

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

BETWEEN:

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

Claimants

AND:

GOVERNMENT OF CANADA

Respondent

AFFIDAVIT OF BOB PETRIE

I, BOB PETRIE, residing at 4126 Highway 359, Hall's Harbour, Nova Scotia, Canada,
MAKE OATH AND SAY AS FOLLOWS:

A. INTRODUCTION

1. I am currently the Director of Wildlife at the Nova Scotia Department of Natural Resources ("NSDNR"). I was a District Manager of the Yarmouth Office of the Environmental Monitoring and Compliance ("EMC") Division at Nova Scotia Environment from October 2000 until July 2005, when I was promoted to the post of Regional Director. In May 2010 I took the position of Director of Wildlife, NSDNR.

2. While serving as District Manager, I was responsible for industrial approvals issued under Part V of the Nova Scotia *Environment Act* in the south-western region of the province, including the Digby Neck. My other responsibilities included: management of programs relating to water resources, contaminated sites, drinking water, municipal solid waste, municipal and on-site sewage, dangerous goods and pesticides; responding to complaints and investigations; and, enforcement measures relating to all of the above.

3. I have personal knowledge of the matters deposed to in this affidavit which addresses: (1) the industrial approval process for quarries of less than 4 ha in size under the Nova Scotia *Environment Act*; (2) my involvement in Nova Stone's application for an approval to operate a quarry at Whites Point, Nova Scotia; and, (3) my involvement in Parker Mountain Aggregate's application for an approval to operate a quarry at Tiverton, Nova Scotia.

B. THE INDUSTRIAL APPROVAL PROCESS FOR QUARRIES OF LESS THAN 4 HA IN SIZE UNDER THE NOVA SCOTIA ENVIRONMENT ACT

4. Under the Nova Scotia *Environment Act* ("NSEA") and the Nova Scotia *Environmental Assessment Regulations*,¹ an environmental assessment ("EA") must generally be conducted for a proposed quarry of 4 ha or more in size. While an EA is not required for a quarry under 4 ha, a proponent must still apply for a permit – known as an industrial approval – under Part V of the *NSEA*.²

5. The typical process followed by EMC in issuing an industrial approval for a quarry is as follows: When an application for an industrial approval is filed, EMC arranges for its review by an NSDEL environmental inspector and an NSDEL engineer. After this initial review, the District Manager typically works with the engineer, the inspector, and other federal or provincial departments to determine any conditions to be placed on the approval. EMC may also consult an NSDEL EA officer if there is any

¹ *Environment Act*, S.N.S. 1994-95, c. 1, s. 1, **Exhibit R-5**; *Environmental Assessment Regulations*, S.N.S. 1994-95, c. 1, **Exhibit R-6**.

² I note the Claimants' assertion in paragraph 5 of their Memorial that "an application to construct and operate a quarry of less than 4 ha does not generally require a permit or an environmental assessment." Such quarries do require a permit – an industrial approval.

question as to whether the proposed quarry is over the 4 ha threshold, thereby requiring an EA under Nova Scotia law.

6. The conditions that might be placed on an approval are developed with a view to the Nova Scotia *Pit and Quarry Guidelines*.³ These Guidelines address a number of issues, including ground water impacts, air quality, blasting vibration, fly rock, and clearance distances from private property. Conditions might also relate to the concerns and questions of other federal or provincial departments that have been consulted on the application.

C. NOVA STONE'S APPLICATION TO OPERATE A 3.9 HECTARE QUARRY AT WHITES POINT, NOVA SCOTIA

7. Nova Stone applied to NSDEL for an industrial approval to construct and operate a 3.9 ha quarry at Whites Point on February 18, 2002.⁴ In addition to myself, the EA inspector who worked on Nova Stone's application was Brad Langille, the engineer was Robert Balcom and the NSDEL EA officer was Mark McLean.

8. We could not process Nova Stone's February 18, 2002 application because of errors in the calculation of the area covered by the quarry (which exceeded 4 ha and would have required an EA).⁵ Nova Stone filed a new application on April 23, 2002.⁶

9. Nova Stone's 3.9 ha quarry was the first step in a much larger operation that would consist of a quarry of over 150 ha in size and a marine terminal and that would be used to blast and ship significant volumes of aggregate to export markets over an extended period of time. In his engineer's report, Mr. Balcom noted "[t]otal leased area is about 350 acres," that "[a]pproximately one million tons per year of crushed rock will

³ Nova Scotia Department of the Environment, *Pit & Quarry Guidelines*, May 1999, **Exhibit R-74**.

⁴ Nova Stone, Application for Approval to Operate a Quarry, Little River, Digby County, February 18, 2002, **Exhibit R-75**.

⁵ See email from Mark McLean to Brad Langille and Bob Petrie, April 11, 2002 wherein Mr. McLean advises that if all associated elements of the project were taken into account, the quarry's footprint would exceed 4 ha and require an EA, **Exhibit R-76**. See also the letter from myself to Paul Buxton, April 15, 2002, **Exhibit R-77**.

⁶ Nova Stone, Application for Approval for 3.9ha quarry, April 23, 2002, **Exhibit R-78**.

be shipped from the quarry,” and that a “ship loading facility will be constructed in the cove.”⁷

10. As part of the review process Mr. Balcom observed that as Nova Stone’s application would involve blasting very close to the Bay of Fundy,⁸ it could engage concerns relating to the marine environment under federal jurisdiction. His engineering report raised “the effect that the blasting operations will have on marine mammals in the Bay of Fundy” and that “[i]t may be necessary to restrict blasting in the quarry to when the Right Whales are not in the Bay of Fundy.” The report further noted that “[u]nder water concussion from the on shore blasting has not been defined in the application” and that “[t]he applicant has not supplied any information that would indicate what affect [sic] blasting will have on the whales in [sic] the Bay of Fundy.”⁹

11. As NSDEL does not have the expertise or jurisdiction to address such issues we consulted with our counterparts at the Department of Fisheries and Oceans (“DFO”) on Nova Stone’s application.

12. NSDEL frequently reaches out to DFO when a new project might engage federal fisheries concerns, a point expressly noted in the *Guide to Preparing an EA Registration Document for Pit and Quarry Developments in Nova Scotia*, which states that “Fisheries and Oceans Canada (DFO) will be reviewing the registration document to determine if the pit or quarry development will likely result in the harmful alteration, disruption, or destruction of fish habitat [emphasis added].”¹⁰ I would add that NSDEL considers the proactive identification of matters engaging federal jurisdiction to be a service to proponents. The alternative is that an uninformed proponent — and the province of Nova

⁷ Engineer’s Report on the Nova Stone Exporters, Inc. Quarry, by Robert Balcom, March 21, 2002, page 2, **Exhibit R-79**.

⁸ As it turned out, Nova Stone intended to blast 35.6 metres from the Bay. See letter from Paul Buxton to Bob Petrie, attaching “Whites Point Quarry Blasting Plan” dated November 18, 2002, p. 5, **Exhibit R-80**.

⁹ Engineer’s Report on the Nova Stone Exporters, Inc. Quarry, by Robert Balcom, March 21, 2002, pages 3-4, **Exhibit R-79**.

¹⁰ *Guide to Preparing an EA Registration Document for Pit and Quarry Developments in Nova Scotia*, page 12, **Exhibit R-81**.

Scotia if it authorizes the activity in question — run the risk of violating federal fisheries law and facing prosecution under the *Fisheries Act*.¹¹

13. In the case of Nova Stone’s application it is therefore not accurate to state, as the Claimants have here, that “DFO imposed itself into the provincial process.”¹² What did happen was that on April 9, 2002 NSDEL solicited DFO’s comments on the application.¹³ A briefing note dated April 11, 2002 states that “[t]he application was also sent to the Department of Fisheries and Oceans (DFO), Bedford Institute of Oceanography for comment on the effects of the blast concussion on marine life (i.e. Endangered North Atlantic Right Whale).”¹⁴ This was followed up by a telephone call from NSDEL to DFO to further discuss the application.¹⁵ In light of DFO’s concerns over the potential impact of the proposed blasting, DFO requested that two blasting conditions be included in the conditional permit; specifically, that “[a]ll blasting be carried out in accordance with the *Guidelines for the Use of Explosives in or Near Canadian Fisheries Waters*” and 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.”¹⁶

14. I issued an approval to Nova Stone on April 30, 2002. The approval authorized Nova Stone to construct and operate a quarry on the 3.9 ha site for a ten year period, subject to certain conditions, such as Nova Stone remaining in control of the land on which the quarry was located,¹⁷ and the blasting conditions.¹⁸ In addition, as the 3.9 ha quarry was the first step in a far larger undertaking, it had already generated considerable public concern and NSDEL officials had fielded numerous inquiries from the public

¹¹ *Fisheries Act*, R.S.C., 1985, c. F-14, s.78, **Exhibit R-82**.

¹² Claimants’ Memorial, ¶11, 13.

¹³ Letter from Brad Langille to Jerry Conway, April 9, 2002, **Exhibit R-83**.

¹⁴ NSDEL Briefing Note, Nova Stone Exporters Inc., Quarry Application, Little River, Digby County, April 11, 2002, **Exhibit R-84**.

¹⁵ Telephone Log of call by Brad Langille to Brian Jollymore, April 22, 2002, **Exhibit R-85**.

¹⁶ Email from Brian Jollymore to Bob Petrie, April 26, 2002, **Exhibit R-86**.

¹⁷ Nova Stone Approval to Construct and Operate a quarry near Little River, Digby County, April 30, 2002, ¶ 3(b), **Exhibit R-87**.

¹⁸ Nova Stone Approval to Construct and Operate a quarry near Little River, Digby County, April 30, 2002, ¶¶ 10(h), 10(i), **Exhibit R-87**.

about Nova Stone's plans.¹⁹ The approval therefore required Nova Stone to undertake a public information program that would address, among other issues, the future of the project.²⁰

15. I understand that around the time the approval was issued, Nova Stone had entered into a partnership called Global Quarry Products ("GQP") with Bilcon of Nova Scotia, for the purpose of developing the larger quarry and marine terminal at the site. While Nova Stone was part of the GQP partnership, and while both Nova Stone and GQP were represented by Paul Buxton, the holder of the approval from NSDEL's perspective was always Nova Stone. Under the *NSEA*, industrial approvals – such as the one issued here – cannot be transferred, sold, leased, assigned or otherwise disposed of without the written consent of the Minister.²¹

16. I understand that on August 13, 2004 Mr. Buxton advised the Canadian Environmental Assessment Agency that Nova Stone had withdrawn from the GQP partnership and had purportedly assigned its interests in the 3.9 ha quarry to Bilcon of Nova Scotia.²² This assignment was of course not possible under the terms of the approval – as I have noted, Nova Stone's approval could not be assigned without the consent of our Minister. However, any questions about the validity of a purported assignment appear to have been put to rest four days later when Mr. Buxton advised the Agency that the GQP partnership had been dissolved and that "[t]he Permit issued by the Nova Scotia Department of Environment and Labour to Nova Stone Exporters Inc. for a

¹⁹ See Telephone Log of call between Brad Langille and Mary Linyak, March 27, 2002, **Exhibit R-88**. See also Telephone Log of call between Brad Langille and Jim Thurber, April 2, 2002, **Exhibit R-89** and Telephone Log of call between Brad Langille and Tonya Wimmer, April 3, 2002, **Exhibit R-90**. See also email from Brad Langille to Bob Petrie advising of inquiry from *Chronicle Herald* newspaper on quarry information, April 9, 2002, **Exhibit R-91** and NSDEL Briefing Note, Nova Stone Exporters Inc., Quarry Application, Little River, Digby County, May 1, 2002 that states "[t]here is a high degree of public concern over this project and inquiries have been received from the public, media and the NDP caucus", **Exhibit R-92**.

²⁰ Nova Stone Approval to Construct and Operate a quarry near Little River, Digby County, April 30, 2002, ¶ 11, **Exhibit R-87**. See also NSDEL Briefing Note, Nova Stone Exporters Inc., Quarry Application, Little River, Digby County, May 1, 2002, **Exhibit R-92**.

²¹ *Environment Act*, S.N.S. 1994-95, c. 1, s. 59(1), **Exhibit R-5**.

²² Letter from Bilcon of Nova Scotia to Jean Crépault, August 13, 2004, **Exhibit R-93**.

3.9 ha quarry at Whites Point is no longer valid since Nova Stone Exporters Inc. no longer holds the lease to the subject property.”²³

17. I understand that, on May 1, 2004 Bilcon of Nova Scotia entered into a lease agreement with the owners of the land on which Nova Stone’s 3.9 ha parcel was situated.²⁴ In my view the industrial approval issued to Nova Stone would actually have been null and void as of this date as it was the point at which Nova Stone no longer controlled the land on which the 3.9 ha parcel was located, as required by paragraph 3(b) of the approval.

D. PARKER MOUNTAIN AGGREGATE’S APPLICATION TO OPERATE A 1.8 HECTARE QUARRY AT TIVERTON, NOVA SCOTIA

18. I was also involved in NSDEL’s review of Parker Mountain Aggregate’s (“PMA”) application for an approval to operate a quarry of 1.8 ha at Tiverton, Nova Scotia. PMA filed its application to NSDEL on February 27, 2003.²⁵ As PMA’s proposed quarry was under 4 ha it did not require an EA under the *NSEA*. However, the PMA application did not raise the same issues presented by Nova Stone’s at Whites Point.

19. First, PMA’s proposal was not the first step in a large scale quarry and marine terminal operation. Whereas we were aware of Nova Stone’s intent to expand its quarry and to export over one million tons of aggregate per year for up to 50 years from Whites Point, the PMA proposal was limited to a 1.8 ha parcel of land and would supply armour rock for repairs to a fisherman’s wharf and for the construction of a new harbour facility at Tiverton.²⁶ The PMA project also wouldn’t entail the use and operation of a crusher, ship loader or water pumping and processing equipment that would be used at a large aggregate quarry and marine terminal operation like the Whites Point project.

²³ Letter from Paul Buxton to Jean Crépault, August 17, 2004, **Exhibit R-94**.

²⁴ Lease Agreement between Bilcon of Nova Scotia and the Linebergers and Johnsons, May 1, 2004, **Exhibit R-95**.

²⁵ Letter from Michael Lowe to Jacqueline Cook, February 27, 2003 attaching application for the Approval of a Rock Quarry at Tiverton, **Exhibit R-96**.

²⁶ Letter from Michael Lowe to Jacqueline Cook, February 27, 2003 attaching application for the Approval of a Rock Quarry at Tiverton, “Process description for the activity”, **Exhibit R-96**. The Tiverton Quarry operation was to terminate once these two projects were completed.

20. We were also not presented with the same potential for public concern over the PMA proposal, as we had been almost a year earlier at Whites Point. As I have noted above, at Whites Point there had been public meetings and inquiries to NSDEL over the potential impact of the project on fisheries and ecotourism as early as April 2002, and the level of this concern continued to increase after the issuance of the approval.²⁷ There certainly was a potential for public concern at Tiverton as there were apparently 37 residences within 800 metres of the proposed quarry that could have been impacted by blasting activity. But as the *Pit and Quarry Guidelines* prohibit blasting within 800 metres of a residence without consent, PMA advised it had obtained the consent of each resident, demonstrating to us that the plans for the quarry were well known in the Tiverton community and that the project was not raising public concern or opposition.²⁸

21. There were also significant differences in the location of each proposed quarry, relative to the marine environment. As I have noted, Nova Stone's application documentation stated that blasting at the Whites Point Quarry was to be conducted approximately 35.6 meters metres from the edge of the Bay of Fundy and just above sea level.²⁹ By contrast, the setbacks of the Tiverton quarry were much greater — blasting was conducted approximately 400 meters from the Bay of Fundy and 313 meters from the Petit Passage (which connects the Bay of Fundy to St. Mary's Bay).³⁰ The Tiverton

²⁷ See NSDEL Briefing Note, Nova Stone Exporters Inc., Quarry Approval Little River, Digby County, June 5, 2002, **Exhibit R-97**.

²⁸ Letter from Michael Lowe to Jacqueline Cook, February 27, 2003 attaching application for the Approval of a Rock Quarry at Tiverton. Cover Letter, **Exhibit R-96**. In total, the consent of 93 individuals was obtained - see **Exhibit R-98**.

²⁹ Letter from Paul Buxton to Bob Petrie, attaching "Whites Point Quarry Blasting Plan" dated November 18, 2002, p. 5, **Exhibit R-80**.

³⁰ There is some confusion about the setbacks at Tiverton Quarry. The proponent wrote advising that the blast area was 370 meters from the Petit Passage and 780 meters from the Bay of Fundy to the westerly (see Michael Lowe letter to Robert Balcom, March 13, 2003, **Exhibit R-99**). The Engineering Report completed by Robert Balcom and attached to the Terms and Conditions for the quarry stated that the "nearest surface water" was 160 meters away (see Engineering Report of Robert Balcom, on the Parker Mountain Aggregates Ltd. Quarry Tiverton, Digby County, March 21, 2003, page 2, **Exhibit R-101**). For the purpose of preparing this affidavit, I had a staff member from the Nova Scotia Department of Environment take measurements at the Tiverton Quarry site using GPS. The figures obtained are reflected above, see Maps Illustrating the Setbacks at Parker Mountain Aggregates' 1.8 ha Quarry at Tiverton, **Exhibit R-100**.

quarry was also situated at the top of a large hill, approximately 63 meters above sea level.³¹

22. It was also apparent to us that the PMA proposal would not raise the same concerns that we had regarding the impact of blasting on marine mammals at Whites Point. In addition to the large setback distances, blasting at Tiverton could not, under the *Pit and Quarry Guidelines*, endanger any of the residences that were within 800 metres of the quarry.³² Given the maximum allowable ground vibration limits that were required to safeguard each residence, the NSDEL engineer (who had reviewed Nova Stone's application) formed the opinion that "[t]he blasting effect on marine mammals should not be a problem since the blasts must not endanger structures within the 800 meter buffer zone."³³

23. Notwithstanding the apparent differences, we were mindful of DFO's concerns with the proposal at Whites Point. As such, consistent with NSDEL's past practice, I forwarded the PMA application to DFO to gauge whether it engaged fisheries concerns.³⁴ DFO determined the proposal was not expected to result in the harmful alteration, disruption or destruction of fish habitat and that an authorization under s. 35(2) of the *Fisheries Act* was not required.³⁵ As a result, an environmental assessment under the *Canadian Environmental Assessment Act* would also not be required.

³¹ This elevation was determined using the Province of Nova Scotia's Digital Elevation Model, which is an electronic topographic model maintained by the Nova Scotia Geomatics Centre.

³² Nova Scotia Department of the Environment, *Pit & Quarry Guidelines*, May 1999, ¶ IV(2)(c), **Exhibit R-74**.

³³ Engineer's Report on the Parker Mountain Aggregates' Quarry, by Robert Balcom, March 21, 2003, page 3, **Exhibit R-101**. I note that the approval ultimately issued to PMA provided for maximum ground vibration limits of 0.5 in/sec (12.5 mm/s). This condition prevented blasts that would exceed 12.5 mm/s of ground vibration as measured from the closest structure.

³⁴ Notes of Bob Petrie, March 18, 2003, **Exhibit R-102**.

³⁵ DFO provided me with verbal advice that it had no concerns over the PMA proposal on March 24, 2003 (see Notes of Bob Petrie, March 24, 2003, **Exhibit R-103**). This was followed by a written confirmation from DFO (see letter from Peter Winchester to NSDEL, April 25, 2003, **Exhibit R-104**).

24. On March 24, 2003 I issued PMA a two-year permit for the Tiverton quarry.³⁶ The permit contained Terms and Conditions beyond the “standard rock quarry permit” referred to by the Claimants in their Memorial.³⁷ Such additional conditions are often required as each quarry site has its own set of unique facts to be considered.

25. I note the Claimants have alleged a “difference” in treatment between the Whites Point and PMA proposals that “was caused by the political interest of the Government of Nova Scotia.”³⁸ On the basis of my involvement in both proposals, I can say that this was absolutely not the case. I never once received instructions, nor am I aware of any such instructions, that one project should be treated differently than the other because of political considerations. To the contrary, we were mindful of the process applied to Nova Stone’s application and endeavoured to be consistent in our process with PMA. Any difference in how the applications were processed was due entirely to the different nature of the projects and project sites, not to political interference.

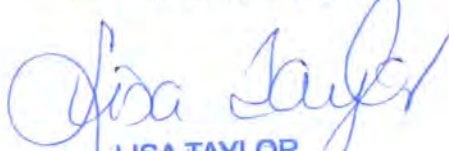
AFFIRMED

SWORN BEFORE ME)
at Kentville, in the Province)
of NOVA SCOTIA, this 1 day)
of November, 2011)
December



BOB PETRIE

A Commissioner for taking Affidavits
in Supreme Court for Province
OF NOVA SCOTIA



LISA TAYLOR
A Commissioner of the
Supreme Court of Nova Scotia

³⁶ Letter from Bob Petrie to Michael Lowe, March 24, 2003, attaching Approval to Parker Mountain Aggregates Ltd., March 24, 2003, **Exhibit R-105**.

³⁷ Claimants’ Memorial, ¶ 99.

³⁸ Claimants’ Memorial, ¶¶ 121-122.