

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON,
DOUGLAS CLAYTON, DANIEL CLAYTON, and BILCON OF DELAWARE**

Investors

v.

GOVERNMENT OF CANADA

Respondent

**SUPPLEMENTAL WITNESS STATEMENT OF
PAUL BUXTON**

December 20, 2012

1. Canada's Counter-Memorial refers to my role with the Digby Industrial Commission. I was actually a consultant to the Commission and was not involved in its decisions. My responsibility in the particular matter referred to was limited to organizing the public meeting.
2. The Whites Point quarry and marine facility (the "Project") was not my first industrial project in the Digby Neck area.¹ I have been involved in various projects that required a deep understanding of local concerns and priorities, including working with David Kern to design the Brier and Long Island tourism plans, the Balancing Rock Trail, and the restoration of Canada's birth place, Annapolis Royal.
3. I approached my task with Bilcon and the Project with this background knowledge of industrial projects in mind, as well as the specific local and cultural concerns of residents and businesses in and around Digby Neck.
4. It never struck me as problematic to develop and operate a quarry at Whites Point. The land at Whites Point had previously been used as a gravel pit and was designated as a pit on Nova Scotia's geological maps.² Its previous owners, had also clear cut the majority of the site in 2001.
5. In March 2002, at a meeting with Robert Balcolm, Regional Engineer for the Nova Scotia Department of Environment, Mr. Balcolm told me specifically that he believed the quarry at Whites Point was an excellent project for the area. He also told me that the local Member of Parliament, Robert Thibault, would likely not be in favour of it and would try to prevent it from proceeding.
6. Although Whites Point had a history of industrial use, and the Government of Nova Scotia encouraged natural resource investment, I also knew, as a long time resident of the area, that a faction within the fishing community would oppose the project.
7. The fishing license owners on Digby Neck were actually well known for their opposition to industrial development in the area, because it diminished their historical dominance of the local economy. I had encountered this with my work on other projects in the area. I also knew that the fishing license owners were major supporters of Minister Thibault.
8. That is why Bilcon welcomed the opportunity to engage with local residents through the Community Liaison Committee, to explain our plans and our sensitivity to local concerns.

¹ Witness Statement of Paul Buxton, dated July 20, 2011, at paras. 4-5.

² Nova Scotia Geological Map (*Buxton Exhibit 26*).

9. In October, 2003, I met with the Nova Scotia Minister of the Environment and Labour (“NSDEL”), Kerry Morash. During our discussion, Minister Morash acknowledged that there were political undertones to Bilcon’s environmental assessment, and that Robert Thibault’s joint role as Minister of Fisheries and Oceans, and as the local Member of Parliament, was a factor in Bilcon’s environmental assessment.
10. I believed, however, that if we put together a competent application, backed up by expert scientific opinion and data, it would be honestly assessed. It is for this reason that the owners of Bilcon ensured that there were no financial constraints on my ability to engage the best experts in every field, and to gather all of the required scientific data and reporting necessary to put together the material in support of Bilcon’s submission. My concern throughout was focused on satisfying the applicable legal and scientific requirements, on which I believed the success of the application depended.
11. Bilcon’s actions in the early stages were focused on moving the regulatory process forward as quickly and efficiently as possible. This is what motivated our NWPA application on January 8, 2003.³
12. That was the same motivation underlying our decision not to object to the scoping in of the quarry and marine terminal into one assessment. If there was to be an assessment, our focus was not to fight it, but rather to facilitate and expedite it.
13. This is also why we did not contest the draft EIS Guidelines. Our priority was not to challenge the Guidelines, but to commission the necessary studies and prepare our Environmental Impact Statement. We also did not expect that the final Guidelines would be so significantly different from the draft version. However, when the final EIS Guidelines were produced, our attention remained focused not on complaining, but on getting the work done.
14. I fully expected that we would need to consider the potential effects our activities might have on whales and other marine mammals, which are common in the Bay of Fundy. We were fully aware that whale watching plays a role in local tourism and we knew that we needed to ensure that our activities would not interfere with whales or whale-watching.
15. For that purpose, we approached Dr. Jon Lien of Memorial University for his advice in advance of submitting the Project Description. Dr. Lien concluded that the intended blasting would not have an adverse effect on whales.

³ Letter from Paul Buxton to the Regional Superintendent, Navigable Waters Protection attaching Navigable Waters Protection Application, January 8, 2003 (*Investors’ Schedule of Documents at Tab C 43*).

16. Dr. Lien's conclusion was completely consistent with information we were given by the Government of Nova Scotia. In a meeting with Mr. Balcolm, he also discussed the potential issue of the North American Right Whale. Mr. Balcolm told me that he did not believe that blasting would be a problem, but that some environmental activist groups like the Sierra Club would likely make it an issue.
17. To study matters associated with whales in more detail, I asked Dr. Paul Brodie to submit a proposal for an in-depth and comprehensive scientific study of the potential effect Bilcon's activities might have on whales, and to suggest appropriate mitigation measures. I expected that Dr. Brodie's investigation, analysis and report would cost in the range of \$100,000. He was paid an initial retainer of \$2000 to visit the site and prepare his proposal.
18. Instead of preparing a proposal for a comprehensive scientific study, however, Dr. Brodie merely gave us a four page personal statement opinion based on a single site visit, without any significant science-based research and analysis.
19. To ensure that we had comprehensive scientific data about all of the possible effects of our intended activities at Whites Point on whales, Bilcon obtained further scientific data with respect to the geographic distribution⁴ of the North Atlantic Right Whale, as well as mitigation measures to alleviate any concerns related to noise or vibration that might be caused by blasting or shipping activities.⁵
20. Going through the process, I often felt that government regulators were not being transparent and forthright with Bilcon. For example, I made repeated written requests to DFO officials to provide me with their blasting calculations:
 - a. On June 6, 2003, I wrote to Mr. Phil Zamora, and requested that he forward to me the calculations of the modeling carried out by Habitat Management Division which purportedly led them to the preposterous conclusion that the 500m horizontal distance (initially 35m) from the shore line to the blast location would be required for the protection of iBoF salmon;⁶

⁴ Map 25, at Page 119, EIS Vol VI Chapter 9.3 -Environment and Impact Analysis-Whites Point Quarry & Marine Terminal Environmental Impact Statement -Biological Environment and Impact Analysis much of the data was provided by Moira Brown, Senior Scientist, Right Whale Research at the New England Aquarium. (*Investors' Schedule of Documents, Tab C 1*)

⁵ JASCO Research Limited and LGL Limited "PEAK PRESSURE AND GROUND VIBRATION STUDY FOR WHITE'S COVE QUARRY BLASTING PLAN", dated August 14, 2003. (*Investors' Schedule of Documents, Tab C 428.*)

⁶ Letter from Paul Buxton to Phil Zamora dated June 6, 2003 (*Investors' Schedule of Documents, Tab C 68*) (Buxton Exhibit 27).

b. On June 11, 2003, Mr. Zamora wrote to me:

*“The calculations were performed using a computer simulation model supplied by the developer of the DFO ‘Guidelines for the use of Explosives in or Near Canadian Fisheries Waters’ – 1998. The results of these calculations are available for your examination;”*⁷

c. In my letter dated June 16, 2003, I again requested a copy of the blasting calculations to identify the correct experts to bring to a meeting to enable us to understand the parameters of the calculations⁸; and

d. In my letter dated July 21, 2003, I wrote again to Mr. Zamora and again requested details of the calculations for the 500m setback distance for blasting.⁹

21. In the end, I never was provided with these blasting calculations. Nor was I ever provided with an explanation of why the setback was later changed yet again from 500m to only 100m.

22. From my review Mr. McDonald’s diary entries, which record what was actually happening behind the scenes, I now know that the government officials were in fact not forthright with me:

“Mon, Jun. 9/03

– LMF Buxton – he wants a meeting re: blasting plan

- Phil Zamora phone call – DFO has rec’d letter from Buxton asking for details of blasting calculations – Buxton wants a meeting with DFO, NSDEL (Petrie) and CEEA

Tues, Jun 10

- lots of mulling over of Nova Stone Quarry situation

0945 – Call from Paul Buxton – confirmed he is seeking a meeting to discuss lack of progress on the EA, and the blasting plan.

Wed. Jun 11

⁷ Letter from Phil Zamora to Paul Buxton, dated June 11, 2003 (CP23193) (Buxton Exhibit 28).

⁸ Letter from Paul Buxton to Phil Zamora dated June 16, 2003 (Canada’s Counter-Memorial Exhibit R-493) (Buxton Exhibit 29).

⁹ Letter from Paul Buxton to Phil Zamora dated July 21, 2003 (0810) (Buxton Exhibit 30).

- review Phil's draft letter to Buxton re: Blasting Plan meeting and model calculations.

Wed, Jul 30

- called Bruce Young to discuss Phil Zamora's enquiry – Bruce is in agreement that DFO should hold off on the blasting plan review.

- called Phil Zamora to discuss DFO approach – they still plan to respond to the request for blasting set-back calculations, but will run a draft by CEAA.

Thu, July 31

- Whites Point – discuss proposed DFO letter to Paul Buxton with Phil. Urged him to hold off or not send. He will send draft for discussion.

Thu, Aug 7

- a few calls on Whites Point – DFO nervous about 3.9 Ha quarry¹⁰

23. I also now know that, while government officials were not disclosing to me the model they had said required a 500m set back for blasting, the DFO knew that they had used the wrong model. Mr. McDonald's July 30, 2003 diary entry states:

“Phil Zamora calls – they [the DFO] have rec'd advice from Denis Wright that iBlast model is for open water, not explosives used on land. They should use the table provided in the DFO Explosive Guidelines. It seems that if proponent were to modify the plan, it could be acceptable to DFO and they would be in a position to enable the provincial approval.”¹¹

24. It is also now apparent to me that Mr. Zamora himself was aware of the government's deliberate silence and delay:

“...we feel that we cannot sit for very long on this new information that the proponent could use to adjust the Blasting Plan.”¹²

¹⁰ Derek McDonald's journal notes (*Investors' Schedule of Documents, Tab C612*) (Buxton Exhibit 31).

¹¹ *Ibid.*

¹² Email from Phil Zamora to Bruce Hood, dated August 5, 2003 (CP05140) (Buxton Exhibit 32).

25. I attach to this Supplemental Witness Statement a “draft” letter dated July 30, 2003 which I never received and which to my knowledge Mr. Zamora never sent to me.¹³
26. On August 29, 2003, I met with Stephen Chapman, the Panel Manager from CEAA, who refused to answer many of our key questions. These included:
 - a. How was it that the media was alerted that Minister Thibault had referred the Project to the Minister of Environment for a Panel Review, and how was it that the referral was publicly known and discussed at a debate on Digby Neck during an election campaign before Bilcon was notified?
 - b. Why was the Project being assessed in a different way and being treated differently than the Tiverton quarry, and in particular, why had the Tiverton project been approved without any comparable environmental assessments.
 - c. Why was the Panel Review being handled out of CEAA headquarters in Ottawa, instead of the Agency’s regional Halifax office?
27. I said in this meeting that I felt Bilcon had been ignored in the process, despite the *CEAA* and other guidelines affirming the importance of the proponent in the environmental assessment process.
28. I had also become aware of ways in which Bilcon was being treated differently compared to what had occurred with the Tiverton quarry.
29. The Tiverton quarry approval did not include conditions 10(h) and 10(i), which were inserted into the Whites Point quarry approval.
30. Another difference was in the compensation for the disruption of the Bay of Fundy seabed resulting from industrial activities. Tiverton’s breakwater destroyed far more of the Bay of Fundy’s seabed than the marine terminal at Whites Point would have. However, the compensation work Tiverton performed was carried out 100 km away from the affected area, and the compensation plan was not approved until after the breakwater had been completed. In contrast, Bilcon designed a compensation plan in advance that would be implemented in the area affected.
31. In late 2007, in the context of our continued effort to secure permission to blast (on land), I was informed by DFO representative, Tony Henderson, that due to the extremely small

¹³ Draft letter from Phil Zamora to Paul Buxton, Nova Stone Exporters Inc., dated July 30, 2003 (CP33967) (Buxton Exhibit 33).

area of disruption planned at Whites Point, Bilcon should have never even been required to file a HADD [Harmful Alteration Disruption or Destruction] or to design a compensation plan.

32. Any suggestions that Bilcon's planning was not undertaken with full due diligence on our part to deal, in advance, with any potential concerns are simply wrong.
33. Bilcon appreciated the fishing industry, eco-tourism and cultural concerns of Digby Neck residents and conducted no less than 20 different studies¹⁴ relating to these issues, to ensure that there was minimal impact on marine and terrestrial habitat and socio-economic and cultural elements in the community.
34. Another example where Bilcon displayed foresight was in the manner in which it designed its marine facilities. Bilcon had three options: i) a floating facility, which was impractical due to the tides and currents; ii) a rock filled pier, which was not pursued due to the amount of fish habitat that would be affected; and iii) a facility supported by pipe piles affecting a very small amount of fish habitat, which was the chosen design. Unlike the decision of the DFO to build the Tiverton Harbour Development as a rock filled pier, Bilcon chose the pipe pile design, as it would result in the lowest potential impact to fish habitat.
35. Bilcon also made other design decisions to limit the potential effects on the local fishing and eco-tourism industries:
 - a. Bilcon worked with the DFO in the design of its blasting protocol to mitigate any potential effects on marine mammals, fish or crustaceans;
 - b. The ships that were to dock at the marine facilities were to approach and leave at scheduled times on the same bearings and buoys used to assist local fisherman;
 - c. Bilcon would work with local fisherman to implement a compensation plan should any of their equipment be damaged;
 - d. Bilcon designed the quarry so that it would not be visible from the local highway, or any community in the area;

¹⁴ George Alliston, Ph.D.; Paul-Michael Brunelle; Kenneth A. Neil, BSc. Ph.D, PDF; Ruth E. Newell, M.Sc.; Gini Proulx; Michael Brylinsky, Ph. D.; E.E Carver, M.Sc. and A.L Mallet, M.Sc.; Kristy Herron, BSc, M. Ed.; John Christian, M. Sc.; M.J. Dadswell; David E. Hannay M.Sc.; John Walker; Robert Fraser; Barry Moody, Ph.D.; Susan Sherk, B.A; Charles R. Watrall, Ph.D.

- e. Bilcon carried out a season long study, conducted by a local fisherman and whale watch operator, to determine the presence of marine mammals off the shore of the proposed quarrying site; and
- 36. Bilcon also designed an environmental preservation zone between the sea and the active quarry area, that would further reduce any impacts on marine and terrestrial life from the quarry operations.
- 37. In its cover letter providing the EIS Guidelines to Bilcon, the JRP stated that the EIS Guidelines provided only the "minimum information" which the JRP expected to receive.¹⁵ I had actually discussed this specifically with Derek McDonald of CEAA. He told me that *"If it is not in the Guidelines, then you do not need to deal with it"*. Relying on what Mr. McDonald told me, Bilcon focused its efforts on what was stated in the EIS Guidelines.
- 38. Bilcon nonetheless treated all of the JRP's requests seriously, even if we felt they were peripheral or unrelated to the question of whether our activities would have any significant adverse environmental effects. For example, the JRP required us to deal with allegations from an opponent that human remains had been located on the site of the quarry. Although the allegations were discredited by the RCMP, they still posed one of many significant distractions from our efforts to focus on the real and substantial scientific issues.
- 39. Another matter that arose during the Panel hearings which concerned me was the revelation that JRP members had conducted unannounced field visits to Whites Point, as well as to the Glensanda quarry in Scotland. I felt it was inappropriate for the JRP to conduct its own investigation without consulting, or at least notifying Bilcon. No reports or findings of these visits were ever made public.
- 40. After Bilcon submitted its Environmental Impact Statement (EIS), the JRP sent us many more information requests. While some of these requests related to issues in the EIS, we were also confronted with issues that had never been raised before.
- 41. One of these information requests related to copper levels in the water. It is common knowledge in Nova Scotia that copper leaches out of the basalt on the shore into the Bay of Fundy. Copper levels are therefore high in the Bay of Fundy. It is also well known that

¹⁵ Letter from Robert Fournier, Chair, Joint Review Panel, Whites Point Quarry and Marine Terminal Project to Paul Buxton, dated March 31, 2005, with attached Environmental Impact Statement Guidelines. (*Investors' Schedule of Documents at Tab C 120*).

marine life, like lobster, have adapted to the higher copper levels. Since this was a non-issue, we did not include reference to copper in our EIS.

42. Since we did, however, receive information requests on copper from the JRP, I hired an expert from the United States and spent approximately \$75,000 preparing answers to the JRP's copper-related information requests.¹⁶ It was particularly frustrating that after all of the effort we expended to answer what I felt were ill-conceived information requests, and after I specifically advised the Panel Manager that our expert was in attendance at the hearings, the issue was never raised in the hearings, and our expert was ignored by the Panel.
43. Another example is where the Panel made an information request at the instance of Nova Scotia Museums asking us to explain why the bristletail insect and a species of terrestrial mollusc were not considered in the EIS. These species were not on any of the lists maintained by the Federal and Provincial agencies used to identify species at risk, nor were they on the COSEWIC list of candidate species. Nonetheless, to satisfy the Panel, Bilcon carried out an additional expert study.
44. Another concern was the issue of the harlequin duck, classified as an endangered species under the Nova Scotia Endangered Species Act. Bilcon was required to carry out a survey to determine whether harlequin ducks wintered at Whites Cove. An extensive study¹⁷ demonstrated that they did not. Bilcon was then asked to determine whether harlequin ducks perhaps crossed Whites Cove, in moving from one wintering area to another. Again, an extensive study¹⁸ determined that was unlikely. By comparison, the harlequin duck has actually been observed in Petit Passage, but that was apparently not raised as a concern in the assessment of the Tiverton project.
45. Bilcon's presentations were made available to the JRP 10 days in advance of the JRP hearing. It was Bilcon's understanding that the Federal/Provincial regulatory authorities would submit their presentations, or at least the outlines of their presentations, 10 days in advance as well so as to allow Bilcon a reasonable opportunity to review, consider and effectively respond to the presentations. Bilcon's preparation for the hearings was also

¹⁶ Response to Panel Questions, prepared by John Schupner, Kevin Reinert, AMEC Earth and Environmental Inc., October 30, 2006 (2154) (*Investors' Schedule of Documents at Tab C 909*).

¹⁷ *Wintering Harlequin Ducks in the Digby Neck Long Island Area*, Dr. George Alliston, May 20, 2005. (*Investors' Schedule of Documents at Tab C 410*).

¹⁸ *Use by Wintering Waterbirds of Digby Neck and Adjacent Coastal Waters of Southwestern Nova Scotia* Dr. George Alliston, June 7, 2005. (*Investors' Schedule of Documents at Tab C 411*).

confounded by the fact that we were not given a number of the presentations in advance, or sufficiently in advance of the hearings, leaving us guessing at times as to what was going to be said that might require our immediate response. A number of government presentations were provided to us just a few days before or on the eve of the hearings. The presentation by DNR at the hearings was also substantially different from the presentation it submitted prior to the hearings.

46. The hearings were not neutral or objective. As Bilcon's representative, I sensed hostility from the JRP members from the start. It was obvious to me throughout that the hearings were not fair and impartial. The Panel members treated Bilcon as if it was the 'accused'. The mannerisms, body language, facial expressions and tone of voice of the Panel members displayed a disdain for Bilcon. The Panel Chair typically became animated and helpful when there was a presentation opposing the quarry. But when a Bilcon representative or a supporter of the Project was speaking, the Chair became demonstrably skeptical and dismissive, often physically turning his back.
47. A striking example of the Panel's approach to the hearing related to blasting. Ashraf Mahtab, a quarry opponent who said he was a retired mining engineer, made an extensive presentation on blasting at the prompt of Panel member Gunter Meuke. Mr. Mahtab had no expertise in blasting, and admitted that he had never designed nor executed a blast. Yet he was treated by the Panel as an expert. In contrast, Bilcon's real blasting expert, who had designed and executed thousands of blasts and was in attendance at the hearing, was asked only a few questions and was treated by the Panel with skepticism bordering on contempt.
48. Although I arranged for 19 leading experts to attend the hearings for a combined total of 294 hours, they were conspicuously ignored by the JRP. The following experts were not asked any questions at all:
 - a. John Amirault – Accidents and Malfunctions;
 - b. John Walker and Tricia Beazley – Jacques Whitford, Noise and Air Quality;
 - c. Mike Brylinsky – Marine Biologist;
 - d. Gordon Fader – Marine Geologist;
 - e. Scott Carr – JASCO, Marine Acoustic;
 - f. Jim Ross – Fisheries Compensation;
 - g. Pat Campbell – Canadian Seabed Research, Bathymetry;
 - h. Steve Sauveur – CRA, Hydrogeologist; and

i. John Schupner – AMEC Earth and Environmental.

49. Some supporters of the Project were not given an opportunity to testify at the hearings. Supporters, including some from the pool of approximately 400 applicants who had applied for jobs with Bilcon, attempted to secure spots on the JRP agenda, but were told the agenda was full.
50. On the first day of the hearings, two supporters of the Project reported to Bilcon's secretary that they had been told by the Panel Manager they could not speak at the hearings because there was no space available. Several days into the hearings, two other local supporters of the Project, who had obtained speaking spots, sought me out at a recess to tell me that they were no longer prepared to speak, because they had seen the Panel's hostile attitude toward anyone supporting the Project, and felt they would not be able to tolerate it.
51. My lack of express objections during and after the hearing, were not, and should not be construed as an endorsement of the process. Despite the difficult circumstances in which Bilcon found itself leading up to and during the hearings, I believed, as a matter of scientific proof and analysis, that Bilcon had made a very strong case in its EIS, about which there could be no serious question or doubt on the merits from a scientific standpoint. Having an honest belief in the substance of our presentations, and in the ultimate scientific objectivity of the process, I did not feel it was necessary or helpful to the process to create controversy by making accusations on matters that I felt were peripheral to the scientific and socio-economic analysis.
52. Bilcon incorporated "local traditional knowledge" into its project planning. Throughout the EA process, Bilcon engaged in significant community outreach which included:
 - a. Operating an office in Digby where the public could attend to receive information about the Project and provide information to Bilcon;
 - b. Organizing general public meetings, as well as meetings that specifically reached out to lobster and ground fishermen; and
 - c. Retaining Elgin Consulting and Research to produce a Report on Traditional Knowledge.
53. Despite the low turnout of fishermen at these meetings, I still received approximately 400 job applications for work at the quarry.
54. When I first saw the JRP Report itself, the very first thing I noticed was that the picture the JRP put on the cover page of the Report was not a picture of the Whites Point Quarry site.

55. A pervasive concern I then had with the content of the Report was that its principal findings demonstrated to me a lack of understanding of the role the JRP was supposed to play in the process. When a proponent is proposing an industrial project, there are two broad preliminary stages before it becomes operational: a planning stage and a design stage.
56. Planning stages are the earliest reflections of projects. They are preliminary in nature and reflect a proponent's intentions. They are detailed, but not precise. They state, for example, that tubing will be used to support an object, but not the width of the tubing, or whether one will need six or seven tubes. Those types of specifications are premature at the planning stage. It is only after a project is approved, that it moves to the design stage.
57. Industrial permitting is accordingly a separate stage in Nova Scotia. Once the Project was approved, Bilcon would still have had to obtain all of the requisite design stage permits.
58. Instead, the JRP said in its Report that it expected Bilcon to provide detailed designs during the Panel Review process. This was not the practice or expectation in the industry, and was directly contrary to the Panel's own definition of "Environmental Impact Statement" in the Whites Point Quarry EIS Guidelines:
- "Environmental impact assessment is a planning tool intended to identify and mitigate significant adverse environmental effects induced by projects."*¹⁹
59. An example of this was the Report's criticism of the baseline data that Bilcon supplied.²⁰ The baseline data the JRP thought was missing does not even exist at the planning stage. Baseline data of that nature for a quarry would only be gathered shortly before commencing operations. Otherwise it would be of little value.
60. Bilcon was motivated throughout by a genuine belief that it was participating in a regulatory process whose barometer, as described by the regulations, was scientific. Bilcon's concerns, motivations and resources were therefore focused on preparing to meet the highest scientific standards when submitting our materials and making our presentations throughout the regulatory process. From the beginning through to the finish, we were, perhaps naively, of the belief that the soundest science would prevail.

¹⁹ Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry & Marine Terminal (*Investors' Schedule of Documents Tab C168*).

²⁰ Joint Review Panel Final Report, dated October 23, 2007, at p. 7, 35, 79 (*Investors' Schedule of Documents Tab C 34*).

61. I have reviewed the Bay of Fundy video which I authenticate as being factually true and accurate. The video accurately and fairly depicts the general location and conditions of quarries in Nova Scotia and the Bay of Fundy, as well as the geographical, socio-economic and other conditions relating to the proposed Whites Point Quarry and Digby Neck.
62. I have also now had the opportunity to review the witness statements and documents produced by Canada, and have become aware of facts and evidence which were not disclosed to me or to Bilcon during the course of my work on the Project.²¹
63. For example, I was not aware that Mr. Balcom, Regional Engineer with NSDEL, had recommended that the application for the White Points Quarry could be approved without Blasting Conditions 10(h) and 10(i). Those conditions were:

"h) Blasting shall be conducted in accordance with the Department of Fisheries and Oceans Guidelines for the Use of Explosives In or Near Canadian Fisheries Waters – 1998.

i) A report shall be completed by the proponent in advance of any blasting activity verifying the intended charge size and blast design will not have an adverse effect on marine mammals in the area. This report shall be submitted to the Department of Fisheries and Oceans (DFO), Maritimes Aquatic Species at Risk Office and written acceptance of the report shall be received from the DFO and forwarded to the Department before blasting commences."

64. From Mr. Balcom's Report on the Application for Approval, (dated March 21, 2001), it is clear that he knew that the quarry was planned to expand, and that the total area involved was about 350 acres. He noted that approximately 1 million tons per year of crushed rocks would be shipped from the quarry, and that it may be necessary *"to restrict blasting in the quarry to when the Right Whales are not in the Bay of Fundy."*:

"Blasting operations will be restricted to the limits in the Department of Environment and Labour, pit and quarry guidelines. Each blast will be monitored by the approval holder with periodic reports being submitted to the Department. The approval holder has indicated that they will

²¹ The Bay of Fundy Video for NAFTA Tribunal, *Bilcon et al v. Canada* December, 2012, Videographed by: Warren Jefferies, Narrated by: John Baillie (*Investors' Schedule of Documents Tab C 910*)

monitor the effect that the quarry blasts on (sic) marine mammals in the Bay."²²

65. I was not aware that Mr. Balcom had recommended that the application to operate the quarry could be approved subject to terms and conditions which would and could readily have been met by Bilcon, including a condition that blasting operations could be modified by the administrator if there was a negative effect on the Right Whale in the Bay of Fundy.
66. Mr. Balcom's conditions would have allowed Bilcon to conduct test blasts, to measure whether there were in fact any adverse effects on marine mammals associated with the blasts, and would have allowed Bilcon to modify its blasting operations accordingly.
67. I was not aware that blasting conditions 10(h) and 10(i) would be applied and interpreted so as to prevent Bilcon from ever conducting any test blasts at the quarry site to determine whether blasting would have "*an adverse effect on marine mammals in the area.*"
68. I was not aware that Mr. Petrie was apparently of the mistaken belief that the requirement in Condition 10(i) was that a "*report be completed in advance of any blasting activity verifying the intended charge size will not have an impact on marine mammals in the area*", rather than "*the intended charge size and blast design will not have an adverse effect on marine mammals in the area.*"²³
69. I was not aware that some of the blasting conditions in Mr. Balcom's recommendations were not imposed on Tiverton, including "*that the [blasting] design shall be sent to the Department for review prior to any blasting; and (g) that the effect of blasting in the quarry on the marine mammals shall be monitored and a report on the effect must be submitted to the department....*"
70. I was not aware that Mark McLean wrote to Mr. Langille and Mr. Petrie on April 11, 2002, saying "*I am impressed that the company has taking (sic) the time and effort to examine the whale issue and have offered to monitor the blast levels in the bay.*"²⁴

²² Robert Balcom, Engineering Report on the Nova Stone Exporters, Inc. Quarry, March 21, 2002. (*Government Canada Counter-Memorial Exhibit R-79*) (*Buxton Exhibit 34*).

²³ Affidavit of Bob Petrie, sworn December 1, 2011 at para. 13.

²⁴ Email from Mark G McLean to Brad Langille, April 11, 2002, (*Government Canada Counter-Memorial Exhibit R-76*) (*Buxton Exhibit 35*).

71. I was not aware that Jerry Conway, the DFO scientist who had initially expressed a concern about the possible effects of blasting on marine mammals in April 2002,²⁵ had concluded by December 2002, that he had no concerns in respect of marine mammal issues relating to the blasting plans submitted by Bilcon; or that he said in an email to Mr. Ross, then the Section Head of the Habitat Management Division (dated December 2, 2002):

*“Anyway in respect to the Whites Cove Blasting based on the information provided and the undertakings that the proponent is prepared to take I have no concerns in respect to marine mammal issues in respect to this specific proposal.”*²⁶

72. I was not aware that in respect to neighboring Tiverton harbour, DFO scientists had concluded there was a “*low probability*” of IBOF Atlantic salmon being in the area, and that it was doubtful that the area was a significant migration route for them.²⁷
73. I was not aware that in regards to the Tiverton quarry “*The Minister has met with the proponent*”, that government officials were actually aware of the Minister’s interest, “*as it is in the Minister’s riding*”²⁸, and that the responsible officials knew that “*Robert Thibault Minister – asked if there was anything he can do to speed up process*”²⁹, at a point when the Tiverton application was incomplete and had not been thoroughly reviewed.³⁰
74. I was not aware that the Tiverton quarry was approved in 3 weeks (Application received on March 3, 2003; Application approved on March 24, 2003)³¹; that blasting began on

²⁵ NSDEL Communication Form, dated April 9, 2002 (CP31735); NSDEL Form, dated April 9, 2002 (CP00262); Letter from Brad Langille to Jerry Conway dated April 9, 2002 (*Government Canada Counter-Memorial Exhibit R-83*).

²⁶ Email from Jerry Conway to Jim Ross, dated December 2, 2002 (CP26290) (*Buxton Exhibit 36*).

²⁷ Email from Rod Bradford to Larry Marshall, Andrew R.J. Stewart, dated October 8, 2003 (PH00658) (*Buxton Exhibit 37*).

²⁸ Email from Lee Geddes to Carol Ann Rose, Andrew Stewart re Parker Mtn Aggregates, NSDEL Communication Form dated March 3, 2003, (PH00617) (*Buxton Exhibit 38*).

²⁹ NSDEL Communications Form, dated March 3, 2003, (PH00427) (*Buxton Exhibit 39*).

³⁰ NSDEL Briefing Note dated March 4, 2003, (PH00285) (*Buxton Exhibit 40*).

³¹ NSDEL Application for Approval and Proposed Blast Design - Tiverton Quarry (PH0027) (PH00032) and NSDEL Approval for Quarry Tiverton (PH00607) (*Buxton Exhibit 41*).

March 18, 2003 and continued on March 20, 2003 (prior to the Approval) and on March 24, 2003 (the day of the Approval); and that in reference to “Hazards” the March 24, 2003 Blasting Report simply had a “smiley face”.³² Bilcon was prevented from conducting any test blasts and was kept embroiled in the approval process for over 5 years.

75. I believe that the YouTube videos of blasting in Nova Scotia at Sandy Cove, Bear River, and the Sissaboo Bridge fairly and accurately depict the kind of blasting (underwater) that needed to be done in Tiverton harbour.³³
76. I was not aware that on April 26, 2002, Mr. Jollymore of DFO had advised Mr. Conway and Mr. Petrie, District Manager for NSDEL, that the DFO had “*no legislative trigger to request an environmental assessment*”; or that Mr. Jollymore had pre-judged and miscalculated the number of blasts which were to be conducted at the quarry site.³⁴
77. I was not aware that Derek McDonald, the CEAA official to whom I had submitted the Draft Project Description, had concluded and advised other CEAA officials that:

“Generally, PD [Project Description] looks pretty good – they follow the OPS [Operational Policy Statement] format very closely.”³⁵

78. I was not aware that the office of the Federal Minister of Fisheries and Oceans had advised Mr. Tim Surette, the Area Director of Fisheries and Oceans, that the Department:

“... we are not to accept a report on the effects of blasting on marine mammals as per section (i), item 10 of the NS Approval issued April 30 until such time as the Ministers office has reviewed the application.”³⁶

³²Consbec Inc. Blast Report No. 012927, dated March 18, 2003 (PH00275); Consbec Inc. Blast Report No. 12928, dated March 20, 2003 (PH00276); Consbec Inc. Blast Report No. 12929, dated March 24, 2003 (PH00277) (Buxton Exhibit 43).

³³ Sandy Cove Blasting Video (*Investors' Schedule of Documents at Tab C 611*), Bear River Blasting Video (*Investors' Schedule of Documents at Tab C 612*), Sissaboo Blasting Video (*Investors' Schedule of Documents at Tab C 613*),

³⁴ E-mail from Brian Jollymore to Bob Petrie dated April 26, 2002. (*Investors' Schedule of Documents at Tab C 42*) (Buxton Exhibit 44).

³⁵ E-mail Derek McDonald to Bill Coulter, dated February 4, 2003. (*Investors' Schedule of Documents at Tab C 57*) (Buxton Exhibit 45).

³⁶ Email from Tim Surette to Neil Bellefontaine, dated June 26, 2002 (CP45845) (Buxton Exhibit 46).

79. I was not aware that this had been communicated to Mr. Neil Bellefontaine then the Regional Director General of the DFO, who was the most senior DFO official in the region, and whose area of responsibility included Minister Thibault's political riding.
80. I was not aware that Mr. Zamora had given a "heads up" alert as early as February, 2003, that the DFO was intending to refer the Project to the Minister for referral to a Panel.³⁷ I had been advised by the DFO officials from the outset that the highest level of assessment the Whites Point Quarry was likely to attract was a Comprehensive Study.
81. I was not aware that the question of establishing a Comprehensive Study or a Panel Review was being considered by the DFO in the context of:
- "This is such a politically hot project that I don't want to make any wrong decisions."*³⁸
82. I was not aware of the extent to which the consideration of the Project had become politicized within the Federal and Provincial Governments, or of the behind the scenes political orchestrations between the Governments and the CEEA surrounding the Project.³⁹
83. I was not aware that Bruce Hood, a key DFO official, noted in his Journal on May 29, 2003, that Chris Daly of NSDEL had said the "*Province will likely go to election in July*"⁴⁰; or that Mr. Hood noted in his Journal on June 17, 2003, 9 days before Minister Thibault's letter, that Chris Daly had talked to Steve Chapman of CEEA, saying that he was "*keen to get something together sooner rather than later*", and that the "*Province wants to have a letter to them reflect that DFO has decided to refer project to panel*"⁴¹; and that the "invitation" was extended to Mr. Daly three days later:

³⁷ Email from Bill Coulter to Bruce Young, dated February 17, 2003 (*Government Canada Counter-Memorial Exhibit R-222*) (Buxton Exhibit 47).

³⁸ Email from Phil Zamora to Charlene Mathieu and Joy Dube, dated April 3, 2003 (*Government Canada Counter-Memorial Exhibit R-146*) (Buxton Exhibit 48).

³⁹ Email from Bruce Hood to Richard Nadeau, dated June 26, 2003, (*Investors' Schedule of Documents at Tab C 63*) (Buxton Exhibit 49).

⁴⁰ Journal Note by Bruce Hood, dated May 29, 2003 (*Government Canada Counter-Memorial Exhibit R-260*) (Buxton Exhibit 50).

⁴¹ *Ibid.*

*"I am interested to know if your Department would be interested in participating in a joint review panel of this project."*⁴²

Mr. Daly wrote back that same day saying:

*"At your request we are willing to participate in a joint environmental assessment review panel, once an agreement is reached."*⁴³

84. I was not aware that senior officials in the DFO felt it was urgent that a letter from Minister Thibault to Minister Anderson, the Minister of Environment, referring the White Point Quarry and Marine Terminal to a Panel Review, be signed and sent to Minister Anderson because:

*"It is a distinct possibility that the Province of Nova Scotia will be announcing an election before or on June 30th and will send out a media release preceding this, indicating that the Whites Points Project, which is very contentious, has been referred to a Panel Review."*⁴⁴

85. I was not aware that senior DFO official, Richard Nadeau, then wrote on June 25, 2003 to various other senior DFO officials, saying it was urgent the letter be sent to Minister Anderson:

"The province has very serious reasons for issuing a press release by the end of this week announcing the joint federal/provincial panel review process; and

*the project is located in our Minister's riding as well as in the electoral circumscription of the provincial Minister responsible for making decisions on this project and the announcement of a joint panel review is of the nature to take a lot of pressure off the Ministers' shoulders for the summer months."*⁴⁵

⁴² Letter from Paul Boudreau (DFO) to Chris Daly, (NSDEL), dated June 20, 2003 (CP04668) (Buxton Exhibit 51).

⁴³ Letter Chris Daly to Paul Boudreau, dated June 20, 2003 (Government Canada Counter-Memorial Exhibit R-71) (Exhibit 52).

⁴⁴ Email from Carol Rose to Josee Beriault, dated June 25, 2003 (Investors' Schedule of Documents at Tab C 456) (Buxton Exhibit 53).

⁴⁵ Email from Richard Nadeau to Kaye Love, dated June 25, 2003 (Government Canada Counter-Memorial Exhibit R-385) (Buxton Exhibit 54).

86. Minister Thibault's letter to Minister Anderson is dated June 26, 2003.⁴⁶ I only learned of the referral by reading about it in the *Halifax Chronicle Herald* newspaper.
87. I was not aware that while Mr. Chapman had refused to produce a copy of Minister Thibault's letter to us, on the basis that the communication was Minister to Minister, a copy of it had been given to Lisa Mitchell, a lawyer who represented a local citizen's group opposed to the project, and who was organizing an opposing petition.
88. I was not aware, that even though government officials had communicated between themselves that the "*referral is secret until accepted by Minister,*" an official in the CEA Agency had sent Mr. Chapman an email saying;

*"I had tipped her [Lisa Mitchell] off that DFO might make a recommendation to refer to Panel, and that, in such a case, you [Mr. Chapman] would be the contact. She had seen Thibault's letter before sending the petition."*⁴⁷

89. Although I had extensive dealings with Derek McDonald of CEAA, I was not aware that he had written to Mr. Chapman on June 10, 2003, saying;

"Although not proceeding with the 3.9 ha operation is arguably the "high road", there is no clear legal impediment to this operation. A cynical view might be that DFO wants to avoid making a decision on the blasting plan and the Agency is a convenient scapegoat.

The proponent is clearly frustrated, and with good reason, I think. Things are dragging. I find it frustrating myself and it's not even my money."

Mr. Chapman responded by saying:

*"We should communicate via telephone for discussions of this nature. Give me a call"*⁴⁸

⁴⁶ Letter from Minister Robert Thibault to Minister David Anderson, dated June 26, 2003 (*Government Canada Counter-Memorial Exhibit R-79*) (Buxton Exhibit 55).

⁴⁷ Email from Steve Chapman to Bruce Young, dated July 7, 2003 (CP04857) (Buxton Exhibit 56).

⁴⁸ Email from Steve Chapman (CEASS to Derek McDonald, dated June 11, 2003, (*Investors' Schedule of Documents at Tab C 404*) (Buxton Exhibit 57).

90. Although I repeatedly asked the DFO to provide me with its blasting calculations, I was not aware that the DFO's scientist had actually determined that the iBlast model it used to generate the inflated (500m) setback did not apply to the proposed blasting at White's Point. As Mr. McDonald stated in his diary on July 30, 2003:

"Phil Zamora calls -- they have rec'd advice from Denis Wright that the iBlast model is for open water, not explosives on land. They should use the table provided in DFO Explosives Guidelines."⁴⁹

91. I was not aware that, before the JRP hearings even began, the Panel members were already prejudiced against Bilcon:⁵⁰

"I don't know about you two, but I feel that I am being buried by the sheer volume of words. Where a concise well argued paragraph would do, we are facing a barrage of often meaningless stuff that dances around the issues.... We need to discuss at which point it becomes futile to ask for more info because all we will get is more words"

92. I was unaware that Dr. Fournier forwarded this email to Deborah Myles, the Panel Manager, adding:

"Gunter very nicely summarizes how we are all feeling -- frustrated -- dealing with this non-professionalism that verges on incompetence. We will need to get some clarity on this and other items related to Bilcon's lack of responsiveness cloaked in the mantle of a response."

93. Apart from the outrageous and unprofessional insult of these internal notes between the Panel members, the "volume of words" generated in the JRP process resulted from Bilcon's commitment to comprehensively and scientifically satisfy all of the requirements of the EIS Guidelines and the Panel's additional information requests and undertakings. The experts Bilcon engaged to carry out the requested work were in my view the very best experts in Canada. Four of them were also previous heads of the corresponding government departments. Gordon Fader, for example was the Senior Marine Geologist for the DNR, and was the recognized expert on marine geology in the Bay of Fundy. In view of the 17 volumes of Bilcon's EIS, which contained 48 expert reports and related materials, and 35 studies dealing with the environmental, social, and economic issues involved, the Panel's comments are astonishing to say the least.

⁴⁹ Journal Notes by Derek McDonald, *supra* note 10.

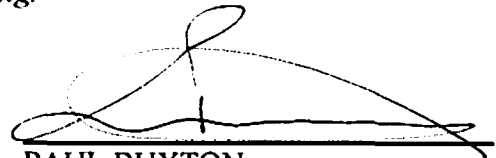
⁵⁰ E-mail from Bob Fournier to Debra Myles, dated February 13, 2007 (CP26704) (Buxton Exhibit 58).

94. Although I was not aware at the time that all of this was going on behind the scenes, on November 16, 2007 I wrote to Minister Parent advising him of what we did know:

“Yet, despite our good faith and best efforts to develop a project of the highest quality, which goes well beyond regulatory requirements, something had gone wrong, and the truth about the project has become confused and distorted. We are compelled to note that this has happened in part because the Panel formed to review the project was obviously biased and unfair, and did not do its job.

The Panel showed no interest in considering how the project might work. It seemed only to be interested in reasons why it would not work... this is not the way other environmental assessments of projects like ours have been conducted in the past. In this case, it is clear that the Panel's mind was made up from the beginning, and its report and recommendations to you are nothing but political mischief making.”⁵¹

Dated: December 20, 2012



PAUL BUXTON

⁵¹ Letter Paul Buxton, Bilcon of Nova Scotia Corporation to Minister Mark Parent, dated November 16, 2007 (CP10647) (Buxton Exhibit 59).