

**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

SECOND AFFIDAVIT OF CHRISTOPHER DALY

I, **CHRISTOPHER DALY**, residing at 45 Roxham Close in the City of Halifax, in the province of Nova Scotia, Canada, MAKE OATH AND SAY AS FOLLOWS:

1. I have reviewed the Reply materials filed by the Claimants in this arbitration including the Claimants' Reply, the Supplemental Witness Statement of Paul Buxton, the Reply Expert Report of David Estrin and the Expert Report of Murray Rankin. I have filed this second Affidavit for two reasons: to provide a brief clarification of testimony in my first Affidavit;¹ and, to clarify how Nova Scotia made its decision in response to the recommendations made by the Joint Review Panel (JRP), particularly in light of certain speculation that has been offered by Mr. Estrin.²

¹ First Affidavit of Christopher Daly, ¶ 18.

² Reply Expert Report of David Estrin, ¶¶ 327-352.

A. Clarification Regarding Testimony in My First Affidavit

2. In my first Affidavit, I discussed the Stellarton Open Pit Mine as an example of a Class 1 undertaking in Nova Scotia that was subject to public hearings. In so doing, I noted that several members of the local community voiced their concerns over the effects of blasting in this project. In passing, I also referred to a blasting plan submitted by the proponent and the requirement that the plan be modified. I have re-reviewed the relevant information, and wish to clarify that while public concern was indeed expressed over blasting in Stellarton project,³ the proponent did not submit a blasting plan as part of its proposal. In fact, it had undertaken not to blast in its registration document. However, the conditional approval issued to the proponent did include a condition that the proponent was not permitted to blast.⁴

B. Decision Making by Nova Scotia in Response to the Recommendations of the JRP

3. Mr. Estrin claims that if Canada had “indicated concern about “core community values” being a valid basis for Canada to reach the same conclusion [to not approve the project], it could have informed Nova Scotia of that.” He adds that, “Given Nova Scotia’s clearly expressed wish to ensure its response to the Panel Report would align with Canada’s, any expression of concern by Canada as to the need for Canada to reject the project would likely have delayed Nova Scotia from proceeding to make an early announcement to reject the project based on the original Panel Report conclusion,” and that the “results could have been entirely different.”⁵

4. Mr Estrin’s speculation misconstrues the Nova Scotia Minister’s responsibilities in responding to a report of a JRP, which are to consider the recommendations in the

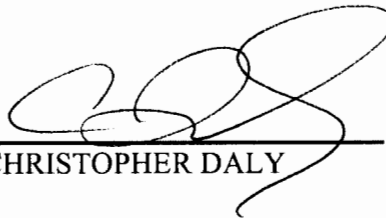
³ With respect to the concerns of the local community over blasting, *see* letter from Thomas Kirincich, Chairman of Citizen’s Liaison Committee to the Honourable Terence Donahoe, April 13, 1992, **Exhibit R-533**, and letter from G.J. Phillips of Westray Coal to Tom Kirincich, April 14, 1992, **Exhibit R-534**. As I noted in my first Affidavit, concerns over blasting were expressed during the public hearings as well – *see* excerpt from Stellarton Open Pit Mine Public Hearing Transcripts, July 4th, 5th, 6th and 10th, 1995, Volume 2, pp. 410-411, **Exhibit R-529**.

⁴ Nova Scotia Department of Environment, Stellarton Pit Mine Project Conditions of Approval, November 1, 1995, paragraph 2.1, **Exhibit R-168**.

⁵ Reply Expert Report of David Estrin, ¶352.

report and to either approve or reject the undertaking in issue, in accordance with our governing legislation.⁶ This is a Nova Scotia only decision, one distinct from and independent of the decision to be made by the federal government under its own legislation.⁷ In the case of the Whites Point EA, my colleagues in the Environmental Assessment Branch were evidently interested in the outcome and timing of the federal response to the JRP report. As this was a joint review this was not unusual. However, Nova Scotia was not looking to align its decision with that of the federal government.⁸ Rather, Nova Scotia communicated with Canada regarding the timing and nature of the decisions in order to prepare an appropriate communications strategy around the Minister's announcement. Any concern the federal government might have expressed to us over its constitutional jurisdiction to respond to the report would have been irrelevant to our Minister's decision, taken under Nova Scotia law, that the Whites Point project not be approved.

SWORN BEFORE ME IN THE)
 CITY OF HALIFAX IN THE)
 PROVINCE OF NOVA SCOTIA)
 THIS 4th DAY OF MARCH, 2013)



 CHRISTOPHER DALY



A Commissioner for taking Affidavits
 in and for the Province of Nova Scotia

DAVID J. BARTOL
 A Barrister of the Supreme
 Court of Nova Scotia

⁶ See paragraph 6.7 of the "Agreement Concerning the Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal," which required the Minister to "consider the recommendation of the Panel, and either approve with conditions, or reject the Project." See **Exhibit R-27**.

⁷ I have described the Nova Scotia decision making process following issuance of the Whites Point JRP's report in ¶¶58-62 of my first Affidavit.

⁸ Indeed, I understand that our Minister made his decision well before the federal government response had been sent to Cabinet for approval.