite know how to handle Suncor.⁵⁰

The inference is that Frame or another Curragh official was seeking the assistance of the premier to intervene or at least support Curragh's efforts to be involved in the bidding process. Buchanan refuted the suggestion that he ever spoke with the chairman of Suncor about the bidding process. Cameron testified that he, too, was unaware of any such event, though he said he would not be alarmed to learn that Curragh had sought the assistance of someone in Nova Scotia to facilitate becoming involved in the bidding process.⁵¹

Elmer MacKay, federal minister of public works and MP for Central Nova at the time, also testified before the Inquiry. MacKay commented on the suggestions that Buchanan had asked Coates if he was aware of anyone who would be interested in developing a mine in Pictou County and that the Curragh connection was passed from Coates to Buchanan: "I have also heard this. It sounds plausible to me because Bob Coates was acquainted with Steve Roman. . . . And Cliff Frame was a key associate of Stephen. And . . . it's entirely possible that Mr. Coates was the connector, if you will."⁵²

Phelan said he did not know of anyone's contacting Suncor to request that Curragh be allowed to submit a bid for the project late in the process. Phelan further testified that he was not privy to discussions between Curragh and Suncor and did not believe he had known anything about how they arrived at their agreement.⁵³

On 23 September 1987, Phelan wrote a memorandum to Laffin in which he provided an update on the Suncor Pictou coal project. John Shillabeer, Suncor's project manager, had advised Phelan that six

⁴⁸ Hearing transcript, vol. 66, pp. 14444–49.

⁴⁹ Hearing transcript, vol. 66, p. 14454.

⁵⁰ Exhibit 141.03.001.

⁵¹ Hearing transcript, vol. 66, p. 14455.

⁵² Hearing transcript, vol. 65, pp. 14258–59. Roman was a mining executive and a Conservative party candidate in several elections.

⁵³ Hearing transcript, vol. 51, p. 11118.

companies had already signed a secrecy agreement with Suncor and had received the Placer feasibility study. Phelan went on to say that three or four more companies were expected to sign in the next few days. He explained that Suncor had requested that the companies reply by mid-October with an expression of interest and an approximate range of what they would pay for the property. Suncor would deal with two or three of the companies and expect them to provide a firm offer by 15 December. Suncor would then make a final decision by 31 December. Phelan went on to say:

John Shillabeer was aware that Clifford Frame approached Tom Thompson, the President of Suncor, regarding the project. Mr. Shillabeer was later contacted by Price Waterhouse who are representing Westray Resources, a subsidiary of Curragh Resources. Suncor are now waiting to receive a signed copy of the secrecy agreement and will be forwarding a copy of the Placer Feasibility Study to Price Waterhouse. Shillabeer indicated that there may have been some delay in getting the information package to the Curragh interests because of their requirement to have a secrecy agreement signed, but they are treating this inquiry in the same way as the other 10 companies who are interested in the project.⁵⁴

Phelan could not explain having singled out Frame for special attention in his memorandum to the deputy minister.⁵⁵

There is little evidence on the identity of the other interested companies or the reasons why they may have been disqualified as potential buyers. Cameron said he was aware of two other companies who vied for the rights to the project – Esso and Coalcor. It was his understanding that Esso had been turned down as a potential developer because it intended to tie up the leases while bringing in its own coal from a low-sulphur coal mine in South America. Cameron’s information on Coalcor was also limited. He testified that the company was very upset about the situation because “they felt they didn’t get a fair shake.” He went on to question how Coalcor was intending to develop such a project without any source of revenue.⁵⁶

It is clear that Curragh had set its sights on the Pictou project and was intending to develop it with government funds. On 25 November 1987, two days before its formal offer to Suncor, Curragh had already applied to the federal government for financial assistance under the Atlantic Enterprise Program.⁵⁷ While both the federal and the provincial financial assistance packages sought by Curragh are discussed at length later in this chapter, it is significant to note that the *first* formal action taken by Curragh in pursuing the project was to seek financial support from the public sector. There is no evidence of any technical evaluation, feasibility study, or review of existing studies by Curragh officials before the

⁵⁴ Exhibit 137.03.17.

⁵⁵ Hearing transcript, vol. 51, p. 11119.

⁵⁶ Hearing transcript, vol. 66, pp. 14450–52.

⁵⁷ Exhibit 35d.0011–12.

submission of their offer. The approach of Curragh, compared with that of Suncor or other interested mining companies, is telling. Deputy minister Tom Merriam told the Inquiry that it is not uncommon for companies to attempt both to minimize their risk and investment in a project and to lever funds, public or otherwise. Although Curragh may have been more aggressive in leveraging those other sources, its approach to the project, in that sense, was not unusual. Merriam went on to say:

- A. But certainly at the end of the day, Curragh's attitude was that they were very aggressive in minimizing their cash investment, if you will, in the project or their investment of whatever form.
And that troubled me in the sense that I was concerned about what might happen down the road if, in fact, there were difficulties that had to be addressed. If they were starting out with that approach, I'm not sure where that would have left us a little later on in the process.
- Q. Is that something that we should learn from this, that we should be careful to ensure that the proposer, the developer, while he may want government funds, and that's understandable, is really in it for the project as opposed to in it because they can do it for almost nothing?
- A. Yes, and I would say the simplest measure of that over time has always been the level of equity investment.⁵⁸

That was the reality of Curragh's involvement.

Finding

It seems that Curragh was interested in the Pictou coal project only if it was able to secure significant government support; Curragh seemed less interested in the merits of the project itself. And it was this mind-set that set the tone for the negotiations and developments to follow.

Federal Financing

The negotiations between Curragh and the federal government for financing the Westray project were long and trying: Curragh made application to the federal government on 25 November 1987, and an agreement was not finalized until 27 June 1990.⁵⁹ There was significant opposition to the proposed Westray mine, particularly at the bureaucratic level. As a result, many issues required resolution before a deal could be reached. The opposition to the project was evoked by the level of federal financing requested by Curragh, the effect such a project would have on the Devco operation, and environmental concerns. The resultant delay in resolving these issues was due, in part, to Curragh's intransigence. Curragh's stance, as directed by Frame, reflected confidence in the solid political support for the project, backing that prompted the company to play hardball with the federal officials.

⁵⁸ Hearing transcript, vol. 72, p. 15691. Emphasis added.

⁵⁹ Harry Rogers, deputy minister of the Department of Regional Industrial Expansion, testified to this date of signing when he discussed the final documents (Exhibit 64) that were sent to the company for signing (Hearing transcript, vol. 61, p. 13465).

The Negotiators

Before reviewing the negotiations between Curragh and the federal government, it is important to gain some appreciation of the personalities integral to the process. Harry Rogers was deputy minister of the Department of Regional Industrial Expansion (DRIE) from 1987 to 1992.⁶⁰ He became the lead representative of the federal government in the negotiations for a financial assistance package. Elmer MacKay commented on Rogers's involvement. He felt that Rogers tried to reach the best possible deal for the government, and described Rogers as a "reluctant convert" who thought that "it may be all right, provided it's a clean deal and . . . there are as many safeguards put in there . . . as a deputy minister can put in."⁶¹ Rogers agreed with MacKay's description that he started out quite negative about the project, but eventually came around and tried to get the best deal he could for the federal government.⁶² Rogers perceived his own role in the negotiations as follows:

I could not reveal to my own staff or to anybody else that I was favourably disposed or unfavourably disposed. Because to do so would disqualify me in terms of . . . the project leadership role that I had been asked to assume. So I simply maintained an optimistic view with respect to the proponents and . . . at the same time I was challenging them, and would undertake the discussions with Minister MacKay or Minister Cameron in as even-handed a fashion as I possibly could, because to do otherwise would destroy my own credibility and, therefore, my effective leadership of the case that I had been asked to assume.⁶³

In commenting on his negotiations with Curragh, Rogers testified that "[t]hey were tough, hard-nosed negotiators, and we were equally tough-minded with respect to the expenditure of taxpayers' money."⁶⁴ Rogers went on to comment on Curragh's chief executive officer, chairman, and lead negotiator – Clifford Frame:

I did say they were tough negotiators. He [Frame] was personally abrasive and abusive, and a very difficult and unattractive person to do business with. Probably the most offensive person I have met in business or in government.⁶⁵

MacKay supported the project, which was in his constituency. Rogers testified that MacKay had played an appropriate role in the development of the Westray project:

Well, certainly, he acted as any Member of Parliament would in actively and aggressively, proactively promoting a case for his constituents. And he's no different in that respect than anybody else, so there's nothing

⁶⁰ Hearing transcript, vol. 61, p. 13317. The department has been renamed the Department of Industry, Science, and Technology, and is often referred to as Industry Canada.

⁶¹ Inquiry interview, 28 March 1996 (Exhibit 135, p. 83).

⁶² Hearing transcript, vol. 61, p. 13355.

⁶³ Hearing transcript, vol. 61, p. 13354.

⁶⁴ Hearing transcript, vol. 61, p. 13337.

⁶⁵ Hearing transcript, vol. 61, p. 13368.

to be critical of in his playing that role. . . . [H]e generally intervened where he thought it could speed up the process or he could improve the quality of the dialogue between the Federal Government and the Province. And that was an appropriate role for somebody who was anxious to see it proceed.⁶⁶

Rogers also commented on his dealings with Cameron, provincial minister of industry, trade and technology. While Cameron's department was negotiating with Curragh on a provincial level, the provincial government also became, in a sense, a party to the negotiations with the federal government because of such issues as the long-term agreement between the federally owned coal supplier Devco and the provincially owned power corporation.⁶⁷ Rogers had the following to say about Cameron's demeanour:

- Q. In our interview you referred to Cameron and MacKay as "good cop, bad cop." What did you mean by that?
- A. Well . . . on occasion, Minister Cameron would become quite testy, and he would try to use an intemperate response as a means of avoiding whatever the rest of the discussion was. . . . And Minister MacKay on other occasions would be quite conciliatory after I'd had such a conversation and would go and try to lay oil on troubled waters. . . . On other occasions, Minister Cameron was very forthcoming and very agreeable to deal with. So it was possibly strategic in terms of dealing with me.⁶⁸

Both Rogers and Cameron commented on the involvement of Prime Minister Brian Mulroney. Rogers believed that Mulroney's role in the development of the Westray project was no different from any other prime minister's involvement in such projects. Rogers agreed that Mulroney was aware of the project but was careful not to commit to a position. Rogers did not see any indication that the Prime Minister's Office actively promoted the project or facilitated it through the process.⁶⁹ Cameron similarly described Mulroney's role as "very normal" in the development of such a project.⁷⁰

There is no question that Cameron was actively lobbying in support of the Westray project. MacKay had also expressed his support for the development of a mine in the area. And Buchanan had publicly endorsed the proposal. According to Rogers, Curragh officials were aware of the strong political support for the project and felt they had the project in the bag: "I believe they felt that they were riding high with respect to a proposition that they would get approved as requested. And I think that

⁶⁶ Hearing transcript, vol. 61, pp. 13359–60.

⁶⁷ Rogers testified that he had attempted to obtain from Cameron the written commitment between the province and Westray about the contract for coal purchases. According to Rogers, Cameron refused to reveal the formal document on principle – Cameron felt that his word should be sufficient. In the final analysis, however, Rogers insisted that the document be reviewed (Hearing transcript, vol. 61, pp. 13360–61).

⁶⁸ Hearing transcript, vol. 61, p. 13361.

⁶⁹ Hearing transcript, vol. 61, pp. 13364–66.

⁷⁰ Hearing transcript, vol. 67, p. 14678.

accounted for what I would regard as *intransigent behaviour* with respect to discussing or negotiating any changes from the original request.”⁷¹

Rogers agreed that much of the delay in getting the federal financial assistance package finalized was arguably due to Curragh’s intransigence. He agreed that the uncompromising behaviour of Frame and others was likely based on the belief that the political support for the project would carry the day. Rogers believed that Curragh probably underestimated how seriously the federal government viewed the issues to be resolved respecting Westray.⁷²

Curragh’s Application for Financial Assistance

Curragh’s formal application in November 1987 for financing under the Atlantic Enterprise Program (AEP) represented the start of long and serious negotiations over the level of federal financing for the Westray mine. Rogers explained that the AEP was a small program run by the Cape Breton Development Corporation (Devco) to provide loan guarantee and interest buydown support for projects. He stressed that the AEP was established to deal with small projects, not one the size of Westray. Nonetheless, Curragh used the terms and conditions of that program as the basis for approaching the federal government for funding.⁷³

Curragh was seeking an interest buydown at the 6 per cent maximum rate for a period of 15 years on a loan of \$117,378,900. The company also requested a 100 per cent loan guarantee.⁷⁴ The proposed equity investment by the company was 8 per cent, with the federal government at risk for 92 per cent. The normal program maximums were 6 per cent interest for seven years, and an 85 per cent loan guarantee with the proponent’s minimum equity investment of 20 per cent.⁷⁵ Curragh’s initial bargaining position clearly fell outside permissible government guidelines. It is important to realize that Curragh’s application countered a policy of the federal government, espoused shortly before. As Rogers told the Inquiry, “it was only in May 1987 [just months prior to Curragh’s approaching the federal government] that the government had adopted a policy of *not*, in fact, providing support for mining development in the country.” In the department’s view, there were adequate incentives and markets for support to be sought independently by the developers themselves.⁷⁶ The federal government’s ultimate decision to assist Curragh was clearly not in accord with policy.

While the negotiations between Curragh and the provincial government will be addressed later in this chapter, it is important to note that the ultimate financial package offered to Curragh was dependent on

⁷¹ Hearing transcript, vol. 61, p. 13351. Emphasis added.

⁷² Hearing transcript, vol. 61, pp. 13447–48.

⁷³ Hearing transcript, vol. 61, p. 13324.

⁷⁴ Exhibit 35d.0012.

⁷⁵ Exhibit 139.16.013.

⁷⁶ Hearing transcript, vol. 61, pp. 13332–33. Emphasis added.

Curragh's negotiating and securing the financial support of the province. It is quite obvious, from a review of the evidence on the point, that federal financing would not be forthcoming to Curragh, or any promoter, without the required equity of 20 per cent. Obviously, Curragh showed great reluctance to commit its own resources to this extent and therefore turned to the province for support. By agreeing to make up a portion of the required equity, the province, in effect, diminished Curragh's interest in the project to the extent that the company was not a full "equity participant." It may be in this respect, as well as with respect to the take-or-pay agreement, that the province was less than astute with the public purse. The ramifications of the take-or-pay agreement are significant and are discussed later in this chapter.

Opposition to the Project

Although the federal government ultimately assisted Curragh through a loan guarantee of approximately \$85 million and a direct contribution against interest, Curragh's initial approach to the federal government was met with much opposition. On receipt of the company's application, a cabinet committee discussed the project and identified a range of issues to be resolved.⁷⁷ Officials expressed concern for the amount of support being requested by Curragh – the sum was more than half the department's annual disbursements for government-funded projects. The effective cash cost to the federal government for the requested loan guarantee and interest buydown was approximately \$27 million. There was concern within the federal government about establishing a mine in the Pictou County area and the impact that that would have on Devco, a federally funded crown corporation. There were environmental questions, such as the impact on the salmon spawning beds, the effect of trucking large quantities of coal on a daily basis from the mine to the generating plant, the effect of constructing a railway access line, and the effectiveness of the low-sulphur coal in reducing sulphur emissions as needed. There were other issues to be resolved, including the sufficiency of Curragh's equity investment in the project, the confirmation of a contractual agreement between Curragh and the province with respect to the purchase of coal, the technical feasibility of the project, and the aforementioned policy of no government support for mining initiatives.⁷⁸ The federal government's overriding concern, however, was the requested level of support.⁷⁹

Rogers testified that opposition to the project at the time was extensive: "Unequivocally this [proposal] was up in the air right until the end. I mean, the extent of opposition to this was not simply in the hands

⁷⁷ Rogers (Hearing transcript, vol. 61, pp. 13325–31).

⁷⁸ The federal government's technical review of the project was conducted by CANMET. In the final analysis, the review concluded that the project was technically feasible, although it did express some reservations. See Chapter 11, Department of Natural Resources, for a review of this study.

⁷⁹ Hearing transcript, vol. 61, p. 13331.

of a few intransigent bureaucrats. There was extensive opposition from a whole range of people.”⁸⁰ He went on to elaborate his own views:

My own particular concern throughout this was that DRIE was going to get saddled with the financial responsibility for this project, and that this was going to disable an emerging department that was moving rapidly away from extensive subsidies to business and that this would be seen as . . . totally inconsistent with the objectives of the emerging new department.

As deputy minister of the department, Rogers attempted to be objective with both Curragh officials and politicians. He found this stance to be particularly difficult with his own staff, all of whom were opposed to the project both in principle and for financial reasons. In the final analysis, Rogers did not feel the proposal warranted the federal government’s support.⁸¹

During the initial months of the review, there was “a lot of challenge and a lot of back and forth” between Curragh and government officials with respect to the adequacy of documents and investment levels. The business plan would have generated “a very healthy amount of cash starting in about four years out” for Curragh. The department’s primary argument, in a financial sense, was that the requested level of support was not warranted. Both Curragh and the department put their evidence forward, and the debate continued for months without agreement between the two sides. Ultimately, the department arrived at a “reasonable business case” with Curragh.⁸²

In a memorandum dated 2 May 1988 to Robert de Cotret, minister of the Department of Regional Industrial Expansion, Rogers provided a financial analysis of the Westray proposal. He advised that there was “currently no DRIE budget allocation for this project, and funds would have to be taken from other DRIE A-base budgets, or approved separately by ministers, through reserves.” Rogers further noted that the Department of Energy, Mines, and Resources “states that there is no precedent in Canada for federal financial assistance for primary coal extraction, and consequently that assistance to Westray could result in criticism from Western Canadian coal producers.”⁸³

In another memorandum, dated 1 June 1988, Rogers presented the minister with two options: first, if the minister intended to provide federal assistance, further negotiations and consultations would be required; second, if he intended to reject the Westray proposal, communication with the company should emphasize the high cost of the project to the government, the disproportionate sharing of risk, and the necessity for the department to authorize an assistance package that exceeded the normal maximum assistance levels of the AEP.⁸⁴

⁸⁰ Hearing transcript, vol. 61, p. 13356.

⁸¹ Hearing transcript, vol. 61, p. 13359.

⁸² Hearing transcript, vol. 61, pp. 13336–37.

⁸³ Exhibit 139.16.006–07.

⁸⁴ Exhibit 139.16.019–20.

In July 1988, Rogers reported to de Cotret that Westray had apparently been successful in convincing the province, specifically Buchanan, to assist the project. The province agreed to buy one million tonnes of coal from the mine and to provide Westray with a subordinated loan to meet the department's equity requirement, thus enabling a revised Westray request to be technically within normal AEP assistance levels.⁸⁵ Despite Westray's progress in its negotiations with the province, Rogers recommended that the Westray application be rejected, based on "the high cost to the federal government, the large negative impact on Devco, the potential closure of the Sydney to Trenton CN line, the existing worldwide overcapacity situation, and the poor precedent-setting nature of the proposal."⁸⁶ Rogers testified that he was persuaded by the negative impact on Devco to an extent he had not been before. His recommendation was not approved.⁸⁷

The possible impact of the Westray mine on Devco sales to NS Power posed a major concern for the federal government as it tried to ensure that the Devco market would not be jeopardized by the development of a new coal mine in the province. The province did not exhibit the same degree of concern. Elmer MacKay told the Inquiry that there was greater consciousness with respect to Devco at the federal level because of the federal connection with it.⁸⁸ The Devco board of directors had expressed strong concern that the Pictou project would have a direct and very negative impact on the corporation. In the final analysis, Devco doubted the feasibility of two commercially viable coal mine operations in Nova Scotia competing for a limited power generation market.⁸⁹

In a 20 April 1988 memorandum, Rogers advised de Cotret of the potential impact of the project on Devco. He noted that, while Buchanan had given public assurances that Devco's local market would not be eroded (NS Power was committed to purchasing Devco coal), the premier had not provided any specifics. Rogers concluded by recommending that "appropriate safeguards be negotiated with the province of Nova Scotia and NSPC to ensure Devco a significant share of the NSPC market, in keeping with Premier Buchanan's public assurances in this regard."⁹⁰

In October 1988, Louis Comeau, president of NS Power, wrote to Peter White, principal assistant to the prime minister, advising that NS Power had no intention of defaulting on the contract it had signed with Devco in 1978. The contract stipulated that the agreement would operate for a full 33 years. Comeau reiterated that "it is still Nova Scotia Power's obligation to live within the general terms of this contract. We need CBDC [Devco] coal."⁹¹ Comeau went on to express concern about

⁸⁵ Exhibit 139.16.022.

⁸⁶ Exhibit 139.16.023.

⁸⁷ Hearing transcript, vol. 61, p. 13390.

⁸⁸ Hearing transcript, vol. 65, p. 14271.

⁸⁹ Exhibit 139.16.114.

⁹⁰ Exhibit 139.16.115-16.

⁹¹ Exhibit 139.16.024.

“environmental considerations which were not in effect in 1978.” NS Power could not agree to specific quantities for the long term unless it had “some assurance of quality and price.” This commitment did not satisfy Rogers, who was looking for a contractual commitment from NS Power.⁹² Negotiations continued with the province for a contractual commitment between Devco and NS Power, as well as a formal agreement that, pursuant to the province’s take-or-pay agreement, Westray coal would not replace Devco coal.

The federal government expressed further concern about the environmental impact of establishing a coal mine in Pictou County.⁹³ A series of environmental assessments were completed, and a public hearing was held at the provincial level. Rogers explained that the federal department could either conduct its own hearing or adopt the findings of the province. The government ultimately decided that the provincial findings, along with some environmental impact assessment done by Acres Limited, were adequate to satisfy the basic requirements of the *Environmental Assessment and Review Act*.⁹⁴

The Continuing Debate

At a 26 October 1988 meeting between the federal government and Westray, Rogers laid out six outstanding issues: “If we can satisfactorily resolve these, then we (DRIE officials) will make a favourable recommendation to Cabinet.”⁹⁵ On 28 October 1988, Frame wrote to Rogers outlining his understanding of “the consensus, I trust you will agree, reached during the meeting” about the outstanding issues. Frame reminded Rogers of the inherent risks associated with the development of the project. He noted that, although the shareholders were making an important direct investment of \$15 million, the most significant financial commitment by the shareholders could be at the end of the development in the event of any difficulties.⁹⁶ Rogers made the following comments about Frame’s position:

What it portrays is the continuing disagreement with respect to the sort of project financial analysis, the assessment that was being made by myself and my officials where we were basically saying that they were requesting a far greater level of financial support than their own financial analysis indicated would be warranted.

And their rebuttal was that our analysis was deficient and that our analysis did not take into account a whole series of potential outturns on

⁹² Hearing transcript, vol. 61, p. 13392.

⁹³ The environmental aspects of the Westray project are well outside the Terms of Reference of this Inquiry. The following commentary is included in this Report only to provide some indication of the complexity of the negotiations and the various regulatory agencies and statutes involved in the total project. Similarly, although the Inquiry received thoughtful submissions on the environmental aspects of the Westray project, they did not come within the ambit of this Inquiry.

⁹⁴ Hearing transcript, vol. 61, pp. 13335–38.

⁹⁵ Draft minutes of meeting (Exhibit 139.16.026). The issues were labelled “Minimum conditions to Westray financial assistance” (Exhibit 139.16.032).

⁹⁶ Exhibit 139.16.038–39.

cost overruns or on other financial commitments they would have to make to the project and, for this reason, the base of our assessment should be changed.

This went on beyond this meeting and I suspect even after the project was approved, they probably would still argue that they had a valid position and that our position was not valid.⁹⁷

On 4 November 1988, Rogers responded by letter to Frame. He expressed concern about Frame's version of the conditions to be resolved between the parties. Rogers believed that Curragh failed to account for the fact that the federal government, not the shareholders or the commercial lender, was being asked to assume the bulk of the financial risk on the project. Accordingly, Rogers told Frame that his department would be suggesting that the minister require the following from Curragh:

- the insured loan to carry a first charge on all company assets
- a copy of any shareholder agreements
- the right to restrict any corporate restructuring or reorganization if impacting on federal fiscal revenues or impairing the government's security position
- assurances as to the willingness and financial ability of the shareholders to fund any capital cost overruns.⁹⁸

The federal government and Curragh continued to debate outstanding issues well into 1989. On 11 July 1989, Rogers wrote to Merriam outlining the three issues that required further clarification: the requirement for an agreement between Devco and NS Power; an agreement that there would be no diversion of Westray "take-or-pay" coal to replace Devco coal; and the province's intention with regard to its policy on sulphur dioxide emissions.⁹⁹ Rogers again expressed his ongoing concern that the level of financial assistance requested by Westray was not warranted in light of the company's projected financial returns.¹⁰⁰

Merriam responded to Rogers in a letter dated 20 July 1989. First, discussing a contractual arrangement between Devco and NS Power, Merriam relied on the existing contract. He stated that the contract had worked to the benefit of both Devco and the federal government in the past and he believed it reasonable to expect that the existing arrangement would deal adequately with any future arrangements. In Rogers's opinion, however, Merriam's reply did not by any means firm up the contractual arrangement with Devco; rather, it was "a further attempt to obfuscate the

⁹⁷ Hearing transcript, vol. 61, p. 13404.

⁹⁸ Exhibit 139.16.052.

⁹⁹ Exhibit 139.16.057. Rogers said that he was not disagreeing with a policy to reduce sulphur emissions, but felt that the environmental concern was being used as a bargaining tool. Cameron had, in Rogers view, precluded the possibility of burning Devco coal at the Trenton 6 station. Rogers felt that a judicious mixture of higher-sulphur washed coal with a low-sulphur anthracite coal would produce a low-sulphur-content coal for burning (Hearing transcript, vol. 61, pp. 13424–25).

¹⁰⁰ Exhibit 139.16.057.

issue and skate on it.”¹⁰¹ Second, Merriam advised that the take-or-pay contract was initiated to help the company arrange financing; it was not anticipated that it would ever be exercised.¹⁰² Third, Merriam commented on the federal-provincial sulphur emissions agreement, noting that the Westray project would assist the province “to more than comply” with the agreed reductions. Finally, considering the technical risks associated with mine development, the time-frame for payback of capital, and the substantial loan and completion guarantees given by the company, Merriam felt that Westray’s request was not unreasonable.¹⁰³ In his testimony, Rogers said that Merriam was making it clear in his letter that the federal government would not be able to enlist the support of the Nova Scotia Department of Industry, Trade, and Technology in debating with Curragh over the level of assistance.¹⁰⁴

On 6 September 1989, Rogers wrote to Merriam, informing him that the federal government was willing to assist Curragh through “loan insurance of 85% of a \$100 million loan, valued at \$21.25 million,” and an “approximate 2 percentage point interest rate buydown for 7 years with a maximum value of \$8.75 million.” Rogers advised that the assistance package was subject to the usual government approvals, compliance with environmental requirements, and the attainment of the following contractual agreements between Devco and NS Power:

- a firm ten year contract at acceptable prices for the coal quantities previously agreed to by Devco and NSPC . . .
- a formal contractual agreement that there will be no diversion of Westray “take-or-pay” coal to replace Devco coal.

Finally, Rogers required clarification by the province of its future intentions regarding sulphur emissions standards.¹⁰⁵ According to Rogers, it was “decision time.” While the same three issues were being debated, Rogers was putting Merriam on notice that this was the end of the negotiating process.¹⁰⁶

On 2 October 1989, Frame responded to Rogers’s formal offer. Rogers told the Inquiry why he felt Frame had accepted the offer:

Eventually, the perception of strong unrelenting support from the three Ministers was becoming, I am sure in his mind, frayed at the edges. And suddenly, I think, he was perceiving that they had a way to, more in sorrow than anything else, come back to him and say, “We tried, God knows we tried, but we can’t get more than this, obviously. So if this isn’t satisfactory – It would have been a great thing.” But they could walk away with their dignity and their political reputations unimpaired, that they had really tried. And I think what he realized was this was the end. He either accepted this

¹⁰¹ Hearing transcript, vol. 61, p. 13429.

¹⁰² See the section on the take-or-pay agreement in this chapter.

¹⁰³ Exhibit 139.16.058–60.

¹⁰⁴ Hearing transcript, vol. 61, p. 13432.

¹⁰⁵ Exhibit 139.16.064–65.

¹⁰⁶ Hearing transcript, vol. 61, pp. 13440–41.

or there was no deal. And that he did not have support from those quarters that he believed that he had had up until that point.¹⁰⁷

On 14 December 1989, Buchanan and NS Power president Comeau jointly sent a letter to Rogers advising that the province and NS Power agreed that all coal requirements for existing and new thermal generating plants in Cape Breton would be purchased from Devco. The agreement further applied to new thermal plants on mainland Nova Scotia, except Trenton.¹⁰⁸ This was the provincial commitment to Devco that the federal government had been looking for. Rogers made the following comment in relation to the province's commitment:

It does not contain specifics on price; it does not contain specifics as regards quantities. . . . It was my opinion . . . that this was the best we could get, and that this document was, in my opinion, binding on the Province. And since it was a codicil to the original contract, it had the force of contract law, and that was accepted.¹⁰⁹

The Final Deal

On 27 June 1990, Curragh and the federal government finalized an agreement. The federal government provided Curragh with a loan guarantee of approximately \$85 million and a direct contribution against interest. Rogers spoke to the two major improvements in the agreement that had been achieved by the federal government. He compared Curragh's requested level of assistance to the amount it ultimately received. He testified that, in both instances, the amount of loan guarantee was "the same budgeted appropriation value of \$21.75 million." The difference came in the level of interest buydown. Curragh's original request was \$26.75 million, but the federal government and Curragh settled on \$8.75 million. As well, pursuant to the final deal, if the cash surpluses shown in Curragh's plan materialized, for every dollar Curragh took out of Westray up to \$20 million, another dollar had to be paid back to the lenders. This reduced the overall payback period from 15 to 10 years.¹¹⁰

Curragh technically complied with the 20 per cent equity requirement of the federal government's AEP. It contributed a \$9 million cash investment, supplemented by a deferral of management fees of \$6 million and a \$12 million fully subordinated loan from the provincial government.¹¹¹ It was Rogers's understanding that the province had provided Curragh with the \$12 million loan to meet the federal government's equity requirement and to give Westray the required

¹⁰⁷ Hearing transcript, vol. 61, p. 13446.

¹⁰⁸ Exhibit 139.16.071.

¹⁰⁹ Hearing transcript, vol. 61, p. 13444.

¹¹⁰ Hearing transcript, vol. 61, pp. 13468–69.

¹¹¹ **Comment** The word "technically" is used here intentionally. No matter how one interprets these numbers, Curragh injected only \$9 million to assist in getting the project under way. In my view, the deferral of management fees is a somewhat hokey accounting manoeuvre, one that didn't make any actual funds available for development. It seems that both Rogers and Merriam had similar reservations.

infusion of cash to continue to proceed with the project before federal funding was approved.¹¹² Although “equity” was arguably defined quite loosely in this instance, both the \$6 million in deferred management fees and the \$12 million fully subordinated loan fell within the definition of equity pursuant to the AEP guidelines. Rogers testified that, whether one viewed these sources as good elements of equity, they met AEP stipulations. Personally, he did not feel there was sufficient equity in the project.¹¹³ Merriam testified to the importance of the level of equity investment in a project. His comments are well founded:

I think we’ve learned the hard way over many years that if an owner doesn’t have a substantial stake in the project, then when difficult times come, and they always do to every project, there may not be enough both commitment and resources to deal with those problems. . . . if the owner is going to feel a lot of pain as a result of the project either failing or getting in serious difficulty, then that motivates them to burn the midnight oil, as it were, in order to work hard to find solutions to whatever those problems might be.¹¹⁴

The negotiating process between the federal department and Curragh officials was protracted and complex. The parties reached an impasse on more than one occasion. The issues to be resolved – the appropriate level of financing, the equity requirement, the impact on Devco, and environmental concerns – were by no means simple. They were further complicated by the infusion of politics into the process. All these factors contributed to the delay of federal funding to Curragh. Although Curragh officials did not get all they had asked for, they did get a federal package that enabled them to develop the Westray project with minimal investment and maximum profit potential.

Finding

The arrogance and the tough negotiating stance of Curragh officials were probably rooted in their awareness of, and reliance on, the political backing for the project.

Provincial Support

The province made significant concessions in its negotiations with Curragh. The record reveals that single-minded political support for the proposal overcame intense bureaucratic opposition. As a result, Westray managed to negotiate an attractive provincial financial assistance package on the strength of the political support it had rallied for the project: a \$12 million loan, an \$8 million interim loan, and a take-or-pay agreement, which guaranteed a sale for Westray coal.

¹¹² Hearing transcript, vol. 61, pp. 13338–39.

¹¹³ Hearing transcript, vol. 61, p. 13493.

¹¹⁴ Hearing transcript, vol. 72, pp. 15673–74.

The Westray Negotiations: A Standard Provincial Deal?

The Department of Industry, Trade, and Technology conducted negotiations with Curragh for the provincial government. In his testimony, Tom Merriam, deputy minister of the department from 1987 to 1992, provided insights into the negotiations and dynamics between the province and Curragh. Merriam first learned of the Westray project in June 1988. At that point, the Westray proposal had been in the federal system for some months. Federal officials had had an opportunity to assess the proposal, articulate their position, and determine the project's eligibility for AEP assistance.¹¹⁵ Merriam stated that the Westray proposal received different treatment from that accorded to others. Although it was common practice for the staff of the department to assess a proposal for government assistance and to develop recommendations for the minister's review, that did not occur in the case of Westray. Rather, the federal government had identified shortfalls in the financing package that needed to be addressed, and there had been some discussion that the province would address those issues.¹¹⁶ Merriam told the Inquiry about the instructions he and his staff received in relation to the project:

- Q. In this case, your Department wasn't asked to do the normal assessment that you and I talked about earlier?
- A. No, and the fact that the vehicles were to be put in place were already pretty much determined, we weren't asked to do that assessment.
- Q. You were basically told it was going to be a loan and a take-or-pay type of arrangement?
- A. That's right. The direction was to negotiate the details of those two forms of assistance.

The proposal was reviewed by the federal government, but it did not receive the customary provincial assessment.¹¹⁷ In fact, by 9 September 1988, Cameron had already written to Westray to advise the company of the province's commitment:

Further to recent discussions in respect of the development of a coal mine at Foord Seam near Stellarton, Nova Scotia, by Westray Coal Inc., I am pleased to advise that the Province agrees to provide: a Mining Lease . . . a loan in the principal amount of \$12 Million Dollars Canadian to assist in financing the development of the Project on the terms and conditions outlined in Schedule "A" attached hereto; and a take or pay contract for 275,000 tonnes per year for a term of fifteen years on the terms and conditions contained in Schedule "A" attached hereto.¹¹⁸

As a result of the manner in which the proposal developed within the department, the provincial department did not address a fundamental issue: Did Curragh require such a strong financial commitment from the provincial government? Cameron himself could not comment on whether

¹¹⁵ Hearing transcript, vol. 72, pp. 15651–52.

¹¹⁶ Hearing transcript, vol. 72, pp. 15654–55.

¹¹⁷ Hearing transcript, vol. 72, p. 15656.

¹¹⁸ Exhibit 141.03.011.

the department had investigated Curragh's ability to raise the money on its own. He suggested asking the officials who were involved in the day-to-day negotiations.¹¹⁹ Merriam was not aware of anyone from the province requesting that Curragh prove or justify the need for such a level of government assistance. Although Merriam said that Cameron was convinced that the support was necessary, he was not aware that this need had been confirmed in any technical or business sense. The province relied on the federal assessment and believed it to be complete and appropriate. It was Merriam's personal opinion that the proposal was too risky – too much public money was being invested in the project.¹²⁰

Cameron was the minister of the Department of Industry, Trade, and Technology at the time the negotiations began, and his support for the project was unequivocal. Merriam said that the minister was both interested in and committed to the project from its inception and that he had a fairly heavy involvement in its development. According to Merriam, Westray was "one of a handful of projects that he [Cameron] chose to be involved in on a daily basis."¹²¹ Merriam was inclined to say that "Westray was unquestionably the project he [Cameron] was most interested in."¹²²

During the negotiations between Curragh and the province, Westray management called the minister directly on occasion to express dissatisfaction with members of the department and their particular approach. Cameron felt that the company had been challenged on many occasions, since it complained of tough negotiating with his staff. He said that he advised the company that they were to deal directly with his officials.¹²³ Merriam's testimony on this point varies somewhat with Cameron's. Merriam said that, in most cases, Cameron advised the department to continue negotiating, but that, on occasion, Cameron would tell staff that the company's position was acceptable to the province.¹²⁴ He testified that Cameron was involved in the negotiating process:

He was involved in the process, although I think . . . his approach was to press the company to negotiate with officials. And it was only when either he or the company, I guess, felt that things might be breaking down in terms of making progress on an issue that he would inject himself into the decision on the issue.¹²⁵

Merriam agreed that, because of Cameron's involvement, the job of his department was somewhat more difficult in the case of Westray.¹²⁶

Cameron was determined to see the development of the Westray mine proceed. His involvement in the negotiation process attests to this goal. In

¹¹⁹ Hearing transcript, vol. 66, p. 14468.

¹²⁰ Hearing transcript, vol. 72, pp. 15684–86.

¹²¹ Hearing transcript, vol. 72, pp. 15656–57.

¹²² Hearing transcript, vol. 72, p. 15761.

¹²³ Hearing transcript, vol. 67, p. 14699.

¹²⁴ Hearing transcript, vol. 72, p. 15658. The discussion of the *pari passu* security on Westray's interim loan from the province is an example of such an occasion.

¹²⁵ Hearing transcript, vol. 72, p. 15659.

¹²⁶ Hearing transcript, vol. 72, p. 15660.

fact, when there was some doubt whether the federal government would complete a deal with Westray, Cameron spoke with Westray manager Gerald Phillips about a provincial deal without federal input. On 20 March 1990, in an inter-office Westray memorandum, Phillips wrote to Curragh officials:

Don met with Premier Buchanan last night, at which time he suggested to the Premier that he phone Harry Rogers and tell him to forget about the meeting on Thursday, because, as they were told last week, the Provincial Government is prepared to finalize a deal with Westray.

...

It is my impression that Don wants to finalize a Provincial/Westray deal. I will ask Don if he thinks it will help if Mr. Frame calls Premier Buchanan to let him know how frustrated we are with the Federal Government and the continued delays we have had to put up with.¹²⁷

In another inter-office memorandum, dated 29 March 1990, Phillips wrote:

Don Cameron phoned me this morning to inform me that Westray will not receive Treasury Board approval today. Don was speaking with Harry Rogers. Don is absolutely disgusted that we are not going to get the approval this week.

...

After Don talked to Harry Rogers, he met with the Premier. Don told the Premier that the federal government was not going to give their approval today. Don also told the Premier that he was going to complete a provincial deal with Westray and the Premier told Don that he cannot do that. *Don said he does not care what the Premier says, he is going to do a deal regardless because this is becoming an embarrassment to everyone involved.*¹²⁸

On 30 March 1990, Phillips relayed the following:

Don also said that he was speaking to Harry Rogers today. Harry Rogers told Don that the deal is done and will be approved this Thursday. *Don has obtained the approval of the Premier and his other Cabinet colleagues that if the federal deal is not done this Thursday, the Province will negotiate a deal with Westray.*¹²⁹

Cameron commented on Phillips's account of the development of a Westray-provincial deal.¹³⁰ In response to the claim that he would do the deal without the premier, Cameron testified that you simply do not do a deal without the premier: "If the Premier says in Cabinet, 'We're not doing that,' then it's not going to be done. And the orders won't be signed.

¹²⁷ Exhibit 141.03.052–53. It is interesting to note that Cameron had expressed his dissatisfaction and frustration with the manner in which the federal department had handled the Westray proposal (Hearing transcript, vol. 72, pp. 13449–50).

¹²⁸ Exhibit 141, tab 3, p. 56. Emphasis added.

¹²⁹ Exhibit 141, tab 3, p. 58. Emphasis added.

¹³⁰ **Comment** The entire series of memoranda from Phillips to senior Curragh officials in Toronto has caused me some concern. It consists solely of Phillips's interpretation of discussions with provincial officials. The accuracy of the contents of these memoranda was questioned by some witnesses. In many cases, I formed the opinion that the memoranda not only relayed information but were composed to impress Frame and other Curragh executives with Phillips's prowess as a negotiator and his close connections with the senior provincial people. To this extent, these memoranda ought not be relied on as reflecting the events and discussions they purport to relate.

So it's just that simple."¹³¹ Cameron could not say that a cabinet decision had been made authorizing a provincial deal.¹³² He felt that the discussion around the provincial deal was a good tactic "to allow the feds to know that we were negotiating, so they would start playing fair."¹³³ In the event that the federal government decided not to proceed with the project, Cameron thought the province would have initiated a deal with Westray.¹³⁴

Finding

Donald Cameron, a Pictou County MLA, was totally committed to the concept of having a coal mine in that county. This commitment is laudable and represents the sort of activity expected of politicians. It is, perhaps, one of the most rewarding of their duties. Cameron, as minister of industry, trade, and technology, continued with the same single-minded determination to work to ensure that Westray became a reality. In this context, he may have exceeded the limits of ministerial prudence and responsibility. He became an advocate of the project in much the same way that the promoters were in their dealings with the government of Canada.

\$12 Million Equity Loan

The provincial government ultimately agreed to provide Westray with a \$12 million fully subordinated loan at an interest rate of 11.75 per cent.¹³⁵ Merriam commented that equity loans are usually granted to existing companies in financial difficulty and require the province's assistance in corporate restructuring. They are granted less frequently for new projects. In the case of Westray – a new project initiated by a reportedly healthy company – such a loan was an unusual kind of financial assistance.¹³⁶

Curragh's equity in the project consisted of a cash outlay of \$9 million and deferred management fees of \$6 million. The province had adopted the same guidelines as the federal government – at least 20 per cent of the project cost should be in the form of equity by the owner. Merriam testified that, ideally, "equity" was considered "cold, hard cash," and, therefore, the company's equity in this project would normally have been considered insufficient to qualify for either provincial or federal assistance.¹³⁷ On 19 December 1988, Marvyn Robar, a certified accountant and part of the department's business advisory group, sent a memorandum to Merriam in which he appeared to question whether the company's \$9 million investment and \$6 million deferred management fees were

¹³¹ Hearing transcript, vol. 66, p. 14597.

¹³² Hearing transcript, vol. 66, p. 14605.

¹³³ Hearing transcript, vol. 66, p. 14600.

¹³⁴ Hearing transcript, vol. 66, pp. 14601–02.

¹³⁵ "Fully subordinated" means that the provincial loan would be the last in line to be paid, thereby qualifying it as equity invested in the project.

¹³⁶ Hearing transcript, vol. 72, pp. 15671–72.

¹³⁷ Hearing transcript, vol. 72, pp. 15672–73.

adequate equity.¹³⁸ In testimony, Merriam responded by stating that deferred management fees constitute adequate equity pursuant to the AEP guidelines. Both the federal and the provincial departments accepted that interpretation. Merriam did not feel that a \$15 million investment was adequate; nor did the province or the federal government. It was his view that \$25 million, or 20 per cent, in some acceptable equity form would have been appropriate.¹³⁹

Cameron provided some background for the province's decision to support the Westray project with a \$12 million loan. His first knowledge of the loan was just before his department became involved in the negotiations with Westray. According to Cameron, the province's support came about as a result of the federal government's refusal to "accept some of the money the company was putting in as equity."¹⁴⁰ As we know, the company needed additional equity to meet the requirements of the AEP. Cameron believed that the federal government was determined to have the province financially involved in the project: "And so that initially, it came to us that we would be required to give them a \$12 million loan. And then when we agreed to that later on they said, 'Now you have to fully subordinate it.'"¹⁴¹ Cameron was not able to offer any further basis or justification for the province having lent Westray \$12 million.¹⁴²

On 10 May 1990, Elizabeth Cuddihy, solicitor for the Department of Industry, Trade, and Technology, wrote a memorandum to Robar in which she advised:

He [Sheldon Plener, a lawyer acting for Curragh] seems insistent on us drafting a letter to Curragh confirming the \$12 million arrangement including the subordination matter. I advised him that we are reviewing the issues and we will be prepared to move as soon as the Federal offer is received and accepted by the Company and unless I am instructed otherwise that is the course we intend to follow.¹⁴³

Merriam also testified that he was not eager to have the province's position subordinated "the way it had to be to have those funds considered equity."¹⁴⁴ Notwithstanding Cuddihy's advice, Cameron wrote to Frame on that very same day, confirming that the province was "prepared to enter into a subordination agreement in respect of the \$12 million loan on terms and conditions satisfactory to Curragh Resources Inc. and the province."¹⁴⁵ Phillips responded with a letter asking the province to confirm that it would do whatever was necessary to ensure that

¹³⁸ Exhibit 142.01.022.

¹³⁹ Hearing transcript, vol. 72, pp. 15677–78.

¹⁴⁰ Hearing transcript, vol. 66, p. 14462.

¹⁴¹ Hearing transcript, vol. 66, pp. 14459–62.

¹⁴² Hearing transcript, vol. 66, p. 14467.

¹⁴³ Exhibit 141.03.063.

¹⁴⁴ Hearing transcript, vol. 72, p. 15689.

¹⁴⁵ Exhibit 141.03.064.

the \$12 million loan qualified as equity under the AEP.¹⁴⁶ Cameron testified that the province made that commitment. His response about whether Cuddihy's memorandum and his letter were inconsistent was vague and evasive: "Well . . . the letter is different than this. The one aspect of subordination is certainly in here, and she didn't want to discuss it with them."¹⁴⁷ According to Cameron, the subordination issue was clear-cut – it was a request by the federal government that had already been agreed to by the province. Cameron testified that he was not keen about subordinating the loan, but realized it was the only way it was going to be done.¹⁴⁸

\$8 Million Interim Loan

In January 1989, Curragh and the Department of Industry, Trade, and Technology entered into serious discussions about the advance of funds to Westray on an interim basis. Westray had already invested \$10.5 million in the development of the project. The company wanted the province to advance a portion of its funding – approximately \$4 million at that time – to permit continued site preparation and tunnel excavation. Westray's investment had been contingent on both an imminent decision from the federal government to assist with the project and the \$12 million provincial financing arrangement provided to the company in September 1988. Because of delays in securing federal financing, the company was not prepared to make any further investment in the project; nor did it want to delay the project, since it was determined to meet the production commitment to NS Power.

In a memorandum dated 18 January 1989, Merriam presented two alternatives to the minister: first, mine development could be suspended until federal financing was secured; or second, the province could advance up to \$4 million subject to the company's agreeing to provide a first security position on all assets, though once permanent financing arrangements were concluded, security would be subordinated to the prime lender. The company argued that it required full compensation should the province take control of the project. In this event, Merriam recommended that Westray be compensated on the percentage of its capital contribution vis-à-vis the total capital contribution of the project.¹⁴⁹

Cuddihy, in a memorandum to Cameron dated 26 January 1989, advised that interim financing to Westray without confirmation of federal financing had to be treated as a separate loan apart from the \$12 million equity loan, since the equity loan was contingent on federal support.¹⁵⁰ She did not believe that the \$4 million allotment would be sufficient for continued progress on the project; nor did she believe that it was realistic

¹⁴⁶ Exhibit 141.03.065.

¹⁴⁷ Hearing transcript, vol. 66, pp. 14508–09.

¹⁴⁸ Hearing transcript, vol. 66, pp. 14507–08.

¹⁴⁹ Exhibit 141.06.001–03.

¹⁵⁰ Exhibit 141.03.022.

to consider partial interim financing. Shortly thereafter, in a memorandum to file dated 8 February 1989, Cuddihy reported that the company was reluctant to accept a forfeiture of the assets in the event of default, notwithstanding that the province was prepared to advance \$8 million.¹⁵¹ Westray felt that it should be compensated for getting the project under way. Cuddihy also commented on a letter from the Prime Minister's Office advising the conditions under which the federal government might be prepared to advance financing: "Overall," she concluded, "it seemed negative. Accordingly, the risks of the Province providing the interim financing could not be ascertained, but did not look good."

Merriam said it was clear that the company would not provide the security that the department felt was appropriate, and, in light of that, the department was not prepared to recommend the advance of an interim loan to Curragh.¹⁵² He believed that there should be normal commercial security for a loan of this kind, not only because of the amount but also because of the possibility that there would not be a federal offer and that the province would have to proceed with Curragh or another operator on a different basis altogether. In the event of such an occurrence, the province wished to have control of all the assets.¹⁵³

On 8 February 1989, Merriam advised Cameron that the company was asking for *pari passu* security with the province on its own assets and, in the event of a default, the entitlement to release its interest in the security for its share of the value of the project as a going concern.¹⁵⁴ Merriam went on to explain the impact of such a request:

The *pari passu* clause would essentially mean that the Province is entering into a joint venture with Westray with the Province assuming the financial risk. The provision for valuation as a going concern would mean that the Province would have to write Westray another cheque for \$10.5 million to gain unencumbered rights to the property after having already laid out its \$8 million in interim financing which would never be recovered.

Merriam concluded the memorandum with the following remark:

It is the company's position that we are at an impasse if we cannot resolve the security issue. Westray is now inclined to wait for the Federal offer to see if that will . . . provide us with a way around this problem.

It was clear from Merriam's memorandum to the minister that his department was not in favour of granting an interim loan to Westray on this basis. Merriam testified that, although he was somewhat sympathetic to the company's argument that it could potentially come away with nothing, having already invested \$10.5 million, he felt the counterarguments outweighed this consideration. The minister, on the other hand, thought a partnership was a reasonable compromise. Merriam believed that Cameron felt it would be unfair for the company to go away

¹⁵¹ Exhibit 141.03.023.

¹⁵² Hearing transcript, vol. 72, p. 15717.

¹⁵³ Hearing transcript, vol. 72, p. 15721.

¹⁵⁴ Exhibit 141.03.024-25.

with nothing, after all it had invested. The minister, accordingly, sided with company officials on the issue. Merriam said, “Well, all I can tell you is we gave the Minister the best advice we could and, in the end, he exercised his responsibility to make a decision. And he chose to do otherwise.”¹⁵⁵

Cameron testified that the interim loan resulted from the delay in federal financing and the need to keep the project going until such financing was secured. He did not regard the advance of \$8 million as a difficult issue, because the interim loan came out of a \$12 million loan that the province had already agreed to provide to the company.¹⁵⁶ Cameron did not consider the company’s position on the security issue to be unreasonable. He understood the company to be saying that, in the event that the province shut the project down, the company would want to recover the amount of money it had invested. Cameron did not appear to have any problem with such rationalizing.¹⁵⁷ Merriam’s suggestion that the province would be entering into a joint venture with Westray did not cause Cameron any real concern:

No, I didn’t see it that way. I had every confidence that the Federal Government would go through with their funding; the money would be paid back, and we went back to the original \$12 million loan. And, as you know, that’s exactly what happened, plus a quarter of a million dollars in interest.¹⁵⁸

Provincial consent to provide interim financing to Westray required the approval of cabinet. On 17 March 1989, an Order in Council authorized financial assistance to Westray in an amount not to exceed \$8 million. The terms and conditions relating to security for the loan specified that there would be a fixed and floating charge debenture on a *pari passu* basis with shareholders. The loan was to be repaid in full on the earlier of 30 September 1989 or 70 days from the date of the written offer of project financing under the AEP.¹⁵⁹ Shortly thereafter, on 19 April 1989, Westray and the province signed an agreement setting out the terms and conditions of the interim loan.

Take-or-Pay Agreement

By the summer of 1988, discussion concerning a provincial take-or-pay agreement with Westray had begun. In a letter to Cameron dated 4 July 1988, W.R. Redrupp, of Price Waterhouse, alluded to the take-or-pay agreement ultimately provided by the province. According to Redrupp, Westray required a provincial guarantee for the sale of up to one million tonnes of coal as soon as the project reached that level of production. He

¹⁵⁵ Hearing transcript, vol. 72, p. 15724.

¹⁵⁶ Hearing transcript, vol. 66, pp. 14474–75.

¹⁵⁷ Hearing transcript, vol. 66, p. 14500.

¹⁵⁸ Hearing transcript, vol. 66, p. 14503.

¹⁵⁹ Exhibit 35c.0022–23. The date of repayment of the interim loan was eventually extended; it was not paid back until the provincial government’s next fiscal year.

understood that a contract to purchase 710,000 tonnes had been committed by NS Power:

Westray Coal undertakes to use best efforts to sell the balance of the one million tonnes. . . . The wording of the guarantee should be worked on with you as soon as possible . . . The guarantee will be most important for use in arranging senior debt financing as well as the AEP application.¹⁶⁰

A few days later, on 8 July 1988, Cameron wrote to de Cotret and said that the province had agreed, *in principle*, to provide assistance to Westray, including a take-or-pay agreement for 275,000 tonnes of coal.¹⁶¹ On 9 September 1988, Cameron wrote to Frame, stating that the province agreed to provide “a take or pay contract for 275,000 tonnes per year for a term of fifteen years.” The conditions specified that the agreement was to terminate on 31 January 1989 if by that date the parties had failed to conclude a formal agreement.¹⁶² It is important to note that written cabinet approval for the take-or-pay contract – a mandatory requirement – had not been given at this juncture. In fact, on 20 September 1988, an Order in Council authorizing financial assistance to Westray for the \$12 million loan made no mention of a take-or-pay contract.¹⁶³

At Westray’s request, the 31 January 1989 date specified in the conditions attached to Cameron’s offer of assistance was extended to 31 March 1989.¹⁶⁴ Subsequently, on 31 October 1989, Marvin Pelley, president of Westray, wrote to Cameron asking him to confirm that the termination date for the agreement would be again revised – this time to 28 February 1990.¹⁶⁵ In a memorandum to Merriam dated 2 November 1989, accountant Marvyn Robar advised against such an amendment by the minister:

In order to extend this same offer now as requested would first require the approval of Cabinet for the take or pay contract.

I would therefore strongly recommend against the Minister approving this request. *In the event that he does wish to sign, he must first obtain the approval of Cabinet for the take or pay contract.*¹⁶⁶

On 3 November 1989, Robar and Cuddihy advised Cameron against extensions to the take-or-pay agreement without the approval of cabinet. Their words were unequivocal:

You will recall that the Cabinet did not approve the execution by the Department of any arrangement relating to the take or pay and *if such were to be granted at any time a specific Cabinet authority would be required.*¹⁶⁷

¹⁶⁰ Exhibit 141.03.006–07.

¹⁶¹ Exhibit 141.03.009.

¹⁶² Exhibit 142.01.006–14.

¹⁶³ Exhibit 35c.0017.

¹⁶⁴ Exhibit 142.02.008.

¹⁶⁵ Exhibit 141.03.034–35.

¹⁶⁶ Exhibit 142.02.008. Emphasis added.

¹⁶⁷ Exhibit 141.03.033. Emphasis added.

On 14 December 1989, Cuddihy was instructed to draft a cabinet minute to seek authority for Cameron to sign a letter of undertaking with Westray for a take-or-pay contract involving 270,000 tonnes of coal per year for 15 years.¹⁶⁸ On 9 January 1990, Cameron wrote to Cuddihy: "I have received Cabinet authority to finalize the contract with Westray regarding a \$12 Million loan and Take-or-Pay Contract."¹⁶⁹ On that same day, Cameron wrote a letter to Frame:

[T]his will confirm that the Province is prepared . . . to enter into a take or pay contract for 275,000 tonnes per year for a term of fifteen years substantially on the terms and conditions attached hereto.¹⁷⁰

This letter was much the same as the letter he had written to the company well over a year before on 9 September 1988 – *without* cabinet approval.

Cameron had an opportunity to testify to this issue at the Inquiry, though he was less than forthcoming in his answers:

Q. So my question to you is: Did you have Cabinet approval to commit the take-or-pay agreement in September of 1988?

A. I would not put it in the letter without having Cabinet approval. Absolutely not.

Q. Well, you tell me: Did you take it to Cabinet and did Cabinet approve committing to a take-or-pay agreement in September of '88?

A. I would not write a letter saying that we – you have a take-or-pay agreement without going to Cabinet and having approval.

Q. Your staff is saying here you didn't have it, that Cabinet had refused to give you that authority.

A. Maybe at that time. But I would not write that letter if I didn't get permission from Cabinet to do it.

Q. They're saying you did not have approval prior to 1989, July –

A. What they –

Q. – sorry, '90.

A. What they may be saying is that we didn't have the documents. But lots of times in Cabinet we would have a decision – we'd go through the book and then have a decision made on a number of issues after we got the agenda done to the book, and agree to do certain things. So they may be saying that I didn't have the paperwork done, but I can assure you that I did not write a letter on this or any other item that Cabinet didn't give its approval.

Q. Tell me about Cabinet approval. Tell me when you took it [to] Cabinet; tell me what was passed in Cabinet.

A. Well, if we agreed in Cabinet to do this, then we'd follow it up later with an Order-in-Council.

...

Q. . . . Now this is a point that I think is of some significance, and I want your evidence on the point. *If you got Cabinet approval to make the commitments that you did in '88, you should be able to point me to something that evidences that because I've got two pieces of paper from your staff that said you don't – that you didn't.*

¹⁶⁸ Exhibit 141.03.036. The 270,000 tonnes is likely a typographical error. All other references are to 275,000 tonnes.

¹⁶⁹ Exhibit 141.03.037.

¹⁷⁰ Exhibit 141.03.038.

- A. Mr. Merrick, I think you're more interested in trying to embarrass me than get to the truth. *The truth is that I would not write a letter to any company on any issue without having Cabinet approval.*
- ...
- Q. Do you remember in 1988, prior to your writing to Mr. de Cotret in July and prior to your writing to Mr. Frame in September, taking that issue to Cabinet as to whether you could commit the province to a take-or-pay agreement?
- A. Mr. Merrick, you asked this question 15 times.
- Q. Yeah.
- A. I'm telling you that I didn't sign a take-or-pay agreement with this company or any other issue without having Cabinet approval.
- Q. Yes.
- A. Now that should be very clear for you.
- Q. I've got that.
- A. Good.
- Q. Now my question is do you remember your request to Cabinet –
- A. I don't remember –
- Q. – in '88?
- A. – the exact day. But all I can tell you is I did it.
- Q. You remember taking this request in '88 to Cabinet? Have I got that?
- A. I don't know when I took it to Cabinet. All I can tell you, I took the request to Cabinet.
- Q. Do you recall how Cabinet dealt with it the first time?
- A. No, I don't.
- Q. You don't remember if they authorized it or didn't authorize it?
- A. No, I don't. I don't know how many times we discussed – I don't know.
- Q. So that do you – I take it then you cannot dispute the statement that appears in this memo by Elizabeth Cuddihy and Mr. Robar that the Cabinet did not approve the execution by the Department of any arrangement relating to take-or-pay and if –
- A. I don't know –
- Q. – such were to be granted –
- A. There was a piece of paper that – it wasn't done.
- Q. Are you able to –
- A. I don't know.
- Q. – dispute whether that is the reality?
- A. I'd have to understand the surroundings of this. Was the day – draft a piece of paper and I took it and it was turned down? I don't know. Did they look through the book and say, "Hey, we don't have legal authority to do so"? I don't know. That happens lots of times. They will say, "Well, we don't have legal authority to do this yet. You will have to take this in before we can exercise this." I don't know what they're referring to here. I'm not reading anything into it. The bottom line is that Cabinet approved every part of the deal.
- Q. Ultimately.
- A. That's the bottom line.
- Q. Ultimately. I'm talking about '88. Let me ask you this: Mr. Rogers, when he was on the stand, said that he consistently was asking you for a piece of paper that confirmed that the province was prepared to make that commitment.
- A. Uh-huh.

- Q. And you consistently put him off and put him off for some period of time. And that he was skeptical that such a piece of paper [ever] existed.
- A. Well, it existed.
- Q. Here's my question: *Is it possible that his evidence is correct, that you were not able to show him a Cabinet document because you didn't have a Cabinet document?*
- A. *No, that's not true. I didn't want him to see it because I didn't trust them.*
- Q. *What Cabinet document did you have prior to 1990?*
- A. *I don't know, but I didn't want them to see it because I didn't trust them. I figured they'd –*
- Q. So you had –
- A. – give it to – I figured, before the day was over, they would give it to Devco.
- Q. So you had a piece of paper that you didn't want him to see, but you don't know what that piece of paper was?
- A. Not on a particular date.¹⁷¹

Senator Buchanan commented on the authority Cameron would have had for the take-or-pay agreement in September 1988. He testified that Cameron had Cabinet *direction* to continue to negotiate a take-or-pay agreement, but that he had no *authority* to bind the province to any contractual obligation or to confirm that the province would in fact give a take-or-pay agreement.¹⁷²

Merriam testified that it was his understanding that Cameron had received cabinet approval to commit the province to a take-or-pay agreement. According to Merriam, Cameron advised him that he had cabinet's blessing and that the 9 September 1988 letter was to be prepared for his signature. Although the cabinet minute for this meeting made no reference to the take-or-pay agreement, Merriam was reluctant to say that the minister had misled him about the authority he had in fact been given: "I wouldn't say the Minister misled me. Whether there was some differing interpretation by he and his Cabinet colleagues of what they agreed to in that discussion, I can only assume there must have been."¹⁷³ It was Merriam's understanding that Cameron had the authority to make the agreement in September 1988; he subsequently learned that no such authority had existed.¹⁷⁴

Finding

The evidence is unequivocal that, by September 1988, the cabinet had not approved a take-or-pay agreement with Westray for 275,000 tonnes of coal per year. Although the issue may have been discussed in cabinet, there was no existing authority for the minister to confirm that the

¹⁷¹ Hearing transcript, vol. 66, pp. 14551–58. Emphasis added.

¹⁷² Hearing transcript, vol. 68, pp. 14973–74.

¹⁷³ Hearing transcript, vol. 72, p. 15695.

¹⁷⁴ Hearing transcript, vol. 72, pp. 15695–96. It is important to note that Merriam raised the question whether Cameron in fact required cabinet authority to write a letter of this nature and the level of commitment the letter actually represented from a legal point of view.

province was willing to enter into the agreement. In spite of this, Cameron, in his letter of 9 September 1988, committed the province to the take-or-pay agreement. That action on the part of the minister was clearly improper. Cameron may have felt secure that the negotiations, which were all that had been authorized by cabinet, would mature into formal approval for the agreement. It would appear that Cameron allowed his determination to cloud his judgment. The fact that the agreement received cabinet approval two years later in no way excuses Cameron's earlier unauthorized action.

Opposition to the Take-or-Pay Agreement

The take-or-pay contract elicited no support among senior staff members and solicitors of the Department of Industry, Trade, and Technology. Nor were officials in the Department of Mines and Energy interested in becoming involved. Eventually, Novaco Limited, a provincial crown corporation, entered into the contract with Westray. Even this arrangement raised questions whether Novaco was the appropriate body, and whether there was a conflict of interest with Novaco taking on the role.

The questionable authority to enter into the agreement in large part fostered the opposition to the take-or-pay agreement. Some did not consider it to be a standard commercial agreement. Nancy Ripley-Hood, solicitor for mines and energy, in a memorandum of 15 July 1990 to deputy minister of mines and energy John Laffin, provided a summary of the background to the take-or-pay agreement as relayed to her by Merriam. She informed Laffin that Cameron's staff had advised him that his department had no authority to enter into the take-or-pay agreement and that "they will not do the necessary drafting." She went on to say: "Since DC [Don Cameron] can't get the work done in house, he goes to MCR [law firm McInnes Cooper & Robertson]. MCR also advise he has *no authority* and that *TOP [take-or-pay] not in best interests of Province.*"¹⁷⁵

Senator Buchanan testified that he was not aware that officials within the Department of Industry, Trade, and Technology thought that the take-or-pay agreement was illegal, that they had refused to draft the necessary documentation, and that the law firm McInnes Cooper & Robertson had rendered an opinion on the issue.¹⁷⁶ Cameron, in his testimony, did not dispute that his department had advised him that he had no authority to make this deal and that they would not draft the documents. But he was adamant that outside counsel had been retained to do the entire deal; they were not retained to do only the work that his staff was reluctant to perform. Cameron said he was unaware of McInnes Cooper & Robertson's opinion that there was no authority for the take-or-pay agreement.¹⁷⁷

Merriam himself testified that he did not like the take-or-pay agreement and could not identify any department, agency, or individual

¹⁷⁵ Exhibit 141.03.068. Emphasis added.

¹⁷⁶ Hearing transcript, vol. 68, pp. 14978–79.

¹⁷⁷ Hearing transcript, vol. 66, pp. 14560–62.

who was enthusiastic about it. The bureaucracy was concerned about the risks associated with a contract of this nature and was not eager to inherit the potential of Westray's calling on the agreement.¹⁷⁸ Ripley-Hood stated that she did not like the deal from day one.¹⁷⁹ She saw no need for the agreement, and, in her July 1990 memorandum to Laffin, she said: "Our staff . . . have concluded that if no one entered the TOP, the rate of return to CF [Clifford Frame] and terms of financing are such that this is the best deal CF will ever get anywhere and that any 'threat' to pull out should be firmly ignored."¹⁸⁰ Ripley-Hood questioned whether there was any authority for the Department of Mines and Energy to enter into the deal if, in fact, the province was contemplating such action. She explained that any department entering the take-or-pay agreement required a statute giving cabinet the authority to enter such an agreement; cabinet did not have such a statute.¹⁸¹ Ripley-Hood subsequently found a somewhat antiquated statute that did provide cabinet with the necessary authority, via the Governor in Council, to allow the contract.¹⁸²

Laffin testified that he did not want his department involved in the take-or-pay agreement. It was not Laffin's idea of a usual take-or-pay contract, in which a purchaser and a seller make an agreement, and the purchaser commits itself to take a certain amount of a particular product. In this case, a third party – the provincial government – was involved. Laffin believed that a normal take-or-pay agreement should have been executed between Westray and the power corporation.¹⁸³ Phelan also described a take-or-pay agreement as "a usual type of agreement between a buyer and a seller," but he did not seem to have reservations about this particular agreement.¹⁸⁴

On 31 August 1990, almost two years after Cameron committed the province to a take-or-pay agreement with Westray, cabinet passed an Order in Council authorizing Novaco Limited "to enter into a take or pay agreement with Curragh Resources Inc. as part of the development of a coal mine" in Pictou County.¹⁸⁵ The agreement was ultimately finalized, but the record suggests that there was considerable discussion within cabinet about how to handle it. Merriam agreed in testimony that, between

¹⁷⁸ Hearing transcript, vol. 72, pp. 15689, 15713–14.

¹⁷⁹ Inquiry interview, 26 April 1996 (Exhibit 138, pp. 64–65).

¹⁸⁰ Exhibit 141.03.069.

¹⁸¹ Exhibit 138, p. 45.

¹⁸² Exhibit 138, p. 66.

¹⁸³ Hearing transcript, vol. 70, pp. 15366–68.

¹⁸⁴ Hearing transcript, vol. 53, p. 11553. During independent research, I had the opportunity to discuss the concept of take-or-pay agreements with several mining executives. Such agreements are not unusual. These executives were not aware of situations where a third party such as a government, entered into an agreement of this kind. Though the agreement appears most unusual, more puzzling, in my view, were the lengths to which Cameron went to rationalize the agreement and his firm understanding that the province would never be called upon to honour it – another example of his seeing only what he wanted to see.

¹⁸⁵ Exhibit 141.07.002.

the fall of 1988 and the summer of 1989, there was a belief, at least by his department, that the take-or-pay agreement would not proceed:

- A. It was [an] unresolved issue, is my memory of it. It was in question whether it would be done and who would do it, and our approach was, when in doubt, go with the directions you have in writing, which were to proceed to negotiate the loan and the take-or-pay was –
- Q. Off the table?
- A. Well, or at least set aside temporarily.¹⁸⁶

The minister, according to Merriam, did not particularly care what arm of government executed the agreement, as long as the project proceeded and the federal assistance requirement was met.¹⁸⁷

The take-or-pay contract was considered and debated as late as 16 August 1990. A set of unidentified handwritten notes of a meeting among Cameron, Laffin, Cuddihy, Premier Buchanan, and others indicates that the take-or-pay agreement was still very much under consideration. The author made the following notation: “John Laffin and J. MacIsaac [minister of mines and energy] would like to offer another way around the take or pay.”¹⁸⁸ Senator Buchanan agreed that it was fair to conclude that right up until cabinet finally approved the agreement, there were discussions whether there might be another way to deal with the situation.¹⁸⁹ Clearly, the provincial government was not sold on the deal.

In the end, the province decided that the agreement was to be signed between Novaco Limited and Westray. There is some question whether Novaco’s involvement constituted a conflict of interest situation. In her July 1990 memo to Laffin, Ripley-Hood commented on the appropriateness of Novaco’s participation in the deal:

3. If Nco [Novaco] was to enter TOP *we* (ie Minister) would have a conflict of interest (MCR now agrees with this)
- a) Minister is responsible for NSPC, Nco and our Dept.
 - c) Minister becomes bad guy if he exercises his regulatory function under MR Act & closes Project for any period, CF [Clifford Frame] will scream that we are frustrating TOP
 - d) Minister will be sole guy responsible in House for *all* aspects of this Project. He is responsible for operation of mine, for NSPC and for TOP if Nco gets involved. My opinion & it is also opinion of both ADMs is that Nco not be involved.¹⁹⁰

In her pre-hearing interview, Ripley-Hood elaborated on Novaco’s involvement in the take-or-pay agreement. She explained that McInnes Cooper & Robertson had advised that a numbered company should be established to enter into the take-or-pay agreement. But since Novaco was already established as a corporate entity, the discussion centred on Novaco as the vehicle to implement the agreement. Although Novaco was

¹⁸⁶ Hearing transcript, vol. 72, p. 15704.

¹⁸⁷ Hearing transcript, vol. 72, p. 15705.

¹⁸⁸ Exhibit 141.08.008.

¹⁸⁹ Hearing transcript, vol. 68, p. 14972.

¹⁹⁰ Exhibit 141.03.070–71. Emphasis in original.

mandated to provide advice to the province on near-surface coal mining, excluding Devco, it “could provide advice regarding coal markets which, by implication, would involve Devco.”¹⁹¹

Phelan, in contrast, never saw himself in a conflict of interest situation.¹⁹² As director of mining engineering with the Department of Mines and Energy, he operated in compliance with the *Mineral Resources Act* and had the authority to forfeit Westray’s mining permit. At the same time, he sat on the board of Novaco. In his view, the department’s responsibility under the act encompassed both promotional and developmental activities as well as regulatory duties. His deputy minister, Laffin, though, accepted the possibility of a conflict between the terms of the take-or-pay agreement and the regulatory authority within his department.¹⁹³

Finding

The whole question of the take-or-pay agreement was fraught with difficulties. It was an unusual agreement in that it provided for a third party, the province, to commit public funds for the purchase of coal for which it had no immediate market. The agreement was roundly criticized as a bad deal for the province, and, moreover, the agreement was not really required in order to conclude the deal with Westray.

Cameron piloted this agreement through cabinet, which finally gave its approval. Although a minister is under no obligation to accept the advice of his or her departmental staff, the minister does at least have an obligation to consider that advice. The evidence is strong that Cameron did not give prudent and thoughtful consideration to the advice coming from his, and other, government officials. Notwithstanding the overwhelming opposition to the take-or-pay agreement, the political support for it became the final and decisive factor in pushing it through.

Enforceability of the Take-or-Pay Agreement

There is no question that the final take-or-pay agreement between Novaco and Westray was a legally binding contract. In the event that Westray elected to give notice pursuant to the agreement, the province would have had no choice but to comply with its terms. Notwithstanding this fact, Cameron was adamant that he and the company had reached an understanding about the enforceability of the take-or-pay agreement. According to Cameron, the company merely pursued the agreement for the benefit of securing financing, and had absolutely no intention of relying on the agreement:

And the take-or-pay was . . . very simple – everyone has tried to make it very complicated and make it something it’s not. What we said to them was, “Okay, to help put your financing in place, with a clear understanding that

¹⁹¹ Exhibit 138, pp. 54–56.

¹⁹² Hearing transcript, vol. 53, p. 11549.

¹⁹³ Hearing transcript, vol. 70, pp. 15380–81.

you will never get one red cent out of this. You have to understand that.” And I think they . . . at least, Gerald Phillips and Marvin Pelley understood it very clearly, believe me.¹⁹⁴

Cameron went on to explain that Westray would have had absolutely no problem selling its low- sulphur coal “in these environmental times.” For the contract to be implemented, the company had to prove, without doubt, that it had tried and was unable to sell its coal at world price. The potential of this scenario happening did not concern Cameron.¹⁹⁵ While still maintaining his position that the take-or-pay contract would never be exercised, Cameron did say: “If they wanted to break their word, they had every right to exercise that document. And I can tell you it would have got a tough response from us.”¹⁹⁶

Merriam was clearly not as confident as Cameron that Westray would not exercise its rights flowing from the agreement. In a memorandum to Cuddihy dated 14 December 1989, Merriam wrote:

[T]he Minister is aware that, while it is the intent of Westray not to call on the Take-or-Pay contract, the legal commitment will be there for the Province, and there is always a possibility that we may be required to fulfil the purchase requirement of the contract in some future year.¹⁹⁷

Merriam had no doubt that the take-or-pay agreement was a legal commitment; he was suspicious that it would be exercised at some point during the 15-year term. He told the Inquiry that, given the project and the commitment in the agreement, there was a “reasonable possibility” that the province would be called to honour the take-or-pay agreement at certain times.¹⁹⁸ Merriam commented on Cameron’s belief that the company would not exercise the agreement:

- Q. Did you ever see any signs of a binding commitment by the company that they would never seek recovery under the contract?
 A. No, there was no such commitment I’m aware of. A verbal commitment, but no binding legal commitment.¹⁹⁹

Rogers testified that he did not accept Cameron’s argument that Westray’s low-sulphur coal would be disposed of readily. He believed that, because the coal would be entering the world market at highly subsidized levels, it would likely be in contravention of both the General Agreement on Tariffs and Trade (GATT) and the Canada–United States Free Trade Agreement. He thought there would be very quick responses and trade action from coal producers in other markets: “[T]hat’s . . . why I think it was wise to presume that from a planning point of view, that the Nova Scotia Government probably would be paying for some coal.”²⁰⁰

¹⁹⁴ Hearing transcript, vol. 66, p. 14510.

¹⁹⁵ Hearing transcript, vol. 66, pp. 14511–12.

¹⁹⁶ Hearing transcript, vol. 66, p. 14524.

¹⁹⁷ Exhibit 141.03.036.

¹⁹⁸ Hearing transcript, vol. 72, p. 15726.

¹⁹⁹ Hearing transcript, vol. 72, p. 15727.

²⁰⁰ Hearing transcript, vol. 61, pp. 13430–31.

Senator Buchanan understood the take-or-pay agreement to be a binding commitment on the province: if the company after due diligence could not sell its low-sulphur coal, the province would be on the hook. Buchanan went on to say that the recommendation to cabinet indicated that there was a market for low-sulphur coal and that the province would *probably* never have to honour the agreement. Although Buchanan accepted the information that came through the minister and his department, he commented that “it would be a strange government that would sign something and . . . not intend to honour it.”²⁰¹

There was a clear indication that Westray was in fact serious about exercising its rights in accordance with the take-or-pay agreement. In November 1991, Curragh requested an amendment to extend the date by which Curragh could give notice under the agreement. In a memorandum to Ripley-Hood dated 4 December 1991, Phelan wrote:

When the Board of Novaco Limited met with Marvin Pelley of Curragh Resources Inc. on November 22, 1991, he informed us that Curragh Resources Inc. have not been able to sell the coal they expect to produce in the calendar year 1993. Curragh will be required to give an election notice pursuant to Clause 3.01 of the “Take or Pay Agreement” to Novaco by December 31, 1991 so as not to be in breach of the agreement with their bank.²⁰²

The board agreed to Curragh’s request to amend the agreement so it did not have to give the election notice until 30 June 1992. The board’s decision was subject to Ripley-Hood’s concurrence that the contract could be legally amended, that the other parties agreed, and that Novaco could agree to the delay of the notice without compromising its position or the position of the provincial government.²⁰³ On 11 December 1991, Ripley-Hood wrote a memorandum to Phelan. She was adamant that the agreement should not be amended:

There is no legal reason to amend this Agreement. It puts the Province and Novaco in a less than optimal position so that the Company can be put in a better position.

I recommend that the Province does not agree to such amendment.²⁰⁴

Ripley-Hood outlined the repercussions of agreeing to such an amendment:

- In all probability, the company would have time to produce enough coal to kick in the provisions of the agreement. If such an extension was not

²⁰¹ Hearing transcript, vol. 68, p. 14986.

²⁰² Exhibit 137.04.12. Clause 3.01 of the take-or-pay agreement provided that “[i]f CRI [Curragh Resources Inc.] anticipates that its sales of coal in connection with the Westray Project from production from the Mine will aggregate less than 975,000 tonnes in a particular Year during the Term, CRI may give written notice (the ‘Election Notice’) in accordance herewith to the Purchaser within thirty (30) days prior to December 31 in any Year, but in any event no earlier than December 1991 requiring the Purchaser to take or to pay for the applicable Obligation Amount in respect of the Year (the ‘Take or Pay Year’) commencing twelve (12) months after such December 31” (Exhibit 141.07.014–15).

²⁰³ Exhibit 137.04.12.

²⁰⁴ Exhibit 137.04.15.

provided, the province probably would not have to take or pay for coal, because the company would not achieve the full production level.

- The province would reduce the time to give its take-or-pay option. This time was also needed to ascertain whether Westray used its best efforts to sell the coal.
- There would be a possibility of receiving two election notices in one year. The political ramifications were obvious.
- The extension of time had potential ramifications for the other provisions of the agreement, including its term, further amendments, etc.
- The amendment required cabinet approval.

The agreement, however, was ultimately amended. The chairman of Novaco wrote to Curragh on 19 December 1991 amending the election date from 31 December 1991 to 1 October 1992. The date by which the purchaser was to notify Curragh was extended from 30 June 1992 to 15 November 1992, giving the province only six weeks (as opposed to six months) in which to consider its option pursuant to the agreement.²⁰⁵

In her pre-hearing interview, Ripley-Hood maintained her position that there was no reason for the province to have amended the take-or-pay agreement.²⁰⁶ Phelan agreed that Ripley-Hood had raised some legitimate concerns about an extension of the notice period, but noted that “Novaco had decided they wanted to do this” as long as the agreement could be legally amended. Phelan did not see it as an issue or a major concession.²⁰⁷

Cameron agreed that Curragh was apparently getting ready to give notice so it could call on the province to honour its obligations under the agreement for the 1993 year. He was aware of this intention at the time and explained how he had addressed the issue:

We had a very tough conversation about it. And I reminded them of the commitment made and that they simply wouldn't be getting one cent of money from the Provincial Government, that they could sue us, they could do anything they want, but they were going to honour their commitment. And their commitment was that they would not exercise this agreement.²⁰⁸

Cameron was not concerned about the advice he received from Ripley-Hood. According to Cameron, amending the agreement would not make any difference because Westray was not going to get any money out of the province:

[T]he Board was happy to change it. I was happy to change it. The bottom line was that they were never going to get any money and they knew it. And they were told directly from me, and they repeated that to our officials. So I didn't care what they did. They just weren't ever going to use it.²⁰⁹

²⁰⁵ Exhibit 137.04.28.

²⁰⁶ Exhibit 138, p. 97.

²⁰⁷ Hearing transcript, vol. 53, pp. 11539–47.

²⁰⁸ Hearing transcript, vol. 66, p. 14539.

²⁰⁹ Hearing transcript, vol. 66, p. 14544.

Finding

The take-or-pay agreement executed by Curragh, Novaco, and the province was enforceable, notwithstanding a purported understanding between Cameron and Curragh officials that the agreement would never be exercised. To exercise the agreement for a given production year, the company had to choose to do so, well in advance, by a date specified in the agreement. The company would have to demonstrate at that time that the mine was capable of full production for the forthcoming year. Curragh indicated its intent to avail itself of the agreement when it requested an extension to that date, presumably to give itself time to get up to full production. Cameron's support for the agreement was based only on Curragh's word that the take-or-pay agreement would never be exercised. This attitude indicates startling naivety for a person of experience in the political milieu. If not naivety, it is another compelling example of Cameron's obdurate and single-minded determination to bring Westray to reality.

Having criticized Cameron for his conduct throughout the development stage of the Westray project, I must carefully note that my criticisms cannot be construed as evidence of any sort of complicity in the many defaults and oversights that led to the terrible event of 9 May 1992. There is no evidence that Cameron was ever told by his staff that the Westray mine was poorly or inadequately planned, poorly and unsafely operated, or operated in contravention of the *Coal Mines Regulation Act* and the *Occupational Health and Safety Act*.

The Economic Costs of Westray

The reason politicians found development of the Westray mine so attractive was that it created a number of jobs in an area of high unemployment and it supplied low-sulphur coal at a time of increasing concern for the environment. Yet, in the wake of the explosion, the economic costs of the disaster, as distinct from the human tragedy, have been enormous. Once again, these costs underline the need for safe mine production.

The Inquiry engaged the services of Professor Cyril Grant, an economist at St Francis Xavier University, to assist in preparing the figures and financial components for this report. In his submission, he said: "The statistical nature of the estimate must be emphasized as it cannot be interpreted as putting a dollar value on the life of a specific individual but it is useful in determining the economic desirability of proposed safety legislation." Although Grant did calculate the losses experienced by Curragh relating to the Westray disaster, it is sufficient for my purposes to say that the company was placed into receivership in September 1992. The major thrust of the analysis here is related to the economic costs of the Westray mine to public funds.

Provincial government loans We have seen that on 19 April 1989 Curragh signed an agreement with the province of Nova Scotia for an interim loan of \$8 million. By an agreement dated 14 September 1990, this

loan was absorbed into another loan with a principal amount of \$12 million bearing interest at 11.75 per cent. The loan was secured by debenture on the Westray project and was subordinated to a loan from the Bank of Nova Scotia. On 9 September 1992, the province gave Curragh notice of default and demanded payment of the principal amount plus interest. That amount remains unpaid.

Government of Canada loan guarantee By an agreement with the Bank of Nova Scotia dated 14 September 1990, Curragh obtained credit up to a limit of \$100 million. This line of credit was secured by the assets of the Westray coal project and was guaranteed to a maximum of 85 per cent by the government of Canada (by the agreement of 27 June 1990). In December 1992, the government paid \$80.75 million to the Bank of Nova Scotia and thereby acquired an interest in the assets secured. As a result of acquiring that interest, the federal government was entitled to a portion of an insurance settlement amounting to \$13.4 million. The net loss to the government of Canada under its loan guarantee to the bank totalled \$67.35 million.

Workers' Compensation benefits The families of the 26 miners who died in the explosion were entitled to a number of annuities. According to reports in the media, each widow was entitled to a lump-sum payment of \$15,000 and a pension equal to 75 per cent of her late husband's salary to a maximum of \$27,000 per year.²¹⁰ In addition, there was entitlement for child-support payments and funeral payments. The Workers' Compensation Board of Nova Scotia placed the actuarial value of these payments at between \$13.3 million and \$15 million.

Canada Pension Plan benefits The widows and families also became entitled to certain benefits under the Canada Pension Plan. These benefits were estimated at about \$5 million.

Unemployment Insurance (UI) benefits After the explosion, many Westray workers were left without employment. Grant estimated the cost of UI payments at \$2.38 million. He indicated that this figure might be "biased upwards," because 47 of the laid-off employees entered retraining programs and might in future gain increased earnings. On the other hand, in light of current economic conditions, some of the miners may have exhausted their unemployment benefits. No calculations have been made for any claims for social assistance.

When these five factors are combined with the costs of this Inquiry, it appears that the total direct public cost of the Westray mine disaster is more than \$105 million.²¹¹ In addition, there are other losses that are difficult to evaluate in hard dollar terms, such as the value of future lost

²¹⁰ Halifax *Chronicle-Herald*, 22 December 1992.

²¹¹ This amount includes only a small portion of the true public costs of this Inquiry (see Appendix K), the RCMP criminal investigation, and the subsequent aborted criminal trial of Gerald Phillips and Roger Parry.

income through unemployment in the Pictou area and the loss to Nova Scotia Power Corporation of the 700,000 tonnes of low-sulphur Westray coal it had contracted to purchase each year. Ironically, it was these “softer” issues that enticed the politicians to support the Westray project in the first place.

Curragh had projected that the Westray mine would employ 241 persons when it was fully operative. This number of employees would result in a total of 339 jobs created in the community as a direct result of the operation of the mine, once the multiplier of 1.41 (an economist’s way of estimating the spinoff jobs created in the service and supply industries) was applied. At the time of the explosion, there were 223 employees at Westray, a figure that, applying the multiplier, amounted to 310 jobs. Grant cautioned, however, that it was impossible to make a direct translation of these numbers:

It would not be correct to say that the explosion *caused* the loss of 310 jobs since various payments arising out of the disaster, the re-training of individuals and the alternative source of coal for the Trenton generating stations all had positive effects on employment. It would be safer to say that, other things being equal, in-province job opportunities would be 310 higher with a profitable Westray operation.

These huge economic costs of the mine disaster at Westray should cast a new light on the whole question of underground mine safety. As Kevin Burkett stated in his report, *Towards Safe Production*:

Apart from the moral, social and legal reasons which underpin a strong commitment to safe performance, the direct financial costs associated with poor safety performance surely serve as an incentive to the chief executive officer of any organization to require safe production. Beyond the direct costs of compensation, the company is burdened with the indirect costs associated with lost time, post-accident production losses, accident investigation, damage to property, etc. . . . We believe that it is essential that accident costs be computed in order to underscore the financial implications and thereby to serve as a further incentive to improved safety performance.²¹²

Burkett went on to cite a study by the U.S. Bureau of Mines showing that the total cost of 9,286 underground coal mine accidents in 1974 was \$56.9 million. In 1997 dollars, this figure could represent a cost in excess of \$200 million, or more than US\$21,000 each. In 1993, J.C.H. Longden told a mine safety conference that mining accidents in the United Kingdom cost the employer £11,600 (or approximately C\$25,000) for each lost-time accident.²¹³ These are mine accidents that involve an injury of sufficient gravity to cause the miner to miss some time, and do not relate to circumstances in which a miner or some miners are killed.

²¹² Joint Federal-Provincial Inquiry Commission into Safety in Mines and Mining Plants in Ontario, *Towards Safe Production*. (Toronto, 1981) (Chair Kevin M. Burkett).

²¹³ J.C.H. Longden, “The Management of Health and Safety at the Workplace” (paper presented at Minesafe International Conference, Perth, Australia, 1993).

I hope that the figures presented in this section will cast a different light on the question of underground mine safety. They must be viewed in the context of the total coal mining environment, both economic and social, rather than in isolation. Only then can we realistically move towards the goal so aptly expressed by Burkett as “safe mine production.”

