

**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 ROBERT THIBAUT**

I, ROBERT THIBAUT, residing at 2660 Division Road, Lower Concession Digby County, Nova Scotia, Canada, MAKE OATH AND SAY AS FOLLOWS:

**A. PERSONAL BACKGROUND**

1. I was born in 1959 in the town of Digby, which is located at the top of the Digby Neck, in south-western Nova Scotia. My family has resided in Nova Scotia since the early 1600s, and in the Digby area since the late 1700s.

2. In 1988, I became involved in local government in this area as a municipal councillor in Clare. Clare is a municipality that covers the western half of Digby County and lies across St. Mary's Bay from the Digby Neck. I was a municipal councilor there until the end of 1991. From 1991-2000, I was the Municipal Clerk and Treasurer for the municipality of Argyle in the neighboring county of Yarmouth.

3. I left municipal government service after 12 years because in the November 2000 federal election, I was elected as West Nova's Member of Parliament ("MP") to the 37<sup>th</sup> Parliament of Canada. West Nova is a federal electoral district in Nova Scotia that includes, among other areas, Digby County. I had the pleasure of serving as the MP for West Nova for 8 years.

4. The 37<sup>th</sup> Parliament began its session in January of 2001. In addition to my role as West Nova's MP, I was also appointed as a member of Cabinet. In particular, I was appointed the Minister of State responsible for the Atlantic Canada Opportunities Agency ("ACOA"). ACOA's mandate is to help build economic capacity in the Atlantic provinces of Canada, including Nova Scotia.

5. Then, a year later, in January 2002, I was appointed the Minister of Fisheries and Oceans. I held that position until December 2003, at which point I became the Parliamentary Secretary to the Minister of Health. From 2001 until the end of 2003, I was also the Regional Minister responsible for Nova Scotia.

## **B. ROLES AND PRACTICES AS A MEMBER OF PARLIAMENT AND AS A MEMBER OF CABINET**

6. My role as an MP was distinct from my role as a Minister. On the one hand, as an MP, I was responsible for ensuring that the viewpoints of my constituents were given a voice in the federal government. To do this, I maintained offices with a small staff in the towns of Yarmouth and Middleton in Nova Scotia where I met with constituents to hear their requests and to provide them with information about the operations of the federal government.

7. On the other hand, as the Minister of Fisheries and Oceans, I was responsible for providing the ultimate policy oversight for the Department of Fisheries and Oceans ("DFO"). My role as the Minister thus involved striking an appropriate balance between supporting the economic development of Canada's fisheries and working to protect Canada's marine and freshwater environments. This balancing involved applying the principles of sustainable development when considering proposed projects with potential adverse environmental effects.

8. As the DFO Minister, my office was in Ottawa. However, when I was in the Maritimes region, the regional Minister's office was available to me (as it was to all Ministers who

happened to be in Halifax), and two of my own staff members also worked out of this regional office. Also, from time to time, people would come to see me, in my role as the Minister, in my constituency offices in Yarmouth and Middleton. Whenever I had advance notice of such meetings, DFO staff were available to assist me as needed.

9. As a general matter, my staff in Ottawa worked with DFO officials at DFO headquarters, and my staff in Halifax worked with DFO officials in the DFO Maritimes Regional office. I also met with officials at Headquarters at the Assistant Deputy Minister level or higher and, from time-to-time, with the Regional Director-General of DFO for the Maritimes Region, Neil Bellefontaine.

10. All of the meetings that my staff and I had with DFO officials were limited to information gathering. Neither I nor my staff, as far as I am aware, ever provided any direction or instruction during these meetings. Whenever I did give direction or instruction, it always went through the appropriate channels, which meant through the office of the Deputy Minister who would then coordinate with the appropriate Assistant Deputy Minister or Regional Director-General, who would, in turn, coordinate with the lower level government officials.

### **C. THE REVIEW OF THE PROPOSED WHITES POINT QUARRY AND MARINE TERMINAL BY THE DEPARTMENT OF FISHERIES AND OCEANS**

11. Of course, where a matter engaging DFO jurisdiction arose in the area of West Nova, I had to manage both of my roles. For example, I first learned of the proposal to develop the Whites Point Quarry and Marine Terminal informally through my constituents in the local communities of the Digby Neck. As the MP for the region I was always open to and interested in economic development in the riding. In this sense, I recall initially thinking that the quarry might be a good news story for my constituents. However, I also recall hearing, from the beginning, concerns from people who wanted me to stop the project and who were worried that it would simply be forced through and approved, without them having the chance to participate in the process. As the Minister, I was aware of DFO's responsibilities with respect to the environmental assessment of industrial developments. I understood that it was as inappropriate to use an environmental assessment for the purpose of stopping a project, as it was to use it as a rubber stamp to approve a project.

12. I did want to be kept informed of developments as much as possible. To accomplish this, my staff had discussions with DFO officials for the purpose of understanding developments on the project. And, while I do not specifically recall a particular discussion, I believe that I may have discussed the Whites Point project with Neil Bellefontaine. Again, such discussions would be limited solely to gathering information about the project.

13. In addition to informal information gathering, I also received numerous formal briefings from DFO officials on the proposed Whites Point project between the autumn of 2002 and the end of June 2003. However, with the exception of the final briefing note in June 2003, which recommended that I make a decision to refer the environmental assessment of the Whites Point Quarry and Marine Terminal to the Minister of the Environment for referral to a review panel under the *Canadian Environmental Assessment Act* (“CEAA”), all of these briefing notes were for “Information Only.” This means that these briefing notes were provided to me only to keep me updated on the development of the project and the evolution of views within DFO as to how it should be environmentally assessed.

14. I wanted to be informed for a simple reason: this was a major development in my electoral district, and I wanted to make sure that I stayed informed of events so that neither I nor my staff would be surprised by claims being made about the project by my constituents. I was, however, at all times aware of the need to let officials complete their work. At no time did I ever direct or otherwise interfere with the work of these officials, nor did I ever make a decision before they requested one from me.

15. In particular, I never provided any direction to officials regarding blasting on the proposed quarry, the scope of the project or the assessment, or the type of assessment that was most appropriate. Nor did I, nor to the best of my knowledge, anyone on my staff ever request that any decision on the project be delayed or dealt with in a manner that was different than the normal course. In fact, I am at a loss to understand why anyone would believe that slowing down the process would be in my interest. There was nothing to be gained by my avoiding making a decision on the project, and I certainly never expressed that there would be.

16. The only comment that I made, both to my own staff and publicly to the press, was that I would not use the *Fisheries Act* or the *CEAA* to “kill the project.” I made clear that my only

interest was in a full and fair environmental assessment of the proposal that strictly complied with the rules, did not cut any corners and allowed for meaningful public participation.

**D. THE DECISION TO REFER THE ENVIRONMENTAL ASSESSMENT OF THE WHITES POINT QUARRY AND MARINE TERMINAL TO A REVIEW PANEL**

17. When I was eventually briefed in June 2003 that the recommendation of DFO officials was that I refer the environmental assessment of the Whites Point Quarry and Marine Terminal to the Minister of the Environment for a referral to a review panel, I was satisfied that they had come to the appropriate conclusion.

18. As more information about the proposal became available, the overwhelming amount of public concern about it, as well as the significant environmental concerns associated with it, had become quite clear. In fact, because of my dual roles as both the relevant Minister and the MP for the area, I was in a particularly good position to understand the level of public concern over the project. I received hundreds of letters, from all across the province of Nova Scotia, expressing concern with the project and, every time that I would visit the area in particular, or even Nova Scotia in general, I would meet individuals who expressed their concerns about the project. As I recall, many of the letters and discussions focused on how inconsistent the proposal was with the economy and culture of the Digby Neck and the need for openness and transparency in the assessment of the proposed project.

19. In addition, while it was not the reason that I agreed to make the referral, I also believed that the independent nature of a review panel was the best way to assess a contentious project located in my riding and directly affecting my constituents. I was certainly aware that if DFO had conducted the assessment itself, there might have been allegations of bias because of my role as the local MP, regardless of whether the conclusion came out in favour of or against the proposed development.

20. Looking back on the proposed project eight years later, I am as sure now as I was then that referring this project to the Minister of the Environment for a referral to a review panel was the right decision.

21. After I made the referral my involvement in the proposed project essentially stopped. As mentioned above, in December 2003 I ceased to be the Minister of Fisheries and Oceans. Then, in January 2006, the Liberal Party, of which I was a member, lost the federal election and a new Conservative government came into office. I remained the MP for West Nova until October 2008, but only in opposition, not as a member of government.

22. I was an opposition MP during the public hearings of the Joint Review Panel, and in that capacity I made a presentation to the Panel. I understand that the Claimants have tried to characterize my presentation to the Panel on the benefits of the "local use of local resources" as anti-Americanism. This characterization misrepresents what I said and is untrue. I did not and do not care whether a proponent is from Canada or not. My comments to the Joint Review Panel would have been the same if the proponents had been Canadian. They would have also been the same had the proponents planned to move the aggregate they quarried in Nova Scotia to another Canadian province. Moving aggregate anywhere outside of Nova Scotia is not a local use of local resources, and it would not bring any of the environmental, economic and social benefits that can be realized through the local use of local resources.

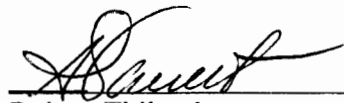
23. I was also an opposition MP when the federal government made its decision at the end of 2007 to accept the recommendations of the Joint Review Panel. While, as an opposition MP, I was obviously not involved in the government's decision making, I thought the government's decision in 2007 to refuse to issue the authorizations that the proponents sought was a reasonable one. Ultimately, some projects are just not appropriate for some areas.

24. I confirm the above to be true to the best of my knowledge and belief.

SWORN BEFORE ME at CHURCH POINT)  
this 26<sup>th</sup> of November, NOVA SCOTIA)  
2011 )

A Commissioner for taking Affidavits  
in and for \_\_\_\_\_

**GERARD N. POTHIER**  
A Notary Public in and for  
the Province of Nova Scotia

  
\_\_\_\_\_  
Robert Thibault