

**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

**WITNESS STATEMENT OF
WILLIAM RICHARD CLAYTON**

July 25, 2011

1. My name is William Richard Clayton. I am a director and shareholder of Bilcon of Delaware.¹ Bilcon of Delaware is the sole shareholder of a Nova Scotia unlimited company, Bilcon of Nova Scotia. Bilcon of Delaware is part of the Clayton Group of Companies.
2. The Clayton Group of Companies was established over fifty years ago. At the time of making our investment in Nova Scotia, the Clayton Group of Companies operated in over twenty-five locations in the United States and employed approximately 750 employees.
3. The Clayton Group of Companies was managed by my father, William Ralph Clayton until he reduced his workload in 2008 and transferred his remaining interests in the Clayton Group to myself and my brothers. Throughout the period of our investment in Nova Scotia, I participated along with my brothers Douglas and Daniel in our Group's operations which deal primarily with building materials and related products in New Jersey and New York. I, along with my father and brothers, are citizens of the United States of America.
4. A steady supply of aggregates is important for our business. Prior to seeking approval for the Whites Point Quarry in Nova Scotia, the Clayton Group had already obtained crushed stone from the Bayside Quarry in New Brunswick. The Bayside Quarry was located on a tributary to the Bay of Fundy. This quarry only partially met our needs for crushed stone.
5. In 2001, the Clayton Group was approached by Nova Stone Exporters Inc., a Nova Scotia corporation. Nova Stone held a lease of land encompassing approximately 380 acres on a remote stretch of coastline on the Bay of Fundy in Nova Scotia that contained high-quality aggregate suitable for export.
6. After researching the investment climate in Nova Scotia, we discovered that the Government of Nova Scotia was very encouraging to companies seeking to quarry in Nova Scotia. In fact, the government of Nova Scotia had adopted a written policy in favor of such development and Nova Scotia had publications discussing how mineral extraction and quarrying would be beneficial for Nova Scotia and for investors making investments there.²
7. The Clayton Group sought a first strategic investment to support our business operations.³ It was hoped that the Whites Point Quarry would provide a secure 50 year supply of aggregates to address the business needs of the Clayton Group and its customers.

¹ Organization Action In Writing of Incorporator of Bilcon of Delaware, Inc., April 15, 2002 (*Clayton Exhibit 1*).

² Nova Scotia Department of Natural Resources, "*Minerals: a Policy for Nova Scotia*" (1996) at 4.5. (*Clayton Exhibit 2*).

³ Letter of Intent from William R. Clayton to Mark Lowe, dated March 28, 2002. (*Clayton Exhibit 3*).

8. On April 24, 2002, the Clayton Group incorporated a new Nova Scotia unlimited company, Bilcon of Nova Scotia⁴, to be held through a US subsidiary, Bilcon of Delaware.⁵ The shares in this Delaware company were owned equally by my brothers and I. Our intent was to operate the Whites Point quarry for the export of basalt aggregate.
9. In light of the government of Nova Scotia's favorable stance towards mining and aggregate extraction, the Clayton Group decided to seek approval of a quarry near Whites Cove on the Bay of Fundy in Nova Scotia.
10. Bilcon of Nova Scotia entered into an agreement with Nova Stone in April 2002 for property in Digby County, Nova Scotia, where it hoped to develop the Whites Point Quarry. Nova Stone and Bilcon of Nova Scotia took steps to form a joint venture partnership to operate the quarry, which became known as Global Quarry Products.
11. In April 2004, Bilcon of Nova Scotia acquired Nova Stone's partial interest in Global Quarry Products and continued as the sole proponent of the proposed Whites Point Quarry project.
12. Paul Buxton, a professional engineer in Nova Scotia, was our agent and representative of Bilcon of Nova Scotia. He headed the approvals process for the Whites Point Quarry.
13. The Hon. Gordon Balser was a senior Nova Scotia cabinet minister and he was also the local MLA for the Whites Point Quarry area. Paul Buxton had numerous conversations with Minister Gordon Balser throughout 2002. Paul reported back to me on the contents of these meetings and informed me that Minister Balser was encouraging of the project and kept discussing the need for new jobs for the local area.
14. Minister Balser's words were even more encouraging to the Clayton Group once the decision was made to invest in Nova Scotia.
15. Based on these meetings between Paul Buxton and Minister Balser, I became convinced that the Government of Nova Scotia looked on our Whites Point Quarry project favorably and would allow the project to be assessed in a fair, impartial and transparent way. In sum, I became convinced that Nova Scotia was a good place to do business.
16. Minister Balser showed his willingness to support the project. He also invited Paul Buxton, my father and myself to meet him in the summer of 2002.
17. On June 24, 2002, I attended a meeting at Gordon Balser's office. The Minister provided helpful and encouraging commentary on the proposed Whites Point Quarry and stated he would do everything in his power to bring new jobs to his riding. Minister Balser's comments went a long way to confirming in my mind that Nova Scotia had a friendly business environment that was supportive to foreign investment.

⁴ Certificate of Incorporation of Bilcon of Nova Scotia, April 24, 2002. (*Clayton Exhibit 4*).

⁵ Certificate of Incorporation of Bilcon of Delaware, Inc., April 15, 2002. (*Clayton Exhibit 5*).

18. I was pleased about the prospects for obtaining approval to operate the Whites Point Quarry due to the overt and extremely positive actions of the Nova Scotia Department of Natural Resources (“NSDNR”).
19. I was informed by our longstanding contract geologist, John Lizak, that the prospects for opening a high-quality aggregate quarry in Digby Neck was likely due to the government’s support. I authorized him to meet with NSDNR staff. I was informed by Mr. Lizak that he met several times with NSDNR staff and, to my pleasant surprise, he was even offered a personal guided tour of the area by helicopter along with knowledgeable provincial government officials on June 4, 2003. After the helicopter tour, John informed me that NSDNR staff were encouraging of investment in quarries and even showcased other alternative sites that Bilcon might wish to invest in.⁶
20. Mr. Lizak told me that NSDNR was supportive of our investment in aggregates in Nova Scotia. A private helicopter tour of the area with government officials was, in my opinion, a strong sign of the Nova Scotia government’s support of Bilcon’s proposed quarry. Mr. Lizak also told me that he received documents from government staff that were very encouraging of the business of quarrying in Nova Scotia. Mr. Lizak provided to me documents referencing the following government policies:
 - a) The encouragement of the government of Nova Scotia to investors seeking to establish marine quarries⁷;
 - b) The support of the government of Nova Scotia for export mining to international markets⁸; and
 - c) The official policy of the government of Nova Scotia to have efficient “one window” environmental assessments.⁹
21. Based on all these actions, statements, publications and documents, I felt confident that investing in Nova Scotia would be a safe and predictable venture. Nova Scotia was clearly encouraging of foreign investment in general, and our investment in particular, in the aggregates sector. It led me to believe that approval of the Whites Point Quarry would only require compliance with the established process in place in Nova Scotia.
22. During this time, we also hired an experienced quarry manager, John Wall, to operate the Whites Point Quarry upon its approval.

⁶ Meetings of John Lizak with Nova Scotia Department of Natural Resources on June 4 and 5, 2002.

⁷ “Potential Crushed Stone Deposits On Tidewater in Nova Scotia”, Gordon Dickie, Nova Scotia Department of Mines and Energy, dated November, 1987 at 1. (*Clayton Exhibit 6*).

⁸ Nova Scotia Department of Natural Resources, “Industrial Minerals in Nova Scotia”, Information Circular No. 24, dated 1991 at 4-5, 22-23. (*Clayton Exhibit 7*).

⁹ Nova Scotia Department of Natural Resources, “One Window Process for Mine Development Approvals” at 1, March 2000 (*Clayton Exhibit 8*).

The Environmental Assessment

23. The environmental assessment process became a politically charged issue in the spring of 2003. A provincial election in Nova Scotia was due to take place in August. The Whites Point Quarry Project, as a result of this political tension, had become a political lightning rod in the election.
24. We sent a letter to the Hon. Kerry Morash, Minister of the Nova Scotia Department of Environment and Labour, on October 24, 2003, which stated that we expected fair and equal treatment, and expressed the concern that the environmental assessment had become a “political football.”¹⁰
25. It was certainly my feeling that the environmental process, from the spring of 2003 onwards, became unfair to Bilcon and was grounded in political considerations.
26. For example, the local Member of Parliament was the federal Minister of Fisheries and Oceans, the Hon. Robert Thibault. I understand that he was responsible for the referral of the Whites Point Quarry project to a Joint Review Panel.
27. I heard about the referral through media reports. The fact that Bilcon found out about the referral in such a manner started to raise concerns for me.

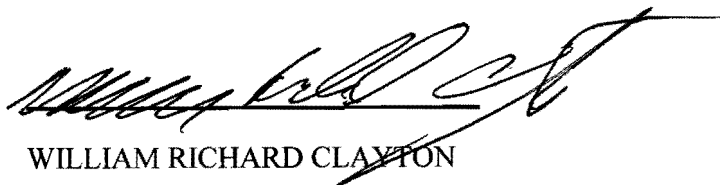
The Joint Review Panel Report

28. I was later surprised when the Whites Point Quarry was rejected by the Joint Review Panel. I was concerned that there were many errors contained in the Panel Report. We invited the federal and provincial ministers to meet with us before taking action on the Joint Review Panel Report. I was surprised that the relevant ministers refused to meet with us before making a final decision that had such serious repercussions on our business. We sent numerous letters to the ministers asking for a meeting before a decision was made.
29. The Clayton Group expended resources for the environmental assessment process in order to obtain approval for a quarry. These expenses were incurred for the preparation of the assessment including to prepare the Environmental Impact Statement, the work required to satisfy the many ongoing information requests made by the Joint Review Panel and the hiring of numerous experts to provide reports throughout the environmental assessment process. I understand from the finance and administration staff at the Clayton Group that we spent more than US\$4.25 million dollars throughout the extremely long environmental assessment process. All of this investment has now been lost as a result of Canada’s actions in contravention of the NAFTA. In light of these extensive costs over a five year period, I was disappointed that the Joint Review Panel ignored most of the evidence submitted by the experts at the Joint Review Panel hearings and in their Report.

¹⁰ Letter from William R. Clayton to Minister Kerry Morash, dated October 24, 2003 (*Clayton Exhibit 9*).

30. Beyond the cost and delay suffered by the Clayton Group, our company's reputation was damaged by this unfair process. Our employees were vilified because they worked for an American company and we were castigated by segments of the local population and the Joint Review Panel for simply wanting to export gravel to the United States, which was a perfectly legitimate and legal endeavor and was already being done by other quarries in Nova Scotia.
31. Our inability to obtain a secure and predictable supply of high quality aggregates from the Whites Point Quarry has caused loss to the Clayton Group, and our associated companies including Bilcon of Delaware and a total loss for Bilcon of Nova Scotia.
32. Owing to the refusal of the Whites Point Quarry, the Clayton Group was deprived of a secure and predictable supply of aggregates. If the Whites Point Quarry had had its environmental assessment done based on due process and the rule of law, then I am sure that the Clayton Group would have been able to operate a successful quarry that would have generated significant economic benefits for the community and Clayton Group. As a result of Canada's unfairness, our company was harmed and we suffered loss.
33. Our inability to obtain approval of the project has made our entire investment in Nova Scotia a loss. We cannot effectively deal with the damage to our goodwill caused by these unfair actions by Canada and Nova Scotia. Our entire expenditure for the environmental assessment is also total loss.
34. I make this witness statement in support of the Investors' Memorial and for no other or improper purpose.

Dated: July 25, 2011



WILLIAM RICHARD CLAYTON