

**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 AND DANIEL CLAYTON AND BILCON OF DELAWARE INC.**

**Claimants**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent**

**AFFIDAVIT OF BRUCE HOOD**

I, Bruce Hood, residing at 6653 Third Line Road, Kars, Ontario, Canada, MAKE OATH  
AND SAY AS FOLLOWS:

**A. Personal Background**

1. I received an Honours Bachelor of Science degree in Fish and Wildlife Biology from the University of Guelph in 1976. Over the next thirty five years, I worked in the fish and wildlife biology field with the Metro Toronto and Region Conservation Authority, the Province of Ontario and the Government of Canada. My last position was at Fisheries and Oceans Canada (“DFO”), where I was a Manager at Habitat Operations (Atlantic and Quebec). In that position, I was responsible for a staff that monitored and advised regional officials on their conduct of environmental assessments (“EAs”) of

major natural resource projects pursuant to the *Canadian Environmental Assessment Act* (the “*CEAA*”). I retired in July 2011.

2. I first joined DFO at its headquarters in October 2000 as a Senior Biologist. In June 2002, I became a Senior Liaison Officer, Habitat Operations responsible for four regions: Newfoundland, the Maritimes, Quebec and the Gulf of St. Lawrence. In this position, I reported to Richard Nadeau, who was the Director of Operations. Mr. Nadeau in turn reported to the Director-General, who was Paul Cuillerier until May 2003, and then Richard Wex thereafter. The Director-General reported to the Assistant Deputy Minister (“ADM”), Sue Kirby, who in turn reported to the Deputy Minister, who in turn reported to the Minister.

3. I had been in this position at DFO headquarters for less than a year when I was given responsibility for working with the DFO Maritimes Regional Office in Halifax with respect to its EA of the Whites Point Quarry and Marine Terminal. I worked on this file essentially from September 2002 until the December 2007<sup>1</sup> release of the decision of the federal government in response to the recommendations of the Joint Review Panel.

#### **B. The Role of DFO Headquarters in Environmental Assessments**

4. In DFO, officials in the regional offices around the country are tasked with making the determinations or recommendations required of DFO under the *CEAA*. It is the regional officials who visit the site of a proposed project and carry out the necessary scientific groundwork with respect to potential environmental effects, who meet with proponents and the other relevant federal and provincial authorities to discuss the issues arising in the EA process, and who monitor and respond to public concerns over a project. As DFO’s regional officials become familiar with the project and its potential effects on the surrounding environment and the public, they are most appropriately placed to make the decisions or recommendations regarding the EA process.

5. As a Senior Liaison Officer at DFO headquarters in Ottawa, my role was to monitor and advise regional DFO officials as they conducted EAs of major projects, with

---

<sup>1</sup> For a period of about a year between 2004 and 2005 I was on training and then medical leave.

the goal of ensuring that federal environmental, legal and policy requirements were met and that aboriginal and public consultation requirements were fulfilled. This role included reviewing briefing notes that regional officials prepared on, among other things, issues arising in the EA process. To be clear, however, the regional officials did not report to me or my supervisors. Rather they had their own direct reporting line to the Deputy Minister. For example, regional officials in the DFO Maritimes office in Halifax ultimately reported to the Regional Director-General, Neil Bellefontaine, who in turn reported directly to the Deputy Minister.

**C. DFO's Involvement in the EA of the Whites Point Quarry and Marine Terminal**

6. I understand that DFO's involvement in the EA of the Whites Point Quarry and Marine Terminal has been described in detail in the Affidavits of former DFO Minister Robert Thibault, former Regional Director-General, Neil Bellefontaine, and current Section Head of the Marine Habitat Protection Section in the Maritimes Regional Office, Mark McLean. I will not repeat the facts here as I believe that their Affidavits accurately detail DFO's involvement. I also agree with their conclusions that the proponents of the Whites Point project were provided with a fair and reasonable EA process that was consistent with Canadian laws and regulations.

7. Nevertheless, I feel obliged to submit this Affidavit because the Claimants have misrepresented and mischaracterized certain handwritten notes that I took during the course of the Whites Point EA. In particular, I am filing this Affidavit to clarify my notes with respect to: (1) the role of Minister Thibault in DFO's evaluation of this project; (2) the decision that the scope of project would include the quarry and marine terminal; and (3) the decision to refer the project to a joint review panel.

**1. The Role of the Minister in DFO's Determinations**

8. The Claimants have asserted that my notes "display the subornation by certain politicians of the DFO," "express[ my] concern with the Minister's political interference with the proper regulatory consideration of the quarry" and as a result, reflect my wish to

“get our Minister off this file.”<sup>2</sup> This is pure fabrication based on blatant mischaracterizations of what I have written. At no point was I ever concerned that the Minister was improperly interfering in our regulatory consideration of the Whites Point Quarry and Marine Terminal, and my notes certainly do not reflect that I was.

9. The truth is that while Minister Thibault had shown a high level of interest in the file because it was in his political riding, he never interfered with my work or, to the best of my knowledge, with the work of other DFO officials. Prior to specifically requesting his decision in late June 2003 with respect to a referral of the project to a review panel, the only “guidance” that we ever received regarding what the Minister wanted on this file is reflected in a note I took during a March 6, 2003 teleconference that I attended with, among others, ADM Kirby, Director-General Paul Cuillierier, and Ministerial Staff Stephanie Tan and Nadine Belliveau.<sup>3</sup> During the call, Paul Cuillierier asked whether the Minister had any views on the project, and we were told by his staff that the project was “not popular” and to “be well advised [and] do everything according to proper process.”<sup>4</sup>

10. This is what we did. In particular, in determining the scope of the project to be environmentally assessed, and the type of assessment that was most appropriate, we followed our usual processes.

## **2. DFO’s Determination that the Scope of Project Would Include the Quarry and Marine Terminal**

11. I also understand that the Claimants have alleged that DFO wrongfully recommended that the quarry be included in the scope of the project being environmentally assessed, and that my notes support this allegation.<sup>5</sup> My notes do no such thing.

12. What my notes represent is a debate going on amongst DFO officials as to the appropriate application and operation of s. 15 of the *CEAA*. At DFO headquarters, we

---

<sup>2</sup> Claimants’ Memorial, ¶ 124.

<sup>3</sup> Notes of Bruce Hood, Dec 1, 2002 to March 7, 2003, Bates Pages 801650-52, **Exhibit R-260**.

<sup>4</sup> Notes of Bruce Hood, Dec 1, 2002 to March 7, 2003, Bates Page 801652, **Exhibit R-260**.

<sup>5</sup> Claimants Memorial, ¶ 120.

understood that, under s. 15 of the *CEAA*, DFO had the discretion to include components of a project that did not necessarily trigger an EA in the scope of the project for the purposes of conducting the EA.<sup>6</sup> However, in the relevant timeframe here, we at DFO headquarters felt that officials should not exercise their discretion to do so because it put us in situations where we were left managing an EA, or even a mitigation program, in areas in which DFO did not have scientific expertise.<sup>7</sup>

13. However, our position was not shared by all officials throughout DFO (and certainly not by officials from the Canadian Environmental Assessment Agency), and for the Claimants to suggest it was the established DFO practice, as well as the only legal position that could be taken, is surprising. For example, in the case of the Whites Point Quarry and Marine Terminal, DFO regional officials believed right from the beginning that the quarry should be included in the scope of the project, whether it engaged DFO triggers under the *CEAA* or not.<sup>8</sup> We certainly had discussions with regional officials on this question, and we made our views known to them. For example, some of my notes reflect an April 25, 2003 phone call that Richard Nadeau and I had with Jim Leadbetter and Jim Ross, officials from the region.<sup>9</sup> During this call, Mr. Nadeau explained his belief as to how DFO should approach scoping decisions so as to limit unwanted practical consequences.<sup>10</sup> I recall that while regional officials listened to our views, they were certainly not convinced that our approach on this issue was the correct one, promising only to discuss it further and get back to us.<sup>11</sup>

---

<sup>6</sup> For example, in a meeting among headquarters staff on the regional approach to scoping this project shortly after March 31, 2003, Cathy Gee, my colleague noted “if quarry linked/dependent to [sic] wharf – no problem in putting them together.” Notes of Bruce Hood, March to June 2003, Bates Page 801593, **Exhibit R-260**.

<sup>7</sup> See, e.g., Notes of Bruce Hood, December 1, 2002 to March 7, 2003, Bates Page 801646, **Exhibit R-260** (recording a conversation with my colleague Cathy Gee who noted that we did not “need” to scope in the quarry if there were no DFO triggers, and that if we did, we would get into “other concerns”).

<sup>8</sup> In the very first briefing note prepared by the region in September 2002, officials had noted based on their understanding of the project, that there would need to be an EA and that the scope of the project would be the “entire terrestrial and marine components.” Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, September 24, 2003, **Exhibit R-63**.

<sup>9</sup> Notes of Bruce Hood, March to June 2003, Bates Pages 801602-04, **Exhibit R-260**.

<sup>10</sup> Notes of Bruce Hood, March to June 2003, Bates Pages 801602-03, **Exhibit R-260**.

<sup>11</sup> Notes of Bruce Hood, March to June 2003, Bates Page 801603, **Exhibit R-260**.

14. Moreover, in relation to the Whites Point EA, this debate was, at the time, premature and hence hypothetical. At the time we were having these discussions, DFO scientists from the regional office had yet to be able to visit the site of the quarry, and hence, had not been able to determine whether the land-based activities would engage a DFO trigger under the *CEAA*.<sup>12</sup>

15. The Claimants have mischaracterized my notes in order to obscure these key facts. For example, I understand that the Claimants have alleged in their Memorial that in the Fall of 2007, I recorded that DFO “knew” that “it had no trigger for the quarry.”<sup>13</sup> This is a blatant misrepresentation. The note in question is not from the Fall of 2007, but rather from the April 25, 2003 phone call mentioned above. As such, the conversation reflected in this note was not an after-the-fact acknowledgement of some sort of improper conduct as the Claimants have portrayed it; rather, it was a discussion between DFO officials as to what our policy approach would be in the hypothetical situation in which officials determined that we did not have a trigger for the quarry—a determination which had yet to be made.

16. Similarly, I understand that the Claimants have alleged that notes that I took in the Fall of 2007 support a conclusion that “[t]he DFO knew that a decision to scope in the quarry was contrary to environmental assessment practices across Canada”.<sup>14</sup> This is another blatant misrepresentation. Once again, the note in question is not from the Fall of 2007, and therefore, does not amount to my considered reflections on DFO’s actions years after the fact.<sup>15</sup> The note in question is from the week of May 12, 2003. Moreover, contrary to what the Claimants represent, the note in question actually says “if we don’t scope in the quarry/contrary to advice of Agency and EA practices across Canada.”<sup>16</sup> What I was recording was, in fact, the exact opposite of the Claimants’

---

<sup>12</sup> Notes of Bruce Hood, March to June 2003, Bates Pages 801609, 801612 **Exhibit R-260**.

<sup>13</sup> Claimants’ Memorial, ¶ 120, referring to my notes at Bates Page 801603, **Exhibit R-260**.

<sup>14</sup> Claimant’s Memorial, ¶ 521, referring to my notes at Bates Page 801617, **Exhibit R-260**.

<sup>15</sup> While I will not take the time to highlight them here, I note that, in addition to these two instances, there are further examples where the Claimants have falsely suggested that my notes were made in the Fall of 2007, when the relevant facts were all known, despite the fact that they were made in 2003 when the facts were very much still unclear.

<sup>16</sup> Notes of Bruce Hood, March to June 2003, Bates Page 801617, **Exhibit R-260**.

allegation—the Agency was telling us that not scoping in the quarry was contrary to EA practice across Canada.

17. Ultimately, the whole debate over scope of project on the Whites Point EA never became anything more than academic because DFO scientists in the region concluded in May 2003 that the proposed quarrying activity itself would trigger an EA by DFO. For example, on May 15, 2003, I was informed that scientists in the Maritimes Region had concluded that because the proposed quarry was “very close to [the] shore” it could “kill small fish through damage to their swim bladders.”<sup>17</sup> Similarly around May 20, it was explained to me that scientists had concluded that there was “likely a Sec 32 trigger” and that even with a smaller test blast, and even at low tide (when the water was as far back from the shore as it gets), there would be “some mortality.”<sup>18</sup> Further, there was a stream on the quarry site which scientists concluded was “excellent nursery habitat” and which “could constitute a S. 35” trigger.<sup>19</sup>

### **3. The Decision to Refer the Project to the Minister of the Environment for a Referral to a Review Panel**

18. I understand that the Claimants have also alleged, relying on my notes, that the decision to refer this project to the Minister of the Environment for a referral to a review panel was improper and motivated by political interests and a desire to delay the project. Read in their appropriate context, my notes do not support any such interpretation.

19. What my notes reflect is a discussion amongst DFO officials as to the appropriate type of EA for this project. My recollection is that regional officials, who were, of course, more in touch with both the potential significant adverse environmental effects and with public concern, believed very early on that an assessment by a review panel might be most appropriate for this project.<sup>20</sup> At headquarters, I recall that we had questions about the national implications of referring this project to a review panel. In

---

<sup>17</sup> Notes of Bruce Hood, March to June 2003, Bates Page 801617. **Exhibit R-260.**

<sup>18</sup> Notes of Bruce Hood, March to June 2003, Bates Page 801624, **Exhibit R-260.**

<sup>19</sup> Notes of Bruce Hood, March to June 2003, Bates Page 801624, **Exhibit R-260.**

<sup>20</sup> See e.g. Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, January 14, 2003, **Exhibit R-65.**

particular, I recall that we were unsure, based on what we understood at the time, that this project should be referred to a review panel. On numerous occasions we spoke to regional officials to discuss the thinking and decision-making behind both their view and our own.

20. While at the time I still believed personally that a comprehensive study would have been sufficient for the Whites Point EA,<sup>21</sup> by May 2003 senior DFO officials had agreed that the preferred option was an assessment by a review panel.<sup>22</sup> As described in the briefing notes to both Assistant Deputy Minister Sue Kirby<sup>23</sup> and Minister Robert Thibault,<sup>24</sup> the rationale for the recommendation was the assessment of regional officials that this project was likely to cause significant adverse environmental effects and that it was the source of a significant amount of public concern.

21. Rather than focusing on the actual rationale for recommending a referral to a review panel, the Claimants have focused on several comments in my notes as evidence of some sort of political conspiracy. For example, the Claimants have said that I and other DFO officials were participating in a “cover up” simply because Richard Nadeau wanted to have an informal discussion with ADM Kirby and Ministerial staff to ensure they were comfortable with a referral to a review panel, prior to making a formal written recommendation.<sup>25</sup> I do not agree that the desire of officials to have an informal meeting to discuss and explain a recommendation prior to its officially being made can be reasonably characterized in the nefarious way the Claimants have suggested.

22. Similarly, the Claimants have said that some notes that I took that reference what I or others perceived to be the ancillary benefits of a referral to a panel review are also

---

<sup>21</sup> I note that as time passed, I changed my views and now believe that the recommendation that this project be referred to a review panel based on the concerns laid out in the briefing notes was, in fact, the correct one.

<sup>22</sup> Notes of Bruce Hood, March to June 2003, Bates Pages 801609-10, **Exhibit R-260**.

<sup>23</sup> Memorandum for the Assistant Deputy Minister, Oceans – Environmental Assessment of Proposed Quarry and Shipping Terminal, Whites Cove Digby County, Nova Scotia Pre-Meeting for Meeting with Associate Deputy Minister, May 26, 2003, **Exhibit R-69**.

<sup>24</sup> Memorandum for the Minister – Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environment for a Panel Review, June 25, 2003, **Exhibit R-72**.

<sup>25</sup> Claimants’ Memorial, ¶ 130; Notes of Bruce Hood, March to June 2003, Bates Page 801615, **Exhibit R-260**.



evidence of some sort of conspiracy to harm them or their project. For example, in certain instances I noted discussions on how a referral to a review panel would “get our Minister off this file,” and avoid DFO having to make a scope of project determination (because in an assessment by a review panel, it is the Minister of the Environment that determines scope) that might have been challenged in court.<sup>26</sup> While we certainly discussed these implications of a referral to a review panel, they were not the reason the recommendation was made. As I explained above, the reasons for recommending that this project be referred to a review panel are fully set out in the briefing notes to the Assistant Deputy Minister and the Minister.<sup>27</sup>

23. Finally, the Claimants have pointed to notes I made near the end of May 2003 on the referral to a review panel as evidencing interference by Minister Thibault in order to “make the Whites Point Quarry Environmental Assessment take as much time, and be as difficult and expensive as possible.”<sup>28</sup> In particular, they point to a note I made that says “Thibault wants process dragged out as long as possible.”<sup>29</sup> While I acknowledge now that in scribbling this note, my word choice was poor, the Claimants have misconstrued this note. This note does not record any direction, instruction or communication, I, or to my knowledge, anyone else, ever received from Minister Thibault or his staff. To the best of my knowledge, the potential time that an assessment by a review panel would take played no role in the determination of senior DFO officials to recommend to Minister Thibault that he refer the Whites Point EA for referral to a review panel; nor, to the best of my knowledge, did it play a role in the decision of Minister Thibault to accept that recommendation.

24. Rather, this note records my personal thoughts when I was instructed by Richard Nadeau to “get [the] ball rolling” on a referral to a panel. In particular, it reflects my own

---

<sup>26</sup> Notes of Bruce Hood, March to June 2003, Bates Pages 801609-10, **Exhibit R-260**.

<sup>27</sup> Memorandum for the Assistant Deputy Minister, Oceans – Environmental Assessment of Proposed Quarry and Shipping Terminal, Whites Cove Digby County, Nova Scotia Pre-Meeting for Meeting with Associate Deputy Minister, May 26, 2003, **Exhibit R-69**; Memorandum for the Minister – Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environment for a Panel Review, June 25, 2003, **Exhibit R-72**.

<sup>28</sup> Claimants’ Memorial, ¶ 126.


<sup>29</sup> Notes of Bruce Hood, March to June 2003, Bates Page 801619, **Exhibit R-260**.

interpretation of the effect that the referral of this EA to a review panel would have on the length of the EA process. At that time, I believed that, in light of the public opposition to the project, and the fact that an assessment by a review panel provides significant opportunities for public input, an assessment of the Whites Point project by a review panel would be a drawn out process. I have since learned that comprehensive studies often take longer to complete than EAs conducted by review panels.

25. I can also confirm that in all of our efforts at DFO, we did not try to drag out the process. For example, the project could have been assessed as a comprehensive study first, and then, at the end of that process, it could have been referred to the Minister of the Environment for referral to a review panel.<sup>30</sup> Such an approach could have added many months or more to the process and resulted in unnecessary duplication and much wasted effort by the proponents.<sup>31</sup> Of course, we did not take such an approach. Instead, I recall, and believe that the record proves, that we moved this file ahead as quickly and efficiently as possible.

26. Overall, I believe that the Claimants have mischaracterized and misrepresented my notes to support their allegation of a political conspiracy that intended to somehow disadvantage the Claimants or their proposed project. I can state without any hesitation that to the best of my knowledge, every DFO official was acting in good faith and in accordance with our mandate and legislative responsibility, and to my knowledge, there was no inappropriate intervention by Minister Thibault.

SWORN BEFORE ME at Ottawa, ON )  
This 5<sup>th</sup> of December, 2011 )

  
\_\_\_\_\_  
Bruce Hood

A Commissioner for taking Affidavits  
in and for Ottawa, ON

  
\_\_\_\_\_

<sup>30</sup> *Canadian Environmental Assessment*, s. 23(b), **Exhibit R-1**; see also Notes of Bruce Hood, March to June 2003, Bates Pages 801609-10, **Exhibit R-260**.

<sup>31</sup> I understand that Robert Connelly, the former President of the Canadian Environmental Assessment Agency, has explained in his Expert Report here that concerns about the delays and wasted efforts that would be involved in such an approach led to the amendment of the *CEAA* in October 2003. Expert Report of Robert Connelly, ¶ 68.