

**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 MARK MCLEAN**

I, Mark McLean, residing at 12 Rose Street, in the Halifax Regional Municipality, in the province of Nova Scotia, Canada, MAKE OATH AND SAY AS FOLLOWS:

1. I have reviewed the Claimants' Reply, the Supplemental Witness Statement of Paul Buxton, the Reply Expert Report of David Estrin, and the Expert Report of T. Murray Rankin, all filed in this arbitration on December 21, 2012. Given the allegations made by the Claimants in these materials I have also re-reviewed my first Affidavit and the first Affidavits of Bob Petrie and Stephen Chapman which were filed with Canada's Counter-Memorial of December 9, 2011. I re-affirm all of my previous testimony and will only repeat that which is relevant to my evidence here.

2. I am filing this second Affidavit to correct certain inaccuracies in the way the Claimants have characterized the facts relating to DFO's involvement in Nova Stone's conditional permit to operate a 3.9 ha quarry on the proposed site of the Whites Point

Quarry and Marine Terminal.<sup>1</sup> The Claimants specifically assert that DFO refused to approve Bilcon's blasting plan and deliberately withheld information, leaving Bilcon in a situation of being unable to blast and losing money.<sup>2</sup>

3. As I explained in my first Affidavit, under the terms of Nova Stones' 3.9 ha quarry permit, which was issued by the Nova Scotia Department of Environment and Labour, DFO was responsible for reviewing Nova Stone's blasting plan. DFO determined the blasting, which was to be conducted 35 metres from the Bay of Fundy,<sup>3</sup> would likely cause harm to the endangered inner Bay of Fundy ("iBoF") salmon. As such, the blasting would require a s. 32 authorization under the *Fisheries Act*. DFO explained its determination to Nova Stone's representative, Paul Buxton, on May 29, 2003. DFO further explained that a horizontal setback distance of 500 metres from the water would be required to protect iBoF salmon.<sup>4</sup>

4. I understand that in the following weeks, and in light of requests made by Mr. Buxton for the calculations used in determining the 500 metre setback,<sup>5</sup> internal consultations were held within DFO with respect to the model upon which the setback was based.<sup>6</sup> The consultations culminated in a recommendation by Dennis Wright, the author of DFO's *Guidelines for the Use of Explosives In or Near Canadian Fisheries Waters – 1998*, that if appropriate modifications were made to Nova Stone's blasting plan, including a reduction in the size of the individual charges, a setback of approximately 100 metres from the Bay of Fundy might be feasible.<sup>7</sup>

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<sup>1</sup> As I explained in ¶ 23 of my first Affidavit, while the proponent of the 3.9 ha quarry was Nova Stone Exporters Inc. ("Nova Stone"), the proponent of the Whites Point Quarry and Marine Terminal project was a partnership between Nova Stone and Bilcon of Nova Scotia, known as Global Quarry Products ("GQP").

<sup>2</sup> See for example, Claimants' Reply, ¶¶ 67, 481, 551 and the Reply Expert Report of David Estrin, ¶ 1(a).

<sup>3</sup> Letter from Paul Buxton to Bob Petrie, November 20, 2002, attaching "Whites Point Quarry Blasting Plan" dated November 18, 2002, **Exhibit R-80**.

<sup>4</sup> Letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55**.

<sup>5</sup> See letters from Paul Buxton to Phil Zamora, June 6, 2003, **Exhibit R-515**, June 16, 2003, **Exhibit R-516**, and July 21, 2003, **Exhibit R-517**. See also, email from Paul Buxton to Derek McDonald, June 16, 2003, **Exhibit R-518**. On June 11, 2003, Mr. Zamora informed Mr. Buxton that the results of the setback calculations were available for examination – see letter from Phil Zamora, June 11, 2003, **Exhibit R-524**.

<sup>6</sup> Letter from Phil Zamora to Dennis Wright, July 3, 2003, **Exhibit R-519**.

<sup>7</sup> Email from Dennis Wright to Phil Zamora, July 29, 2003, **Exhibit R-520**.

5. However, by this time our Minister had requested that the larger Whites Point project be referred to a review panel. As Nova Stone's 3.9 ha quarry appeared to Canadian Environmental Assessment Agency officials to be part of the larger Whites Point project, the Agency was uncomfortable with DFO interacting with Nova Stone on the potential implementation of mitigation measures for this project, which could fall within the purview of the review panel.<sup>8</sup> The Agency therefore requested that DFO not engage in further discussions with Nova Stone until an Agreement establishing a review panel was concluded and the issue of how the 3.9 ha quarry factored into the EA was determined.<sup>9</sup> As the Agency was now responsible for administering the Whites Point EA process, DFO agreed.

6. I understand that at this time, Agency officials were actually taking steps to constitute the review panel and that these efforts continued into the autumn of 2003.<sup>10</sup> However, the Agency postponed constitution of the panel at the Claimants' request, pending resolution of issues relating to the corporate structure of the Whites Point project proponent.<sup>11</sup> The postponement lasted until August 17, 2004, the date on which Mr. Buxton notified the Agency that Bilcon would be the sole proponent of the Whites Point project, that Nova Stone's 3.9 ha quarry permit was no longer valid, and that the Agency should press ahead with constitution of the review panel.<sup>12</sup>

7. As Nova Stone's quarrying permit had been nullified, the issue of the 3.9 ha quarry was, by this point, effectively "dead."<sup>13</sup> But DFO recognized the potential modifications suggested by Mr. Wright, originally conceived as possible mitigation measures for a now defunct project, could still be useful to Bilcon in the EA of the

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<sup>8</sup> See email from Phil Zamora to Bruce Hood, August 5, 2003, **Exhibit R-525**.

<sup>9</sup> See email from Phil Zamora to Stephen Chapman, September 3, 2003, attaching draft letter from Phil Zamora to Paul Buxton, August 29, 2003, which was prepared in consultation with the Agency, **Exhibit R-528**. See also notes of Cheryl Benjamin's meeting with Stephen Chapman, August 28, 2003, **Exhibit R-521**.

<sup>10</sup> These preliminary steps are described in the first Affidavit of Stephen Chapman, ¶¶ 26-33.

<sup>11</sup> First Affidavit of Stephen Chapman, ¶¶ 33-35.


<sup>12</sup> Letter from Paul Buxton to Jean Crépault, August 17, 2004, **Exhibit R-94**.

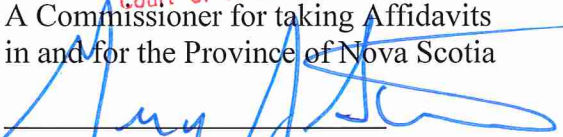
<sup>13</sup> In fact, as explained by Bob Petrie in his first Affidavit, the 3.9 ha permit had been nullified over three months earlier, on May 1, 2004. See first Affidavit of Bob Petrie, ¶ 17.

Whites Point project. Accordingly, on learning the panel review process was back on the rails, DFO sought Agency guidance as to the sharing of this information with Bilcon.<sup>14</sup> DFO provided the information to Bilcon on November 12, 2004,<sup>15</sup> just over a week after the constitution of the Whites Point JRP, and from this point forward DFO continued to collaborate with Bilcon in order to provide input and advice on fisheries related matters that could be in issue before the JRP.<sup>16</sup>

8. I understand the Claimants may feel frustrated because Nova Stone was not able to start operations on the 3.9 ha quarry. But what I cannot understand is the Claimants' suggestion that quarrying should have proceeded on Nova Stone's 3.9 ha quarry when the environmental effects of this activity were to be reviewed in the EA of the Whites Point project by a review panel. The situation Nova Stone faced did not result from an unlawful refusal to authorize a blasting plan or to share information, but rather from the Claimants' approach to the EA of the Whites Point project. To say the least, the approach was unusual<sup>17</sup> – one I have not encountered in my thirteen years' experience in conducting EAs – but I am confident that, unusual as it was, it was dealt with reasonably and appropriately.

SWORN BEFORE ME IN THE )  
 HALIFAX REGIONAL )  
 MUNICIPALITY IN THE )  
 PROVINCE OF NOVA SCOTIA )  
 THIS 13th DAY OF MARCH, 2013 )

  
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 MARK MCLEAN

GREGORY J. STEVENS  
 A Commissioner of the Supreme  
 Court of Nova Scotia  
 A Commissioner for taking Affidavits  
 in and for the Province of Nova Scotia  


<sup>14</sup> Email from Phil Zamora to Stephen Chapman, August 31, 2004, **Exhibit R-522**.

<sup>15</sup> Email from Phil Zamora to Paul Buxton attaching letter containing setback information, November 12, 2004, **Exhibit R-531**. *See also*, letter from Paul Buxton to Phil Zamora, November 22, 2004, **Exhibit R-523**.

<sup>16</sup> I explained the working relationship between DFO and Bilcon over the course of the JRP's EA process in ¶¶ 26-33 of my first Affidavit.

<sup>17</sup> As explained in ¶ 43 of my first Affidavit, the Claimants' approach was unusual in that they appeared to want to commence the very quarrying activity and operations that were to be reviewed in the EA of the larger Whites Point project.