

**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

JOHN LIZAK

JULY 8, 2011

I. Background

1. I am a geologist and mineral appraiser and have worked with the Clayton Group of companies for over 10 years. I am a Licensed Professional Geologist in the states of Pennsylvania, Illinois, Indiana and Kentucky. I am the president and principal of Lizak GeoScience & Engineering, Inc., a geoscience, mining and environmental consulting company. I am also the president and principal of Mineral Valuation & Capital, Inc., a consulting company specializing in mineral valuation and capital sourcing. My clients include international conservation groups, “Fortune 500” and private resource extraction companies, governments, mineral trusts, etc.
2. I received a Bachelors of Science in Fundamental Sciences at Lehigh University, with a specialty in Geology and Geotechnical Engineering, and a Master of Science in Geology at Purdue University. I have undertaken post-graduate studies in Hydrogeology, Mining Engineering and Mineral Economics.
3. I have been involved in hundreds of geosciences, mining and environmental projects in the United States and throughout the world. I have written various scientific and mineral valuation papers and reports, including *Aquifer Protection Within And Near Aggregate Operations* (National Stone Associate, 1998), which demonstrates my knowledge with respect to hydrogeology and aquifer protection as it relates to mining. I have given expert testimony on mineral valuation, resource extraction, and geoscience issues in numerous public forums.
4. I have been qualified as an expert witness in federal and/or state courts in Illinois, Indiana, New Jersey, Pennsylvania, and Ohio. I was also appointed as a “Court Master” to arbitrate a New Jersey quarry case dealing with environmental and reclamation issues.
5. I have been employed by Exxon Coal & Minerals, Inc. as a Senior Geologist, by British Petroleum as a senior manager in the company’s mineral acquisition and development group, and as a Chief Geologist and Manager of Environmental Affairs with the Millington Group of Companies. Further, I was Vice-Chairman of the Society of Mining & Exploration’s Mineral Management Resources Committee and past President of the Indiana-Kentucky Geological Society. I have been an Adjunct Professor of Geology at

both the University of Evansville in Indiana, and Raritan Valley College in New Jersey. I was the 2011 recipient of the American Institute of Mineral Appraisers (AIMA) Cartwright Award which is presented annually for the best paper presented at the joint AIMA-SME mineral valuation symposium. I was also chosen as a 2011-2012 Henry Krumb Distinguished Lecturer by the Society of Mining and Exploration.

6. My work for the Clayton Group involved the assessment of the Whites Point Quarry site, as well as the assessment of alternative sites within Nova Scotia, to determine if the Whites Point Quarry was a suitable investment for the Clayton Group. I also authored a report for the Clayton Group, *Geological Assessment of the Whites Cove Site; Digby County, Nova Scotia* (December 2002)¹, which formed part of Bilcon's Environmental Impact Statement.
7. My report to the Clayton Group referenced a document² produced by an expert with the Nova Scotia Department of Natural Resources which stated that the quality of the basalt located in the Whites Point Quarry region was of the highest quality.

II. Government Encouragement

8. I became involved in the Whites Point Project in March 2002, to evaluate for the Clayton Group of companies the potential for investment in the province of Nova Scotia of a small marine aggregate quarry with export potential.
9. From 2002 to 2005, I had at least 10 meetings with members of Nova Scotia's Department of Natural Resources to discuss potential aggregate investments.³ I had

¹ *Geological Assessment of the Whites Cove Site*, John Lizak, December 2002 (**Lizak Exhibit 1**)

² *Internal Stratigraphy of the Jurassic North Mountain Basalt, Southern Nova Scotia*, Dan J. Kontak (Report of Activities, 2001) (**Lizak Exhibit 2**)

³ These meetings took place on the following dates: April 29, 2002, April 30, 2002, September 9, 2002, May 31, 2003, June 1, 2003, June 4, 2003, June 5, 2003, June 6, 2003, December 20, 2004, December 21, 2004, February 2, 2005, May 9, 2005, May 10, 2005

numerous further discussions with members of Nova Scotia's Department of Natural Resources by teleconference discussing the suitability of quarrying sites.⁴

10. Through my role with the Clayton Group, I developed numerous professional contacts with members of Natural Resources department. These individuals, with specific reference to Dan Kontak, Philip Finck, Garth Prime, Michael MacDonald and John Drage. Dan Kontak, Regional Geologist with the Department of Natural Resources was very helpful in the assessment of the Whites Point Quarry site.
11. At the time that the Clayton Group invested in Nova Scotia, the Province of Nova Scotia promoted itself to be "Open for Business" and encouraging of resource development. This was apparent from my discussions and meetings with Provincial experts, from various publications and advertisements produced by the Government of Nova Scotia which spoke of the importance of the resource industry. At all times during my discussions with the Nova Scotia Department of Natural Resources, I was told that Nova Scotia was encouraging of investments of land based or marine quarries. I relayed these comments of encouragement to invest in Nova Scotia to the Clayton Group.
12. Throughout 2002, Philip Finck, Dan Kontak and Garth Prime provided or referred me to various publications authored by the Nova Scotia Department of Natural Resources which encouraged investment in Nova Scotia, including in the Whites Point region.⁵ One government publication in particular, "*One Window Process for Mine Development Approvals*",⁶ outlines the process under which the Department of Natural Resources has

⁴ These discussions took place on the following dates: January 30, 2003, April 14, 2003, May 5, 2003, May 23, 2003, May 28, 2003, June 16, 2003, June 17, 2003, July 17, 2003, November 19, 2003, November 20, 2003, December 1, 2003, December 10, 2003, December 11, 2003, January 21, 2004, December 8, 2004, December 9, 2004, December 13, 2004, January 18, 2005.

⁵ "Potential Crushed Stone Deposits On Tidewater in Nova Scotia", Gordon Dickie, Nova Scotia Department of Mines and Energy, dated November, 1987. (*Lizak Exhibit 3*); "Industrial Minerals in Nova Scotia", Nova Scotia Department of Natural Resources Information Circular No. 24, dated 1991 (*Lizak Exhibit 4*); "Minerals – A Policy for Nova Scotia", Nova Scotia Department of Natural Resources, dated 1996 (*Lizak Exhibit 5*); "A look at Nova Scotia's Mineral Industry", Nova Scotia Department of Natural Resources, July 1999. (*Lizak Exhibit 6*); and *Internal Stratigraphy of the Jurassic North Mountain Basalt, Southern Nova Scotia*, Dan J. Kontak (Report of Activities, 2001) (*Lizak Exhibit 2*)

⁶ *One Window Process for Mine Development Approvals*, Nova Scotia Department of Natural Resources, March 2000 (*Lizak Exhibit 7*)

formalized and streamlined the review process for the mining industry. It states that the provincial government “believes that mineral development is essential to the economic future of the province”.⁷ The Nova Scotia government was very helpful in providing these resources, more helpful than any other government I have worked with.

13. Through these publications, the Nova Scotia government made repeated efforts to encourage investment in resource extraction.⁸ One such publication, from Nova Scotia’s Department of Mines and Energy (the precursor of the Department of Natural Resources), dealt with the development of marine quarries within the province, and stated:

Construction Aggregates Limited established a granite quarry at Porcupine Mountain, Port Hawkesbury in 1978 and produce about 1 million tonnes of aggregate annually. Over 90% of their production is exported and shipped by bulk ocean carrier to destinations...and several ports in the United States including Savannah, New Orleans and Huston (*sic*).

...

Nova Scotia is very well situated on great circle shipping routes to Europe... and on established shipping routes to the United States Eastern Seaboard and Gulf coast. Consumption of aggregates is increasing in the United States and this trend is to continue. *Nova Scotia is ideally situated to take advantage of this market.*[emphasis added]⁹

14. In 2002, the Nova Scotia Department of Natural Resources specifically recommended that I review a document titled *Industrial Minerals in Nova Scotia*, authored by the Mines and Minerals Branch of the Department of Natural Resources. It outlined Nova Scotia’s encouragement for investment in industrial minerals, which includes aggregate. A section in the document noted Nova Scotia’s historic resource industry:

⁷ *One Window Process for Mine Development Approvals*, Nova Scotia Department of Natural Resources, March 2000, pg. ii (*Lizak Exhibit 7*)

⁸ “Potential Crushed Stone Deposits On Tidewater in Nova Scotia”, Gordon Dickie, Nova Scotia Department of Mines and Energy, dated November, 1987. (*Lizak Exhibit 3*); “Industrial Minerals in Nova Scotia”, Nova Scotia Department of Natural Resources Information Circular No. 24, dated 1991. (*Lizak Exhibit 4*); “Mining Matters”, D.R. MacDonald, Nova Scotia Department of Natural Resources, dated 2004. (*Lizak Exhibit 8*).

⁹ “Potential Crushed Stone Deposits On Tidewater in Nova Scotia”, Gordon Dickie, Nova Scotia Department of Mines and Energy, dated November, 1987 at 1. (*Lizak Exhibit 3*).

Nova Scotia has a rich history in industrial mineral production spanning a period of over 200 years. From the earliest extraction of aggregate for local road construction the industry has developed into a supplier of numerous industrial mineral commodities for local, interprovincial and international markets.

...

In addition, over 75 aggregate producers process mineral aggregate at numerous pits and quarries throughout the Province.

...

Nova Scotia has a long history and proven track record in industrial mining and manufacturing. This is largely a reflection of the diverse and favourable geology of the Province... *The industry has also enjoyed the support and experience of several government agencies and the numerous excellent research facilities which are found here.* The people and the Government of Nova Scotia are committed to the continued growth and development of industrial mineral production in our Province, ensuring a long and prosperous future for this vital industry.[emphasis added]¹⁰

15. That same document specifically noted the rich aggregate resources that are present within the province and makes a specific reference to marine quarries, even displaying a picture of a marine quarry with a docking facility in close proximity.

The geology of Nova Scotia offers excellent potential for the production of quality aggregate materials. Several areas contain extensive bedrock deposits of quartzite, granite and trap rock (basalt), all durable rock types capable of producing the best aggregate. Some of the deposits are in proximity to tidewater, opening the possibility of new marine quarry opportunities.¹¹

...

The Nova Scotia Department of Natural Resources has been involved in identifying industrial mineral resources for over a century, with efforts increasing dramatically in recent years. For almost two decades cooperation agreements between the Governments of Nova Scotia and

¹⁰ "Industrial Minerals in Nova Scotia", Nova Scotia Department of Natural Resources Information Circular No. 24, dated 1991 at 4-5. (*Lizak Exhibit 4*)

¹¹ "Industrial Minerals in Nova Scotia", Nova Scotia Department of Natural Resources Information Circular No. 24, dated 1991 at 10-11. (*Lizak Exhibit 4*)

Canada have implemented a series of programs designed to promote industrial mineral activities in the Province.

...

The Province has an abundance of industrial mineral wealth, much of which remains to be developed. The Government of Nova Scotia is committed to maximizing the use of these resources, and is strongly encouraging their exploration and development. To this end, the Department of Natural Resources has available a broad range of assistance, including geotechnical data and staff experience. Other federal and provincial agencies are in a position to provide financial assistance for resource development projects.¹²

16. I was encouraged by these documents and my discussions and meetings and outlined all the key points of government encouragement and support to the Clayton Group, such as:
- a) The government's encouragement to investors seeking to establish marine quarries¹³;
 - b) The government's support for export mining to international markets¹⁴; and
 - c) The official policy of the Government of Nova Scotia to have efficient "one window" environmental assessments.¹⁵
17. On or about January 9, 2003, I received a letter from Phil Finck containing contact and property information for other operational pits and quarries within Nova Scotia. In that letter, Mr. Finck offered his assistance with respect to arranging meetings or providing contact information for regulatory bodies.

¹² "Industrial Minerals in Nova Scotia", Nova Scotia Department of Natural Resources Information Circular No. 24, dated 1991 at 22-23. (*Lizak Exhibit 4*)

¹³ "Potential Crushed Stone Deposits On Tidewater in Nova Scotia", Gordon Dickie, Nova Scotia Department of Mines and Energy, dated November, 1987 at 1. (*Lizak Exhibit 3*)

¹⁴ "Industrial Minerals in Nova Scotia", Nova Scotia Department of Natural Resources Information Circular No. 24, dated 1991 at 4-5, 22-23. (*Lizak Exhibit 4*)

¹⁵ *One Window Process for Mine Development Approvals*, Nova Scotia Department of Natural Resources, March 2000, pg. ii (*Lizak Exhibit 7*)

18. Once I informed the Department of Natural Resources of our acquisition criteria for construction aggregate quarries and pits, significant assistance was provided in finding a suitable location. For example, the Department of Natural Resources created a very detailed and substantive analysis of current quarrying operations and trends in Nova Scotia and projected future growth.

As part of my work for the Clayton Group, I also reviewed other projects in Nova Scotia that were exporting aggregate, or other mineral commodities, to the United States, such as the Martin Marietta Quarry project, located in Auld's Cove. These projects made it clear that marine quarries were feasible and common in Nova Scotia, and indeed were specifically encouraged by the government.

III. Helicopter Tour to Review Investment Locations

19. The Nova Scotia Department of Natural Resources organized and hosted a helicopter tour to review potential quarry sites that could be suitable for my client. Prior to our departure, Philip Finck hosted a "kick-off" meeting and dinner which Mr. Finck informed me was funded by the Province. During the two-day helicopter tour, which occurred on June 4 to 5, 2003, I was provided with a team of government experts, a comprehensive strategic overview of the regional and local aggregate markets, competitor profiles, an overview of the relevant infrastructure, as well as summaries of the various sites that we visited, to assist me with my analysis of potential quarry sites and reporting requirements to the Clayton Group. My government host also arranged meetings with various site owners and market participants.
20. After the private helicopter tour, there was no question in my mind that the Nova Scotia government was serious about investment in the commodities sector, particularly in aggregates. My impression was that the government was keen to work with the Clayton Group for the development of an aggregate quarry. The government of Nova Scotia had also discussed possible funding mechanisms for the project. I relayed that information to the Clayton Group immediately after returning from the helicopter tour.

21. On August 1, 2003, I wrote a letter to Mike Cherry, Director of Mineral Resources, thanking him for the extraordinary assistance I received from his department. In this letter, I thanked Mr. Cherry for the “tireless enthusiasm” of his staff, and how such tireless enthusiasm “has truly provided the opportunity for success in the venture”.¹⁶
22. Later that year, I received by fax a publication by the department entitled “A look at Nova Scotia’s Mineral Industry”¹⁷. Included in the publication was a detailed map of active mines in Nova Scotia as of July 1999 and industry statistics and trends for my review. This document showcased over 42 current mining operations throughout the province of Nova Scotia.

IV. The Environmental Process

23. However, the government of Nova Scotia’s support for the project appeared to change after the federal government became involved.
24. Following the appointment of the Joint Review Panel in November of 2004, on December 9, 2004, Dan Kontak informed me that he had been appointed as a geological/hydrogeological advisor to the Joint Review Panel. In December 2004, I met with Dan Kontak to survey together the North Mountain Basalt region.¹⁸
25. However, on April 14, 2005, Dan Kontak informed me that the Joint Review Panel would not be asking for his advice when the Joint Review panel was compiling the Environmental Impact Statement Guidelines, rather another member of the Nova Scotia Department of Natural Resources, Sandra Johnston, was requested to provide analysis. I was surprised by the decision of the Joint Review Panel not to seek the advice of Dan Kontak. Dan Kontak was the expert in the rock formations in the Digby Neck region. Dan Kontak told me that he believed the move was “political”.

¹⁶ Letter John Lizak to Mike Cherry, Director of Mineral Resources, Nova Scotia Department of Natural Resources, August 1, 2003. (**Lizak Exhibit 9**)

¹⁷ “A look at Nova Scotia’s Mineral Industry”, Nova Scotia Department of Natural Resources, July 1999. (**Lizak Exhibit 6**)

¹⁸ Letter John Lizak to Daniel Kontak, Regional Geologist, Nova Scotia Department of Natural Resources, December 30, 2004. (**Lizak Exhibit 10**)

26. I was surprised when I heard that the Joint Review Panel rejected the Whites Point Quarry project. This was completely contradictory to the encouragement to invest in Nova Scotia that was provided by members of the Nova Scotia Department of Natural Resources and various policy statements of the government of Nova Scotia on quarrying.
26. Indeed, throughout the numerous meetings with members of the Department of Natural Resources, they expressed surprise and annoyance at the aggressive opposition that the Whites Point Quarry faced from other government departments and the Joint Review Panel. The treatment the Clayton Group received was completely surprising, even to the Department of Natural Resources.
27. I was especially surprised that the consistent, clear and unambiguous encouragement for the Clayton Group to invest, which was made clear to me personally as their agent and through numerous official government documents, proved in the end to be inaccurate.
28. I make this witness statement in support of the Investors' Memorial and for no other or improper purpose.

Dated: July 8, 2011



JOHN LIZAK